ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC006906
Case Name	Joshua Reyes v. Sudler and Company, 2 East Erie Condo Association
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) 8(a)
Decision Type	Commission Decision
Commission Decision Number	23IWCC0291
Number of Pages of Decision	23
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Jordan Browen
Respondent Attorney	Daniel Wellner

DATE FILED: 7/3/2023

/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)
X correct scrivener's error's and add L4-5	☐ PTD/Fatal denied
☐ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOSHUA REYES,

Petitioner,

vs. NO: 20 WC 06906

SUDLER AND COMPANY,
2 EAST ERIE CONDO ASSOCIATION,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b)/8(a) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, medical expenses, prospective medical, and permanent partial disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission 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, herein, corrects a scrivener's error in the Arbitrator's decision, page 9, fourth paragraph, first sentence, to strike "Patricia", to replace with "Petitioner".

The Commission, herein, corrects a scrivener's error in the Arbitrator's decision, page 9, fourth paragraph, second sentence, to strike "add", to replace with "and".

The Commission, herein, in the Arbitrator's decision, page 10, fifth paragraph, third sentence, to add "L4-5" after "left".

The Commission, herein, corrects a scrivener's error in the Arbitrator's decision, page 10, seventh paragraph, second sentence, to strike "2021", to replace with "2020".

The Commission, herein, corrects a scrivener's error in the Arbitrator's decision, page 17, first line, to strike "pine", to replace with "opine".

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $413.02 per week for a period of 120-2/7 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 shall pay directly to Petitioner all bills as outlined in Section J of Arbitrator's Conclusions of Law, pursuant to Sections 8(a) and 8.2 of the Act and adjusted in accord with the medical fee schedule provided in Section 8.1 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for the procedure recommended by Dr. Mohan, as well as all reasonable and necessary post-operative care.

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.

July 3, 2023
o-6/13/23

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

KAD/jsf

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC006906
Case Name	Joshua Reyes v. Sudler and Company, et al.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	19
Decision Issued By	Steven Fruth, Arbitrator

Petitioner Attorney	Jordan Browen
Respondent Attorney	Daniel Wellner

DATE FILED: 8/23/2022

/s/Steven Fruth, Arbitrator

Signature

INTEREST RATE WEEK OF AUGUST 23, 2022 3.11%

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)

JOSHUA REYES Case # **20 WC 6906**
Employee/Petitioner

v.

Sudler & Company, et al.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **10/26/2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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, **7/1/2019**, 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 **$32,215.56**; the average weekly wage was $**619.53**.

On the date of accident, Petitioner was **31** 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 $**14,043.28** 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 §8(j) of the Act.

ORDER

Respondent shall pay Petitioner the sum of $35,637.24, representing 120 & 2/7 weeks TTD benefits, from July 8, 2019 through October 26, 2021 at the rate of $413.02 per week, less Respondent's credit of $14,043.28, for benefits previously paid.

Respondent shall pay directly to Petitioner all medical bills as outlined in Section J of Arbitrator's Conclusions of Law, pursuant to §8(a) of the Act and adjusted in accord with medical fee schedule provided in §8.2 of the Act.

Respondent shall authorize and pay for the procedure recommended by Dr. Mohan, as well as all reasonable and necessary post-operative care.

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

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

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

Signature of Arbitrator

August 23, 2022

ICArbDec19(b)

Joshua Reyes v. Sudler and Company – 2 East Erie Condo Association
20 WC 6906

INTRODUCTION

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

FINDINGS OF FACT

On July 1, 2019, Petitioner Josh Reyes was employed with Respondent Sudler Condominiums. Petitioner testified that he worked as a janitor and had been employed by the condominium association for six or seven years at the time of the accident. Petitioner maintained the 44th floor, as well as floors 68 to 79. Petitioner testified that in addition to cleaning duties, he was responsible for setups, moving furniture, or moving canopies.

Petitioner testified that he was moving canopies for work outside on the windows on July 1, 2019. Specifically, Petitioner testified that the canopies are scaffolding, and are moved with himself and three other people. Petitioner further testified that the wheels were rusted, so in order to move the scaffold they had to drag them. While moving the scaffolding, not everyone was "moving their own weight" and Petitioner felt a pop in his back.

Petitioner testified that he had access to an incident report form and filled one out and left it in a folder before going home, as the injury occurred at the end of his workday.

Petitioner testified that he sought medical attention a week later. He waited a week because he thought his injury was not that serious and was just a strain.

Petitioner presented to his "union doctor" at Union Health Service on July 8, 2019 (PX #1). He complained of strong lower back pain that radiated into the left leg one week after an injury at work July 1, 2019. He also reported numbness in the left thigh. He rated his pain at 6/10. X-rays demonstrated advanced degenerative disc disease at L5-S1 and

spondylitic changes in the lower lumbar spine. Petitioner was diagnosed with low back pain and sciatica. He was prescribed ibuprofen, Flexeril, Norco, and excused from work.

Petitioner followed up at Union Health Service on July 20, 2019, still complaining of lower back pain which is radiating down to left thigh with numbness since July 1, 2019. The orthopedic and neurologic exams were within normal limits. Dr. Gayathri Sundraesan related Petitioner's condition to the July 1 work accident.

Petitioner presented to Grand Harlem Medical Center on July 19, 2019 (PX #2). Petitioner gave history at this visit of working on July 1st and having to move scaffold with co-workers. He reported 3 of the wheels were locked and it was very difficult to move the scaffold. He said he was pushing and felt sharp low back pain and felt his left leg buckle. He then felt numbness into this left anterior lateral and posterior thigh. Petitioner stated he made a report and was seen at his "union office doctors."

The billing statement indicated Petitioner was examined and treated by chiropractor Dr. Michael Banuelos. Petitioner complained of back pain with pain and numbness down the back of his left thigh going into the big toe. On exam Petitioner had a positive straight-leg response in the left leg while seated and supine. Lumbar range of motion was diminished. He complained of numbness down the back of his left thigh going into the big toe.

Dr. Banuelos diagnosed lumbar radiculopathy, intervertebral disc displacement, segmental dysfunction of the lumbar spine, and muscle spasm. Petitioner was continued off work for one week and chiropractic manipulation and physical therapy were ordered.

Petitioner continued to follow up with Dr. Banuelos and Linda Morris, MPT, at Grand-Harlem throughout March 6, 2020 for chiropractic manipulation and physical therapy with little demonstrative progress. On August 5, Dr. Banuelos mentioned a possible MRI. On August 9, 2019 Dr. Banuelos referred Petitioner to Dr. (Tian) Xia for pain management.

Petitioner continued at Grand Harlem through March 6, 2020. He continually presented with low back pain that radiated into his left leg along with numbness and tingling in the leg. Petitioner was kept off work, although light duty work was discussed on August 5 but not authorized. On December 16, 2019, Dr. Banuelos noted the EMG demonstrated pathology without specifying what the pathology was.

Petitioner presented for evaluation with Dr. Tian Xia at Integrated Pain Management on August 21, 2019 (PX #3). A substantial portion of Dr. Xia's records were unreadable due to the method of copying. Petitioner was noted to be in moderate distress. On examination Petitioner's lumbar range motion was limited due to pain. Straight-leg raise was normal. There was loss of sensation in the left upper thigh. Waddell signs were

negative. The remainder of exam findings were benign. Dr. Xia diagnosed lumbar radiculopathy and intervertebral disc displacement. The doctor prescribed cyclobenzaprine and meloxicam, as well as recommended a lumbar MRI. Petitioner returned on August 28, 2019. His condition examination findings were essentially the same. Dr. Xia then ordered the MRI.

Petitioner presented to Fullerton MRI on September 7, 2019 for his lumbar MRI (PX #4). The radiologist noted marked straightening of the lumbar lordotic curvature; and disc desiccation at L3-4, L4-5, and L5-S1 with reduced disc height of L5-S1. The radiologist further noted Grade I anterolisthesis of L5 over S1 with 5.0 mm broad-based diffuse disc bulge causing marked impingement over the exiting L5 nerve roots bilaterally. There was a 2.5 mm broad-based diffuse disc bulge with left foraminal tear resulting in moderate impingement over the exiting L4 nerve roots bilaterally was noted.

Dr. Xia reviewed the MRI on September 25, 2019 and recommended bilateral L4-5 and L5-S1 transforaminal epidural steroid injections [ESI] (PX #3). Dr. Xia administered three rounds of these injections: October 5, 2019, October 26, 2019, and November 16, 2019 at Fullerton-Kimball Medical and Surgical Center (PX #4). The doctor's pre-operative and post-operative diagnoses were lumbar disc herniation and lumbar stenosis.

On October 16, 2019 Petitioner reported he had some relief from the first ESI (PX #3). On October 30 Petitioner had much improved range of motion but increased left leg pain. Dr. Xia note an EMG was scheduled. The doctor scheduled a one-week follow-up for possible release to work with restrictions. On November 6, 2019 Dr. Xia scheduled the third and last ESI based on the EMG, MRI, and complaints. The doctor did not note the specific findings of either the EMG or the MRI. Nor were the reports of those procedures included in PX #3. Also, on November 6 Dr. Xia noted he would refer Petitioner to a spine surgeon if conservative measures failed. It is noteworthy that on all these follow-up visits Petitioner's presentation was unchanged, including negative Waddells.

At a follow up evaluation on December 4, 2019, Dr. Xia opined that Petitioner had failed conservative treatment and referred Petitioner for a surgical consultation with Dr. Vivek Mohan.

Petitioner presented to Dr. Mohan on December 20, 2019 with complaints of low back pain and leg pain following a work injury on July 1, 2019 (PX #5). Petitioner described burning, numbness, and tingling in the left thigh. Petitioner reported that he was sent to an immediate care center and kept off work for two weeks. He then started going to a chiropractor, which he was still seeing. He complained of 7/10 pain on average

and that lying down provided the only relief. Petitioner stated sitting was painful as well as prolonged walking. Lumbar extension was the most painful.

Dr. Mohan noted Petitioner was "hurt by lifting a heavy object." The doctor noted Petitioner's treatment history of X-rays, chiropractic manipulations, pain medications, MRIs, and epidural injections, which did not help much. Dr. Mohan recommended a new MRI since the initial MRI was not available. Petitioner denied other medical history. Dr. Mohan's examination revealed lumbar motion limited by pain. Lower extremity muscle strength was normal. The sensory exam was also normal. Straight-leg raise was positive on the left in seated and supine. Waddells were negative. Dr. Mohan noted the report of Petitioner's August 2019 MRI showed Grade 1 spondylolisthesis with spondylosis and moderate foraminal stenosis at L5-S1 as well as facet arthropathy at L4-5 with disc herniation.

Doctor Mohan diagnosed work injury, lumbar spondylosis, lumbar spondylolisthesis, lumbar disc herniation with radiculopathy, and lumbar spinal stenosis. The doctor recommended a new MRI because the original MRI imaging was not available. He withheld the treatment plan pending review of the new MRI. The doctor took petitioner off work.

Petitioner saw Dr Xia again on January 8, February 5, and March 4, 2020 for medication refills. His condition was unchanged and was waiting for a surgical solution.

Dr. Mohan reviewed the MRI on January 10, 2020. He noted severe L5-S1 disc changes and foraminal stenosis with L4-5 left far lateral disc herniation. Petitioner's clinical presentation was unchanged. The doctor recommended at L5-S1 lumbar posterior and an interbody fusion and a left L4-5 discectomy with possible fusion with instrumentation and allograft. Petitioner was given light duty work restrictions of no lifting more than 10 pounds and limited bending, but then wrote a note taking Petitioner off work until after surgery. The doctor also ordered lumbar X-rays and CT scan.

Orthopedic surgeon Dr. Carl Graf, Jr. performed a §12 exam of Petitioner on February 14, 2020. The doctor prepared a report of the IME, RX #1, DepX #2, and an addendum report on December 20, 2020, RX #1, DepX #3.

On February 14, 2020 Dr. Graf reviewed Petitioner's records from Union Health Service, which included lumbar X-rays, Dr. Banuelos and MPT Morris of Grand Harlem Clinic [*sic*], Dr. Xia, a November 11, 2019 EMG/NCV report by Carlos Halwaji, DC, and Dr. Mohan. Dr. Graf also reviewed the MRI scan on September 7, 2019.

Petitioner gave Dr. Graf a history of working a heavy job. He reported that on July 1 2019 he was moving a scaffold when wheels locked up as he was pushing. He developed low back pain and consulted his primary care physician. He then went on for chiropractic

care and had received 3 epidural injections with partial improvement. Petitioner consulted a surgeon who recommended surgery. Petitioner reported that he was sent to Dr. Graf for a "second opinion."

On exam Petitioner denied prior injury, care, or treatment. Petitioner reported low back pain radiating into the lateral and anterior left thigh. His pain was 10/10 at its worst. Lying down gave relief but sitting and prolonged standing increased back pain going into the left lateral thigh. Lumbar extension was limited by pain, but lumbar range of motion was otherwise within normal limits. Lumbar extension and rotation elicited pain. There was reduced sensation over the anterior and lateral aspects of the left thigh. Straight-leg raise, sitting and supine, were negative but elicited back pain. There was low back pain with testing of hip motion, Dr. Graf noted there were no non-organic signs.

From his review of Petitioner's medical records Dr Graf noted the clinical indication noted for Petitioner's lumbar X-rays on July 8 2019 stated, "chronic lower back pain treatments." Dr. Graf personally reviewed the September 7, 2019 lumbar MRI. He noted it demonstrated disc desiccation from L3 to LS1 with disc space collapse at L5 S1 and bilateral foraminal narrowing, right side greater than left, at L5-S1.

On February 14 2020 Dr. Graf opined that Petitioner had chronic pre-existing lumbar spondylosis and that his low back pain was not related to his work activities from July 1 2019. He further opined that there was no aggravation of any pre-existing condition. The doctor noted there were no acute findings on imaging studies. The doctor also opined that Petitioner's care and treatment was reasonable although in no way related to the claimed injury. Dr. Graf did not give an opinion regarding MMI because his no causation opinion made that inapplicable.

Patricia returned to Dr. Mohan on March 13 2020 with continuing complaints of back pain as well as left leg pain and numbness. His presentation add examination findings were essentially unchanged. The doctor continued with his recommendation for L5-S1 fusion at L4-5 discectomy with possible fusion. Dr. Mohan again wrote a light duty work release with no lifting more than 10 pounds and limited bending, but again wrote a note taking Petitioner off work until follow up April 17. Dr. Mohan also noted an IME had recommended Petitioner's return to work and no further treatment

On May 1 2020 Dr. Mohan noted Petitioners continuing complaints of back pain and left leg pain with burning, numbness, and tingling in the left thigh. He noted that surgery had not been approved. The doctor kept Petitioner off work without the conflicting note regarding light duty. On August 21 2020 Dr. Mohan noted Petitioner's continuing complaints but noted also Petitioner had lost 50 pounds. Petitioner's complaints and clinical findings were unchanged, particularly noting negative Waddell signs. The doctor's diagnosis of lumbar disc herniation with radiculopathy remained

unchanged, as did the recommendation for L5-S1 fusion. Dr. Mohan also ordered an L3-4 ESI to alleviate left side numbness and pain. Petitioner was kept off work "until further notice."

On review of additional medical records, Dr. Graf wrote an addendum report on December 20, 2020 (RX #1, DepX #3). Dr Graf noted Petitioner's history of prior low back pain for which he received chiropractic treatment. Notably, Petitioner treated with chiropractor Dr. David Fish from February 23 through May 18 2019 for lower back pain of 6 months. On May 18 Dr. Fish recommended ongoing chiropractic care on a weekly basis for the next 5 weeks. Petitioner also had documented complaints of low back pain to Dr. Alex Buder, MD in May 2014 from lifting heavy garbage cans.

Having reviewed the additional medical records, Dr. Graf did not change his opinions, notably that Petitioner's condition and complaints were not related to be July 1, 2019 work activities. Again, Dr. Graf did not give an opinion regarding MMI because his no causation opinion made that inapplicable.

Dr. Vivek Mohan gave his evidence deposition on January 21, 2021 (PX #6). He is a board-certified orthopedic surgeon. The doctor refreshed his memory from his records.

Dr. Mohan testified that Petitioner presented to him in December of 2019 after undergoing chiropractic treatment and 3 rounds of injections. On physical examination, he noticed pain with range of motion and extension of the lumbar spine, which was indicative of discogenic mediated pain. Petitioner also had a positive straight-leg sign on the left, which he is indicative of nerve impingement from a disc. Dr. Mohan testified that he suspected a diagnosis of lumbar disc herniation and radiculopathy. However, he further testified that he only had the radiologist's report from the lumbar MRI, so he ordered new imaging.

Dr. Mohan testified that he reviewed the September 2019 MRI film at the next follow up appointment. He testified that he uses the MRI film to compare Petitioner's symptoms with what is clinically relevant on the film. The doctor further testified that the relevant findings were twofold – a herniated disc in the far lateral space on the left and severe disc degeneration at L5-S1, which he characterized as aggravated.

After reviewing the MRI film, Dr. Mohan recommended surgery because Petitioner had failed to improve with injections and physical therapy. Specifically, Dr. Mohan wanted to perform a fusion at L5-S1 and a discectomy at L4-5.

Dr. Mohan testified that Petitioner's complaints did not change in subsequent office visits and that he continued to recommend the same procedure. Regarding the office visit on August 21, 2021, Dr. Mohan testified that when he first met Petitioner, "he was overweight and somewhat unhealthy for his age" and "recommended that…if we do

pursue surgery in the future, it would be best to have him become healthier and lose weight." Dr. Mohan noted that Petitioner has lost 50 pounds since he first saw him.

Dr. Mohan testified that the weight loss decreases the risk of complications, infection, and prolonged surgery. It also allows improved ability to walk and move, which Dr. Mohan testified he encourages after surgery.

Dr. Mohan further testified that based on his history of treating the Petitioner, his diagnosis of Petitioner was "an L4-5 disc herniation and radiculopathy, as well as L5-S1 disc degeneration and stenosis with radiculopathy." Dr. Mohan's opined that Petitioner's back "was permanently aggravated by the lifting activity of the date of injury."

On cross-examination, Dr. Mohan testified that he had not reviewed the records of The Joint Chiropractic prior to the date of the deposition. However, after his review, he opined that "the chiropractor's actually not treating him for a medical problem, but…it says here, 'Patient present for wellness care.' " Dr. Mohan testified further that "basically, he's coming there for a massage."

On further cross-examination, Dr. Mohan elaborated on his diagnosis and causation opinion at each affected level of Petitioner's lumbar spine. With respect to the L5-S1 level, Dr. Mohan testified that the disc collapse happened over time, but that the L4-5 herniation in the far lateral region was acute "because you can see an annular tear and bulging…recent from an injury or from an incident."

Dr. Carl Graf testified at evidence deposition March 8, 2021 (RX #1). Dr. Graf is a board-certified orthopedic surgeon who specializes in spine surgery. On February 14, 2020 he performed an IME of Petitioner at the request of Respondent's claims administrator, ESIS. Dr. Graf reviewed Petitioner's medical records and imaging in addition to a clinical exam. He refreshed his memory from his February 14 report (DepX #2), as well as an addendum report dated December 20, 2020 (DepX #3).

Dr. Graf testified Petitioner described his job duties as a janitor. Petitioner gave a history of a back injury while pushing scaffolding on July 1, 2019. He stated he had low back pain but continued to work. He denied prior related injuries, care, or treatment. Based on the July 8, 2019 radiology report noting chronic back pain for 3 months prior to the accident, Dr. Alex Bruder's May 3, 2014 note of chronic back pain for 3 months prior to the accident, and chiropractor Dr. David Fish's February 23, 2019 note, Dr. Graf described the denial of prior complaints as a lie.

On exam Dr. Graf noted that Petitioner was obese, 291 pounds, 6 feet 3 inches. Petitioner walked with an antalgic gait. He was able to only perform a 50% squat. Petitioner had pain on lumbar extension and rotation. There was pain to palpation of the

lumbar spine. Gross motor strength in the lower extremities was normal. There was diminished sensation over the lateral and anterior of the left thigh. Straight-leg raise was normal. Dr. Graf found no radiating pain that would be considered radiculopathy. Dr. Graf considered the physical examination benign. There were no hard neurologic findings.

Dr. Graf reviewed the lumbar X-ray report from July 8, 2019. The report noted the X-rays were indicated due to "chronic low back pain for three months." The report noted degenerative disc disease at L5-S1. Dr. Graf explained degeneration occurs when a disc loses hydration and collapses, which is a chronic process over a period of years. Dr. Graf also reviewed records from the chiropractor, Union Health records, and the pain management doctor, Dr. Xia. He reviewed Dr. Mohan's records and personally reviewed the images of the September 7, 2019 MRI. He found nothing acute, such as a disc herniation, on the MRI.

Dr. Graf diagnosed pre-existing lumbar spondylosis, which is degeneration. He further noted that despite Petitioner's denial of prior back pain, the records showed otherwise based upon the imaging studies and physical examination. Dr. Graf opined that Petitioner's condition was not aggravated by the alleged accident because there were no acute findings on the imaging. He found Petitioner's treatment reasonable but not related to the accident. Dr. Graf also opined that the recommended fusion would be life altering and guarantee that Petitioner would have another surgery in the future. He found Petitioner had no work-related restrictions.

On December 20, 2020 Dr. Graf reviewed Petitioner's records from a Dr. Buder, showing four days of low back pain in 2014. He also reviewed records from a Dr. Fish for chiropractic treatment from February to May 2019. Dr. Graf noted on the first treatment date, Dr. Fish recorded complaints of six months of back pain. At the last visit in May, Dr. Fish recommended continued treatment. Dr. Graf also reviewed updated records from Dr. Mohan. The doctor testified the records supported his findings of lumbar disc degeneration that was not aggravated by the work accident. He continued to find no work-related restrictions and continued to find no additional treatment necessary. Dr. Graf opined Petitioner's left leg and thigh pain was not caused or aggravated by the work accident. It was a natural progression of his degenerative condition.

On cross-examination, Dr. Graf testified that he performs 15 to 20 IMEs per month. He sees up to 30 patients a day. When someone with pre-existing spondylosis has an accident and starts having pain, Dr. Graf considers that an exacerbation. If the pain was more permanent, he would consider it an aggravation. He testified that an annular tear is not an acute finding on its own. A bulging disc is degenerative.

Dr. Graf noted Petitioner's job involved heavy lifting per the job description. Dr. Graf reviewed the records from his examination and did not specifically ask about the chronic low back pain indication in the July 8, 2019 X-ray report. He did not know if there was a prior recommendation for surgery. He acknowledged the MRI findings at L5-S1 could correlate with left lower extremity symptoms. There is no record of treatment by an orthopedic doctor or pain management physician prior to July 2019.

Dr. Graf further testified:

> Well, let me clarify my opinion. Mr. Reyes came to my clinic stating that he never had any prior low back pain, care or treatment for his low back pain prior to the claimed injury from July 1st, 2019. That's clearly false. He had extensive treatment. He had ongoing back pain. He had lumbar spondylosis. There was no acute findings on his imaging studies. He says that he has some numbness and tingling, which would be a natural progression of his degeneration. There's no acute findings on the MRI scan, such as an acute disc herniation or otherwise. So, yes, it is my opinion that there was absolutely no exacerbation of any preexisting condition. RX #1, pp. 52-53

Dr. Graf based his opinions on the chiropractic records showing three months of pain prior to beginning that treatment in February 2019. He did not agree that the frequency of chiropractic treatment before and after the accident showed there was an exacerbation or aggravation. Dr. Graf questioned whether Petitioner was truthful about his accident because he was not truthful about his pre-existing treatment.

On re-direct examination, Dr. Graf testified that because Dr. Fish did not release Petitioner from chiropractic treatment in May 2019 showed that Petitioner had continued symptoms. When Petitioner filled out the form at the start of chiropractic treatment in February 2019, he indicated that he had the pain for one year but also indicated that he had pain for six months, which was constant. Dr. Graf testified spondylosis can occur in the absence of trauma. The mechanism of injury did not cause or aggravate the findings on physical examination or the MRI. That mechanism did not cause or aggravate the condition to a point where a fusion surgery would be necessary. Dr. Graf added Petitioner did not report a history of pre-existing pain to Dr. Mohan or Dr. Xia.

At trial Petitioner testified that prior of his accident he weighed 285 pounds but now weighs 160 pounds. He testified he stopped eating bad food and gave up drinking pop. Petitioner also testified about his treatment at The Joint Chiropractic (The Joint) who in 2019 before his July 1 work accident. He testified he had strained his back opening a door. A friend recommended The Joint for massages. He was not taken off work while treating at The Joint. Petitioner testified he was never given work restrictions or referred for an MRI or referred to a pain specialist or referred to an orthopedic specialist while treating at The Joint. Only the doctors who treated his July 9 work injuries took him off

work or restricted work activities. He also testified that the treatment at Grand Harlem was more extensive and involved than treatment at The Joint.

Petitioner testified that he was terminated by Respondent in July 2020. He was paid out his vacation days after his termination. Petitioner further testified that he is currently not very active throughout the day because "the more I do, the more it hurts." He cannot engage in recreational activities as he did before. He is always stiff and sore with back pain. Petitioner testified that he wants the procedure recommended by Dr. Mohan "because I want to go back to work."

On cross-examination, Petitioner acknowledged he had prior back complaints. He explained that "we get strains at work." He did not recall if he told his treating doctors about his back treatment at The Joint. He testified that he was truthful when he saw doctors.

On redirect, Petitioner further clarified that prior to the July 1, 2019 incident he did not have the symptoms in his leg.

CONCLUSIONS OF LAW

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

The Arbitrator finds that Petitioner did sustain an accidental injury that arose out of and in the course of Petitioner's employment on July 1, 2019.

Petitioner's unrebutted testimony is that he was moving scaffolding with coworkers on July 1, 2019. The scaffolding had locked wheels, requiring Petitioner and his coworkers to push and drag the scaffolding. While performing this job duty, Petitioner felt a pop in his back and immediate onset of back pain. Petitioner gave consistent histories of the mechanism of injury and his physical complaints as recorded by his treating physicians at Union Health Service, Grand Harlem Medical, Integrated Pain Management, and Orthopaedic Spine Institute. This consistency bolstered Petitioner's credibility.

Respondent offered no evidence to rebut Petitioner credible evidence regarding accident, save for an argument that Petitioner withheld pertinent health history and therefore was not credible. The Arbitrator is unpersuaded by this argument.

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

The Arbitrator finds that Petitioner proved that his current condition of ill-being is causally related to the work injury sustained on July 1, 2019.

The Arbitrator relies on Petitioner's credible testimony, which was corroborated by the medical records from Union Health Service, Grand Harlem Medical Center, Integrated Pain Management, and Orthopedic Spine Institute. The Arbitrator also notes Petitioner's credibility when testifying at trial. The Arbitrator also weighed the conflicting opinions of physicians engaged in treatment of Petitioner's condition and the physician retained by Respondent.

The number of physicians offering opinions regarding a specific issue such as causation may be more convincing than a lesser number of opinions, although a lesser number of opinions may be more convincing regarding that issue than the greater number of opinions. Here, Drs. Xia and Mohan diagnosed they herniated disc in Petitioner's lumbar spine which they found to be causally related to Petitioner's work accident on July 1, 2019. On the other hand, Respondent's retained examining physician, Dr. Graf, opine that Petitioner's condition is an ongoing chronic degenerative condition unrelated to his work accident.

The Arbitrator notes that Drs. Xia and Mohan were engaged in efforts to cure or relieve the medical conditions of which Petitioner complained and that they diagnosed. Dr. Graf was retained by Respondent to bolster its defense in this matter which calls into question the potential of bias on behalf of the defense. Aside from that, Dr. Graf's opinions lacking inherent reliability and credibility. Dr. Graf was singularly affected by his opinion of Petitioner's supposed dishonesty.

In his deposition doctor Graff stated Petitioner lied and perpetrated a falsehood in denying a history of chronic back pain prior to the July 1 2019 work accident. The record is clear Petitioner sought chiropractic care for several months in 2019 for low back pain that had persisted for at least six months prior to the initial contact in February 2019. Petitioner acknowledged that he may not have or otherwise did not recall reporting that history to his treating physicians. However, at trial Petitioner credibly explained that the nature of his work caused occasional, perhaps frequent, episodes of strains and sprains which were the normal course. It is understandable that Petitioner may not have honestly placed emphasis on this history in light of the new and different nature of the complaints he had after the July 1 accident without engaging in an attempt to withhold pertinent information or to deceive.

Further, the Arbitrator finds Dr. Graf's opinions unreliable on their face. In his deposition Dr. Graf testified, "I asked the gentlemen if he had any chronic back pain; He said no, which was a lie." However, on page 2 of his February 14, 2020 report, DepX # 2, the doctor wrote, "Mr Reyes denies any prior related injury, care or treatment." At the time of the February 14 IME Dr. Graf did not document the question and response he testified about on March 9, 2021. Clearly, Dr. Graf embellished his testimony when compared to his report. Precision in language in matters such as these is essential.

In addition, and more important, Dr. Graf totally ignored or disregarded a significant change in Petitioner's presentation and symptomology following the July 1 2019 accident. Prior to the July 1 work accident Petitioner had generalized low back pain. Following that accident Petitioner had a new and significantly different presentation with left leg pain, numbness, and tingling with diminished sensation, well and consistently documented by his treating physicians. In his own IME Dr. Graf noted diminished sensation in Petitioner's left thigh but offered no explanation as to why this symptom arose only after the July 1 2019 work accident. No physician treating or examining Petitioner found non-anatomic complaints.

Accordingly, the Arbitrator finds the causation opinions of Drs. Xia and Mohan more reliable and persuasive then the opinion of Dr. Graf and adopts those causation opinions in finding that Petitioner proved that his current condition of ill-being has causally related to his work accident of July 1, 2019.

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?*

At trial, Petitioner introduced the following unpaid medical bills into evidence:

1.	Grand Harlem Medical Center	$11,060.00
2.	Integrated Pain Management	$124.00
3.	Orthopaedic Spine Institute	$640.00
	TOTAL:	$11,824.00

The Arbitrator is previously found that Petitioner proved that his condition of ill-being is causally related to his work accident on July 1 2019. Accordingly, it follows that medical care provided to cure or relieve that condition of ill-being would be reasonable and necessary. It is noteworthy that even respondents examining physician, although

finding no causal connection, or pine that the medical care provided to petitioner was reasonable and necessary.

Therefore, the Arbitrator finds that the medical treatment ordered and rendered by all the above-listed providers to be both reasonable and necessary and that Respondent has not paid all appropriate charges for Petitioner's reasonable and necessary medical services. Respondent shall pay all outstanding and related medical charges, to be adjusted in accord with the medical fee schedule provided by §8.2 of the Act..

K: *Is Petitioner entitled to prospective medical care?*

The Arbitrator finds Petitioner proved that he is entitled to prospective medical care recommended by Dr. Mohan. Petitioner has not reached MMI, and Dr. Mohan has recommended a lumbar fusion and discectomy. This follows from the Arbitrator's previous finding in favor of petitioner on the disputed issue of causation. Having found Dr. Mohan's opinion on causation to be reliable and persuasive the arbitrator finds the doctor's opinion on prospective surgery to also be reliable and persuasive.

The Arbitrator notes that Dr. Graf opined that surgery would be "life-altering" and that surgery at Petitioner's young age would "guarantee" another surgery later in life. Aside from the Arbitrator having found other of Dr. Graf's opinions unreliable and unpersuasive, Dr. Graf offered no explanation or basis for this opinion. Without explanation or basis, the Arbitrator is challenged to find this opinion of Dr. Graf persuasive.

The Arbitrator found Petitioner to be a credible witness eager to recover and return to work. The Arbitrator takes special notice of Petitioner's successful effort to lose weight at the instruction of his treating physician, Dr. Mohan. This demonstrates a commitment by Petitioner to put himself in a position to have the best surgical outcome.

Accordingly, the Arbitrator orders Respondent to authorize and pay for the lumbar fusion and discectomy recommended by Dr. Mohan, as well as any and all reasonable and necessary follow up rehabilitative care and treatment.

L: *What temporary benefits are in dispute? TTD*

The Arbitrator finds that Petitioner is entitled to 120 and 2/7 weeks of TTD from July 8, 2019 to October 26, 2021.

The parties stipulated that Respondent has paid 34 weeks of TTD from July 8, 2019 through March 1, 2020, totaling $14,043.28.

The dispositive inquiry in deciding whether a Petitioner is entitled to TTD is whether his condition has stabilized, i.e., whether they have reached MMI. When an injured employee demonstrates that they continue to be temporarily totally disabled as a result of a work-related injury, they are entitled to TTD benefits.

Respondent denies ongoing liability for TTD benefits pursuant to the opinion of Dr. Graf following his IME report of February 14, 2020. Dr. Graf did not offer and opinion of whether petitioner had reached MMI, merely opining that Petitioner's condition of ill-being was not causally related to the July 1 2019 work accident.

The Arbitrator, having found Mohan's causal connection opinion persuasive, similarly finds his opinions regarding Petitioner's work restrictions persuasive. The Arbitrator agrees with Dr. Mohan that Petitioner's condition has not stabilized to maximum medical improvement as of the date of hearing on October 26, 2021. Petitioner's light duty restrictions were never accommodated by Respondent, and Petitioner has since been terminated and not returned to work.

At a TTD rate of $413.02 per week, 120 and 2/7 weeks of TTD is a total award of $49,680.52. Respondent paid $14,043.28 in TTD benefits, for which they are credited. Therefore, Respondent owes $35,637.24 in TTD benefits.

Steven J. Fruth, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC011130
Case Name	Stephen Bresnahan v. City of Pekin
Consolidated Cases	
Proceeding Type	
Decision Type	Commission Decision
Commission Decision Number	23IWCC0292
Number of Pages of Decision	15
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Stephen Kelly
Respondent Attorney	John Fassola

DATE FILED: 7/3/2023

/s/Amylee Simonovich, Commissioner

Signature

23IWCC0292

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 PEORIA)	☒ Reverse (Accident)	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Stephen Bresnahan,

Petitioner,

vs. NO: 20 WC 11130

City of Pekin,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering all issues, and after being advised of the facts and law, reverses the Decision of the Arbitrator.

Findings of Fact

Petitioner's Testimony

Petitioner has worked for the Pekin Fire Department since April 1990, and is currently a captain. He testified that throughout the 30 years he has worked for Respondent, the air protective devices firefighters wear have significantly changed. He testified that when he first began working for Respondent, firefighters had self-contained breathing apparatuses (SCBAs); however, they were not widely used. Petitioner testified that during his initial years, firefighters also used smoke ejectors.

Petitioner testified that he has fought various types of fires, including residential, commercial, and car fires. He has also fought wildfires and fires in chemical plants. He testified that at times he has responded to hazmat situations involving chemical spills and gas leaks. Petitioner testified that during his career, he was exposed to toxins such as carbon monoxide, sulfur oxide, hydrogen, and cyanide. Petitioner also has been exposed to various types of dust, mold, ash, alcohol reducing components, and chlorine. Petitioner testified that in his early years the EPA had lower standards for diesel engines, so he was exposed to a lot of diesel exhaust in the station. He has been exposed to asbestos when fighting fires in older buildings as well as fiberglass insulation fibers, drywall compounds, and dust during the overhaul process. He testified that overhaul occurs when the fire is out and firefighters enter to check crevices and put out cold and hot spots. He

testified that they pull down ceilings, breach walls, and pull out insulation. Petitioner testified that in his early years as a firefighter, they would remove their protective gear during overhaul due to the high heat.

Petitioner testified that firefighters are often called to the city's alcohol reducing plants and coal plant for fires. He testified that he has been exposed to extreme heat as well as extreme cold during his career. He testified that fighting a fire in extreme conditions would exhaust him, but he still had to always be prepared for another call. Petitioner testified that at times the alarm would wake him from a dead sleep and his heart would race as he rushed to respond. He testified that he has suffered from sleep deprivation due to his job. Petitioner testified that calls involving a medical response were stressful because they could involve a life or death situation. He testified that during his career he has had to lift heavy items and carry bodies. He testified that when wet, his gear—his pack, tools, boots, and helmet—weighs approximately 100 pounds.

Petitioner denied undergoing any treatment for heart issues in the five years before the date of accident. He testified that he has never smoked and further testified, "I have always maintained a healthy lifestyle I've always worked out. I'm a runner, walker, bicycler, I lift weights, and always taken pride in my appearance physically." (Tr. at 36-37). Petitioner denied having a family history of heart disease. He testified that he has never failed his mandatory annual physical. Petitioner admitted he was diagnosed with sleep apnea and testified that he began using a CPAP approximately five years before the date of accident. He testified that he used his CPAP every night. He denied being on any medication on the date of accident.

On May 4, 2020, he suffered a myocardial infarction. Petitioner testified:

> "On that day I was having a regular day. I had just gotten off shift. It was a busy night as I recall. Got off shift at 7 a.m. and went about my day. Approximately 4 o'clock I headed to some property that I have to mow grass. I had no pain, no shortness of breath, no warning signs, nothing that would ever alert me that something bad was going to happen. And all I can say, I would describe it as everything went black. I couldn't see, I couldn't hear and I couldn't breathe."
> (Tr. at 39).

Petitioner was not at work or responding to a call when this episode occurred. He testified that he drove himself to the hospital.

Petitioner testified that within 30 minutes of arriving at the hospital his sinus rhythm returned to normal. He stayed in the hospital for observation and testified that a nurse told him that he had a heart attack. The hospital referred him to Dr. Chaturvedula. During his first visit with Dr. Chaturvedula, the doctor performed an echo cardiogram and took Petitioner to the cardiac catheterization lab. He testified that his doctor told him that his heart attack was a "widow maker," and he was lucky to be alive.

He testified that he was taken off work and attended cardiac rehabilitation. Petitioner began taking blood thinners soon after his surgery. He testified that he has not returned to work since the date of accident and does not believe his physical condition allows him to return to work. He

agreed that he received his full salary pursuant to PEDA for the first year he remained off work. Petitioner testified that he then began using his accrued personal and sick time for his continued time off work. Petitioner believes he will be on blood thinners for the rest of his life. Petitioner denied ever being examined by or speaking to Dr. Carroll, Respondent's Section 12 examiner.

Under cross-examination, Petitioner denied having a history of high cholesterol. He testified that his cholesterol "…may be close to the spectrum where it starts going into high." (Tr. at 57). The following exchange occurred:

> Q. If I told you that we have laboratory testing from 10 years ago, 2009 little bit more than 10 years ago that your lab readings showed abnormal cholesterol were you aware of that?
> A. Yes.
> Q. The doctor that performed the physical examinations told you you had cholesterol abnormalities that you should watch out for?
> A. I don't believe he said abnormalities and I don't believe it was alerted to where he wanted me on medications.
> Q. You've never taken a prescription to lower your cholesterol?
> A. I believe I tried it one time and it made me so dizzy and I couldn't do it. I monitored my diet. That was 10 years ago. I know it dropped significantly after that.
> (Tr. at 57-58).

Petitioner knew about his heart murmur, but denied ever being diagnosed with high blood pressure. Petitioner testified that he always used his CPAP at the fire house. He testified that it would be inaccurate if a coworker testified that he did not see Petitioner using the CPAP. Petitioner agreed that his job involved paramedic calls much more frequently than active fires. He agreed that during his first decade as a firefighter, he had paramedic calls every day and could go days or even weeks without having to respond to an active fire.

Petitioner worked a shift beginning at 7:00 a.m. on May 3, 2020, and ending at 7:00 a.m. on May 4, 2020. He agreed that he did not experience any symptoms until around 4:00 p.m. on May 4, 2020. Petitioner agreed that his symptoms began when he was about to mow the lawn on his personal property. He agreed that he had done other physical work in the time between the end of his shift and the onset of his symptoms. Petitioner testified that his next medical appointment regarding his heart condition is his annual visit with Dr. Chaturvedula in May 2022.

Christopher Coats' Testimony

Mr. Coats testified via evidence deposition on September 16, 2021, on behalf of Petitioner. (PX 9). He is a fire captain with the fire department and has worked for Respondent as a firefighter for 22 years. He testified that the firefighters perform daily chores, check the equipment and trucks, and respond to any emergencies. He testified that there usually is training in the afternoon. The firefighters have down time after 4:00 p.m., but they must remain ready for any calls. He testified that approximately three-fourths of the fires are residential fires; however, they also respond to many structure and vehicle fires. Mr. Coats testified that they also respond to emergencies at the

ethanol and coal-burning plants.

Mr. Coats testified that the firefighters frequently respond to fires at a substation of the power plant. He agreed that he has dealt with coal dust, but did not know if his exposure included grain dust. He agreed that during his first decade as a firefighter, most firefighters did not wear the SCBAs while performing overhaul. Mr. Coats agreed that he has been exposed to fumes or gases from burning tires, diesel fumes, asbestos, fiberglass, carbon monoxide, sulfur dioxide, and chlorine. He agreed that firefighters are exposed to extreme temperatures at times. Mr. Coats testified that there is stress with every call because there is a constant element of danger. He testified that with each emergency call, he worries about his safety, the safety of his coworkers, and the safety of the public. He testified that firefighters are exposed to fumes and toxins even while diligently wearing the SCBA.

Under cross-examination, he agreed that paramedic responses are much more frequent than fire responses. He agreed that responses to fully involved structure fires are much less frequent than events such as false alarms or small fires. Mr. Coats agreed that they could go weeks without responding to an involved fire. He testified that firefighters usually wear their protective equipment at the scene of a coal fire, but he might not wear his mask during the staging process as this occurs a far distance from the fire.

Mr. Coats testified that over the years he has intermittently been assigned to the same shift as Petitioner. He considers Petitioner a friend, but does not socialize with him outside of work. Mr. Coats denied knowing about any of Petitioner's medical conditions, including his sleep apnea. He testified that he has never seen Petitioner wear any device while sleeping such as a CPAP. Mr. Coats testified that when they worked the same shift, he would sleep in the same bunk room as Petitioner.

Pre-Accident Medical Condition

Respondent submitted records from IWIRC, the clinic that performs the mandatory annual physicals for the fire department. (RX 2). In October 2009, Petitioner's total cholesterol was 226, triglycerides were 125, HDL was 40, and LDL was 151. The report notes that HDL greater than 59 is considered a negative risk factor for congestive heart disease. In October 2010, Petitioner's total cholesterol was 233, triglycerides were 169, HDL was 43, and LDL was 176. Both his total cholesterol and his triglycerides were labeled high on the report. A February 2011 fitness protocol worksheet reveals a blood pressure reading of 136/80. A February 2011 preliminary annual physical report cleared Petitioner to participate in the Wellness Conditioning Program. It also identified Petitioner's LDL of 176 as something Petitioner should bring to his PCP's attention. The report notes that the goal was an LDL of less than 130 and recommended Petitioner try niacin each day. It also recommended Petitioner begin a daily regimen of over the counter aspirin. The report recommended that Petitioner have his cholesterol rechecked in six weeks.

In October 2011, Petitioner's total cholesterol was 240, triglycerides were 137, HDL was 42, and LDL was 171. A January 2012 fitness protocol worksheet reveals a blood pressure reading of 138/76. An April 2012 preliminary annual physical report shows that Petitioner was again cleared to participate in the wellness program. The report lists three findings Petitioner should

report to his PCP. It recommended considering an echocardiogram to follow up on Petitioner's aortic valve condition. It also noted that Petitioner's LDL should be 130 or less and once again recommended Petitioner take niacin daily. Finally, it recommended a chest x-ray. In September 2012, Petitioner's total cholesterol was 217, triglycerides were 124, HDL was 40, and LDL was 145. A document compares Petitioner's blood pressure, weight, and BMI in 2011, 2012, and 2013. In 2013, Petitioner's blood pressure was 124/76. In 2011 and 2012, his BMI was 29, and it lowered to 28 in 2013. Petitioner's weight each year was 208 pounds, 210 pounds, and 201 pounds respectively.

In September 2013, Petitioner's total cholesterol was 217, triglycerides were 99, HDL was 45, and LDL was 152. The February 2014 preliminary annual physical report once again cleared Petitioner to participate in the wellness program. The report identified Petitioner's LDL of 152 as a concern he should report to his PCP. The report notes that Petitioner's LDL was down 24 points and Petitioner had lowered his risk of a heart attack by 28%. An updated chart comparing Petitioner's results in 2011, 2012, 2013, and 2014 shows Petitioner's weight was down to 189 pounds in 2014, his blood pressure was 138/68, and his BMI was down to 26.4.

On July 28, 2016, Petitioner visited the ER after fainting while at work. (PX 4). The record includes the following history:

> "Pt relates he is a fireman and was working a fire when he began feeling winded, states he knelt down on one knee and then reportedly fell onto his face r/t syncope. Pt relates episode was witnessed by his colleagues and states only remembering hearing them yell 'mayday' and requested evaluation in the ER. Hx of cardiac related problems, notes he has a faulty heart valve and has a hx of abnormal EKGs. States he has not eaten today and has been working hard at work…"
> (PX 4).

Petitioner was also examined at IWIRC that day. Petitioner's blood pressure was 142/58 and his weight was 220 pounds. Petitioner was diagnosed with a syncopal episode caused by heat exhaustion. A September 2016 polysomnogram revealed severe obstructive sleep apnea, severe desaturation, and frequent premature ventricular contractions. (PX 4).

Medical Treatment

Petitioner visited the ER on May 4, 2020, and was discharged the next day. An EKG revealed atrial fibrillation with rapid ventricular response, intraventricular conduction delay, and inferior myocardial infarction of indeterminate age. An addendum states that Petitioner's cardiac catheterization showed severe proximal to mid LAD stenosis which was successfully stented. Petitioner underwent a cardiology consultation with Dr. Chaturvedula. After performing the cardiac catheterization procedure, Dr. Chaturvedula prescribed daily aspirin, Plavix, and an anticoagulant. Petitioner was to take the aspirin for up to one month and then would continue using Plavix and the anticoagulant for up to 6 months to a year followed by lifetime oral anticoagulation. While Petitioner was in the hospital, one of his consulting doctors wrote that Petitioner reported he did not use his CPAP.

Dr. Fisher examined Petitioner on May 11, 2020, and recorded the following history:

> "[P]atient was finishing up the shift at the fire house, and then went to work at his maintenance job at [one] of the local assisted living facilities. After doing that job all day he went over to mow the yard at property owned. He recalls standing in the street and everything went dark, he could not hear, could not see and had a hard time breathing. This lasted about 15 seconds and it was a hard task for him just to walk into the yard and he notes his heart was just pounding…He thought it was strange but went back to mowing about 10-15 minutes later he suddenly decided he better go to the emergency and find out what happened."
> (PX 3).

Petitioner reported having an episode of tightness in his neck while mowing. Dr. Fisher wrote that Petitioner's ideal body weight is 200 pounds (+/- 5 pounds). Petitioner told Dr. Fisher that he was extremely active, worked out routinely, and had no risk factors other than being a professional firefighter. Petitioner was to continue attending cardiac rehabilitation and lose 10 pounds by his next visit. Dr. Fisher wrote, "Urged him to get his affairs in order although he…seems in excellent shape he never should have had this event in the first place." (PX 3).

On May 15, 2020, Petitioner was examined by a nurse practitioner in the cardiac department. The nurse practitioner wrote: "He reports Dr. Chaturvedula asked him during the cath how long he had smoked as his coronary arteries looked like someone who smoked. He has never smoked but has been firefighter for over 30 years. We discussed that the firesmoke [*sic*] may have contributed to his heart disease." (PX 6). Petitioner was to continue attending cardiac rehabilitation and taking his medications.

On May 28, 2020, Dr. Chaturvedula noted Petitioner's recent LDL was 139 and wrote that his goal LDL is less than 70 due to his heart attack. Petitioner reported his shortness of breath and chest discomfort had completely resolved. Dr. Chaturvedula wrote that Petitioner was doing well and was to continue participating in cardiac rehabilitation. The doctor cleared Petitioner to begin working light duty as of June 2, 2020. On June 8, 2020, Dr. Fisher wrote Petitioner had only lost one pound and weighed 221.2 pounds. He wrote that Petitioner's ideal body weight is 200 pounds, which was generous given Petitioner's 5'11 height and large frame. Dr. Fisher wrote that Petitioner needed to lose weight at all costs. On June 25, 2020, Dr. Chaturvedula wrote that Petitioner was doing well. He wrote: "Currently participating in cardiac rehab, [Petitioner] wants to return to work with limited capacity, letter provided…Once he is done with cardiac rehab, he may resume full activity and this was discussed with him at the visit." (PX 6).

On December 17, 2020, Petitioner reported to Dr. Chaturvedula that he was trying to be more physically active. He also reported being compliant with using his CPAP nightly. Dr. Chaturvedula encouraged Petitioner's continued compliance with the CPAP and discussed the association of atrial arrhythmias with sleep apnea. On May 5, 2021, Dr. Chaturvedula wrote that Petitioner was doing well and would continue his medication regimen. An updated echocardiogram showed a bicuspid aortic valve with mild to moderate aortic stenosis and eccentric likely moderate aortic regurgitation. Petitioner denied having any chest pain, tightness, or heaviness. However, he reported transient episodes of fluttering in the chest, but denied having

any sustained episodes.

Expert Opinions & Testimony

Dr. Surya Chaturvedula—Treating Physician

Dr. Chaturvedula testified on Petitioner's behalf via evidence deposition on October 29, 2020. (PX 7). Following medical school and residency, he completed general cardiology and interventional cardiology training. He is board-certified in internal medicine, general cardiology, interventional cardiology, echocardiography, and nuclear cardiology.

Dr. Chaturvedula testified:

> "…firefighting and exposure to fumes or chemicals of fire, whatever, you could broadly classify that as you stated as an environmental pollutant, as any industrialized country has, it's not a very accurate science so to speak as it stands today, but there certainly exists concerns that environmental exposure or pollution does have a bearing on one's heart health. Yes, when I first met him and I saw him he was young and otherwise healthy, without traditional cardiac risk factors….I use the word 'traditional' because for years…that's what has been the cardiac wisdom so to speak is family history of heart disease, advancing age, male gender, high blood pressure, tobacco smoking, diabetes, high cholesterol, or any other manifestation of arthrosclerosis, meaning hardening of the arteries, history of stroke, poor circulation to legs, kidney disease, these are considered traditional, but, psychological, emotional stress, environmental pollution, these are so to speak new age risk factors. I can't—you said causation, I can't prove causation in this case. Does the nature of his job have a possible impact, it is likely because of pollution."
> (PX 7 at 16-17).

He testified that things like working all day, waking up at night suddenly due to an alarm, and the stress of responding to a fire are concerns. Dr. Chaturvedula testified that he experienced many of the same stressors and testified, "…these are concerns, can I prove, I can't. Can anyone prove, no. Now, does the stress cause elevation in blood pressure, which in turn might have impact on the heart, sure." (PX 7 at 17). Dr. Chaturvedula further testified:

> "So first of all let me qualify…sleep apnea and treatment is what I know, blood pressure is what I see, cholesterol, diabetes is what I see, lifetime smoking, alcohol, et cetera, one has to assume, because I've only been taking care of [Petitioner] since I met him, if we go by the history provided by the patient, yes, he doesn't have several of the traditional risk factors that I mentioned, again environment and pollution can have a role in heart disease, did it have a role in his case, I don't think I have any data to comment on that."
> (PX 7 at 19).

The doctor testified that there is concern that environmental exposure can raise the incidence of heart disease in the general population.

Under cross-examination, Dr. Chaturvedula testified that he could not attribute a causal relationship regarding new age concerns, such as emotional distress and environmental pollution, to Petitioner's heart disease. He further testified that he could not assess a causal relationship in Petitioner's case. He testified:

> "Causal relationship…I can't prove, but his job as a firefighter you take a same age, gender man, same risk profile person who does not get exposed to the environmental exposures that this patient has, is that person at a lesser risk for heart disease, the answer would be yes. So, again…it's contributory factor, is it a 100 percent causal relationship, not in this patient. In any patient it's hard to prove."
> (PX 7 at 22).

Regarding whether he could opine with a reasonable degree of medical certainty whether Petitioner's job was a cause of his cardiac disease, Dr. Chaturvedula testified, "I wouldn't [use] the word 'cause,' but did it contribute to—contribute to heart disease in a way that I was surprised due to his lack of other risk factors, yes, there's a certain degree of concern that such an exposure or such a life-style could potentially be, you know, playing a role." (PX 7 at 23). Dr. Chaturvedula testified that a history of high cholesterol and high blood pressure are classic risk factors for the development of heart disease. However, he could not offer a medical opinion regarding their involvement in Petitioner's case because outside of the history Petitioner provided, he did not have knowledge of Petitioner's medical history.

Dr. David Fletcher—Petitioner's Section 12 Examiner

Dr. Fletcher examined Petitioner on January 13, 2021, at the request of Petitioner's attorney. (PX 2). He is board-certified in occupational and preventive medicine/public health with extensive training in epidemiology and toxicology. He is an occupational medicine specialist. He wrote that he has conducted police and fire pension disability exams for municipalities throughout the state and is very familiar with medical literature regarding the association between firefighters and cardiovascular disease.

Dr. Fletcher recorded the following history:

> "[Petitioner] states that while walking that morning after he got off work he suddenly could not breathe, see, or hear. Later in the afternoon, [Petitioner] states he was getting ready to mow. He was going to cross the street when he noticed that he was getting ready to faint. He states it did feel like his heart was racing. He ignored it for a few minutes and then started mowing. He states he continued to have the heart racing sensation and was not feeling any better. He did not have any significant chest pain or shortness of breath when this occurred. He discontinued mowing and decided to check his pulse. He states his heart rate was extremely fast. He knew exactly when it started as he could feel his heart racing. The only preexisting cardiac history that he was aware of is a congenital bicuspid aortic valve of which he has never had to take medicine for."
> (PX 2).

He wrote that Petitioner's cardiac event occurred immediately after his shift ended.

He opined that there is "…extensive medical literature and research that cites in addition to the 'traditional risk factors' that cause coronary artery disease…[it] is aggravated and accelerated by occupational factors, such as firefighting. Firefighting exposes one to toxic fumes, chemical, smoke, and heat stress, along with deleterious stressful working conditions with 24-hour shifts." (PX 2). Dr. Fletcher cited an editorial in the New England Journal of Medicine as support for his opinion that firefighters face occupational hazards that may add to or amplify their risk of death due to cardiovascular causes. He opined the occupational hazards include exposure to chemicals and thermal and emotional stress. Dr. Fletcher opined that heart disease among firefighters is caused by a combination of personal and work factors. The personal factors include age, gender, family history, diabetes mellitus, hypertension, smoking, high blood cholesterol, obesity, and lack of exercise.

He wrote, "Dr. Carroll tries to make a big deal about his OSA being a risk factor for the petitioner's coronary heart disease, but the regular use of CPAP substantially decreases the risk of cardiovascular disease." He further opined that Petitioner's sole personal risk factor for heart disease was an elevated cholesterol reading at a health fair in 2011. Dr. Fletcher opined:

> "His work history is one contributing factor to the development and acceleration of coronary artery disease. I found it notable that his treating interventional cardiologist Dr. Chaturvedula asked him during the heart cath, how long he had smoked as his coronary arteries looked like someone who smoked by [Petitioner] has never smoked but has been a firefighter for over 30 years. Dr. Chaturvedula discussed that the fire smoke may have contributed to his heart disease."
> (PX 2).

Dr. Fletcher wrote that his opinion could change if he was presented with additional information and/or medical records. He opined that Petitioner was at MMI and had a favorable prognosis if he continued to maintain cardiac risk reduction behaviors.

Dr. Richard Carroll—Respondent's Section 12 Examiner

Dr. Carroll reviewed medical records at Respondent's request and authored a September 2, 2020, report. (RX 1 at Exh. 2). His review included records from IWIRC. He opined that the medical records reveal Petitioner had several risk factors for the development of heart disease including being male, a history of hyperlipidemia, a questionable history of hypertension, and obstructive sleep apnea. Dr. Carroll noted that as early as 2011, it was recommended that Petitioner take niacin due to his elevated LDL level. He also wrote that the 2016 sleep study revealed Petitioner had severe obstructive sleep apnea with severe desaturation.

Dr. Carroll opined, "Based on the current state of medical science, firefighting [is] not a known risk factor for the development of coronary artery disease." (RX 1 at Exh. 2). Dr. Carroll wrote that it is well-known that acute cardiac events can occur while performing firefighting duties; however, Petitioner's heart attack occurred several hours after his shift ended.

Dr. Carroll testified on Respondent's behalf via evidence deposition on November 20, 2020. (RX 1). Following medical school, he completed a residency in internal medicine and completed cardiology training. He is board-certified in internal medicine and cardiology. His practice primarily focuses on preventive cardiology.

He testified that he is familiar with the activities a firefighter would perform as part of their work duties and that firefighters at times are exposed to smoke, fumes, and other toxins. Dr. Carroll testified that the recognized risk factors for heart disease are being male, hypertension, dyslipidemia, diabetes, family history, and smoking cigarettes. He testified that obstructive sleep apnea appears to be highly correlative with the development of heart disease.

Dr. Carroll denied that the occupation of firefighting is identified as a risk factor for the development of heart disease. He further testified that Petitioner's coronary artery disease is not related to his occupation as a firefighter. Dr. Carroll testified that his opinion is based on his educational background, the status of the medical literature, and the correlation between risk factors and the development of coronary artery disease.

Under cross-examination, Dr. Carroll agreed that he did not speak with or physically examine Petitioner. He testified that treating and controlling conditions such as high cholesterol and high blood pressure would slow the progression of Petitioner's heart disease, but would not reverse existing damage. Dr. Carroll testified that a study by the University of Illinois Fire Science Department supports his opinion that firefighting duties are not related to the development of heart disease. He testified that the study identified non-modifiable risk factors of heart disease as age, heredity, race, and gender. It identified modifiable risk factors of heart disease as cigarette smoking, hypertension, hypercholesterolemia, obesity, diabetes, and physical activity. Dr. Carroll testified:

> "Now, you'd think that if firefighting was one of those risk factors, the [U of I] Fire Science Department would have listed firefighting. They did not because the state of the art is that firefighting does not appear to be a risk factor for the development of coronary disease. Now, you had referenced smoke and all of that other kind of stuff. So, there have been studies that have looked at that, particle size…pollution in general; and the study said there may be some indication, but there's no definitive evidence as of yet. And the last time I saw those studies was probably maybe ten, thirteen years ago…And since then, I kind of keep my eye on that because I want to be able to do the most complete job I can, and I've not seen anything that validates the exposures firefighters have during their job causing coronary artery disease."
> (RX 1 at 36-37).

He further testified:

> "…there have been studies that have looked at things like smoke exposure…small particle exposure. And at the time those studies were performed, there didn't seem to be a correlation that met scientific rigor that that, in fact, was related and they said more studies are needed. And to date, I have not seen any studies that would

validate that presumption…

…Therefore, at this point in time, there is no evidence that that actually is a risk factor for the development of coronary disease."
(RX 1 at 38).

Conclusions of Law

Petitioner bears the burden of proving each element of his case by a preponderance of the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). He must prove he suffered a disabling injury which arose out of and in the course of his employment. *Id*. The phrase "in the course of employment" refers to the time, place and circumstances surrounding the injury. *Id*. To satisfy the "arising out of" prong, Petitioner must show that the injury "…had its origin in some risk connected with, or incidental to, the employment." *Id*. Petitioner's claim is compensable only if he meets his burden of proving his coronary artery disease arose out of and in the course of his employment as a firefighter. After carefully considering the totality of the evidence, the Commission finds Petitioner did not meet his burden of proving his occupation contributed to his heart disease.

Section 6(f) of the Act states, in relevant part:

"Any condition or impairment of health of an employee employed as a firefighter, [EMT], or paramedic which results directly or indirectly from any…heart or vascular disease or condition…resulting in any disability…to the employee shall be rebuttably presumed to arise out of and in the course of the employee's firefighting, EMT, or paramedic employment and, further, shall be rebuttably presumed to be causally connected to the hazards or exposures of the employment…"

This rebuttable presumption only applies to employees who have been employed as a firefighter, EMT, or paramedic for at least five years. It is undisputed that Petitioner has worked as a firefighter for approximately 30 years; thus, Petitioner met his burden of proving the presumption applies to his claim. However, Respondent can rebut the presumption by simply offering some evidence sufficient to support a finding that something other than the Petitioner's occupation caused his heart disease. *See Johnston v. Ill. Workers' Comp. Comm'n*, 2017 IL App (2d) 160010WC, ¶ 44. After reviewing the evidence, the Commission finds the opinions and testimony of Dr. Carroll, Respondent's Section 12 examiner, successfully rebut the Section 6(f) presumption. Consequently, the Commission must consider the evidence as if the presumption never existed. *Id*. at ¶ 37.

The Arbitrator determined that Petitioner proved his duties and exposures as a firefighter contributed to his heart disease and the May 4, 2020, heart attack. The Commission views the evidence much differently. Drs. Chaturvedula, Fletcher, and Carroll provided expert opinions in this matter. Dr. Chaturvedula is a board-certified interventional cardiologist. Dr. Fletcher is a board-certified occupational and preventive medicine doctor. Dr. Carroll is a board-certified cardiologist with a focus on preventive cardiology. After reviewing and carefully weighing the

evidence, the Commission finds the opinions and testimony of Dr. Carroll most persuasive.

The Commission finds Dr. Fletcher's credibility was significantly damaged by his many errors regarding crucial facts and mischaracterization of certain evidence. Perhaps most importantly, Dr. Fletcher believed that Petitioner's symptoms began right after his shift ended. He apparently did not know that after his shift ended, Petitioner worked a shift at his second job as a maintenance worker at a local assisted living facility. He opined that Petitioner's regular use of his CPAP substantially decreased his risk of developing heart disease due to his obstructive sleep apnea. However, he was seemingly unaware of the credible evidence that Petitioner was not compliant with using the CPAP before his heart attack. In fact, while hospitalized, Petitioner admitted to a doctor that he did not regularly use his CPAP. Additionally, Mr. Coats testified that he had never seen Petitioner use his CPAP at the fire station.

Dr. Fletcher also grossly mischaracterized evidence of Petitioner's long history of elevated cholesterol. He opined that Petitioner's only risk factor was an elevated cholesterol reading in 2011 taken during a health fair. However, the evidence shows that Petitioner had concerning cholesterol levels as early as 2009. Furthermore, these test results were part of Petitioner's mandatory annual physical and were not obtained during a health fair. Finally, Dr. Fletcher relied on Petitioner's uncorroborated report that Dr. Chaturvedula believed Petitioner's arteries looked like those of a longtime smoker. The Commission notes that the only evidence of this alleged observation by Dr. Chaturvedula were Petitioner's reports to various providers. Dr. Chaturvedula's office visit notes do not corroborate these reports. The Commission finds Dr. Fletcher's reliance on incorrect facts and mischaracterizations of the credible evidence renders his opinions unreliable.

The Commission finds Dr. Chaturvedula testified credibly; however, his opinions were negatively impacted by his lack of knowledge of Petitioner's medical history. Dr. Chaturvedula readily acknowledged his lack of knowledge of Petitioner's condition prior to the heart attack. Based on Petitioner's self-reported history, Dr. Chaturvedula did not believe Petitioner had many of the traditional risk factors for the development of heart disease. However, he agreed that under certain conditions, a history of high cholesterol is a classic risk factor for the development of heart disease. He testified that determining the effects of firefighting and the exposure to environmental pollutants such as fumes on conditions such as heart disease is not a very accurate science. He also testified that there were concerns that environmental exposure or pollution can raise the incidence of heart disease in the general public. The doctor testified that he did not have enough data to comment on whether environmental exposure or pollution played a role in Petitioner's heart condition. Dr. Chaturvedula testified that he could not attribute a causal relationship between "new age" concerns such as environmental pollution and stress and the development of heart disease. Most importantly, Dr. Chaturvedula was unable to testify with any degree of medical certainty that Petitioner's occupation caused or contributed to his heart disease. Instead, he testified that there is a certain degree of concern that certain exposures or lifestyles could potentially play a role.

Dr. Carroll was the only doctor who thoroughly reviewed the available pre-accident medical records. After considering those records, Dr. Carroll determined Petitioner had several traditional risk factors for the development of heart disease, including high cholesterol and severe obstructive sleep apnea. Dr. Carroll was the only doctor who knew Petitioner's high cholesterol, and particularly his high LDL, caused concern as early as October 2009. Dr. Carroll also knew

that in February 2011, Petitioner's LDL of 176 was identified as a finding that Petitioner should report to his PCP. Furthermore, Petitioner was explicitly advised that his LDL should be less than 130. The provider recommended that Petitioner begin taking niacin each day and begin a daily regimen of a low dose of over the counter aspirin. Dr. Carroll also knew that subsequent preliminary annual physical reports through February 2014 continued to identify Petitioner's elevated LDL as a concern. The pre-accident records also reveal Petitioner's weight, blood pressure, and BMI from 2011 through 2014. Armed with this crucial information, Dr. Carroll credibly opined that Petitioner had numerous risk factors relating to the development of heart disease. Dr. Carroll's accurate knowledge regarding the onset of Petitioner's symptoms on May 4, 2020, is also significant. He credibly testified that firefighting is a well-known cause of work-related acute cardiac events, and correctly noted that Petitioner's heart attack was not an acute event that occurred at work or while Petitioner performed any work-related duties.

After considering the totality of the evidence, the Commission finds Petitioner failed to prove his occupation as a firefighter contributed to his heart disease. The Commission finds Dr. Chaturvedula's inability to testify with any degree of medical certainty that Petitioner's occupation contributed to his heart disease very significant. The Commission also finds the credible evidence that Petitioner had several risk factors related to the development of his heart disease years before his heart attack significant. Petitioner's LDL was consistently identified as a significant concern long before Petitioner's May 2020 heart attack. There is no credible evidence that Petitioner complied with the recommendations made during his annual physicals to seek treatment to lower his LDL. There is no credible evidence that Petitioner achieved an LDL of less than 130 before his heart attack. Similarly, the credible evidence shows that despite his diagnosis of severe obstructive sleep apnea, Petitioner did not regularly use his CPAP. Furthermore, the evidence shows that Petitioner had a history of somewhat elevated blood pressure and BMI. Given Petitioner's multiple and longstanding risk factors, the timing of the onset of Petitioner's symptoms, and Dr. Chaturvedula's testimony, the Commission finds Dr. Carroll's opinion that Petitioner's occupation did not contribute to his heart disease persuasive. The Commission notes that neither Dr. Chaturvedula nor Dr. Carroll testified that the physical duties associated with firefighting such as lifting heavy objects, working in extreme temperatures, and the stress of alarms suddenly interrupting a firefighter's sleep contributed to the development of Petitioner's heart disease.

For the foregoing reasons, the Commission denies benefits because Petitioner failed to prove he sustained an injury arising out of and in the course of his employment on May 4, 2020.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on November 22, 2021, is reversed in its entirety and all benefits are denied.

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

July 3, 2023

o: 5/9/2023
AHS/jds
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/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	08WC029954
Case Name	Gustavo Martinez v. Supervalu Inc DBA Advantage Logistics
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0293
Number of Pages of Decision	18
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Jay Johnson
Respondent Attorney	Kevin Luther

DATE FILED: 7/3/2023

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GUSTAVO MARTINEZ,

Petitioner,

vs. NO: 08 WC 29954

SUPERVALU, INC.,
d/b/a ADVANTAGE LOGISTICS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues[1] of whether Petitioner's current condition is causally related to the May 7, 2008 work injury, entitlement to temporary total disability benefits, entitlement to medical expenses, and the nature and extent of any permanent disability, and being advised of the facts and law, changes the Decision of the Arbitrator as set forth below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission observes Petitioner's personal identity information was unredacted from Respondent's Exhibit 2 and Respondent's Exhibit 3. The Commission cautions Counsel to adhere to Supreme Court Rule 138. *Ill. S. Ct. R. 138* (eff. Jan. 1, 2018).

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 17, 2022 as changed above is hereby affirmed and adopted.

[1] Respondent's Petition for Review identifies accident as well as benefit rate as issues on Review, however Respondent did not advance an argument on either issue in its Statement of Exceptions or during oral arguments, and thus the Commission views the issues as forfeited.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $360.00 per week for a period of 240 1/7 weeks, representing May 7, 2008 through December 12, 2012, 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 the reasonable and necessary medical expenses in Petitioner's Exhibit 5 pursuant to the negotiated rates detailed in Respondent's Exhibit 10, as provided in §8(a) of the Act. Respondent shall be given a credit for medical benefits that have been paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $324.00 per week for a period of 225 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 45% loss of use of the person as a whole.

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

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

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

July 3, 2023

DJB/mck

O: 5/24/23

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/s/ *Deborah J. Baker*

/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	08WC029954
Case Name	MARTINEZ, GUSTAVO v. SUPERVALU, INC., D/B/A ADVANTAGE LOGISTICS
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	15
Decision Issued By	Roma Dalal, Arbitrator

Petitioner Attorney	Jay Johnson
Respondent Attorney	Kevin Luther

DATE FILED: 5/17/2022

THE INTEREST RATE FOR THE WEEK OF MAY 17, 2022 1.49%

/s/ Roma Dalal, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

GUSTAVO MARTINEZ
Employee/Petitioner

v.

SUPERVALU, INC., d/b/a ADVANTAGE LOGISTICS
Employer/Respondent

Case # **08** WC **29954**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Roma Dalal**, Arbitrator of the Commission, in the city of **Ottawa**, on **3/28/22**. 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. ☒ 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 **5/07/08**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**20,080.00**; the average weekly wage was $**540.00**.

On the date of accident, Petitioner was **41** 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 $**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

The Arbitrator finds Petitioner sustained an accident arising out of or occurring in the course of his employment on May 7, 2008. The Arbitrator finds Petitioner established causal connection between his current condition of ill-being and the May 7, 2008 accident.

Respondent shall pay Petitioner temporary total disability benefits of $360.00/week for 240 1/7 weeks, commencing May 7, 2008 through December 12, 2012, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule regarding Petitioner's back condition as provided in Sections 8(a) and 8.2 of the Act. Respondent has negotiated all of the bills claimed in Petitioner's exhibit number 5. (RX10). The Arbitrator orders Respondent to pay the claimed charges pursuant to its negotiated rate. Respondent shall receive credit for amounts paid.

Respondent shall pay Petitioner permanent partial disability benefits of $324.00/week for 225 weeks, because the injuries sustained caused the 45% 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.

MAY 17, 2022

Signature of Arbitrator

GUSTAVO MARTINEZ,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case # 08 WC 29954
	)	
SUPERVALU, INC.,	)	
	)	
Respondent.	)	

STATEMENT OF FACTS

This matter proceeded to hearing on March 28, 2022. Issues in dispute include accident, causal connection, medical bills, TTD benefits, and nature and extent, including whether Petitioner is entitled to Permanent and Total Disability benefits.

Mr. Gustavo Martinez (hereinafter referred to as the "Petitioner") testified he began working for Supervalu (hereinafter referred to as "Respondent") in November 2005. Petitioner worked as a picker at a warehouse. As he got seniority he began to work as a double jack. Respondent operates a warehouse. Petitioner drove a lift truck to pick orders in that warehouse. Petitioner drove the truck with his hands. He testified he would constantly go up and down the aisles and pick merchandise. On May 7, 2008 he was working as a line pick, when he was on a high lift, utilizing two levers. He would look for code numbers on the warehouse shelves to complete the orders as he drove. He stood while he drove the truck.

Petitioner was working in this capacity on May 7, 2008. As he was driving the truck while filling orders, he was looking for numbers, twisting around looking for numbers. He was always going fast. On this date he turned to his right and felt an immediate onset of low back pain. He finished his shift despite being in pain. The next day he reported for work and advised his supervisor of the injury. Based on the same, he went to Illinois Valley Community Hospital that same day.

On May 8, 2008 Petitioner presented to Illinois Valley Community Hospital with low back pain with an onset date of May 7, 2008. He advised he was driving a high lift and twisted and turned his waist and felt immediate pain. He denied radiation. X-rays revealed mild to moderate degenerative changes in the facet joint disease involving the lumbar spine. Petitioner was diagnosed with a lumbar spasm. (PX1 at 9-10).

Petitioner followed up at the Occupational Health Department on May 13, 2008 for his lumbar back pain. Petitioner stated his symptoms had not improved and noted an associated tingling down the posterior aspect of his right leg into his right heel. Petitioner was diagnosed with a lumbar spasm, right lower extremity radiculopathy and possible nephrolithiasis. Petitioner was to return. (PX1 at 17).

Petitioner subsequently had a workup revealing kidney stones. (PX1 at 19). On June 3, 2008 Petitioner underwent surgery for kidney stones. (PX1 at 44).

Petitioner testified his back pain persisted after treatment. He was treating with Dr. Peralis for back pain, his family physician. The Arbitrator notes that no medical records from Dr. Peralis were submitted into evidence.

On June 24, 2008 Petitioner underwent an MRI which revealed a far right lateral L3-4 and far left lateral L5-S1 osteophytes and disc bulging that crowd the left L5-S1 and right L3-4 neural foramina. There was a small

to moderate probability of effacement of the exiting left L5 nerve root and additional areas of mild degenerative disc building without central canal stenosis. (PX2 at 5).

On July 30, 2008 Petitioner presented to the Emergency Room and injured his right thumb which was unrelated. (PX1 at 50). Petitioner was also provided hydrocodone for his back. *Id*. at 53.

On August 12, 2008 Petitioner presented for a physical therapy evaluation. (PX1 at 65). Petitioner's diagnosis was a lumbar disc herniation and low back pain. Petitioner was to undergo pool therapy. It was noted Petitioner was operating a standing forklift when he turned quickly to the right and felt sudden pain in the low back and both legs. Petitioner underwent an MRI which revealed one bulging disc and one herniated disc. *Id*. Petitioner was to undergo therapy two to three times a week for four weeks. *Id*. at 68.

On August 18, 2008 Petitioner was seen by Dr. Dzung Dinh for a neurosurgical visit. Petitioner was a 41-year-old male who was driving a standing high lift and turned to the right when he developed sharp pain across his back. Petitioner had back pain 10 years prior but was released from care. Petitioner had two sessions of water therapy, but his symptoms recurred after a few minutes. The Doctor reviewed the MRI which revealed high intensity zone at the endplate at L5-S1 and bulging disc at this level but no canal or foraminal stenosis. Petitioner was recommended water therapy and a trial of translaminar L5-1 and ESI. (PX3 at 6).

On September 19, 2008 Petitioner presented for a Section 12 Examination with Dr. Gunnar Andersson. Dr. Andersson noted Petitioner was driving a high lift and twisted resulting in low back pain. Petitioner eventually was diagnosed with a lumbar spasm. Dr. Andersson went over his medical notes. Petitioner was examined and he reviewed the MRI. The Doctor noted Petitioner's symptoms were back and predominantly right leg pain. They corresponded to what appeared to be a far lateral disc herniation at L3-4 level which caused moderate to severe spinal stenosis. There were also degenerative changes at L4-5 and L5-1 but not the reason for the pain. The Doctor noted it was unclear what type of injections Petitioner had. The Doctor was also concerned with Petitioner's inorganic behavior and the fact Petitioner did not have any physical therapy. At this juncture Petitioner should undergo physical therapy. He did believe the injury may have strained his back or aggravated the degenerative condition at L3-4 causing the disc asymmetry/herniation at L3-4. (RX1 at 110-112).

Petitioner returned to Dr. Dinh on October 1, 2008. Petitioner had undergone three transforaminal injections right L5-S1 which helped. Petitioner tried therapy but it worsened his pain. At this point Petitioner had some residual pain in the right anterior thigh which could be referred from the L4-5 facet. Petitioner would benefit from a medial branch block and PRF right L4-5 injection. Petitioner should also undergo McKenzie exercise and work hardening program. (PX3 at 13).

On October 10, 2008, Dr. Andersson authored a second report. He noted Petitioner specifically told him that he did not have previous back problems. Regarding the specific incident, it certainly could affect the L3-4 and L5-S1 levels. The mostly likely source of Petitioner's pain resulted in a strain. Petitioner was able to work with occasionally lifting 20 pounds and repetitive lifting 10 pounds. (RX1 at 113-114).

On October 13, 2008 Petitioner's physical therapist noted Petitioner was seen from August 12, 2008 through September 24, 2008. Petitioner was seen for 7 out of 15 schedule therapy visits. Petitioner had not met his goals due to poor attendance of physical therapy and was discharged. (PX1 at 75).

On October 16, 2008 Petitioner underwent a Functional Capacity Evaluation with significant limitations. (PX1, p. 78).

During the October 27, 2008 work conditioning note, it was noted Petitioner underwent four visits. Petitioner had increased symptoms radiating to his right side and down the leg. Petitioner was weak and deconditioned and could not stay on task. Petitioner had to take frequent rests during work conditioning and was very slow in his movements. (PX1 at 73).

On November 3, 2008, Dr. Andersson authored a third report reviewing the DVD which demonstrated the movements of the body and machine Petitioner was working on. Based on this video it was difficult to understand how Petitioner could have in fact injured his lower back. The Doctor did not believe the herniation at L3-4 was caused the by the accident. Dr. Andersson did believe; however, it was possible to develop pain from movement at work even though they were not particularly forceful, but not possible to cause the herniation. (RX1 at 115).

On November 12, 2008 Petitioner returned to Dr. Dinh. Petitioner finished his FCE. According to the report, Petitioner was placed at a low to medium level. The Doctor noted he could not correlate his symptoms with the MRI findings which revealed a bulging disc at L5-S and high intensity change at the endplate which indicated some degenerative changes. There was never any foraminal or canal stenosis to explain the symptoms. Petitioner finished the FCE and could return to work based on the same. No surgery was needed and no neurosurgical follow up was indicated. (PX3 at 15).

On December 22, 2008 Petitioner presented to Dr. George DePhillips for a neurosurgical consultation. Petitioner presented with low back pain radiating into both hips and buttocks. The pain radiated down the right buttock posterolateral thigh and calf to the ankle, shooting down the right leg. Petitioner noted he had undergone physical therapy, aqua therapy, and a series of lumbar epidural injections. Petitioner was currently off work. Petitioner was recommended to undergo a repeat MRI and L2-S1 discogram. Petitioner was to remain off work. (PX2 at 8).

On December 30, 2008 Petitioner underwent a second MRI which revealed mild to moderate degenerative disc disease most pronounced at the L3 through S1 levels with mild neural foraminal narrowing on the right at L3-4 and mild to moderate narrowing on the left at L5-S1 with the left L5 nerve root again draped over the osteophytes on the left at L5-S1 which would account for neural impingement. (PX1 at 84, PX2 at 11).

On January 7, 2009 Petitioner first presented to Dr. Samir Sharma with lumbar radiculopathy and low back pain radiating into his right leg. Petitioner stated this occurred when he was driving a high lift when he twisted and felt low back pain. Petitioner underwent three lumbar steroid injections without significant benefits. Petitioner was diagnosed with lumbar radiculopathy and low back pain. Petitioner was recommended a discogram and to return in three weeks. (PX4).

On January 15, 2009 Petitioner underwent a lumbar discogram which revealed concordant pain at L4-5 and L5-S1. (PX4).

Petitioner returned to Dr. DePhillips on January 26, 2009. The Doctor reviewed the MRI and lumbar discogram. The Doctor diagnosed Petitioner with persistent low back pain radiating into the right lower extremity, buttock, and posterolateral thigh. Petitioner was off work and provided medications. (PX2 at 13).

On January 28, 2009 Petitioner returned to Dr. Sharma. Petitioner was provided medication. (PX4). Petitioner returned on February 12, 2009 to Dr. DePhillips. Petitioner was recommended a spinal fusion at L3-S1. Petitioner was to remain off work. (PX2 at 15).

On February 26, 2009 Petitioner underwent an EMG which showed findings consistent with right greater than left moderate chronic multi-level lumbar radiculopathy. (PX2 at 27). On March 6, 2009 Petitioner underwent lumbar X-rays which revealed mild lumbar spondylosis. (PX2 at 28).

On March 9, 2009 Petitioner had a presurgical psychological screening evaluation. It was noted Petitioner was an appropriate candidate to proceed with surgery. (PX2 at 38).

On March 24, 2009 Dr. DePhillips performed a three-level fusion from L3-S1 with pedicle screw fixation, BMP, and anterior cages. (PX2 at 45). On March 25, 2009 Dr. Sharma provided a consultation. He noted they would continue Petitioner on Dilaudid PCA and wean in the next two to three days. (PX2 at 68).

Petitioner returned to Dr. DePhillips on April 1, 2009 to get his staples removed. He still complained of numbness in the right leg below the knee in the L5 nerve root distribution but noted his leg pains have improved significantly since surgery. Petitioner was to return in two to three weeks. Petitioner was to remain off work. (PX2 at 72-73).

Petitioner followed up with Dr. Sharma on April 22, 2009. Petitioner's symptoms were stable. Petitioner was provided medication. (PX4).

On April 24, 2009 Petitioner returned to Dr. DePhillips. Petitioner still had tingling and numbness in his right lower extremity. Petitioner was to return in three to four weeks and would begin physical therapy. (PX2 at 77). In a May 18, 2009 follow up, Petitioner still complained of low back pain, aching pain and tightness in both anterior thighs to knees. Petitioner was to undergo an X-ray and consider beginning physical therapy. Petitioner was to return in four weeks. *Id.* at 79.

On May 20, 2009 Petitioner underwent an MRI of the lumbar spine, which revealed epidural fluid collection in the left lateral recess at L5-S1 extending to the neuroforamen compressing the nerve root. (PX2 at 83).

On May 29, 2009 Petitioner followed up with Dr. Sharma. Petitioner was 8 weeks post-surgery and still complaining of low back pain and right ankle pain. Petitioner was provided medication. (PX4).

On June 18, 2009 Petitioner underwent an X-ray of the lumbar spine which revealed status post posterior spinal fusion and laminectomies from L3 through S1. (PX2 at 87). Petitioner followed up on June 22, 2009 with Dr. DePhillips. Petitioner continued to suffer low back pain. Petitioner was to begin physical therapy and return in a month. (PX2 at 90). Petitioner began therapy on June 24, 2009. *Id*. at 91.

On June 23, 2009, Dr. Andersson authored another report. He noted he wanted Petitioner to undergo physical therapy prior to deciding whether he was a surgical candidate. The Doctor reviewed Petitioner's MRI and discogram. He noted he was surprised at the extent of the surgery performed but also understood the same based on the MRI and discogram. He noted he believed the procedure could be justified. Post-operatively, Petitioner continued to have symptoms in his right leg. Petitioner may have aggravated his degenerative condition at L3-4, but the Doctor did not believe he aggravated L4-5 and L5-S1. Petitioner would need six to eight months to determine restrictions. (RX1 at 117).

In a July 20, 2009 follow up with Dr. DePhillips Petitioner still had low back pain and right lower extremity weakness. Petitioner was recommended physical therapy and was to undergo a CT scan for August.

Petitioner began therapy again on July 24, 2009. Petitioner was to undergo therapy two to three times a week for four weeks. (PX2 at 96). It was noted Petitioner stopped therapy as of August 17, 2009 as it was painful. *Id.* at 94.

On August 10, 2009 Petitioner underwent a CT of the lumbar spine which revealed status post posterior spinal fusion and laminectomies from L3 through S1. There was no obvious central spinal stenosis or mild neuroforaminal narrowing at L3-4 and L5-1. (PX2 at 102).

On August 17, 2009 Petitioner followed up with Dr. DePhillips. The Doctor noted physical therapy was aggravating his pain. Petitioner predominantly complained of low back pain although he also complained of pain shooting into the right lower extremity, posterolateral thigh, and calf to the ankle worse in the morning but improved with walking and stretching. The Doctor reviewed the CT scan of the lumbar spine which revealed an interbody bone growth and consolidation. The Doctor noted as Petitioner could not tolerate physical therapy, he would be unable to tolerate work conditioning. Petitioner had reached MMI with restrictions of occasional lifting up to 20 lbs., frequent lifting 5-10lbs or less, no repetitive bending, twisting, or stooping, no overhead reaching, no climbing, and sitting or standing for 45 to 60 min duration with a 10 to 15 minute change of position. Based on these restrictions he would be at a sedentary to light physical demand level. The Doctor noted Petitioner was unemployable and totally disabled, noting it was based on his education level. (PX2 at 99). The Arbitrator notes the Doctor's restrictions but finds that he is not a qualified as a vocational expert.

On September 4, 2009 Petitioner was discharged from therapy. The therapist noted Petitioner was tolerating rehab with less pain until he started having increased pain. Petitioner noted he was feeling much better and was not going to return to therapy. Petitioner was discharged from care. (PX2 at 109).

On September 14, 2009 Petitioner returned to Dr. DePhillips. Petitioner still complained of numbness and tingling primarily down his leg. Petitioner was released with restrictions. (PX2 at 110). Petitioner followed up again on October 23, 2009. Petitioner still complained of right leg pain primarily in the calf and heel. His leg symptoms waxed in wane in severity. Petitioner was provided a trial of Neurontin. Petitioner was still on permanent restrictions. (PX2 at 111). In a December 7, 2009 follow up, Petitioner continued to complain of lumbar and lower thoracic back pain. Petitioner was to continue with pain management. *Id.* at 112.

On December 14, 2009 Petitioner presented to Dr. Sharma. Petitioner had chronic pain. Petitioner was provided medication. (PX4).

On January 4, 2010 Petitioner underwent a CT of the lumbar spine which revealed postsurgical changes of the laminectomy and rim-calcified regions of low attenuation extending posteriorly at Left L3-4 through L5-S1. (PX2 at 114).

Petitioner returned on January 11, 2010 to Dr. DePhillips. Petitioner continued to have low back pain. Petitioner denied radicular symptoms in the left lower extremity and the excessive bone growth did not appear to be clinically significant. Petitioner was to follow up in three months. Petitioner was at maximum medical improvement and was placed with permanent restrictions. (PX2 at 115).

Petitioner returned to Dr. Sharma on January 11, 2010. Petitioner noted his symptoms were improved since his last visit. Petitioner was provided medication. (PX4). On March 9, 2010 Petitioner followed up with Dr. Sharma for a follow up on his medication. (PX4).

On April 19, 2010 petitioner returned to Dr. DePhillips. Petitioner's low back had worsened. Petitioner was to continue with pain management and restrictions remained the same. (PX2 at 116). On June 14, 2010 Petitioner returned to Dr. DePhillips. Petitioner noted his low back pain improved since his last visit. The Doctor noted the interbody fusion appeared to be consolidating well with the exception of L5-S1. Petitioner was at MMI and was to undergo a CT scan in six months. (PX2 at 122).

Petitioner returned to Sharma on June 14, 2010. Petitioner was doing well on medication and was provided a refill of the same. (PX4).

Petitioner returned to Dr. DePhillips on July 19, 2010. Petitioner returned due to a new symptom of pain in the left buttocks and thigh. The Doctor recommended a repeat MRI scan and EMG. (PX2 at 123). Petitioner returned on November 1, 2010 to Dr. DePhillips. Petitioner noted his pain in his left leg was intolerable. Petitioner was to undergo a CT scan. *Id.* at 125.

On November 12, 2010 Petitioner returned to Dr. Sharma for a refill on medication. (PX4).

Petitioner returned to Dr. DePhillips on January 10, 2011 to review the CT scan of the lumbar spine. The Doctor noted the interbody fusions and posterolateral arthrodesis were unequivocally solid. The Doctor noted Petitioner's new onset of right radicular pain was not explainable. There was a mild degree of excessive bone growth on the right at L5-S1 but no significant foraminal stenosis. Petitioner was given Neurontin. If he did not improve, Petitioner would undergo a repeat MRI. (PX2 at 129, RX5).

On January 14, 2011 Petitioner followed up with Dr. Sharma. Petitioner was stable on a current medication regimen. Petitioner was provided medications. (PX4). Petitioner presented for physical therapy at the Pain & Spine Institute as well on January 14, 2011. Petitioner was to undergo therapy three times per week for four to six weeks. (PX4).

Petitioner returned on February 7, 2011 with Dr. DePhillips. Petitioner was improved by 75%. Petitioner was to follow up in two months. (PX2 at 130).

On April 13, 2011 Petitioner underwent an MRI that was compared to the July 22, 2010 MRI which revealed postoperative changes. There was no malalignment or significant central canal compromise. (PX4).

In an April 18, 2011 follow up with Dr. DePhillips, Petitioner noted his back pain was tolerable. The Doctor reviewed the MRI and recommended an EMG. (PX2 at 131). On May 20, 2011 Petitioner followed up with Dr. Sharma. Petitioner was prescribed physical therapy three times a week for four to six weeks and medications. (PX4).

On July 15, 2011 Petitioner presented for a second Section 12 examination with Dr. Andersson. Petitioner was complaining of low back and left leg pain. Petitioner had an ectopic bone formation growing into the left foramina. His clinical symptoms fit with left sided pain. The Doctor noted he could leave it as it is or do a re-exploration of surgery. (RX1 at 120).

Petitioner returned to Dr. DePhillips on July 28, 2011. Petitioner had suffered worsening back pain. Once again Petitioner was referred to Dr. Patel for an injection. (PX2 at 132).

On August 17, 2011 Petitioner followed up with Dr. Sharma and was ordered a nerve conduction test. (PX4). Petitioner returned on August 18, 2011. Petitioner noted he had no significant benefit with his current pain medication regime. Petitioner was prescribed therapy and medication. (PX4). Petitioner followed up again on September 9, 2011 with worsening back pain. Petitioner underwent a L5-S1 transforaminal epidural steroid injection. *Id.* In an October 10, 2011 follow up Petitioner noted 10% relief of pain from the injection. On this visit Petitioner underwent a Sacro-lliac joint injection. *Id.*

Petitioner returned to Dr. Sharma on December 6, 2011. Petitioner's symptoms were improved since the last visit. Petitioner underwent lumbar diagnostic medial nerve branch block of the Sacral and received 75% relief of pain. The sensory nerve test did not show any signs of nerve root irritation. Petitioner was provided

medication. *Id.* Petitioner followed up on December 19, 2011 with Dr. Sharma. It was noted Dr. DePhillips recommended a Transforaminal epidural steroid injection. *Id.*

On January 9, 2012 Petitioner followed up with Dr. Sharma and underwent a L2, L3 transforaminal epidural steroid injection. (PX4). On January 25, 2012 Petitioner followed up with Dr. Sharma. Petitioner noted 20% relief of pain from the injection. Petitioner underwent a lumbar intra-articular facet joint injection of the L1-L2 and L2-L3 Joints. *Id.* Petitioner followed up on February 21, 2012 with Dr. Sharma. Petitioner noted 50% relief of pain, but the pain returned in a few days. Petitioner was provided medication and was to return in three weeks. *Id.* On June 12, 2012 Petitioner returned to Dr. Sharma. The Doctor noted Petitioner had axial back pain. Petitioner wanted to wait on additional injections. Petitioner was provided medication and was to return. *Id.*

Petitioner returned to Dr. DePhillips on July 17, 2012. Petitioner felt his screws were loosening. He ordered X-rays and was referred to Dr. Sharma. (PX2 at 134).

On July 31, 2012 Petitioner returned to Dr. Sharma. Petitioner underwent a L2, L3 transforaminal epidural steroid injection. (PX4).

Petitioner followed up with Dr. Sharma on August 22, 2012. Petitioner noted the previous injection provided no relief. Petitioner was to follow up with Dr. DePhillips and was to hold off on any further intervention options at the time. Petitioner was provided medication. (PX4).

Petitioner was last seen on September 18, 2012 with Dr. DePhillips. Petitioner returned to review his flexion and extension X-rays of his lumbar spine which revealed a slight retrolisthesis in flexion. Petitioner was referred to Dr. Patrick Sweeney for a second opinion. (PX2 at 134).

On October 17, 2012 Petitioner returned to Dr. Sharma. Petitioner noted his symptoms were unchanged. Petitioner was pending a second opinion with Dr. Sweeny. Petitioner was provided medications and was to return. (PX4). Petitioner followed up with Dr. Sharma on December 12, 2012. Petitioner complained of left hip pain. Petitioner was noted to have osteoarthritis of the hip. Petitioner was provided medication. (PX4).

On December 3, 2014 the parties proceeded with Dr. Gunnar Andersson's testimony. (RX1). Dr. Andersson is an orthopaedic physician with a subspeciality in back disorders. (RX1 at 5). Dr. Andersson testified he evaluated Petitioner on two occasions, September 19, 2008 and July 15, 2011. *Id.* at 7. Dr. Andersson went over Petitioner's initial Section 12 examination from September 19, 2008. Petitioner noted he was driving a high lift and in the process of driving was twisting. *Id.* at 10. Dr. Andersson reviewed Petitioner's medical records, to include his MRI films. Based on the MRI Petitioner had a full lateral disc herniation at L3-4 and right foraminal stenosis. He also had mild right foraminal stenosis at L-5 and S-1. *Id*. at 13. The Doctor noted the herniation could have been an aggravation of a pre-existing condition. The Doctor also noted inorganic findings. *Id* at 15. Based on his examination he diagnosed Petitioner with a herniation at L3-4. *Id*. at 16. He opined Petitioner aggravated his underlying degenerative condition at L3-4. He did not believe Petitioner's degenerative changes at L4-5 and L5-S1 were related to the injury. *Id*. at 17. Based on the same, he recommended physical therapy. He also noted Petitioner would be able to work with lifting 20 pounds occasionally and 10 pound repetitively. *Id* at 20. Dr. Andersson later noted he reviewed a DVD that showed Petitioner's job. Based on that video he no longer thought Petitioner's condition could be explained based on the activity he was performing. He thought it was either developmental or due to some preexisting condition. *Id*. at 20-21. Dr. Andersson noted that this was due to the fact that the activities observed were not stressful to the back. *Id*. at 21.

Dr. Andersson testified he later reviewed additional medical records, noting Petitioner had undergone a three-level fusion. (RX1 at 23). Dr. Andersson opined the surgery performed was not casually related to the May 7, 2008 injury. *Id*. at 24. Dr. Anderson noted the treatment at L4-L5 and L5-S1 was not related to the alleged work injury. He later testified the surgery that the L3 to L4 level was possibly related to the work injury, but not likely. *Id*. at 25. Dr. Andersson testified that based on his review of the DVD, Petitioner would have suffered nothing more than a strain at L3 to L4, and that since there was findings on the discogram at L3 to L4 it was a surprise to him that they included that level. *Id*. at 25-26. Dr. Andersson noted Petitioner did need further medical care. *Id* at 31. The recommendation of additional surgery was related to the surgical procedure but not directly related to the May 7, 2008 accident. *Id*. at 32. Dr. Andersson noted he found no causal connection with a disc herniation at L3-4 and no findings at L4-5 and L5-S1. *Id*. at 33. Based on the same he did not relate the surgery to the May 7, 2008 accident. *Id*. at 34.

On cross-examination, Dr. Andersson clarified he believed it was possible, but not likely Petitioner aggravated his degenerative condition at L3-4. *Id*. at 36. The Doctor further noted that although he was aware of prior back problems, he never reviewed any medical records. *Id*. at 37. Dr. Andersson noted although the surgery was not causally related, he believed the decision for surgery was justified as L3-4 was the generating pain level. *Id*. at 39. He further noted Petitioner sustained a failed fusion on the left side. *Id*. at 41. Lastly Dr. Andersson noted he no longer performed surgeries due to vision lost. *Id*. at 44-45.

Petitioner testified he has not worked anywhere since May 7, 2008. Respondent terminated him after the expiration of his FMLA.

He last saw the Doctor in December of 2012. Petitioner testified he applied for SSDI and was denied. He has suffered no new injuries to his lumbar spine. Petitioner testified he did have a prior low back injury in 1996 or 1997 while working at a mushroom farm. He testified he received a short course of conservative treatment following that injury and did not seek medical care until May 7, 2008.

Offered as Respondent's Exhibit Nos. 2 and 3 are prior Applications for Adjustment of Claim and settlement information concerning the Petitioner. The Petitioner obtained a prior settlement pursuant to Section 8(d)(2) for the low back in 96 WC 30791 for 9 percent person as a whole. (Respondent's Exhibit Nos 2 and 3.) Respondent placed medical records into evidence showing Petitioner did have prior low back complaints. (RX7, RX 8, and RX9).

Offered and accepted into evidence as Respondent's Exhibit No. 4 are photographs of the high lift. Offered and accepted into evidence as Respondent's Exhibit Nos. 11, 12, 13, 14, and 15 are information regarding the "high lift" that the Petitioner was operating at the time of the occurrence.

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his/her testimony. Where a claimant's testimony is inconsistent with his/her actual behavior and conduct, the Commission has held that an award cannot stand. McDonald v. Industrial Commission, 39 Ill. 2d 396 (1968); Swift v. Industrial Commission, 52 Ill. 2d 490 (1972).

It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. O'Dette v. Industrial Commission, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); Hosteny v. Workers' Compensation Commission, 397 Ill. App. 3d 665, 674 (2009). Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and medical records, may be taken to indicate unreliability. Gilbert v. Martin & Bayley/Hucks, 08 ILWC 004187 (2010).

With respect to Issue (C), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

For accidental injuries to be compensable under the Workers' Compensation Act, a claimant must show such injuries arose out of and in the course of his or her employment. Navistar Intern. Transp. Corp. v. Industrial Com'n, 315 Ill.App.3d 1197 (2000).

After a careful review of the record, including Petitioner's testimony and the medical evidence available in this case, the Arbitrator finds Petitioner did sustain an "accident" as defined by the Act. Petitioner's described he was driving a high lift truck and twisting to his right when he filled order numbers. When he did so, he felt a sudden and immediate onset of low back pain. Petitioner provided a consistent history to all his medical providers and Section 12 physician.

Petitioner also testified consistently with the medical records that he sustained injuries to his back after he turned to his right on the high lift. In addition, he timely reported the incident.

Based on the foregoing, the Arbitrator finds Petitioner sustained a compensable accident.

With respect to Issue (F), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds as follows:

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. Even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. Thus, a claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." International Harvester v. Industrial Com., 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982).

In this case, there were three physicians who provided opinions on Petitioner's condition, Dr. Dinh, Dr. DePhillips and Dr. Andersson.

Dr. Dinh was the initial neurosurgeon who treated Petitioner. Dr. Dinh treated Petitioner until November 12, 2008 noting he could not correlate Petitioner's symptom with the MRI findings. Based on the same he opined no surgery was needed and Petitioner was released per the restrictions of the FCE.

While Dr. Dinh released Petitioner from care, Petitioner testified he continued to complain of pain. This led him to treat with his family physician and seeking a second opinion from Dr. DePhillips. As such the Arbitrator reviews both the opinions of Dr. DePhillips and Dr. Andersson.

Petitioner testified that after being released from Dr. Dinh he still felt really bad and went back to see Dr. Peralis. Petitioner then presented to Dr. DePhillips on December 22, 2008. Dr. DePhillips recommended a repeat MRI and discogram. Based on the same, he eventually recommended and performed a three-level fusion from L3-S1 with pedicle screw fixation, BMP, and anterior cages. (PX2 at 45).

The Arbitrator finds Dr. DePhillips December 22, 2008 office note documents Petitioner's history of accident and the immediate onset of pain and ongoing pain since that time. (PX3 at 8). Dr. Sharma's initial office note also document the same chain of events scenario. (PX4).

Dr. Andersson, Respondent's Section 12 examiner, saw Petitioner twice and reviewed a video of Petitioner's workplace. He thought it was possible Petitioner's work injury aggravated his L3-L4 disc. While somewhat equivocal after viewing the video, Dr. Andersson did clearly testify that it was possible the workplace accident was an aggravating factor. (RX1 at 25). The Arbitrator notes he specifically testified the surgery that included the L3 to L4 level was possibly related to the work injury, but not likely. *Id*. at 25.

The Arbitrator notes 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. Based on the chain of events history in both Dr. DePhillips and Dr. Sharma's notes and Dr. Andersson's opinion that the May 7, 2008 work related accident possibly aggravated Petitioner's L3-L4 disc herniation, the Arbitrator finds Petitioner's current condition of ill-being causally related to the work injury. While Petitioner was initially released by Dr. Dinh, he continued to have pain complaints leading to the recommendation of surgery, which was found to be reasonable by Dr. Andersson and Dr. DePhillip.

Based on the same, the Arbitrator finds Petitioner's condition of ill-being leading to the need for fusion was causally related to the May 7, 2008 injury reaching MMI as of December 12, 2012.

With respect to Issue (J) whether the medical services that were provided to the Petitioner were reasonable and necessary, the Arbitrator finds as follows:

The Arbitrator incorporates by reference the above Findings of Fact and refers to them by reference herein. Based on the record in its entirety, the Arbitrator finds Petitioner's treatment to be reasonable and necessary and finds that Respondent has not paid for said treatment. Given the Arbitrator's finding of causation between Petitioner's May 7, 2008 work accident and his condition of ill-being, Respondent is liable for reasonable and necessary medical treatment of the causally related condition.

As such, the Arbitrator orders Respondent to pay Petitioner the reasonable and necessary medical expenses incurred in connection with the care and treatment of his causally related condition pursuant to Sections 8 and 8.2 of the Act.

Respondent has negotiated all of the bills claimed in Petitioner's exhibit number 5. (RX10). The Arbitrator orders Respondent to pay the claimed charges pursuant to its negotiated rate. Respondent shall receive credit for amounts paid.

With respect to Issue (K), what temporary benefits are in dispute, the Arbitrator finds as follows:

In order to prove entitlement to TTD benefits, a claimant must establish not only that he did not work, but that he was unable to work. Sharwarko v. Illinois Workers' Compensation Comm'n, 2015 IL App (1st) 131733WC. An employee is temporarily totally disabled from the time that an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. Archer Daniels Midland Co. v. Industrial Comm'n, 138 Ill. 2d 107, 118 (1990). Once an injured employee's

physical condition stabilizes or he has reached MMI, he is no longer eligible for temporary total disability benefits. Archer Daniels Midland Co., 138 Ill. 2d at 118. A claimant reaches MMI when he is as far recovered or restored as the permanent character of his injury will permit. Nascote Industries v. Industrial Comm'n, 353 Ill. App. 3d 1067, 1072 (2004). Factors to be considered in determining whether a claimant has reached MMI include whether he has been released to return to work, medical evidence, testimony concerning the claimant's injury, the extent of his injury, and whether the injury has stabilized. Nascote Industries, 353 Ill. App. 3d at 1072. The period of time during which a claimant is temporarily and totally disabled is a question of fact to be determined by the Commission, and its resolution of the issue will not be disturbed on appeal unless it is against the manifest weight of the evidence. Archer Daniels Midland, 138 Ill. 2d at 119-20.

The Arbitrator finds Petitioner was temporarily totally disabled from May 8, 2008 through December 12, 2012, the last date Petitioner sought medical treatment for this injury. During this period of time, Petitioner remained under medical care and either had restrictions which Respondent could not accommodate or was completely removed from work. Respondent presented no contrary evidence. Having found in Petitioner's favor on accident and causation, the Arbitrator orders Respondent to pay Petitioner the claimed benefits.

With respect to Issue (L), what is the nature and extent of the injury, the Arbitrator finds as follows:

At the present time, Petitioner continues to have ongoing low back pain which radiates into his left foot. He rates his pain anywhere from a 2/3 to 5 out of 10. He noted he cannot sit too long. In addition, he can only walk 2 to 3 blocks. He also noted he gets jabbing right sided low back pain.

Petitioner testified he learned to live with the pain and will take over the counter medication as needed. He further testified that he has no future medical visits scheduled.

Based on Petitioner's testimony and medical records, the Arbitrator finds Petitioner reached MMI as of December 12, 2012. Based on the same, Petitioner has sustained a 45% loss of use of the person. Since the injury happened before September 1, 2011, no analysis under Section 8(1)(b) is required.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC008820
Case Name	Terry Roenker v. Safeguard Self Storage
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0294
Number of Pages of Decision	24
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Michael Scanlon
Respondent Attorney	Matthew Rokusek

DATE FILED: 7/5/2023

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TERRY ROENKER,
Petitioner,

vs. NO: 20 WC 8820

SAFEGUARD SELF STORAGE,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by both the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causation, notice, medical expenses, temporary total disability, §8(j) credit, and the denial of penalties and fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

In a preliminary procedural note, The Decision of the Arbitrator was issued on June 14, 2022. Respondent filed an initial Petition for Review on July 8, 2022. Respondent then filed an "amended" Petition for Review on October 4, 2022, in which it waived the issues of accident and notice that had been preserved in the initial petition. Because the amended petition was filed long past 30 days after the parties received the Decision of the Arbitrator, the Commission declines to consider the "amended" petition and will address the issues of accident and notice.

Findings of Fact – Testimony

Petitioner testified that on February 23, 2019 she worked for Respondent as a manager. On that date she had to change light bulbs in an elevator toward the end of her shift. She had to use a 10-foot A-frame ladder to change the bulbs. A coworker helped her to change the bulbs. Petitioner climbed the ladder and the coworker handed her the bulbs. In the meantime, the coworker left to see if turning on the power would alleviate the problem. The coworker was gone for a long time and Petitioner thought something was wrong.

As Petitioner was descending the ladder it tilted and she fell off. She started to fall backwards. She landed on her feet but she continued to stumble backwards. As she stumbled and flailed her arms, her back contacted a stationary edge of the elevator. Her hip hit it first and then the entire right-side of her body. Her shoulder hit it as well. She felt immediate pain in her hip and had a bruise on the hip. She continued to work her shift.

Petitioner reported the incident to her area manager, Gil Beres, that day and filled out an incident report. She faxed it to the manager. She continued to work for Respondent despite pain in her right shoulder. She had no idea what was wrong with her shoulder. She had to change the way she mopped the wide hallways and the way she cleaned with her arms overhead. She never had shoulder pain, or any treatment for her shoulder prior to the accident.

She sent Mr. Beres an e-mail dated September 20, 2019 indicating she wanted medical treatment. Mr. Beres responded that he thought it was too remote from the accident temporally to go through Workers' Compensation. She told coworkers about her shoulder pain prior to September of 2019. One of her coworkers did the overhead activities when they worked together. Petitioner sought medical treatment for her shoulder on September 23, 2019 with Dr. Chilelli because her shoulder pain was worsening. He ordered an MRI and took her off work until the MRI was obtained. She gave Mr. Beres the off work note. After the MRI was reviewed, Petitioner understood that she had a rotator cuff tear. Dr. Chilelli recommended surgery. Surgery was scheduled, but Respondent's Workers' Compensation insurance carrier "withdrew approval."

Petitioner testified she ended up paying for the treatment through her group health insurance. She was prescribed 20 to 25 postop physical therapy sessions but had only seven because the facility was closed due to COVID. When physical therapy was stopped she still had shoulder pain/weakness and was unable to lift any weight/move her hand overhead. She tried to do the exercises at home after the facility was closed. She has not worked since the accident. Petitioner did not "trust" her shoulder; "it lets go of things, so it's dangerous." She was training herself to do things at lower elevations and used her left hand more frequently. She was not able to use all the physical therapy that had been paid for and did not complete her treatment. She had not been paid benefits from Respondent for her days off work.

On cross examination, Petitioner testified she likes to walk, brush, and play with her dog. She uses her right arm a little to brush the dog, but also uses her left arm a lot. She has never hunted deer or driven an all-terrain vehicle. She then acknowledged that she had a "little, like tractor truck," which she tried to drive, but had difficulty. She agreed that her shoulder had improved "somewhat" since the surgery. Her husband was not employed. She currently lived with her son. She did not recall exactly when her insurance ceased. Petitioner has never lived in Tennessee but stayed with her daughter frequently in Kentucky. She tried to have some medical treatment in Kentucky.

Petitioner testified she had not worked for Respondent since Dr. Chilelli took her off work in September of 2019. Petitioner agreed that she received short-term benefits from December of 2020 through December of 2021. She never received any long-term disability benefits. It was turned down and she thought it was currently under appeal. She was never released to return to work after her surgery.

Petitioner acknowledged that she did not receive medical treatment from the date of the alleged accident until September 23, 2019. She did not handwrite the accident report, but reviewed and signed it. That report does not indicate any injury to the shoulder but only the hip. She was shown RX2 another incident report which she did not write or sign. It appears to have been from her coworker who noted Petitioner struck her right hip on the elevator door.

Petitioner testified she was about six or seven feet off the floor when she fell. She landed on her feet but was fighting to keep her balance. She was thrown off the ladder. The numbness/tingling she reported in her hands was still present, but was not as bad. She discussed the accident with Mr. Beres on the day of the accident. She then testified that she believed her coworker made the call. She received an e-mail from Mr. Beres after surgery had been scheduled.

Ms. Jaclyn Owens, Petitioner's daughter-in-law, was called to testify by Petitioner. As of February of 2019 she saw Petitioner every day; they lived in the same household. On February 23, 2019 Petitioner was uncomfortable when she came home from work and needed help. She told the witness that she had fallen and she saw Petitioner's bruises. In the subsequent weeks she noticed that Petitioner "was catering to her side" and was not able to lift her five-month old child. Petitioner needed assistance fastening/unfastening her bra.

On cross examination, Ms. Owens testified she noticed bruising on Petitioner's hip, back, and shoulder. She told Petitioner she should take pictures because she was in a lot of pain and was struggling. They took pictures.

Mr. Gilbert Beres was called to testify by Respondent, for which he worked for 13 years, the last six as area manager. He was area manager in February of 2019. He would oversee accidents at Respondent's facility. He identified RX2 as an incident report. "It's not the report that we would officially use for an employee accident. This is a report that would more be used for a tenant incident or a property damage incident at the facility." The report indicated that Petitioner and a coworker were changing a bulb in an elevator when Petitioner lost balance and her right hip landed on the corner of the elevator door. There was no indication of any right shoulder injury.

Mr. Beres did not recall a conversation with Petitioner until several days later when he instructed her that if there was a "slip, fall, or trip, a report should be made out." He did not recall her mentioning any shoulder injury at that time.

On cross examination, Mr. Beres was shown an e-mail sent to his address. It was dated September 20th. It indicated that Petitioner had an orthopedist appointment for her shoulder from the fall she had off the ladder. She wanted a claim number to bring with her. She noted that the paperwork she filled out did not have a claim number. He responded that he was not sure she could go to a doctor that long after the accident and that he sent her a copy of the claim from February to her e-mail address as well as to human resources. He agreed that he received a notice of the accident a few days after the accident and within the 45-day statutory requirement.

Findings of Fact – Medical Records

On September 23, 2019, Petitioner presented to Dr. Chilelli for evaluation of her right shoulder. She reported that in February of 2019 she fell off an eight-foot ladder and fell into an elevator door. Her shoulder had bothered her since and the pain was progressively worsening. She was preforming a home exercise program and taking over-the-counter pain medication. X-rays showed no fractures/dislocations but showed evidence of AC joint arthritis. An MRI was ordered to evaluate possible rotator cuff tear. The MRI showed an 8 x 16 mm full-thickness tear of the supraspinatus tendon, narrowing of the subacromial space, small cortical pseudocysts of the greater tuberosity, and possible acromiohumeral impingement. Petitioner returned a few days later to review the MRI. Dr. Chilelli noted the MRI showed a full-thickness tear of the supraspinatus at its insertion and degenerative joint disease of the AC joint. He discussed treatment options with Petitioner. He recommended "arthroscopic rotator cuff repair given the full thickness nature of the tear and because this was an acute, traumatic injury."

On October 15, 2019, Dr. Chilelli's office issued a note that it just learned that Petitioner was a Workers' Compensation patient, which she confirmed *via* telephone. They cancelled the surgery scheduled for October 18, 2019 and explained to Petitioner that they needed authorization before they could proceed with surgery. On January 7, 202, it was noted that Respondent's Workers' Compensation carrier denied surgical authorization and Petitioner wanted to proceed with private insurance. On January 17, 2020, Dr. Chilelli performed right shoulder arthroscopy with rotator cuff repair, extensive debridement, biceps tenotomy, and subacromial decompression for rotator cuff tear with impingement and intrasubstance earing of the log head biceps tendon. On February 3, 2020, Petitioner presented to Dr. Chilelli for postop evaluation. She was doing well with no complaints and pain was controlled through oral medication. She had been wearing her sling as instructed. Dr. Chilelli kept her off work began physical therapy as of February 7th.

Petitioner returned to Dr. Chilelli a month later. He noted she was doing well with no complaints and pain was controlled through oral medication. She had been wearing her sling as instructed. Dr. Chilelli discontinued the sling and continued physical therapy. In a postop telephonic visit on April 14, 2020, Petitioner reported she was happy with her progress. She was doing her home exercise program, as instructed by her therapist, which caused some soreness/discomfort but she had no significant pain.

Petitioner returned on July 14, 2020 for her last postop evaluation. Overall she was happy with her progress. Her home exercise program caused some soreness/discomfort but she had no significant pain. She was able to get her hand overhead without weight. It was recommended that she return to physical therapy while she was in Kentucky for strength/range of motion issues and would return to the office when she returned from Kentucky in a few months.

Findings of Fact – Physician Opinions

Dr. Chilelli testified by deposition that he was a board-certified orthopedic surgeon with a fellowship in sports medicine. The vast majority of his surgeries deals with knee and shoulder conditions. He estimated that he performed somewhere between 2,000 and 3,000 surgeries in his career thus far. He treats both chronic and acute conditions.

Dr. Chilelli first saw Petitioner in September of 2019 at which time she complained of right-shoulder pain after a fall in February of 2019. He was shown an incident report which indicated that Petitioner was coming down a ladder after changing bulbs in an elevator, missed a rung, landed on the floor on both feet, "lost her balance, fell back, and was caught from falling by door edge of elevator by right rear hip." He opined that attempting to brace oneself by grabbing something could be a competent mechanism for a shoulder injury. He noted that "a patient in this setting had an obvious traumatic injury followed by a functional deficit limitation and/or symptoms." He related "the injury to the pathology present" that he treated. He noted that some acute injuries can mask other acute injuries.

Dr. Chilelli diagnosed Petitioner with rotator cuff tear with impingement. After surgery, he added intrasubstance tearing of the long head biceps tendon. He also noted fraying in her labrum and that there was a complete tear of the rotator cuff from its insertion and the greater tuberosity. Prior to surgery he had treated Petitioner conservatively with medication, physical therapy, activity modification, *etc*. Nevertheless, she remained symptomatic. He reviewed her physical therapy records and at her last postop physical therapy visit on March 4, 2020, it was noted that she had functional limitations, which he described as routine six weeks postop. It indicated to him that Petitioner was not ready to return to work. Her postop physical therapy was cut short because of the COVID pandemic. Petitioner's physical therapy was terminated at "a very critical time to regain motion and progress toward strength" after rotator cuff repair surgery.

Dr. Chilelli opined that Petitioner's rotator cuff, labrum, and biceps tears were all caused by her work accident. He agreed that if there were any pre-existing shoulder condition, the accident aggravated that degenerative condition and made the condition symptomatic. To the best of his knowledge Petitioner did not have any prior treatment for her shoulder. All the treatment Petitioner received was necessary and reasonable.

On cross examination, Dr. Chilelli re-read the incident report. He agreed that neither the right shoulder nor falling on her right arm were mentioned in the report. He did not know who referred Petitioner to him. He also agreed that he first saw Petitioner about seven months after the

alleged accident. Virtually 100% of the time he supervised his physician's assistant when seeing a patient, even if the physicians assistant's signature is on the treatment note. The MRI showed degenerative findings of AC joint arthrosis. He thought the finding of cortical pseudocysts was nonspecific and incidental. He agreed that any rotator cuff tear can be degenerative. The MRI did not really show significant joint effusion.

Dr. Chilelli last saw Petitioner on July 14, 2020. He read his note from that visit in which Petitioner reported she was doing well, but he suggested she return to physical therapy in Kentucky because she was still having issues with strength. He wanted to see her when she returned from Kentucky, apparently she did not return. It appeared that Petitioner was never released at maximum medical improvement. He was unaware of any treatment she received prior to her seeing him.

Dr. Chilelli explained his causation opinion. He noted that the eight-foot fall would create significant force and that can certainly aggravate chronic degenerative tears of a 62 year old patient. He also noted that the intraoperative photos appeared to show a cleaner, more acute tearing, than degenerative fraying. His opinions would "not really" change if he knew she did have any treatment from February 23, 2019 to September 23, 2019. He agreed that the wording of the incident report did not indicate any direct fall on her right shoulder.

On redirect examination, Dr. Chilelli agreed that he ordered an MRI because of the symptoms in her shoulder and it confirmed the pathology. He agreed that patients, especially patients without insurance or a job may forgo treatment because of the financial burden.

Dr. Birman reviewed and summarized Petitioner's medical records through July 14, 2020 and issued a report. His diagnosis was rotator cuff tear post repair. Thereafter, he answered queries posed by Respondent's lawyer. He noted that the initial accident report described contact only with the hip and not the shoulder and that her initial complaints only involved her hip and not her shoulder. There was some discrepancy about the onset of right shoulder complaints with a physical therapy record indicating onset about two weeks after the accident. "Her reporting in the orthopedic note reported pain onset progressively following the incident."

Dr. Birman was unable to reconcile the injury history with her later presentation of shoulder pain. If she had some mechanical injury to her shoulder, he would have expected some initial pain/dysfunction to the shoulder but there was only mention of the right hip. He did not see any significant distracting injury and he could not understand the seven month delay in treatment if she had suffered a rotator cuff injury on the date of the accident. The tear could not be dated from the MRI, but while the pseudocystic changes at the greater tuberosity might suggest some chronicity of the rotator cuff pathology, there were no atrophic changes or significant effusion. He noted that rotator cuff tears were not unusual in 62 year old women and they can become symptomatic over time without trauma. "In short, [his] opinion is that the right shoulder condition is not causally related to the" February 23, 2019 incident.

Dr. Birman opined the treatment Petitioner received was necessary and reasonable, though not related to her work accident. She was doing "relatively well" in her last medical evaluation and there was no indication that any prospective treatment was necessary. She would be at maximum medical improvement six months after surgery and should be able to return to work without any restrictions at that time.

Conclusions of Law

The Arbitrator found Petitioner sustained her burden of proving she sustained a work-related accident on February 23, 2019 which caused the current condition of ill-being of her right shoulder. He relied on her unrebutted testimony about the accident. He noted that the delay in treatment for her shoulder did not really relate to the issue of accident but rather could be relevant to the issue of causation. Similarly, on the issue of notice, the Arbitrator noted that Petitioner's supervisor, Mr. Beres, testified that he received notice within the statutory 45 days limit and that the failure to initially allege a shoulder injury goes to the issue of causation and not notice.

On the issue of causation, the Arbitrator found Dr. Chilelli more persuasive than Dr. Birman. He stressed that Dr. Chilelli noted that the appearance of the rotator cuff tear seemed more acute than degenerative because it did not have fraying generally associated with a degenerative tear. Dr. Chilelli also testified that the seven month delay in seeking treatment would not really change his opinion about causation.

Respondent argues the Arbitrator erred in finding causation noting that there was no credible evidence of a right shoulder injury contemporaneously to the accident. It also stresses the lack of medical treatment for seven months after the accident. Respondent questions Petitioner's credibility due to the lack of corroboration of her testimony in the records. Finally, it argues that the Arbitrator erred in finding the opinions of Dr. Chilelli more persuasive than those of Dr. Birman. It stresses that Dr. Chilelli assumed Petitioner fell eight-foot off the ladder when that was not corroborated by the records.

The Commission affirms the Decision of the Arbitrator on the issues of accident, causation, and notice. The Arbitrator inherently found Petitioner credible and not only was her testimony unrebutted it was specifically corroborated by the testimony of her daughter-in-law. The Commission also agrees with the Arbitrator's assessment that Dr. Chilelli was generally more persuasive than Dr. Birman. Unlike Dr. Birman, Dr. Chilelli performed surgery on Petitioner and personally observed the pathology which he described as appearing more acute than degenerative.

On the issue on medical expenses, the Arbitrator found that all medical expenses incurred were necessary and reasonable and awarded all medical bills submitted. Respondent argues the Arbitrator's award should be vacated because Petitioner failed to sustain her burden of proving causation. Respondent does not specifically argue that the medical treatment was unnecessary or unreasonable. In addition, Respondent's Section 12 medical examiner, Dr. Birman, opined that the medical treatment provided was both necessary and reasonable, though he did not believe it

was necessitated by the work accident. Therefore, the Commission affirms the Arbitrator's award of medical expenses.

On the issue permanency, the Arbitrator awarded Petitioner 62.5 weeks of permanent partial disability benefits representing loss of 12.5% of the person-as-a-whole. He gave some weight to her occupation in that she testified to some difficulty she would have had in her job, but he also noted that she did not try to return to work. He gave "lesser weight" to her age (62) which made her an older worker. He also gave lesser weight to future earnings because of her lack of any job search. Finally, he gave greater weight to the operative report and MRI than evidence of disability in the record because Dr. Chilelli indicated the tear was small, the surgery was routine, and her recovery was as expected. Respondent argues the Arbitrator erred in awarding permanent partial disability because Petitioner failed to sustain her burden of proving causation of her shoulder condition. In the alternative, it asks the Commission to reduce the permanent partial disability award to 50 weeks representing loss of 10% of the person-as-a-whole. It seems to base that suggestion of Petitioner failure to seek additional treatment. The Commission agrees with the analysis of the Arbitrator regarding permanency and affirms the Arbitrator's award of permanent partial disability.

On the issue of total temporary disability, the Arbitrator awarded total temporary disability benefits from September 23, 2019 through July 14, 2020, which he calculated as 44 weeks. Respondent argues the total temporary disability award should be vacated because Petitioner failed to sustain her burden of proving accident and causation. In the alternative, Respondent agrees that the period of total temporary disability should extend from September 23, 2019 through July 14, 2020 but calculate that period as 29&1/7 weeks. The Commission agrees that the period of total temporary disability should extend from September 23, 2019 through July 14, 2020. However, the Commission calculates that period to be 42&2/7 weeks considering 2020 is a leap year. Accordingly, the Commission modifies the Decision of the Arbitrator on the issue of total temporary disability benefits.

Petitioner preserved the issues of §8(j) credit and the Arbitrator's denial of the imposition of penalties and fees against Respondent. However, Petitioner apparently declined to file a brief. The Commission does not understand the Petitioner's preservation of the issue of §8(j) credit because the Arbitrator noted that the parties stipulated that there were no payments for which Respondent should be awarded credit under §8(j) and no such credit was awarded. On the issue of the denial of penalties and fees, the Commission finds that it was not inappropriate for the Respondent to question compensability based on causation where the Petitioner did not report any initial injury to her shoulder and did not seek medical attention for her shoulder for seven months after the accident. Therefore, the Commission affirms the Decision of the Arbitrator denying the imposition of penalties and fees.

Finally, Respondent seeks the Commission to make three special findings: 1) what credible evidence, if any, was presented in the record to establish that Petitioner fell eight feet off the ladder and grasped anything to present (*sic*) her fall; 2) what credible testimony presented by Dr. Chilelli

establishes that a fall from two feet can cause a "significant force" on Petitioner's shoulder when Petitioner testifies her arms were flailing; and 3) what medical evidence or testimony presented by Petitioner establishes that she could not work after her April 14, 2020 follow up with Dr. Chilelli. The Commission sees no need to include the special findings Respondent requests, because we believe the questions involve issues which are not dispositive of matters before the Commission.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated June 14, 2022 is hereby modified as specified above and is otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $420.00 for per week for a period of 42&2/7 weeks commencing September 23, 2019 through July 14, 2020, 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 the sum of $29,044.80 to Central DuPage Hospital and $1,630.00 to Northwestern Medical Group for medical expenses under §8(a), subject to the applicable medical fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner $378.00 per week for 62.5 weeks, because the injuries sustained caused the loss of the use of 12.5% of the person-as-a-whole, pursuant to §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, including $15,959.28 in paid disability benefits.

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.

July 5, 2023

/dw
O-5/10/23
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/s/ *Stephen J. Mathis*
Stephen J. Mathis

/s/ *Deborah J. Baker*
Deborah J. Baker

Dissent

I respectfully dissent from the Decision of the Majority. In my opinion, Petitioner has not sustained her burden of proving the current condition of ill-being of her right shoulder was caused by her work-related accident on February 23, 2019. Therefore, I would have reversed the Decision of the Arbitrator and denied benefits under the Workers' Compensation Act.

I come to that conclusion based on the complete lack of any contemporaneous report of an injury to her shoulder and her failure to seek medical attention for seven months after the accident. The incident reports, filed by both Petitioner and the witness, specify that Petitioner hit the elevator door only with her right hip. There is absolutely no mention of any contact with the right arm, right shoulder, or any other part of the right side of her body other than her hip. Because of those contemporaneous reports and the lack of medical treatment for seven months I find the opinions of Dr. Birman more closely reflect the medical records and therefore more persuasive than those of Dr. Chilelli.

Dr. Birman noted that there were no significant injuries to other parts of Petitioner's body that would effectively distract her from her alleged full-thickness rotator cuff tear. While Petitioner reported injury to her right hip, she apparently never sought treatment for that condition. It seems reasonable to assume that if Petitioner's hip condition was sufficiently symptomatic to mask a full-thickness rotator cuff tear of her right shoulder, it would have been sufficiently symptomatic for Petitioner to seek treatment. She did not. In addition, Dr. Chilelli seemed to suggest that Petitioner fell eight feet off the ladder and may have used her arm to break her fall. Those possible assumptions are not supported by the record before the Commission. In that regard, simply striking one's shoulder on a door is not a mechanism of injury normally associated with causing a full-thickness rotator cuff tear.

Finally, I disagree with the Decision of the Majority declining to consider Respondent's Amended Petition for Review. While the amended petition was filed after the 30-days of receipt of the Arbitration decision, as required by statute, the initial petition was clearly timely filed. There is no statutory or regulatory provision prohibiting filing an amended Petition for Review or specifying a time limit upon which such an amended petition may be filed. Obviously, the Commission may strike or refuse to consider an amended Petition for Review if the opposing party objects and shows prejudice from the amended petition. That is not the case here. Here, Respondent withdrew issues for which it sought review, Petitioner did not object to filing the Amended Petition for Review, and it is unclear how Petitioner could have possibly been prejudiced by that filing.

For the reasons stated above, I would have found that Petitioner did not sustain her burden of proving her right-shoulder condition of ill-being was causally related to her accident on February 23, 2019 and denied compensation. Therefore, I respectfully dissent from the Decision of the Majority.

DLS/dw
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/s/*Deborah L. Simpson*
Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC008820
Case Name	ROENKER, TERRY v. SAFEGUARD SELF STORAGE
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Stephen Friedman, Arbitrator

Petitioner Attorney	Michael Scanlon
Respondent Attorney	Petar Milenkovich

DATE FILED: 6/14/2022

THE INTEREST RATE FOR THE WEEK OF JUNE 14, 2022 2.16%

/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

Terry Roenker
Employee/Petitioner

v.

Safeguard Self Storage
Employer/Respondent

Case # **20** WC **008820**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Wheaton**, on **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. ☒ 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 **February 23, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**35,280.00**; the average weekly wage was $**630.00**.

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

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

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

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**15,959.28** for other benefits, for a total credit of $**15,050.28** (out of total benefits paid of **44,176.56**).

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, of $1630.00 to Northwestern Medical Group, and $29,044.80 to Central DuPage Hospital, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $420.00/week for 44 weeks, commencing September 23, 2019 through July 14, 2020, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $15,959.28 for disability 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 $378.00/week for 62.5 weeks, because the injuries sustained caused the 12.5% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Petitioner's claim for penalties and attorney's fees is denied.

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

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

/s/ Stephen J. Friedman **JUNE 14, 2022**
Signature of Arbitrator

Statement of Facts

On February 23, 2019, Petitioner Terry Roenker was employed by Respondent, Safeguard Self Storage. Respondent's business is renting storage space. Petitioner was employed as a manager at Respondent's 8131 South Lemont Road location in Darien, Illinois. She was required to run the office, order supplies, clean, schedule, audit the physical spaces in the building, and do general maintenance for the building including sweeping the floors, walking the floor to make sure units were locked, mopping, shoveling snow, and changing light bulbs. Before February 23, 2019, she denied any prior right shoulder pain.

Petitioner testified that on February 23, 2019, she worked her regular shift from 8:30 a.m. to 5:30 p.m. with Sheila Foster, a co-worker. At about 4:45 p.m., Petitioner had to change a light bulb in elevator #1. PX 8 was identified as a map of the location. In order to change the lightbulb, Petitioner had to use an A-Frame ladder. Petitioner went up the ladder while Ms. Foster stood to the side and handed the lightbulb to Petitioner. Petitioner changed four lightbulbs in the elevator, but no light was coming on, so Ms. Foster left the elevator to go check the power. Petitioner stayed up on the ladder. Ms. Foster was gone for a long time, so Petitioner decided to come down the ladder to see if something was wrong. Petitioner testified that when she took a step down the ladder, the ladder tilted, and she came off the ladder. She was six to seven feet above the floor when she fell. Petitioner landed on her feet, but she was not balanced. She stumbled backwards about 10 feet and flailed her arms to regain balance. Petitioner hit the edge of the elevator door with the right side of her body. Her hip made contact with the door first, and then her upper body, including her right shoulder struck the door. Petitioner testified that her right hip hurt the most. She had a bruise on her hip.

Petitioner testified she continued to work until the end of her shift that day. After Petitioner's fall, Gil Beres, Respondent's area manager, told her to fill out an incident report. Petitioner filled out the report and faxed it to the number designated on the form. She identified PX 3 as the report she filled out, noting the nature of the injury was right hip (PX 3, RX 2). Gilbert Beres testified that he is the area manager for Respondent. He recognized RX 2 which contains the accident description as, "coming down off ladder . . . lost balance and right hip landed on elevator frame (corner)." He does not remember any mention of a shoulder injury at that time or thereafter. He recalls the email on September 20, 2019 (PX 9).

Petitioner testified she continued to work for Respondent. She testified she had right shoulder pain. It was sharp and her shoulder would catch. Mopping or overhead cleaning would make it worse. She testified that a co-worker would help her with overhead and heavy-duty activities. Jaclyn Owens testified she was Petitioner's daughter-in-law. She lived with Petitioner in February 2019. Following February 23, 2019, she observed Petitioner catering to her side. She had pain at night after work. She would need assistance with fastening a bra. She noticed bruises on Petitioner's back, hip, and shoulder. Petitioner testified that her pain was getting worse, and she sought medical treatment on September 23, 2019. She sent PX 9 to Mr. Beres advising him that she needed to see a doctor for her shoulder.

Petitioner saw Dr. Brian Chilelli's office on September 23, 2019. She gave a history to Danielle Wisnasky PA-C that she fell off of an 8 foot ladder at work in February 2019 and fell into an elevator door. Her shoulder has been bothering her since and the pain has progressively been getting worse. She reported taking Aleve and doing home exercises (PX 5, p 84). Petitioner was scheduled for an MRI and taken off work (PX 5, p 87). An MRI of the right shoulder on September 24, 2019 showed an 8x16 millimeter full thickness tear of the supraspinatus attachment, narrowing of the subacromial space, small cortical pseudocysts of the greater tuberosity and findings which may reflect acromiohumeral impingement (PX 5, p 79).

On September 26, 2019, Dr. Chilelli stated the MRI revealed the full thickness tear of the supraspinatus at the insertion and degenerative changes of the AC joint. He recommended an arthroscopic rotator cuff repair because this was an acute, traumatic injury. Petitioner told Dr. Chilelli that she would like to think about her options before she underwent surgery (PX 5, p 65-66). Surgery initially was scheduled for October 18, 2019. On October 15, 2019, Laura Anton of Dr. Chilelli's office wrote, "I found out this morning that the patient is WC." Surgery was cancelled to get approval. On November 21, 2019, Ms. Anton reported that Petitioner was upset with her employer for wanting her to go back to work light duty. Petitioner was advised that she had restrictions of no lifting/carrying/pushing/pulling over 5 pounds, no overhead reaching overhead, no lifting doors, no mopping/sweeping (PX 5, p 47). On January 7, 2020, WC denied the request for surgery. Petitioner agreed to proceed with surgery using her private health insurance through Aetna (PX 5, p 59). On January 17, 2020, Dr. Chilelli performed an arthroscopy with rotator cuff repair, extensive debridement, biceps tenotomy and subacromial decompression. The postoperative diagnosis was right shoulder rotator cuff tear with impingement and intrasubstance tearing of the longhead of the biceps tendon (PX 10, p 134-135).

On February 3, 2020, Dr. Chilelli noted that Petitioner was doing well. She was to start physical therapy (PX 5, p 36). Petitioner attended therapy visits from February 7, 2020, to March 4, 2020. She could not follow up after March 4, 2020, due to Covid closing down the hospital. It was noted that Petitioner was out of town (PX 10, p 32-89). Petitioner followed up with her therapists virtually through April 22, 2020, and performed a home exercise programs (PX 10, p 4-32). On July 14, 2020, Dr. Chilelli's physician's assistant, in a telephone evaluation, recorded Petitioner was happy with her progress. She still had some soreness and discomfort with her exercises, but no significant pain. She was able to get her hand over her head with activities that did not involve weight. Petitioner was advised to continue home exercises and return to physical therapy in Kentucky as she is still having some issues with strength and ROM. She was to return to the office when she returns from Kentucky in 3 to 6 months (PX 5, p 8). Petitioner testified that she did not receive any medical care after July 14, 2020 because of Covid, traveling and lack of insurance. Before July 2020, no doctor had cleared her to go back to work. She testified that as of that date, her shoulder was still in pain. She did not have full range of motion.

Dr. Chilelli testified by evidence deposition taken March 9, 2022 (PX 2). His CV was entered into evidence as PX 1. He testified to his treatment of Petitioner beginning in September 2019. The MRI noted an 8 by 16 millimeter full thickness tear. This would be on the smaller end of tears. The majority of rotator cuff tears are the result of a specific injury. He testified to performing the arthroscopy on Petitioner's right shoulder on January 17, 2020. He opined, based on the physical therapy records, that in March 2020, Petitioner was unable to return to work. He testified that the premature stopping of therapy would result in a little bit more disability. Petitioner had some fraying of the labrum, intrasubstance tearing of the biceps. The rotator cuff was completely torn from its insertion. He last saw Petitioner on July 14, 2020. She was not released at MMI at that time (PX 1).

Dr. Chilelli testified that Petitioner's right shoulder injuries were causally related to her fall in February 2019. The basis of that opinion is that a fall from an 8 foot ladder is a significant force on the body. The scope pictures and his notes show that the tendon looks good quality. Usually more degenerative tears are frayed and beaten up. The fact that Petitioner had no treatment for 7 months after the accident would not change his opinion. The treatment provided was reasonable and necessary. He was provided a copy of the accident report. He testified that if a patient missed a rung of the ladder and landed on the floor, lost her balance, fell back, and attempted to brace themselves by grabbing on to something with the right arm, that it is possible,

more likely that not to be a competent cause of a rotator cuff tear. He agreed that the accident report does not mention the right shoulder (PX 1).

Dr. Michael Birman authored a report dated April 11, 2022 (RX 1). He reviewed the incident report and all treating medical records from September 23, 2019 through July 14, 2020. He notes the histories of injury in the accident reporting, medical notes, and physical therapy records, finding some inconsistencies in the exact onset of shoulder pain reported. He opines that based on the information provided, he is unable to reconcile the injury history with the later presentation for a right shoulder rotator cuff tear. He states he would have expected some initial pain and dysfunction, with immediate impact on shoulder pain, range of motion, and function. The absence of such a report and the 7 month delay in seeking treatment suggest a lack of causal connection. He states the MRI findings are age indeterminate. He opines that the right shoulder condition is not causally related to the February 23, 2019 incident (RX 1).

Dr. Birman states the treatment rendered was reasonable and necessary for the symptomatic rotator cuff tear. He states that the records show she was doing relatively well as of the final evaluation on July 14, 2020. There is no indication that she requires any further treatment. He opines that she was at maximum medical improvement at that time based upon the evaluation noted and the expected 6 month timeline to MMI. He opined that Petitioner could have worked unrestricted at that time (RX 1).

Petitioner testified she has not worked since the she was taken off work in September 2019. She did not tell her employer that she stopped working. She feels comfortable doing certain things with her right arm and shoulder. She does not trust her right shoulder. She has motion below her elbow but not reaching high. Using knives is dangerous. She uses her left arm more frequently. She is not currently employed. She testified that she currently walks and plays with her dogs. She plays with her grandchildren but worries about getting off the floor. She has a small tractor truck. She tries to drive it. Her pain has improved somewhat since the surgery. She currently lives with her son. She has lived in Kentucky. She stays with her daughter. She goes to Kentucky frequently. She spent a few months there in 2020.

She did not receive workers' compensation for her time off. She testified that she had group health insurance. She does not know when those benefits ceased. She received disability benefits in 2020 and though December 2021. Respondent admitted RX 3, being the disability benefits paid.

Conclusions of Law

In support of the Arbitrator's decision with respect to (C) Accident, the Arbitrator finds as follows:

To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that he suffered a disabling injury that arose out of and in the course of the claimant's employment. An injury is accidental within the meaning of the Act when it is traceable to a definite time, place and cause and occurs in the course of employment unexpectedly and without affirmative act or design of the employee. *International Harvester Co. v. Industrial Comm.*, 56 Ill. 2d 84, 89 (Ill. 1973). An injury occurs "in the course of' employment when it occurs during employment and at a place where the claimant may reasonably perform employment duties, and while a claimant fulfills those duties or engages in some incidental employment duties. 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. For an injury to 'arise out'

of the employment its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in order in fulfilling his job duties. *McAllister v. Illinois Workers' Compensation Comm'n,* 2020 IL 124848.

Petitioner's unrebutted testimony was that she fell coming off a ladder on February 23, 2019. She promptly reported this incident to Mr. Beres and completed an accident report. Her medical histories are consistent with her testimony and this initial accident report. This incident occurred during employment and at a place where the claimant may reasonably perform employment duties, and while a claimant fulfills those duties or engages in some incidental employment duties. The risk of falling off of the ladder while changing lights is a risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury.

Respondent's dispute in this matter relates to the failure to report a shoulder injury at the time. This does not relate to whether the accident occurred and is more properly addressed in the findings with respect to Causal Connection below.

Based on the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that she sustained accidental injuries arising out of and in the course of her employment with Respondent on February 23, 2019.

In support of the Arbitrator's decision with respect to (E) Notice, the Arbitrator finds as follows:

Petitioner testified that she reported her fall from the ladder to Mr. Beres on the day of the accident and filled out the accident report. Mr. Beres confirms he received the report well within the time limits set forth in the Act. Respondent's dispute that the report does not record any allegations of a right shoulder injury does not relate to whether notice of the accident was made and is more properly addresses in the findings with respect to Causal Connection below.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that she gave notice of the accident to Respondent within the time limits specified in the Act.

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator finds as follows:

A Workers' Compensation Claimant bears the burden of showing by a preponderance of credible evidence that his current condition of ill-being is causally related to the workplace injury. *Horath v. Industrial Commission*, 449 N.E.2d 1345, 1348 (Ill. 1983) citing *Rosenbaum v. Industrial Com.* (1982), 93 Ill.2d 381, 386, 67 Ill. Dec. 83, 444 N.E.2d 122). The Commission may find a causal relationship based on a medical expert's opinion that the injury "could have" or "might have" been caused by an accident. *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 182, 457 N.E.2d 1222, 1226, 75 Ill. Dec. 663 (1983). However, expert medical evidence is not essential to support the Commission's conclusion that a causal relationship exists between a claimant's work duties and his condition of ill-being. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63, 442 N.E.2d 908, 911, 66 Ill. Dec. 347 (1982). A chain of events suggesting a causal connection may suffice to prove causation. *Consolidation Coal Co. v. Industrial Comm'n*, 265 Ill. App. 3d 830, 839, 639 N.E.2d 886, 892, 203 Ill. Dec. 327 (1994). Prior good health followed by a change immediately following an accident allows

an inference that a subsequent condition of ill-being is the result of the accident. *Navistar International Transportation Co. v. Industrial Comm'n*, 315 Ill. App. 3d 1197, 1205 (2000).

Petitioner did not seek any treatment from the date of the accident until September 2019, almost 7 months thereafter. She continued to work for Respondent doing her regular job throughout this period. The Commission has considered such a gap in care in determining causal connection. See: *Richard Olcikas v. Dominick's Finer Foods, Inc*., 2009 Ill. Wrk. Comp. LEXIS 1098, affirmed *Olcikas v. IWCC*, 2012 Ill. App. Unpub. LEXIS 26; 2011 IL App (1st) 103274WC-U; 2012 WL 6951575; *Jacob Haltom v. Center for Sleep Medicine*, 2013 Ill. Wrk. Comp. LEXIS 509; 13 IWCC 563, affirmed *Haltom v. IWCC*, 2015 IL App (1st) 133954WC-U; 2015 Ill. App. Unpub. LEXIS 1568; *Jose Ruben Meraz vs. Minute Men Staffing*, 2015 Ill. Wrk. Comp. LEXIS 30; 15 IWCC 30. This gap defeats any claim of chain of events.

Petitioner offered the medical opinions of Dr. Chilelli that Petitioner's condition of ill-being in the right shoulder was causally related to the accident. Respondent offered the opinions of Dr. Birman in his record review that the condition was not related.

It is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999). Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill, and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Commission*, 309 Ill. 91, 138 N.E. 211 (1923). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion. *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, 960 N.E.2d 587, 355 Ill. Dec. 705. If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. Expert opinions must be supported by facts and are only as valid as the facts underlying them. *In re Joseph S*., 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003). A finder of fact is not bound by an expert opinion on an ultimate issue, but may look 'behind' the opinion to examine the underlying facts.

Having heard the testimony, reviewed the evidence, the Arbitrator finds the opinion of Dr. Chilelli more persuasive than that of Dr. Birman. Dr. Chilelli was the Petitioner's treating doctor. He saw her on multiple occasions, reviewed the MRI and observed the condition of her shoulder during the January 2020 surgery. 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). Dr. Chilelli testified that Petitioner's right shoulder injuries were causally related to her fall in February 2019. The basis of that opinion is that a fall from an 8 foot ladder is a significant force on the body. The scope pictures and his notes show that the tendon looks good quality. Usually more degenerative tears are frayed and beaten up. While the gap in care raises questions as to causation, Dr. Chilelli testified the fact that Petitioner had no treatment for 7 months after the accident would not change his opinion. Petitioner testified that, even though she sought no medical care, she had problems with the right shoulder and was required to modify her work by

having co-workers perform many functions. The Arbitrator finds this unrebutted testimony credible, given her managerial position. Her ongoing problems with the shoulder during the period after the accident were also corroborated by the testimony of Ms. Owens. The Arbitrator also considers that Petitioner's initial email contact with Mr. Beres before seeking medical treatment includes the reference to injuring her shoulder when she fell off the ladder. Dr. Birman had only the paper records without benefit of films or any contact with Petitioner in rendering his opinions. He did not have the benefit of considering her statements of ongoing shoulder problems during the gap in seeking care. His opinion is based the lack of any initial reporting of shoulder pain and upon the delay in seeking treatment without the benefit of the evidence supporting ongoing problems during that interval.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that her condition of ill-being in the right shoulder is causally connected to the accident on February 23, 2019.

In support of the Arbitrator's decision with respect to (J) Medical, the Arbitrator finds as follows:

Under section 8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are necessary to diagnose, relieve, or cure the effects of his injury. *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 470, 949 N.E.2d 1158, 1165, 351 Ill. Dec. 63 (2011). Based upon the Arbitrator's finding with respect to Causal Connection, reasonable and necessary medical for Petitioner's right shoulder would be compensable. Petitioner offered the medical bills of Northwestern Medical Group (PX 6) and Central DuPage Hospital (PX 7). The Arbitrator has reviewed the exhibits and except for the unrelated bill for services on 12/23/12, finds the treatment related. Dr. Chilelli testified and Dr. Birman confirms that the treatment provided was reasonable and necessary. PX 6 documents charges for services for the 9/24/19 MRI and office visits on 9/26/19 and the telemedicine evaluation on 7/14/20 totaling $1,630.00. This bill is not adjusted for fee schedule or negotiated rate pursuant to the Act.

The Central DuPage Hospital bills show that they have been paid by Aetna. In Petitioner's medical records, this is referred to as her private health insurance through Aetna. In her testimony she stated she had group insurance, but no evidence that this was provided by Respondent was offered. The Request for Hearing did not seek 8(j) credit for any payments. The Arbitrator therefore finds that this was Petitioner's private health insurance. Petitioner is therefore entitled to these bills pursuant to the payments made by Aetna after adjustments made, not the total amount charged. See *Tower Automotive*, 407 Ill. App. 3d at 437 ("By paying, or reimbursing an injured employee, for the amount actually paid to the medical service providers, the plain language of the statute is satisfied."). To award claimant any amount for medical expenses beyond the amount actually paid to the medical service providers would result in a windfall to claimant. The amount paid by Aetna totals $29,044.80.

Based upon the record as a whole, and the Arbitrator's finding with respect to Causal Connection, the Arbitrator finds that Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $1630.00 to Northwestern Medical Group, and $29,044.80 to Central DuPage Hospital, as provided in Sections 8(a) and 8.2 of the Act.

In support of the Arbitrator's decision with respect to (K) Temporary Compensation and (N) Credit, the Arbitrator finds as follows:

Temporary compensation is provided for in Section 8(b) of the Workers' Compensation Act, which provides, weekly compensation shall be paid as long as the total temporary incapacity lasts, which has interpreted to mean that an employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit. In order to prove his entitlement to TTD benefits, a claimant must establish not only that she did not work, but that she was unable to work. *Sharwarko v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 131733WC, ¶ 49. An employee is temporarily totally disabled from the time that an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118 (1990). Once an injured employee's physical condition stabilizes or he has reached MMI, he is no longer eligible for temporary total disability benefits. *Archer Daniels Midland Co.*, 138 Ill. 2d at 118. A claimant reaches MMI when he is as far recovered or restored as the permanent character of his injury will permit. *Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1067, 1072 (2004). Factors to be considered in determining whether a claimant has reached MMI include whether he has been released to return to work, medical evidence, testimony concerning the claimant's injury, the extent of his injury, and whether the injury has stabilized. *Nascote Industries*, 353 Ill. App. 3d at 1072.

Petitioner was taken off work by Dr. Chilelli as of September 23, 2019. While there was interaction between the Respondent and the doctor about light duty work and what restrictions for Petitioner were appropriate in November 2019, no evidence that a job offer of light duty work was made to Petitioner. Petitioner was not at MMI at that time since she was still awaiting surgical authorization. Following her surgery, Petitioner remained under active care through April 2020. She left the area to live in Kentucky and had one follow up telephonic visit with Dr. Chilelli's office on July 14, 2020. No physical examination was performed at that time and Dr. Chilelli's records are silent as to what if any restrictions were appropriate for Petitioner at that time. While he testified that Petitioner still had disability and might benefit from additional therapy, Petitioner has had no further treatment for 2 years. Petitioner testified she is better that before surgery. The November notes confirm she could perform at least light duty at that time. Any opinion by Dr. Chilelli as to her condition after his last office visit in March 2020 would be pure speculation. Petitioner has not looked for any work since her accident despite completing medical treatment almost 2 years prior to the hearing.

Given the lack of any treatment or medical evaluations since July 14, 2020, the Arbitrator finds the opinion of Dr. Birman persuasive that maximum medical improvement would have been reached six months post-surgery or as of the July 14, 2020 visit.

Respondent admitted RX 3, being the disability payments made by Lincoln National Life Insurance as carrier for Respondent. Total payments for benefits through December 2021 total $44,176.56. Respondent is entitled to credit under Section 8(j) only for those payments made for the period of temporary total disability awarded herein. Benefits paid for the period from September 23, 2019 through July 14, 2020 total 15,959.28.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that she is entitled to temporary total disability commencing September 23, 2019 though July 14, 2020, a period of 44 weeks. Respondent shall be given a credit of $15,959.28 for disability 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 support of the Arbitrator's decision with respect to (L) Nature & Extent, the Arbitrator finds as follows:

Petitioner's date of accident is after September 1, 2011 and therefore the provisions of Section 8.1b of the Act are applicable to the assessment of partial permanent disability in this matter.

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 manager of a storage facility at the time of the accident and that she has not returned to work in her prior capacity since said injury. The Arbitrator notes Petitioner testified to several functions of her job that would continue to cause her pain including overhead work, mopping and sweeping, and heavy lifting. The Arbitrator also notes that Petitioner was able to perform her full duties for 7 months after the accident by delegating these tasks. She had not made any effort to return to work despite being in a management position at the time of the accident. 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 63 years old at the time of the accident. This would make Petitioner an older worker with a shorter period of expected work ahead of her. Because of this, the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner has not returned to work. She has made no effort to find work of any kind since the accident. The Petitioner testified that she spends extended periods of time in Kentucky as well as living in the Chicago area. At the time of her injury, Petitioner would have been considered a lower wage earner. No evidence that she could not earn similar wages if she actually tried to find work was presented. Because of these facts, the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner had a full thickness tear of the rotator cuff that required surgical repair. Dr. Chilelli referred to the tear as on the smaller size. He described the surgery as a routine procedure. He noted that at the time Petitioner stopped treatment in March 2020, she was just coming out of the sling, so she would be expected to be stiff. There is no subsequent medical examination or physical findings. Because of these facts, the Arbitrator therefore gives greater weight to the MRI and operative findings and lesser weight to the subsequent records for 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 12.5% loss of use of whole person pursuant to §8(d)2 of the Act.

In support of the Arbitrator's decision with respect to (M) Penalties, the Arbitrator finds as follows:

Penalties imposed under section 19(l) are in the nature of a late fee. The award of section 19(l) penalties is mandatory if the payment is late, for whatever reason, and the employer or its carrier cannot

show an adequate justification for the delay. The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. The employer bears the burden of justifying the delay, and its justification is sufficient only if a reasonable person in the employer's position would have believed the delay was justified.

The standard for awarding penalties and attorney fees under sections 19(k) and 16 is higher than the standard for awarding penalties under section 19(l) because sections 19(k) and (16) require more than an "unreasonable delay" in payment of benefits. For the award of penalties and attorney fees under sections 19(k) and 16, it is not enough for the claimant to show that the employer simply failed, neglected, or refused to make payment or unreasonably delayed payment without good and just cause. Instead, penalties and attorney fees under sections 19(k) and 16 are intended to address situations where there is not only delay, but the delay is deliberate or the result of bad faith or improper purpose. In addition, while section 19(l) penalties are mandatory, the imposition of penalties and attorney fees under sections 19(k) and 16 is discretionary.

As noted above with respect to Causal Connection, Petitioner neither reported a right shoulder injury nor sought any treatment for her condition from February 23, 20109 until her September 20, 2020 email to Mr. Beres. The Commission has considered such a gap in care in determining causal connection. See: *Richard Olcikas v. Dominick's Finer Foods, Inc*., 2009 Ill. Wrk. Comp. LEXIS 1098, affirmed *Olcikas v. IWCC*, 2012 Ill. App. Unpub. LEXIS 26; 2011 IL App (1st) 103274WC-U; 2012 WL 6951575; *Jacob Haltom v. Center for Sleep Medicine*, 2013 Ill. Wrk. Comp. LEXIS 509; 13 IWCC 563, affirmed *Haltom v. IWCC*, 2015 IL App (1st) 133954WC-U; 2015 Ill. App. Unpub. LEXIS 1568; *Jose Ruben Meraz vs. Minute Men Staffing*, 2015 Ill. Wrk. Comp. LEXIS 30; 15 IWCC 30. While Dr. Chilelli recorded Petitioner's history, his records do not contain an unambiguous causation opinion until his deposition. His causation opinion is based, in large part, upon Petitioner's claim of injury to the shoulder at the time of her fall, which is reasonably questionable based upon the gap in reporting and care. Upon receiving his testimony, Respondent obtained the report from Dr. Birman which disputed causation. When the employer relies on responsible medical opinion or when there are conflicting medical opinions, penalties are not usually imposed. *Avon Products, Inc. v. Industrial Comm'n*, 82 Ill. 2d 297, 302, 412 N.E.2d 468, 470, 45 Ill. Dec. 117 (1980).

Based upon the record as a whole, the Arbitrator does not find that Respondent's refusal to pay benefits was unreasonable. Petitioner's claim for penalties and attorney's fees is denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC020658
Case Name	Rodrigo Rodriguez v. H & S Concrete Construction
Consolidated Cases	
Proceeding Type	Petition for Review Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0295
Number of Pages of Decision	19
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Zbigniew Bednarz
Respondent Attorney	Katrina Robinson

DATE FILED: 7/5/2023

/s/ Deborah Baker, Commissioner

Signature

23IWCC0295

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 Causation	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify Temporary Disability, Medical, Permanent Disability, Penalties and Attorney's Fees	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RODRIGO RODRIGUEZ,

Petitioner,

vs. NO: 18 WC 20658

H & S CONCRETE CONSTRUCTION,

Respondent.

DECISION AND OPINION ON REVIEW

This matter comes before the Commission pursuant to Petitioner's timely filed Petition for Review of the Decision of the Arbitrator. Therein the Arbitrator found Petitioner's current low back condition is causally related to his undisputed June 27, 2018 accident but he reached maximum medical improvement as of July 9, 2019. The Arbitrator awarded temporary total disability ("TTD") benefits and medical expenses through July 9, 2019, and found Petitioner sustained 40% loss of use of the person as a whole, though the Arbitrator ordered Respondent to pay 50% of the award directly to Petitioner's ex-wife through her divorce attorney. Petitioner's alternative requests for further TTD benefits and prospective medical care or maintenance benefits with vocational rehabilitation, as well as his request for penalties and attorney's fees were denied. Notice having been given to all parties, the Commission, after considering all issues and being advised of the facts and law, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Petitioner is a Spanish-speaking gentleman; he testified through an interpreter. T. 24. Petitioner has been a member of Laborers Local 68 since 2001. T. 27. On May 10, 2015, he began working for Respondent, a concrete construction company; Respondent's business is seasonal in that its employees go on unemployment during winter. T. 26, 72. Petitioner's duties involved using a variety of equipment as well as tools to lay concrete. T. 27.

The parties stipulated that Petitioner sustained an accidental injury on June 27, 2018. Arb.'s Ex. 1. Petitioner was pushing a wheelbarrow full of wet concrete (T. 32) when the incident

occurred: "It was very muddy…we had to put a ramp because the wheelbarrow was heavy and it was not going anywhere. And I had my working boots, and then I slipped. And I fell, and that's when I felt, you know, the pain in my lower back." T. 30. Petitioner explained the wheelbarrow started to tip over and he ended up falling to his knee. T. 32-33. Petitioner testified he worked the remainder of his shift and did not seek treatment that day because he thought it was "nothing serious." T. 36. Petitioner reported for work the next day, a Thursday, but was unable to complete his workday, nor was he able to go to work Friday. T. 37. Petitioner testified that on Sunday, one of the owners phoned him about coming to work, "I told him that I wasn't able to work, and that's when he sent me to see the doctor." T. 37, 39.

On July 2, 2018, Petitioner presented to his family physician, Dr. Miguel Burgos, and gave a history of a sudden onset of low back pain while moving a heavy load at work. After an examination, Dr. Burgos obtained lumbar spine X-rays, prescribed Prednisone, and imposed work restrictions of no bending, pushing, or pulling. Pet.'s Ex. 1. The parties stipulated that Petitioner was temporarily totally disabled as of July 2, 2018. Arb.'s Ex. 1.

Petitioner followed up with Dr. Burgos on July 16, 2018 and reported his pain was worsening and had begun radiating to his left leg. Dr. Burgos adjusted Petitioner's medications and ordered physical therapy, which Petitioner commenced at ATI on July 19, 2018. Pet.'s Ex. 1, Pet.'s Ex. 4. On July 23, 2018, Petitioner returned to Dr. Burgos and reported no improvement in his symptoms. Dr. Burgos referred him to Dr. Ryon Hennessy; in the interim, Petitioner was to continue physical therapy. Pet.'s Ex. 1.

On July 30, 2018, Petitioner was evaluated by Dr. Hennessy of Orthopedic Specialists. The record reflects Petitioner complained of low back pain and left lower extremity radicular pain associated with a June 27, 2018 injury at work when he slipped and twisted while wheelbarrowing cement across a wet wooden plank. Dr. Hennessy noted Petitioner had an initial "twinge" in his back, which had progressed to low back pain going down the left leg following the S1 dermatome. Dr. Hennessy recommended a lumbar spine MRI as well as further physical therapy, and authorized Petitioner off work. Pet.'s Ex. 2.

The lumbar spine MRI was completed on August 21, 2018. The radiologist's impression was 1) L3-4 - central disc protrusion with moderate central spinal stenosis; 2) L4-5 - mild central spinal stenosis with narrowing of the lateral recesses, left paramedian disc protrusion noted and moderate bilateral foraminal stenosis; 3) L5-S1 - small central disc protrusion and mild bilateral foraminal stenosis; and 4) chronic appearing subtle anterior wedge deformity of L1. Pet.'s Ex. 2. On August 24, 2018, Petitioner followed up with Dr. Hennessy and, with a member of the doctor's staff translating, Petitioner reported physical therapy had not been beneficial and his symptoms persisted. Dr. Hennessy reviewed the MRI images and noted his agreement with the radiologist's findings of a "quite significant" protrusion at L3-4 causing moderate stenosis as well as facet arthropathy and protrusions at L4-5 and L5-S1 causing significant lateral recess and foraminal stenosis, though the doctor "thought there was a little more stenosis than the radiologist listed centrally." Pet.'s Ex. 2. Concluding the L5-S1 level was the source of Petitioner's pain, Dr. Hennessy recommended an epidural steroid injection ("ESI") as well as an EMG; in the meantime, Petitioner was to remain off work and continue with physical therapy. Pet.'s Ex. 2.

On September 14, 2018, Petitioner was evaluated by Dr. Naveen Tipimeni, a pain management specialist in Dr. Hennessy's practice group. Dr. Tipimeni noted Petitioner

complained of severe axial low back pain radiating down the left lateral leg to the ankle. After an exam and review of the MRI, which the doctor noted was consistent with Petitioner's pain complaints, Dr. Tipimeni recommended proceeding with a left L4-5 injection and prescribed Tramadol. Pet.'s Ex. 2.

On September 25, 2018, the bilateral lower extremity EMG was performed, and it was consistent with lumbosacral radiculopathy minimally involving the left L4-L5 nerve roots, with possible L3 radiculopathy as well. Pet.'s Ex. 2. Petitioner returned to Dr. Hennessy on October 8, 2018 and reported his symptoms were unchanged. He further advised the injection recommended by Dr. Tipimeni was denied by the workers' compensation insurance carrier. Dr. Hennessy noted the EMG revealed left L5 radiculopathy which correlated with Petitioner's symptoms. Dr. Hennessy again recommended an ESI, ordered further physical therapy, and maintained Petitioner's off work status. Pet.'s Ex. 2.

On October 25, 2018, Dr. Frank Phillips performed a §12 examination and record review at Respondent's request. Dr. Phillips' examination findings included tenderness to palpation, pain with range of motion, and a positive straight leg raise on the left; the doctor also noted Petitioner had no Waddell signs. On review of the August 21, 2018 MRI, Dr. Phillips noted it was a poor quality scan but demonstrated a central disc protrusion at L3-4 with some effacement of thecal sac with mild stenosis, diffuse disc bulging at L4-5 somewhat more prominent on the left side with mild contact with the thecal sac, and a central disc bulge at L5-S1. Dr. Phillips opined Petitioner likely sustained a lumbar sprain/strain with radiculopathy on the left side with a possibility of a disc injury, probably most pronounced at L3-4. Dr. Phillips further opined the diagnosis was causally related to the work injury. Dr. Phillips recommended a series of epidural steroid injections as well as completion of the previously started three-month course of physical therapy. Resp.'s Ex. 1, Dep. Ex. 2.

Dr. Hennessy re-evaluated Petitioner on November 21, 2018 and noted he continued to complain of pain following the L5 nerve distribution; the doctor also noted there had been no approval for the epidural injections. Dr. Hennessy referred Petitioner to pain management for the injections and recommended further physical therapy. Pet.'s Ex. 2.

On December 10, 2018, Dr. Phillips authored an addendum following his review of three additional medical records: the EMG, one physical therapy note, and Dr. Hennessy's October 8, 2018 office note. Dr. Phillips indicated the additional records confirmed his prior opinions that the work accident caused a lumbar sprain/strain with an element of radiculopathy, and a course of ESIs was reasonable and related to the injury in question. Dr. Phillips further opined Petitioner was limited to modified duty, avoiding repetitive bending and lifting more than 30 pounds. Resp.'s Ex. 1, Dep. Ex. 3.

The record reflects the epidural steroid injections first prescribed in August 2018 and confirmed as appropriate by Respondent's §12 physician in October 2018 were not approved until late January 2019. Pet.'s Ex. 2. On February 1, 2019, Dr. Tipimeni performed a left L4 and L5 transforaminal epidural steroid injection. Pet.'s Ex. 2. When Petitioner followed up with Dr. Tipimeni two weeks later, he reported excellent relief from the injection; specifically, his radiating left leg pain had completely resolved and not returned, and his axial low back pain had temporarily improved by 70% then returned to baseline. Dr. Tipimeni recommended proceeding with a second injection at L5-S1. Pet.'s Ex. 2.

On March 1, 2019, Petitioner was re-evaluated by Dr. Hennessy. Petitioner reported the injection provided moderate benefit but his low back pain had been slowly increasing and his left leg radicular pain had also returned though it was not as severe as prior to the injection. Petitioner's primary complaint was right lower back pain. Dr. Hennessy recommended proceeding with the second injection and maintained Petitioner's off work status. Pet.'s Ex. 2.

Petitioner underwent an L5-S1 interlaminar epidural steroid injection at Midwest Anesthesia & Pain Specialists on April 30, 2019 (Pet.'s Ex. 3) and followed up with Dr. Hennessy 10 days later. Petitioner advised the doctor that he had no relief from the second ESI and complained of radicular pain down the left leg as well as a new onset of occasional numbness into the fifth digit. Dr. Hennessy opined surgery may be appropriate and ordered an updated lumbar spine MRI. Pet.'s Ex. 2.

The MRI was done on June 11, 2019. The radiologist's impression was: 1) Disc desiccation noted at L1-2, L2-3, L3-4, L4-5 and L5-S1 levels; 2) Schmorl's node at T11-12 to L2-3 levels; 3) At L1-2 and L2-3 levels, there is a 1-2 mm diffuse disc protrusion with effacement of the thecal sac. Spinal canal and neural foramina are patent; 4) At L3-4 and L4-5 levels, there is a 2-3 mm diffuse disc protrusion with effacement of the thecal sac. Spinal canal and neural foramina are patent; 5) At L5-S1 level, there is a 2-3 mm diffuse disc protrusion with annular tearing effacing the thecal sac. Disc material and facet hypertrophy causing bilateral neuroforaminal narrowing that effaces the left and right L5 exiting nerve roots; and 6) Present scan when compared with previous scan shows no significant neural foraminal narrowing at L3-4 and L4-5 levels in the current scan seen previously. No other significant interval change noted. Pet.'s Ex. 2.

On June 14, 2019, Dr. Hennessy reviewed the MRI films and his interpretation was significant degenerative disc disease at L4-5 and L5-S1 with stenosis and annular tears at both levels contributing to the stenosis as well as the facet arthropathy, as well as mild stenosis at L3-4. Noting Petitioner continued with back pain predominantly in the left S1 distribution, Dr. Hennessy recommended an L4-5 and L5-S1 decompression and fusion. The record reflects Dr. Hennessy advised Petitioner the surgery had a 75 to 80% chance of improving his pain. Petitioner indicated he wished to consider the surgery and obtain a second opinion. Pet.'s Ex. 2.

On July 9, 2019, Dr. Phillips performed a second §12 examination and record review at Respondent's request. The report indicates the history was obtained through a translator and Petitioner described "some intermittent left leg radicular symptoms but feels these symptoms are quite manageable and not his primary concern"; Petitioner's main complaint was persistent and consistent axial back pain rated at 6/10. On examination, Dr. Phillips noted Petitioner was pain focused, reporting pain "with barely palpating the skin over lower lumbar spine"; range of motion was decreased and produced discomfort at end range, and straight leg raising on the left caused pain into the posterior thigh. Dr. Phillips reviewed the 2019 MRI and noted underlying mild congenital stenosis throughout the lumbar spine, a small central/right-sided disc protrusion at L5-S1 with a high intensity zone and some canal narrowing related to mostly the congenital stenosis, congenital stenosis with diffuse disc bulging at L4-5 with no evidence of any herniation, and congenital stenosis with a central disc protrusion at L3-4 effacing the thecal sac with some stenosis related to the underlying congenitally narrow canal. Dr. Phillips indicated his diagnosis of a work-related lumbar sprain/strain with an element of radiculopathy was unchanged, though radiculopathy was no longer a significant component of Petitioner's symptoms as Petitioner voiced

only complaints of back pain. Dr. Phillips further opined Petitioner's persistent complaints remained causally related to the work accident, but he disagreed that decompressive surgery would address Petitioner's axial back pain: "I believe with his congenital stenosis and mild degenerative changes, he is a poor candidate for a fusion. Based on review of the imaging studies I am not even certain what levels would actually be operated on." Resp.'s Ex. 1, Dep. Ex. 4. Dr. Phillips concluded Petitioner had reached maximum medical improvement ("MMI") and could no longer perform heavy manual labor; Dr. Phillips suggested a 20-pound lifting restriction and recommended an FCE to delineate Petitioner's functional levels. Resp.'s Ex. 1, Dep. Ex. 4.

When Petitioner was re-evaluated by Dr. Hennessy on October 28, 2019, he described a symptom complex consistent with his description to Dr. Phillips: Petitioner advised physical therapy had improved his radicular symptoms "quite a bit," leaving him with only occasional radiculopathy, and his primary issue was back pain. The record reflects Petitioner brought a copy of Dr. Phillips' §12 report for Dr. Hennessy to review, and Dr. Hennessy agreed with Dr. Phillips about Petitioner's history, the readings of the MRI "for the most part," and that Petitioner had plateaued with conservative care, however they came to different conclusions on surgery. Dr. Hennessy advised Petitioner that his options were to continue pursuing surgical authorization or have an FCE as Dr. Phillips has opined; noting Petitioner wished to have surgery, Dr. Hennessy maintained Petitioner's restrictions and directed that he lose weight pending surgery. Pet.'s Ex. 2. Petitioner has thereafter attended four- to six-week follow-up appointments with Dr. Hennessy while awaiting approval for surgery. T. 57. Dr. Hennessy continues to authorize Petitioner off work pending surgery. Pet.'s Ex. 2.

Petitioner testified his workers' compensation benefits were terminated in 2019, and he thereafter began a self-directed job search. T. 68-69. Petitioner testified he makes the employer contacts himself and because he does not write well in English, his friend, Maria Nava, helps him by documenting the information on the job search log. T. 70. He identified Petitioner's Exhibit 7 as his job search logs. T. 69. Petitioner typically goes to potential employers in the mornings. T. 77-78. An "in-person" contact means he went to the business, asked for an application, then filled out the application. T. 77. For "phone" contacts, he speaks to Spanish-speakers when possible and if none is available, he tries "to comprehend a little bit in English." T. 78. Petitioner testified he can "understand a little bit; but at the moment that I want to speak it, I stutter a lot and I'm not able to communicate." T. 84. Petitioner has a smart phone, but "is not very savvy as far as smart phone. Sometimes I need to ask my nieces on it, about it." T. 81. Petitioner confirmed the logs accurately reflect his job search efforts. T. 82. Petitioner has not gotten any interviews, nor has he secured formal employment, however he has earned occasional wages working odd jobs for a friend. T. 80, 61. Petitioner testified his friend, whom he has known since childhood, does residential side projects such as walls or built-in grills, and the friend would sporadically ask Petitioner to assist. T. 64, 66. Petitioner's role was to pick up around the job site, and when his friend noticed Petitioner was in pain or tired, he would tell Petitioner to sit down and rest. T. 64-65. He explained he worked for a few hours one or two days a week then would rest for the next two or three weeks. T. 65. Petitioner estimated that he performed work during five weeks and earned a total of $1,500. T. 65-66. Petitioner last worked with his friend in October 2020, when winter weather started and his friend stopped working for the season. T. 67.

On January 29, 2020, Dr. Hennessy authored a narrative report at Petitioner's Counsel's request. Resp.'s Ex. 10. Dr. Hennessy noted Petitioner's imaging studies revealed degenerative changes with an L4-5 disc protrusion and facet arthropathy causing some central and more

importantly foraminal stenosis, worse on the left, as well as an L5-Sl annular tear, disc protrusion, and facet arthropathy, with the left facet arthropathy being "the offending pathologic structure in my opinion as he had no significant right sided complaints." Pet.'s Ex. 5. Dr. Hennessy opined the June 27, 2018 accident permanently aggravated Petitioner's previously asymptomatic pre-existing condition and reiterated his surgical recommendation: "As he has failed these nonoperative measures, and his symptoms are objectified by the MRI in my opinion, it is my opinion as an orthopedic surgeon that it is reasonable and necessary for Mr. Rodriguez undergo [sic] lumbar decompression and spinal fusion at L4-5 and L5-S1." Pet.'s Ex. 5.

On March 11, 2020, Petitioner met with Kathleen Mueller ("Mueller"), a certified rehabilitation counselor with Independent Rehabilitation Services, for a vocational rehabilitation assessment. T. 75. Mueller's April 24, 2020 report reflects Petitioner's highest level of education was eighth grade in Mexico, he had minimal computer skills and did not have a computer at home, and he had a singular work history in the Very Heavy Physical Demand Level as a construction laborer with his most recent wages at Respondent being approximately $46.00 per hour. Noting she was instructed to base her conclusions on Dr. Phillips' 20-pound lifting restriction, Mueller opined that restriction precluded Petitioner from returning to his pre-accident line of work and he therefore suffered a loss of trade. Mueller conducted a transferable skills analysis utilizing the OASYS program and based on the Fair match results, determined Petitioner's potential earnings would be from $9.25 (the then-current minimum wage in Illinois) to $12.37 per hour; Mueller further noted the low end would increase as of July 1, 2020, when the minimum wage increased to $10.00 per hour. Mueller concluded Petitioner was a candidate for vocational rehabilitation services, and if approved, she would develop a Rehabilitation Plan and begin providing Petitioner with job readiness training, job seeking skill training, and job placement assistance. Mueller further noted she would recommend a GED/ESL program as well as short term computer training courses when available given the evolving COVID-19 pandemic. Pet.'s Ex. 6.

On June 4, 2020, Dr. Phillips performed a third §12 examination and record review at Respondent's request. Dr. Phillips recorded that Petitioner voiced similar complaints as he had previously, with axial low back pain being his primary symptom along with intermittent pain radiating down the left leg. On examination, Dr. Phillips noted Petitioner was "somewhat pain focused" but did not have any positive Waddell signs; exam findings included mild tenderness to palpation, decreased extension that reproduced back pain only, and straight leg raise on the left caused pain down the posterior aspect of the left leg. Dr. Phillips indicated his opinions were unchanged, and he continued to believe the work accident resulted in a lumbar sprain/strain injury. Dr. Phillips further reiterated his opinion that a two-level decompression and fusion was not indicated:

> To my review, the MRI shows no clear-cut pathology to explain [Petitioner's] ongoing symptoms. I am not certain as to the source of his ongoing back pain. His MRI shows only very mild degenerative changes of the L4-5 and L5-S1 disc. In addition, although he has radiating left leg pain, I do not see any clear-cut stenosis or neural compression as it relates to the injury in question at either L4-5, or L5-S1 on that side. For these reasons, I believe the proposed surgery has an extremely unpredictable chance of relieving [Petitioner's] symptoms and would recommend against it. Resp.'s Ex. 1, Dep. Ex. 5

Dr. Phillips again opined Petitioner was at MMI and unable to return to unrestricted work

activities, but the doctor updated his recommended lifting restriction to 30 pounds. Dr. Phillips concluded Petitioner had an impairment rating of 3% per the AMA 6th Edition Guidelines. Resp.'s Ex. 1, Dep. Ex. 5.

On July 31, 2020, Mueller conducted an updated transferable skills analysis utilizing Dr. Phillips' 30-pound lifting restriction. In her addendum, Mueller indicated the new restriction yielded two new Direct matches she considered appropriate for Petitioner, Tile Setter and Trimmer, and numerous Fair matches. Mueller opined Petitioner's earning potential under the 30-pound restriction was $10.00 to $13.60 per hour. Mueller further indicated she continued to believe Petitioner was a candidate for vocational rehabilitation services and would benefit from a GED/ESL program, computer training classes, and job placement assistance. Pet.'s Ex. 6.

Dr. Hennessy's August 24, 2020 office note reflects his review of, and disagreement with, Dr. Phillips' June 2020 §12 report. Dr. Hennessy noted his reading of the July 2019 MRI as demonstrating significant foraminal stenosis at left L5-S1 was consistent with the radiologist's while Dr. Phillips' reading was "in contrast to both mine and the radiologist." Pet.'s Ex. 2. Dr. Hennessy again recommended surgery, noting Petitioner had "consistent let [*sic*] L5 radiculopathy seen since the time of injury consistent with the foraminal stenosis predominantly at L5-S1 impinging the left L5 nerve root documented by not only myself but two radiologists in 2018 and 2019." Pet.'s Ex. 2.

Petitioner's last visit with Dr. Hennessy prior to arbitration was on April 21, 2021; Dr. Hennessy continues to recommend surgery. T. 59. Petitioner described his current symptoms. He cannot tolerate sitting or standing for long periods, and his back will hurt if he sits for an hour or an hour and a half. T. 53, 72. His pain goes along the length of his left leg starting at his left thigh down to his shin. T. 60. Petitioner testified he wants to proceed with surgery as recommended by Dr. Hennessy: "Because I'm still young and I want to be able to go back to work. And [Dr. Hennessy's] telling me that 98 percent that I'll be better." T. 56-57.

Maria Nava ("Nava") testified on Petitioner's behalf. Nava has been Petitioner's friend for over 25 years; they are from the same hometown. T. 13-14. Nava completed Petitioner's job search logs. T. 14. She testified Petitioner contacted the prospective employers, then she filled out the forms "because he has a language barrier." T. 15. Nava explained Petitioner understands and speaks "a little bit" of English, however she had "to fill out the form completely because [Petitioner] didn't understand it" nor can Petitioner write in English. T. 20, 22. Nava testified she and Petitioner were in contact most every weekday evening, either on the phone or in person, and he would "tell me where he went and who he spoke to, and I would write down the information." T. 15, 18-19. Nava stated she also assisted Petitioner with online applications: "And that would be in person; we would be in the same place…Sometimes he would come to my work office or sometimes at my house." T. 18. Nava could not recall how many online applications there were, but estimated it happened a couple times a month. T. 18-19. Nava would either email or hand deliver the completed job logs to Petitioner. T. 19.

Karen Taussig ("Taussig") testified on Respondent's behalf. Taussig has been a vocational rehabilitation specialist since 1988; she is a certified rehabilitation counselor with Genex. T. 85-86, 121. Taussig reviewed and verified Petitioner's job search logs at Respondent's request. T. 87. She did not prepare a report and instead testified from her notes. The first set of logs she reviewed was from November 4, 2019 through April 3, 2020; she reviewed the logs in May 2020. T. 90, 92-

93. Taussig summarized the job contact information gleaned from the logs: of the more than 300 contacts, 265 were in-person and of those, 110 noted an application was completed; in addition, 15 online applications were reported as well as one phone contact, and 29 entries did not specify how contact was made. T. 98. Taussig testified she attempted to verify the job logs by phoning some of the listed employers; when she called, she did not ask if there was a Spanish-speaker available. T. 99, 122. Of her 91 phone calls, she was advised the contact name as noted on the log was not accurate 43 times; 17 employers indicated there was no application on file although Petitioner had noted he submitted an application; nine employers refused to provide information regarding the application; nine employers advised that when an in person contact is made, the person is advised to apply online, email a resume, or contact a staffing agency, and Petitioner's logs did not indicate whether that was done; and four employers reported that during the dates Petitioner reported coming in, their offices were not open at all due to [COVID-19]. T. 99-101.

In October 2020, Taussig reviewed and verified a second set of logs, these from May 4, 2020 to July 2, 2020. T. 101-102. Taussig testified there were 129 employer contacts listed, 79 phone contacts and 50 in-person contacts with 21 applications submitted. T. 105. All of the contacts appeared to be cold contacts without the use of want ads or research of advertised job leads. T. 105. Taussig phoned 25 of the 129 employers, or about 19% of the contacts, to verify the logs: "11 of the employers contacted verified that they did not have an application on file for Mr. Rodriguez even though he had reported on his logs he had completed an application. 17 employers verified that there was no contact person by the name that he had reported on the job logs." T. 105-106.

Taussig performed a third review and verification of logs from November 2, 2020 to April 15, 2021. T. 106. She testified there were 321 employer contacts documented on the logs, of which 127 were phone contacts, 27 were in-person, and 162 were mail contacts, which she was unclear on what that meant. Taussig noted 40 of the contacts were from want ads, which she criticized as being "very low," and 29 were well outside the Chicago metropolitan area, which she felt was odd but did not affect her opinion. T. 106-109, 126. Taussig phoned 34 of the 321 employers, or about 10% of the contacts, to verify the logs:

> He did document legitimate accurate company names, addresses, and phone numbers. 16 of the employers verified that he did not document an accurate contact name. There was no one there by the name he provided on the job log. 17 employers verified that if he had called, he would have been directed to apply in person or online. And one employer verified that there was no application on file when he had reported he had submitted an application. T. 110-111.

Taussig opined, based on her review of the job logs, "it appeared that there was information that was not truthful or accurate as evidenced by the feedback from the employers I spoke with." T. 112. Taussig further opined Petitioner did not put forth a good faith job search, and Petitioner did not have a genuine intention to return to work. T. 112-113.

Taussig testified the factors which may hinder an individual's job search efforts include education, work history, and language skills T. 127-129. Taussig noted Petitioner's education was limited to eighth grade in Mexico, which she characterized as very low from a vocational rehabilitation perspective and could hinder his ability to perform a self-directed job search. T. 134-135. Taussig further agreed Petitioner had a singular work history as a union laborer and was

Spanish-speaking, and those factors could hinder his ability to find alternative employment. T. 135. Taussig opined Petitioner would benefit from vocational rehabilitation services such as job readiness training, job seeking skills training, creation of a resume, as well as job placement assistance. T. 136.

The August 3, 2020 evidence deposition of Kathleen Mueller was admitted as Petitioner's Exhibit 8. Mueller has been a certified rehabilitation counselor since 1998; she is also a licensed clinical professional counselor and certified ergonomic assessment specialist. Pet.'s Ex. 8, p. 7-8. Mueller has worked for Independent Rehabilitation Services ("IRS") since 2011. Pet.'s Ex. 8, p. 8. Mueller testified IRS receives the majority of its referrals from attorneys, and it is an equal split as far as referrals from plaintiffs and defense. Pet.'s Ex. 8, p. 9-10.

On March 11, 2020, Mueller met with Petitioner and conducted a vocational assessment interview; Mueller testified an interpreter was present as Petitioner is primarily Spanish-speaking and she is unaware of Petitioner's English proficiency. Pet.'s Ex. 8, p. 19, 58. Mueller thereafter performed a transferable skills analysis utilizing Dr. Phillips' 20-pound lifting restriction and documented her opinions in a report dated April 24, 2020. Pet.'s Ex. 8, p. 20. Mueller subsequently prepared an addendum detailing the results of an updated transferable skills analysis utilizing Dr. Phillips' 30-pound lifting restriction; Mueller testified there were two Direct matches and several Fair matches that she considered appropriate for Petitioner. Pet.'s Ex. 8, p. 39-40. Based on the wage range for these positions, Mueller opined Petitioner's earning capacity was $10.00 to $13.60 per hour. Pet.'s Ex. 8, p. 41.

Mueller opined Dr. Phillips' 30-pound restriction precluded Petitioner from returning to his pre-accident occupation of construction laborer, and he suffered a loss of trade, "the job that he has done for 24 years and will not be able to return to." Pet.'s Ex. 8, p. 42, 43. She further concluded Petitioner's work injury resulted in a loss of earnings and vocational rehabilitation services would increase his earnings capacity. Pet.'s Ex. 8, p. 42. Mueller opined Petitioner is a candidate for vocational rehabilitation and appeared motivated at the interview, stating he was "willing to go to GED class, ESL courses, anything that would help him obtain employment," and noting he needed assistance with computer skills, resume, cover letter, and "[d]id not know how to do a job search." Pet.'s Ex. 8, p. 44. Mueller explained the program would include GED/ESL classes, computer skills training, job readiness training, job seeking stills training, and job placement assistance. Pet.'s Ex. 8, p. 47-49, 53. Mueller emphasized that Petitioner had not had to look for work since 2005 (Pet.'s Ex. 8, p. 49), and the job search process has changed drastically in those 15 years and is now primarily online which "takes some amount of finesse in regards to the resume and cover letter and uploading documents to that software, entering into the fields of that software the appropriate responses, and using e-mail to monitor a job search and job application process." Pet.'s Ex. 8, p. 50-51. Mueller further clarified that Petitioner owning and using a smart phone does not translate to Petitioner being proficient on a computer: "The smartphone is not computer software processing. It's not the ability to amend documents. It's not the ability to work on a computer…you don't have access to your resume and cover letter." Pet.'s Ex. 8, p. 71-72.

Mueller testified it would be "very difficult" for Petitioner to perform an unassisted job search given he does not have a computer, does not know how to use word processing software, and has a language barrier. Pet.'s Ex. 8, p. 51. Mueller explained it is common for her clients to be confused about how to find employment on their own, and Petitioner expressed similar confusion:

"I recall him saying he just didn't know what to do next and he didn't know how to apply for stuff online, didn't have a computer. So I know he was having a difficult time trying to figure out where to go." Pet.'s Ex. 8, p. 70. Mueller did not review Petitioner's job search logs. Pet.'s Ex. 8, p. 92.

The September 9, 2020 evidence deposition of Dr. Ryon Hennessy was admitted as Petitioner's Exhibit 9. Dr. Hennessy is board certified and has a general orthopedic surgery practice; approximately 30 percent of his practice involves spine care, of which 60-70 percent involves the lumbar spine. Pet.'s Ex. 9, p. 6-8. He performs 20-30 spine surgeries per year. Pet.'s Ex. 9, p. 9.

Dr. Hennessy testified Petitioner came under his care on July 30, 2018, and surgery was first considered at the May 10, 2019 re-evaluation, when Petitioner reported no relief from a second lumbar ESI: "At that point he had failed physical therapy, activity modification, medications and time off work; and I recommended - - we wanted to talk about surgery. His first MRI was an open scan. So I recommended a second MRI in a closed scanner and then return to talk about possible surgery." Pet.'s Ex. 9, p. 28. The higher quality MRI was done on June 11, 2019, and Dr. Hennessy reviewed the images and report on June 14, 2019: "he had significant degenerative disc disease at L4-5 and L5-S1 with stenoses and annular tears and facet arthropathy. And I also found that he had L3-4 mild stenosis but did not thinking [*sic*] it was a symptomatic level and, therefore, did not need to be included in an operation." Pet.'s Ex. 9, p. 30. Dr. Hennessy noted the radiologist indicated the central canal was open, but in "my opinion, the L4-5 and L5-S1 lateral canals, lateral recesses and foramina were narrowed." Pet.'s Ex. 9, p. 46. Dr. Hennessy testified his diagnosis of lumbar radiculopathy emanating from the L4-5 and L5-S1 levels was unchanged, and he recommended decompression and fusion of L4-5 and L5-S1. Pet.'s Ex. 9, p. 31. Dr. Hennessy concluded the June 27, 2018 work accident permanently aggravated Petitioner's pre-existing condition:

> When the wheelbarrow wrenched his back at work, his symptoms began immediately and were reported in a timely fashion. They were consistent across Dr. Burgos [sic] and developed from back pain into a lumbar radiculopathy within a week or two, which is also consistent with an acute injury, and then remained consistent for the last two and a half years well, under two and a half years, just under two and a half years. Pet.'s Ex. 9, p. 39-40.

Dr. Hennessy is still recommending surgery. Pet.'s Ex. 9, p. 35.

Dr. Hennessy testified he had reviewed Dr. Phillips' reports and disagrees with Dr. Phillips' opinion that Petitioner is at MMI and not a surgical candidate:

> …he used the rational that spinal fusion is not always successful. I agree with that; but no surgery is always successful; and the numbers that I quoted were, in workmen's compensation, greater than half and up to 75 percent of patients who undergo spinal fusion as I'm recommending for Mr. Rodriguez do improve. So in some respects, well, I agree with Dr. Phillips that there's - - it's not 100 percent guaranteed that he will improve as no surgery has 100 percent guarantee. This has a very significant - - a very high rate of success in this particular patient who has consistent symptoms that were objectified; and we all agree they were objectified, even Dr. Phillips. Pet.'s Ex. 9, p. 57-58.

The November 24, 2020 evidence deposition of Dr. Frank Phillips was admitted as Respondent's Exhibit 1. Dr. Phillips is a board-certified orthopedic surgeon; his practice is focused on treatment of spinal disorders, and he performs over 300 spine surgeries per year. Resp.'s Ex. 1, p. 5-7. Dr. Phillips performed four §12 examinations and record reviews at Respondent's request: October 25, 2018; December 10, 2018; July 9, 2019; and June 4, 2020. Dr. Phillips testified consistent with his reports.

Dr. Phillips testified that at the October 25, 2018 §12 examination, he concluded Petitioner sustained a lumbar sprain/strain with a possible element of radiculopathy, which was related to the June 27, 2018 accident. Resp.'s Ex. 1, p. 14. Dr. Phillips testified that diagnosis remains unchanged, though by the July 9, 2019 examination, the focus of Petitioner's complaints had changed: "At this time, either the radicular complaints had essentially resolved or were not bothersome to him and he had persistent low back pain," which was related to the work accident. Resp.'s Ex. 1, p. 25-26. Dr. Phillips confirmed lumbar fusion surgery had been recommended, but he disagreed that Petitioner was a surgical candidate. Resp.'s Ex. 1, p. 28-29. Dr. Phillips concluded Petitioner had reached MMI, and based on his subjective presentation, Dr. Phillips did not think Petitioner could not return to heavy manual labor; Dr. Phillips recommended a 20-pound lifting restriction and suggested an FCE to further define what Petitioner could safely do. Resp.'s Ex. 1, p. 29-30. Dr. Phillips testified that when he examined Petitioner for the third and final time, on June 4, 2020, his diagnosis remained lumbar sprain-strain and the subjective radicular complaints Petitioner previously voiced seemed to not be an issue. Resp.'s Ex. 1, p. 34. The doctor continued to believe Petitioner was at MMI, could work with a 30-pound restriction pending an FCE, and surgery was not indicated. Resp.'s Ex. 1, p. 36-38. Dr. Phillips reiterated his disagreement with proceeding with decompression and fusion as recommended by Dr. Hennessy, explaining a decompression is not warranted because Petitioner does not have leg pain, and there is neither instability nor advanced degeneration sufficient to warrant fusion. Resp.'s Ex. 1, p. 80-82. Dr. Phillips performed an AMA impairment rating and concluded Petitioner had a three percent impairment. Resp.'s Ex. 1, p. 38.

CONCLUSIONS OF LAW

The Arbitrator found Petitioner's current condition is causally related to the accident but Petitioner "has reached maximum medical improvement and is not entitlement [sic] to prospective medical care or vocational rehabilitation services." Arb.'s Dec., p. 16. The Arbitrator found "Petitioner proved himself unreliable, with little credibility, and motivated by secondary gain," and noted "Petitioner's lack of credibility extends to all issues." Arb.'s Dec., p. 18. The Commission views the evidence differently.

I. Credibility

The Commission does not share the Arbitrator's credibility assessment, nor do we agree with the negative inferences in the Decision. The Commission finds nothing "hyperbolic" about Petitioner's testimony; to the contrary, Petitioner was plain spoken and his responses were straightforward. We further disagree that Petitioner was evasive regarding his actual job duties; there was nothing vague or misleading about Petitioner's responses to the few questions he was asked about his duties and the tools he used. T. 27-29. Moreover, the finding that Petitioner exaggerated his schedule seems predicated on Petitioner, along with all of Respondent's laborers,

going on unemployment when Respondent shut down during the winter months (T. 72); the Commission finds a negative inference predicated on Petitioner's acknowledgement that concrete construction is a seasonal endeavor is improper. Additionally, we do not believe Petitioner's completion of job search logs is suggestive of secondary gain motivation; rather, Petitioner testified his attorney instructed him to document his job search efforts to establish his entitlement to continuing workers' compensation benefits while the parties debated the reasonableness and necessity of further treatment versus vocational rehabilitation. T. 74. The Commission further observes some of the Decision's negative inferences are based on inaccurate statements. For instance, the Decision indicates Petitioner claimed to have been looking for work since "mid-July 2019," yet his job search logs do not start until October; we note, however, Petitioner testified he started his job search after his benefits were terminated in 2019 (T. 68-69), and according to Respondent's TTD ledger, that occurred in October (last TTD check was issued October 2, 2019). Resp.'s Ex. 9. As such, Petitioner's timeline testimony is corroborated by Respondent's evidence. The Commission finds Petitioner was credible. *See R & D Thiel v. Illinois Workers' Compensation Commission*, 398 Ill. App. 3d 858, 866 (1st Dist. 2010) (When evaluating whether the Commission's credibility findings which are contrary to those of the arbitrator are against the manifest weight of the evidence, "resolution of the question can only rest upon the reasons given by the Commission for the variance.")

II. Prospective Medical Treatment and Temporary Total Disability Benefits

There is no dispute as to causation, as Respondent's §12 expert, Dr. Frank Phillips, agrees Petitioner's persistent complaints are related to the undisputed work injury. Rather, the first issue the Commission must resolve is whether Petitioner remains temporarily totally disabled pending surgery as recommended by Dr. Ryon Hennessy or whether Petitioner is at maximum medical improvement with permanent restrictions as Dr. Phillips opined.

Dr. Hennessy diagnosed Petitioner with lumbar radiculopathy emanating from L4-5 and L5-S1 and is recommending a two-level decompression and fusion. Pet.'s Ex. 2. During his deposition, Dr. Hennessy testified the MRIs provide objective evidence of the pathology causing Petitioner's complaints. The doctor first reviewed the 2018 MRI and identified an L4-5 left paramedian disc protrusion, which is the same side as Petitioner's leg pain, causing moderate central spinal stenosis, lateral recess narrowing, and moderate bilateral foraminal stenosis, as well as L5-S1 disc bulges, endplate spurring, a small central protrusion with annular tear, and mild bilateral foraminal stenosis. Pet.'s Ex. 9, p. 44. Dr. Hennessy compared his reading with that of the radiologist and stated they "disagreed in terms of the magnitude" of the findings, but agreed on the overall presentation of the lumbar spine as not normal. Pet.'s Ex. 9, p. 44-45. Dr. Hennessy then summarized his reading of the 2019 MRI: L4-5 stenosis, foraminal narrowing, and hypertrophy of the facet joints, and L5-S1 hypertrophy of the facets with impingement of the left and right L5 nerve roots. Pet.'s Ex. 9, p. 45-46. Dr. Hennessy acknowledged his interpretation differed from the radiologist's; while he opined the L4-5 and L5-S1 lateral canals, lateral recesses, and foramina were narrowed, the radiologist concluded the central canal and foramina were open. Pet.'s Ex. 9, p. 45-46. Dr. Hennessy explained he believed the L5-S1 findings were "more likely the chief pain-generating level," but L4-5 could also be causing Petitioner's symptoms; therefore, to reduce the risk of a subsequent re-operation, he recommended fusing both levels. Pet.'s Ex. 9, p. 66-67. Dr. Hennessy testified the proposed surgery has a "very high rate of success," with a greater than half to 75 percent chance of improving Petitioner's symptoms. Pet.'s Ex. 9, p. 57-58.

Dr. Phillips, in turn, opined Petitioner was not a surgical candidate. During his deposition, Dr. Phillips testified his diagnosis for Petitioner was lumbar strain/sprain with an element of radiculopathy but as of his July 9, 2019 examination, "the radicular complaints had essentially resolved or were not bothersome to him and he had persistent low back pain." Resp.'s Ex. 1, p. 25-26. Dr. Phillips detailed his review of both MRIs. On the 2018 MRI, Dr. Phillips identified mild disc desiccation and narrowing throughout the spine, diffuse disc bulging at L4-5 somewhat more prominent on the left with mild narrowing of the spinal canal, and a central disc bulge at L5-S1, though the doctor emphasized the images were poor quality. Resp.'s Ex. 1, p. 11. Dr. Phillips testified the 2019 MRI revealed Petitioner had a congenitally narrow spinal canal; as to the specific levels, there was a central right-sided disc protrusion with a high intensity zone at L5-S1, and a diffuse disc bulge at L4-5. Resp.'s Ex. 1, p. 24. Dr. Phillips further testified there was no nerve compression noted on the 2019 MRI, and this is consistent with Petitioner's description of primarily low back pain. Resp.'s Ex. 1, p. 25. Dr. Phillips explained he did not believe a lumbar fusion would address Petitioner's current low back pain complaints, nor did the imaging studies reveal findings sufficient to warrant a fusion: "…to be a good candidate you have to have a specific discrete pathology that you know is the source of the pain and address it…I felt there was nothing to suggest that to be the case…." Resp.'s Ex. 1, p. 28-29. Dr. Phillips opined the chances of the proposed surgery being successful are "incredibly small." Resp.'s Ex. 1, p. 37. Dr. Phillips concluded Petitioner was at maximum medical improvement and could work with a 30-pound lifting restriction pending an FCE to precisely define his capabilities. Resp.'s Ex. 1, p. 37.

The Commission finds Dr. Phillips opinions are persuasive and we adopt same. The Commission observes Dr. Phillips is an experienced spine surgeon who only treats disorders of the spine. We find Dr. Phillips' conclusion that surgery is not warranted and instead Petitioner is at maximum medical improvement with a permanent 30-pound restriction is corroborated by the imaging studies and Petitioner's symptoms. The Commission finds Petitioner reached MMI as of October 28, 2019; on that date, Dr. Hennessy reviewed Dr. Phillips' recommendation but rather than ordering the FCE to specify Petitioner's capabilities, Dr. Hennessy continued to pursue surgical authorization. Pet.'s Ex. 2. The Commission further finds Petitioner is entitled to TTD benefits from July 2, 2018 through October 28, 2019. While Petitioner acknowledged he performed sporadic work for a friend while Dr. Hennessy authorized him off work, the Commission finds those *de minimis* earnings constitute occasional wages, which do not preclude an award of TTD benefits. *See Mechanical Devices v. Industrial Commission*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003).

III. Vocational Rehabilitation and Maintenance Benefits

Having determined Petitioner is at maximum medical improvement with permanent restrictions which preclude him from returning to his pre-accident job as a concrete laborer, our analysis turns to Petitioner's request for vocational rehabilitation services and concomitant maintenance benefits. There are two phases to this issue: first, is formal vocational rehabilitation appropriate, and second, was Petitioner's self-directed job search sufficient to merit maintenance benefits.

A. Formal Vocational Rehabilitation

"A claimant is generally entitled to vocational rehabilitation when he sustains a work-related injury which causes a reduction in his earning power and there is evidence that

rehabilitation will increase his earning capacity." *Greaney v. Industrial Commission*, 358 Ill. App. 3d 1002, 1019 (1st Dist. 2005). Because the primary goal of rehabilitation is to return the injured employee to work (*Schoon v. Industrial Commission*, 259 Ill. App. 3d 587, 594 (3rd Dist. 1994)), if the injured employee has sufficient skills to obtain employment without further training or education, that factor weighs against an award of vocational rehabilitation. *National Tea Co. v. Industrial Commission*, 97 Ill. 2d 424, 432 (1983). The Commission finds both vocational rehabilitation experts, Kathleen Mueller and Karen Taussig, opined Petitioner would benefit from formal vocational rehabilitation.

On March 11, 2020, Mueller met with Petitioner and conducted a vocational assessment interview; on April 24, 2020, she authored a report of her conclusions. Mueller opined Petitioner had a singular work history as a laborer, suffered a loss of trade as a result of the injury, and was a candidate for vocational rehabilitation services which, if approved, would include job readiness training, job seeking skills training, and job placement assistance. Pet.'s Ex. 6. On July 30, 2020, Mueller authored an addendum with an updated transferable skills analysis using Dr. Phillips' 30-pound lifting restriction. Pet.'s Ex. 6. Mueller documented there were additional potential Fair job matches and indicated it "remains this consultant's opinion that Mr. Rodriguez is a candidate for Vocational Rehabilitation Services." Pet.'s Ex. 6. During her deposition, Mueller reiterated her opinion that Petitioner suffered a loss of trade, and she further opined the injury resulted in a loss of earnings and vocational rehabilitation would increase Petitioner's earning capacity. Pet.'s Ex. 8, p. 42. Mueller explained the program would include GED/ESL classes, computer skills training, job readiness training, job seeking stills training, and job placement assistance. Pet.'s Ex. 8, p. 47-49, 53. While Respondent retained Taussig to perform a job search review and verification and not a vocational assessment, the Commission emphasizes that Taussig is a certified rehabilitation counselor and during her testimony, she opined Petitioner would benefit from the vocational rehabilitation services recommended by Mueller. T. 135.

In the Commission's view, the vocational expert opinions establish that formal vocational rehabilitation is appropriate, and Petitioner is motivated to participate in Mueller's program. T. 70. Respondent is ordered to provide and pay for vocational rehabilitation services with Mueller.

B. Self-Directed Job Search

Section 8(a) of the Act grants maintenance benefits while a claimant is engaged in a vocational rehabilitation program. *Greaney v. Industrial Commission*, 358 Ill. App. 3d 1002, 1019 (1st Dist. 2005). A claimant's self-initiated and self-directed job search or vocational training may constitute a "vocational-rehabilitative program" under section 8(a). *Roper Contracting v. Industrial Commission*, 349 Ill. App. 3d 500, 506 (5th Dist. 2004). Petitioner claims he conducted a valid self-directed job search and is therefore entitled to maintenance benefits. The Commission agrees.

The Commission emphasizes Petitioner's job search must be considered in context. As of October 2019, Petitioner had been authorized off work for over a year, and neither Dr. Hennessy nor Dr. Phillips believed Petitioner was physically able to return to work as a concrete laborer. Pet.'s Ex. 2, Resp.'s Ex. 1. Despite the mandate of Commission Rule 9110.10(a), there is no vocational rehabilitation assessment from that period in the record. Instead, Petitioner, who is primarily Spanish-speaking, has a singular work history in heavy manual labor, and most recently looked for work a decade and a half prior to the incident at issue (Pet.'s Ex. 6, p. 49), was left to

look for work on his own. Our review of the evidence reveals Petitioner was given no guidance and was not even provided with a bilingual job search form; rather, Petitioner had to communicate his employer contacts to Nava, who then recorded the information second-hand on the forms. In spite of these obstacles, Petitioner made over 750 employer contacts during his six-month job search. The Commission has considered Taussig's job search verification, and we do not find it persuasive. Initially, we note Taussig contacted only 19 percent of Petitioner's listed employer contacts. T. 99, 105-106. Of that 19 percent, Taussig testified there were several instances where the contact name documented on Petitioner's job log was not accurate, however, the Commission finds this is likely a consequence of, and attributable to, Petitioner having to report the information to Nava, who then transferred it to the job log. The Commission reiterates that we find Petitioner credible, and we find Petitioner performed a good faith job search under the circumstances. The Commission finds Petitioner is entitled to maintenance benefits from October 29, 2019 through May 13, 2021, the date of arbitration.

IV. Medical Expenses

Petitioner's Exhibit 11 contains medical bills for treatment rendered through the hearing date. Consistent with our maximum medical improvement determination, the Commission finds only those expenses incurred through October 28, 2019 are reasonable and necessary. The Commission observes Respondent urges us to find only the first 12 physical therapy appointments were reasonable and necessary. We decline to do so. Our review of the evidence reveals the extended course of physical therapy was a significant factor in reducing Petitioner's radicular complaints. Pet.'s Ex. 2, Pet.'s Ex. 3, Pet.'s Ex. 4. The Commission finds the full complement of physical therapy at ATI was reasonable and necessary.

V. Penalties and Attorney's Fees

Petitioner argues §19(l) and §19(k) penalties and §16 attorney's fees are warranted for Respondent's refusal to pay benefits for over a year. The Commission agrees, in part.

Section 19(l) of the Act provides as follows:

> 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 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits *** 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)*.

Section 19(k) of the Act provides, "In case[s] where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation *** then the Commission may award compensation additional to that otherwise payable under the Act equal to 50% of the amount payable at the time of such award." *820 ILCS 305/19(k)*. Section 16 of the Act provides for an award of attorney fees when an award of additional compensation under 19(k) is appropriate. *820 ILCS 305/16*. As the Supreme Court of Illinois explained in *McMahan v. Industrial Commission*,

> Viewing the statute as a whole, we believe that section 19(k) and section 19(l) were actually intended to address different situations. The additional compensation authorized by section 19(l) is in the nature of a late fee. The statute applies whenever the employer or its carrier simply fails, neglects, or refuses to make payment or unreasonably delays payment "without good and just cause." If the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay, an award of the statutorily specified additional compensation is mandatory.
> In contrast to section 19(l), section 19(k) provides for substantial penalties, imposition of which are discretionary rather than mandatory. See *Smith v. Industrial Comm'n*, 170 Ill. App. 3d 626, 632, 121 Ill. Dec. 275, 525 N.E.2d 81 (1988). The statute is intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose. This is apparent in the statute's use of the terms "vexatious," "intentional" and "merely frivolous." Section 16, which uses identical language, was intended to apply in the same circumstances. *McMahan v. Industrial Commission*, 183 Ill. 2d 499, 515 (1998).

The purpose of sections 16, 19(k), and 19(l) is to further the Act's goal of expediting the compensation of workers and penalizing employers who unreasonably, or in bad faith, delay or withhold compensation due an employee. *Avon Products, Inc. v. Industrial Commission*, 82 Ill. 2d 297, 301 (1980). Under section 19(l) of the Act, the penalties are in the nature of a late fee, and are mandatory if the payment of benefits is late and the employer cannot show an adequate justification for the delay. *Jacobo v. Illinois Workers' Compensation Commission*, 2011 IL App (3d) 100807WC, ¶ 20. The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. *Id*. The employer has the burden of justifying the delay, and the employer's justification for the delay is sufficient only if a reasonable person in the employer's position would have believed that the delay was justified. *Id*.

The record reflects Respondent terminated TTD benefits on October 2, 2019. Resp.'s Ex. 3. Respondent offers two bases for its TTD termination: 1) Petitioner failed to provide Respondent with updated treatment records, and 2) its orthopedic expert opined Petitioner had reached MMI. Although Respondent's first justification lacks merit, we find it was reasonable for Respondent to rely on Dr. Phillips' opinion. The Commission observes that under Commission Rule 9110.70(c), if a respondent is denying TTD benefits based on a lack of medical records, it is the respondent's responsibility to subpoena the needed records. Barring Petitioner refusing to provide an executed medical release, which there is no evidence of this occurring here, Respondent's failure to obtain updated medical records is not adequate justification for refusing to pay TTD benefits. However, the Commission finds Respondent reasonably relied on Dr. Phillips' expert opinion that Petitioner had reached MMI. As such, the Commission finds Respondent proved it had a good faith basis for discontinuing TTD benefits under the circumstances. This does not end our inquiry, however. Instead, we next consider Respondent's refusal to pay maintenance benefits.

Petitioner argues there was over a year that he was looking for work but Respondent failed to pay maintenance benefits. The Commission observes, though, that while Petitioner's job logs start in October 2019, the logs were not provided to Respondent until January 27, 2020. Resp.'s Ex. 7. As such, for the first three months of the claimed maintenance period, Respondent was not in possession of the records which would justify payment of benefits. Therefore, the Commission

finds Respondent reasonably withheld payment of maintenance benefits through January 27, 2020. The record reflects, however, that after Respondent received the logs, it did not institute benefits; instead, three months later, in May 2020, it retained Taussig to review and verify the job logs. T. 90, 93. In its Response to Petitioner's Petition for Penalties, Respondent claimed it based its denial on the expert vocational opinion of Julie Bose. Resp.'s Ex. 9. The Commission observes Respondent did not introduce Julie Bose's opinions into evidence. Respondent cannot prove it reasonably relied on an expert opinion when it fails to produce the expert's report for the Commission's scrutiny. To be clear, the only vocational expert opinion Respondent offered into evidence was the testimony of Karen Taussig. The Commission emphasizes, however, Respondent did not retain Taussig to perform the job log verification until May 2020 (T. 93); as such, the record reflects Respondent refused to pay maintenance benefits for over three months despite having no contrary vocational opinion evidence. The Commission finds Respondent's failure to pay maintenance benefits from January 28, 2020 through May 31, 2020 was unreasonable and vexatious and implicates the Act's penalties provisions.

Section 19(l) imposes a penalty of $30 for each day payment is delayed or withheld. The Commission has concluded Respondent withheld maintenance benefits from January 28, 2020 through May 31, 2020, a period of 125 days. The Commission orders Respondent to pay §19(l) penalties in the amount of $3,750.00 ($30 x 125 = $3,750.00).

The Commission finds Respondent vexatiously delayed payment of 17 6/7 weeks of maintenance benefits totaling $15,271.61 (17 6/7 x $855.21 = $15,271.61). Therefore, the Commission finds Petitioner entitled to §19(k) penalties of $7,635.81 ($15,271.61 x 50% = $7,635.81) and §16 fees of $3,054.32 ($15,271.61 x 20% = $3,054.32).

VI. Award Disbursement Order

The Decision ordered Respondent to pay 50% of Petitioner's award directly to a third party – Bernardina Nava. The Commission emphasizes such an order violates the plain language of Section 21, and we hereby vacate it.

VII. Permanent Disability

Given our order for formal vocational rehabilitation, the Commission finds Petitioner's permanent disability is not ripe for adjudication. The Commission vacates the award of 40% loss of use of the person as a whole and remands this matter to the Arbitrator for further proceedings consistent with this Decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the July 8, 2022 Decision of the Arbitrator is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $855.21 per week for a period of 69 1/7 weeks, representing July 2, 2018 through October 28, 2019, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent shall have a credit of $56,443.86 for TTD benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner maintenance benefits in the amount of $855.21 per week for a period of 80 3/7 weeks, representing October 29, 2019 through May 13, 2021, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Responent shall provide and pay for vocational rehabilitation services with Kathleen Mueller, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses incurred through October 28, 2019, as provided in §8(a), subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner §19(l) penalties in the amount of $3,750.00.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner §19(k) penalties in the amount of $7,635.81.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner §16 attorney's fees in the amount of $3,054.32.

IT IS FURTHER ORDERED BY THE COMMISSION that the order directing Respondent to pay 50% of the award to Bernadina Nava via the law firm of Lucas & Apostolopoulos is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of 40% loss of use of the person as a whole is 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.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

July 5, 2023

/s/ *Deborah J. Baker*

DJB/mck

O: 5/10/23

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC010219
Case Name	Kevin Hess v. Mil-Ron Trucking Inc
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0296
Number of Pages of Decision	34
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Michael D. Block
Respondent Attorney	James Kelly

DATE FILED: 7/7/2023

/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

Kevin Hess,

Petitioner,

vs. NO. 21WC 10219

Mil-Ron Trucking, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, notice, 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 July 25, 2022, is hereby affirmed and adopted.

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

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

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

July 7, 2023

SJM/sj
o-5/10/2023
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/s/ *Stephen J. Mathis*
Stephen J. Mathis

/s/ *Deborah J. Baker*
Deborah J. Baker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC010219
Case Name	Kevin Hess v. Mil-Ron Trucking Inc.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	31
Decision Issued By	Michael Glaub, Arbitrator

Petitioner Attorney	Michael D. Block
Respondent Attorney	James Kelly

DATE FILED: 7/25/2022

THE INTEREST RATE FOR THE WEEK OF JULY 19, 2022 2.91%

/s/Michael Glaub, 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

KEVIN HESS
Employee/Petitioner

v.

MIL-RON TRUCKING, Inc.
Employer/Respondent

Case # **21** WC **010219**

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 **Woodstock**, on **5/5/2022**. 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 **7/31/2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**65,000.00**; the average weekly wage was $**1,250.00**.

On the date of accident, Petitioner was **62** 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 $**6,417.34** for other benefits, for a total credit of $**6417.34, subject to further stipulation of the parties**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $833.33/week for 30 weeks, commencing 4/9/2021 through 11/4/2021, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $750.00/week for 64.5 weeks, because the injuries sustained caused the 30% loss of the left leg, as provided in Section 8(e) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the Illinois Medical Fee Schedule, of 226,875.09, as provided in Sections 8(a) and 8.2 of the Act.

Petitioner's petition for Penalties and Attorneys Fees is Denied.

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

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

JULY 25, 2022

Michael Glaub
Signature of Arbitrator

BEFORE THE WORKERS' COMPENSATION COMMISSION

KEVIN HESS Plaintiff, v. MIL-RON TRUCKING, INC. Defendants.	)	Case No.: 21 WC 10219

This case was tried on May 5, 2022. The issues were accident, notice, causal connection, medical bills, TTD, nature and extent of the injury, and penalties and attorney fees. The parties eliminated the credit issue by agreement that Respondent paid $14,639.90 for medical expenses, but that one bill to ADCO Solutions in the sum of $8,222.56 was not part of the bills claimed. The parties agreed that the credit shall be $6,417.34, but in the event the ADCO bill was claimed the Respondent would have an additional credit to the extent of the $8,222.56 it paid.

STATEMENT OF FACTS

Petitioner had driven for Respondent for a number of years, some of which were as an owner operator, but for the last eight plus years he had been an employee driver. (T10-11) He would drive a flatbed truck which would carry pre-cast concrete forms to construction sites. (T12) These weighed 40 to 50 thousand pounds, (T23)

and were lifted on and off his flatbed by crane. He did have to move heavy timbers weighing up to 200 pounds which support the concrete panels, as well as lift chains, straps, big rachets and other items to protect the panels, which could weigh up to 50 pounds. He would have to tie the panels down with straps and binders, and they would sit on timbers. (T12-14). He would pick up his truck in Plainfield, take it to the Aurora facility to pick up the concrete panel which had been pre-loaded by crane, and then haul it to the job site, which this day was in Waukegan. (T12-14). Petitioner's exhibit 21 was a photo of the truck he had been using for the last four years, which showed corrugated non-slip steps(T25), the deck plate behind the cab, and the handles he would grab. Petitioners exhibit 22 showed the precast panel they haul, chained and strapped down, and exhibit 23 shows the dunnage and chains and straps after the panel is lifted off (T15).

On July 31, 2020, his hours of work were 5:30AM to probably 3:30PM. He was on his second run to the same job site in Waukegan. (T21-22). He was delivering concrete panels similar to what is shown in the photos, and was feeling fine. (T23). From the moment he pulled in until he exited the vehicle, which was 11:45 AM (T21) he pulled in the pad, out of the way to unstrap everything, he opened the door, stood on the top step, grabbed the handle right outside the cab, and went to pivot around to the back of the cab, where he was grabbing another handle. His feet turned and then they grabbed, his body pivoted but his feet didn't, leading to a twisting motion, where he crouched down on the deck plate. He felt a lot of pain, and sat there 10-15 minutes until the pain alleviated. He then got on top of the panel, took the binders off the chains slowly, and then got down off the panel, took the chains and straps off,

and got back in the truck. (T24) At the time this happened he was performing a duty of work, making his way onto the panel to take the chain binders off, and felt a very sharp pain in his left hip and a very sharp pain in his left groin(T25). When he had arrived, it was shortly before lunch. The workers shut down between noon and one, and he was hoping to get in and out before lunch so he would not have to wait, and he was thus hurrying. By the time he was ready to move again, it was too late and he waited for the lunch hour to end, then completing the delivery. (T25-27).

He drove back to the company's facility in Aurora, dropped the flatbed trailer, and drove his truck to the base in Plainfield. On the way back, he noticed most of the pain went away, but there was quite a bit in his left hip. Once he got back, and stood up or bent down, he had excruciating pain in his left groin and left hip. (T27)

As he got out to fuel the truck, he noticed more pain. He went and told the owner, Ron Tucek, what happened, and he seemed put off with like ok, a worker's comp case. So, petitioner told him it's Friday, let's give it a few days and see what happens over the weekend. (T28) After that conversation he did not go to an emergency room. (T45-46)

By middle of the next week, he was performing his job, but the pain was still there. So, he told the boss (T29) about it and filled out a First Report of Injury dated Aug 7, 2020 (Px 6), which recites the address of the job site in Waukegan, that he was turning around on the deck plate of a truck and twisted his body sharply causing sharp pain in the left hip. The form also reflected that he made an appointment with Dr. Dworsky at Hinsdale Orthopedics in New Lenox. Petitioner clarified that he was on the left step and pivoting to step on the deck plate on the back of the truck while

holding the handle with the left hand while reaching for the other handle with his right(T30). At the time he handed his boss the form, he had worked some days in between, noticing when he bent over or crouched excruciating pain in the groin, which would not totally go away when not doing those type of activities.

His appointment with Dr. Dworsky was cancelled due to an electrical outage at the doctor's office, and rescheduled for August 27, 2020, which was about two weeks later. The Covid virus was severe at this time. (T31-32) At that visit, Dr. Dworsky noted the petitioner to be a pleasant 62-year-old male presenting with a chief complaint of left hip pain. One history on the record was the injury occurred at work 7/31/2020 when he turned on a "dock" and felt a pain in the hip. The pain was 5 out of 10 on a 10-point scale and had been going on for approximately 1 month, which was the time between the accident and the visit, indicating that the pain was not improving. He described the quality as being dull and sharp, occurring during the entire day, sleep and activity. Associated symptoms included "joint" pain (sic groin pain, as Petitioner testified, he told Dr. Dworsky; "joint" pain as an associated symptom makes no sense, as the injury was to the joint and the pain to the joint had been described). Alleviating factors were resting, and aggravating factors were movement, laying down, walking, standing, squatting, or sleeping on the same side. (Px 1 p9)

A second history was that while working he made a quick move and had a sharp pain on the outer aspect of the hip, able to complete the day, but started hurting to the point where he had difficulty getting around, standing, walking, or climbing, and that it happened July 31. He did get a little better, but it was still there, hurting on the

outside, trouble laying on it, and unable to stand for long periods of time without having pain, denying any radiating or groin pain (id p11). Diagnostic studies showed no evidence of an acute injury, and no evidence of significant degenerative changes, according to Dr. Dworsky's reading of the x-ray, and on that basis, he opined that it was probably more of a muscle strain that he was still recovering from. He recommended some anti-inflammatories and physical therapy, which the Petitioner did not do since he had strains before, they had healed and he did not want run up a doctor bill. (T33) Dr. Dworsky also noted that if symptoms continue, further workup may be necessary. Petitioner testified that in explaining what happened he said "deck plate," but apparently Dr Dworsky assumed it was dock. (T32). Petitioner testified there was no building where he was delivering the concrete panel, and no dock. Nor was there a dock where he picked up the panel at the company facility in Aurora. (T32-33)

Respondent, upon suggestion of its Section 12 examiner, Dr. Brian Neal, (see infra) subpoenaed the records of Mr. Hess' general practitioner, a Dr. Syed. (Resp. ex 2) Dr. Neal suggested that it could evidence of prior left hip pain which would be important for Dr. Neal's opinions. Respondent did obtain the records, (Resp ex 2) but the only evidence it offered was a visit of August 12, 2020, about two weeks after the accident, and pre and post op left hip surgery visits. In the 8/12/20 visit Petitioner went there at the request of his wife for possible cancer, as there was a history of cancer in the family, and he was seeking to order tests, which, if positive, he expected to be referred to a cancer specialist. (id. @ 7-9) There was no mention of the left hip incident or any left hip problems, but Mr. Hess already had filed his accident report

and already had an appointment to see Dr. Dworsky at approximately the same time. The appointment with the general practitioner was for a specific purpose, a cancer check (T48 and if the CTs reflected anything, for a referral. The appointment with Dr. Dworsky was at approximately the same time, although delayed due to an electrical storm at the doctor's office.

The Petitioner continued working through April 7, 2021, (T51) but was also experiencing back pain following a surgery by Dr. Sean Salehi in August of 2018. After post-surgery MMI 10/16/18, (Px 3 p36-37) the Petitioner did not return to Dr. Salehi until December 16, 2020, again for the specific purpose of some lower back pain, also inquiring as to the source of pain into the groin region, some numbness in the hands, and some neck stiffness (Px 2 p7). At that visit, under past medical histories there was no history regarding the left hip. Similarly, there were no histories of left hip issues in Dr. Salehi's records leading up to the final pre-accident visit of October 16, 2018, which demonstrated a quick recovery and return to work following back surgery (Px 2 p36-37). Pre-spine surgery symptoms were low back pain which radiated down the right leg to the calf (id @12). Mr. Hess testified, and Dr. Salehi's records confirmed, that the only groin pain prior to July 31, 2020 was some bilateral groin pain for the first few days following back surgery which resolved once he had a bowel movement. (id @ 23) (T34-35) At the second visit to Dr. Salehi in the winter of 2020-21, the doctor noted that the patient complained of pain in the left lower back that radiated into the left groin (id @11). It also noted at that point, for the first time, arthralgia of the pelvic region under PMH, presumably "past medical history", which

would encompass that the physician's assistant felt the groin pain which he had for a number of months would be arthritic in nature and emanating from the left hip and not the spine. She noted the groin pain was not explained by imaging of the spine and therefore prescribed a new MRI of the lumbar spine as well as an MRI of the left hip (id @ 13). Petitioner testified he would need to see a hip doctor if the hip was the problem. MRIs were carried out on both hips 2/1/21 at Advanced MRI and Imaging Center (Px 3 p 12-13) which as to the left hip showed tearing of the labrum, chondromalacia of the acetabulum, reactive subchondral/subarticular bone changes due to subchondral changes or bone bruise, plus mild gluteus medius insertional tendinosis, grade 1 strain of the iliopsoas muscle overlying the acetabulum and mild obturator externus bursitis.

After the hip MRI had been performed, Petitioner sought out a hip specialist, Dr. Benjamin Domb, first seen February 18, 2021. He gave a history of stepping to the step from his truck at work, holding onto the side rail with his left hand, turned his upper body to the left while his feet did not turn, causing twisting motion at the hips, especially the left one and felt immediately sharp pain at the left groin. Right hip pain started at the same time, but less intense. Patient had no pain at the hips prior to the date of the accident. Pain is 7/10 today at the left hip, located at the groin and lateral aspect of the of the hip. Does not radiate. More intense on the left, constant, sharp and throbbing. Occasional limping and other symptoms described. Continues working. (Px 4, p10) X-rays were taken, showing severe joint space narrowing, with associated sclerosis and osteophytes, worse on the left than the right. Review of the 2/1/21 left hip MRI imaging revealed extensive full thickness cartilage damage

throughout the left hip joint. (Id p16) Assessment was 62 y/o with left hip pain since 7/31/2020 in the setting of left hip arthritis exacerbated with work-related injury, cortisone injection today, tolerated well. Given the temporal onset of symptoms and mechanism of injury, the "current condition is related to the injury described above." He also noted the right hip pain but did not give a causal connection opinion as to that, nor did Petitioner receive right hip treatment. (Id. At 17) Dr. Domb advised as of that date he would likely need a Birmingham hip replacement if symptoms progressed (Px 4 p18). By March 4, 2021, as noted by the initial physical therapist report (Px 3, p14), pain had progressed to 8/10, with a history of "getting out of work truck," a consistent general description.

April 9, 2021 petitioner returned to Dr Domb. Pain was 8/10, same as with the initial physical therapy. The cortisone shot provided relief, but only for a day or two, the pain was limiting his ability to work and he'd like it fixed as soon as possible. He was restricted to "sedentary," (Id. At 24) which respondent did not offer (T40). On May 5, 2021, petitioner saw Dr M. Bryan Neal for a Section 12 exam at the request of the respondent.

Left hip Birmingham resurfacing was performed by Dr Domb July 20. 2021, and 3 ½ months later on November 4, 2021 he was returned to full duties MMI (T40-41, Px 4 p74). No compensation was paid for that period (T41). At that time, petitioner was placed on permanent restrictions of no regular lifting beyond 20 pounds, with occasional lifting up to 50 pounds. (Px 4 p74). On Feb 8, 2022, petitioner returned to Dr Domb's office (Px 4C, p9-12), to see a nurse practitioner with complaints he felt better several months after surgery than he did on the date of this exam, pain 1/10

going to 3/10, sometimes has a limp which he felt was a mental thing, doing well with occasional aches and tightness, mild pain after a lot of activity, seeking to continue physical therapy. He was provided a prescription, and was to return in July, 2022 for one year follow up. There was no evidence he pursued this physical therapy, as he was told again, he was MMI.

Medical Evidence

Dr Domb, from the first day he saw Petitioner, wrote that this twisting injury caused an aggravation of this left hip. Dr Neal generated a report of May 27,2021 for the May 5, 2021 exam. Dr Domb's note of 6/10/21 was a reply to this report. (Px 4a) They both agreed there was likely some arthritis pre-existing the injury. Dr. Domb agreed at the time of the Neal exam it was affecting petitioner's activities of daily living and that surgery was needed, but noted that although Dr Neal did not perfom them, Birmingham hip resurfacing was a valid and less invasive alternative to hip replacement. Dr. Domb noted that a twisting injury to the hip was a competent mechanism to injure or aggravate any condition of the hip, including pre-existing asymptomatic arthritis. From the temporal and mechanism standpoint, the current condition and need for treatment is very clearly causally related to his injury of 7/31/2020, as is the need for surgery. (Px 4A, p4 of 5). Following a supplemental report of Dr Neal of July 15, 2021, Dr Domb wrote a supplemental report of 9/29/21, narrowing the issues. (Petr ex 4b) One was that the history to Dr Dworsky was of an injury on a "dock, rather than a "deck plate." Dr Domb noted the deck plate was consistent with the first written description of the accident by petitioner, the form 45 (Px 6), which Dr Neal was never furnished. The second issue addressed was that

petitioner felt some right hip pain at the same time. Dr Domb opined whether petitioner had some right hip pain has nothing to do with his left hip nor his left hip injury. Other than there was no preexisting pain of either hip, petitioner was never questioned about his right hip by either attorney. Petitioner did testify both his feet started to turn and then were stopped by the corrugated surfaces portrayed in the photos, and it is virtually impossible to turn one hip without turning the other. Petitioner's right hip was never symptomatic enough to seek any medical treatment. Any claim on the right hip would not involve a gap in treatment, but rather no treatment whatsoever, with no medical opinion on causation.

At point 3 of his report, (Px 4B), Dr Neal had claimed the prescription for a Birmingham hip resurfacing had come from someone other than Dr Domb. This was refuted in the records and by Dr Domb, who discussed it with petitioner on the first visit. Point 4 was petitioner omitted the two spine surgeries from the history to Dr Domb on the intake form, something Dr Domb wrote would not have been relevant to the treatment of the hip.

Point 5 (id at p2) is the mechanism of injury. Dr Domb points out that a twisting injury to someone with pre-existing arthritis can cause permanent aggravation and lead to surgery by causing additional damage to already damaged cartilage or by causing compression of osteophytes associated with the preexisting arthritis. In the absence of an accident, "there is no reason to think that Petitioner would have become symptomatic at this time, or would have required any surgery. Surgery would never be done for radiographic findings in the absence of significant symptoms." Dr Domb at paragraphs 6,7 and 8 notes petitioner was working full duties prior with no

symptoms, the twisting mechanism, and that the findings at surgery support his opinions. (Id.)

Dr. Domb's Testimony

Dr Domb's testimony. (Px 7A), incorporates his reports, so those portions will not be restated. The MRI petitioner brought with him to the first visit was reviewed personally and revealed full thickness cartilage damage throughout the left hip. The X-rays he took at the first visit showed joint space narrowing with associated sclerosis and osteophytes, worse on the left. (Id p7). This is in contrast to the left hip X-ray taken by Dr Dworsky four weeks after the accident, personally reviewed by Dr. Domb, which showed early arthritis, mild to moderate (Id @ 16), and which Dr Dworsky had interpreted as showing no evidence of significant degenerative changes. (Petr ex 1, p11)

At the time of the first visit, Dr Domb inferred he was likely to have symptom progression. A shot given at that time provided immediate relief for one or two days, showing the hip as the source of the pain, but also the severity of the arthritis. Nothing during the surgery of 7/20/21 changed Dr Domb's opinion from the first visit on causation, because everything was consistent with his initial diagnosis and opinion. He explained why the Birmingham hip resurfacing was advantageous to a total hip replacement, and a cardio and general physical was required before surgery. He noted that the arthritis "clearly" progressed from the time of the Dworsky exam to his. (Id@17). In retrospect, any muscle pain at the time of Dr Dworsky's exam was "clearly secondary to the osteoarthritis that was aggravated by the injury." (Id @ 17).

Dr Domb testified that groin pain, or the lack thereof, has no clinical significance nor

affects his opinions on causal connection, and there's a lot of overlap in how those terms are used. (Id @18-19)

Dr Domb was asked whether a four-month gap in treatment from the time he saw Dr Dwosrky, leaving with the impression he had a strain, until he saw Dr Salehi, was significant. He testified it would have no significance, since he had hip pain right away. (Id@ 20). Likewise, the physical therapy prescribed by Dr Dworsky would not have mattered. (Id @ 18) Dr Domb's impression of Mr. Hess as a patient was that he was a great patient, done everything asked, been very compliant. Petitioner was temporarily totally disabled from the time of surgery until MMI. Id @21).

On cross, the comparison between the x-rays of 8/27/2020 and the first Dr Domb visit of Feb 25,2021 showed an acceleration of the left hip osteoarthritis. There was an increased narrowing of the joint space which represents progression of the damage to the cartilage, and also progression of sclerosis of the acetabulum and femur which represents the bony response to that loss of cartilage. The accident led to an acceleration of the arthritis. Although in general it can progress on its own, he didn't believe that was true in this case. (Id @ 23)

He testified the accident either caused or aggravated osteoarthritis of the left hip, although more likely than not it preexisted. (Id @ 24-25). He did not believe any advancement of arthritis in February or March was consistent with performance of activities of normal life. It was from the accident. (Id @25-26). Dr Domb emphasized it is not normal for a person to twist their hip in a way that incurs pain; it is not an activity of daily life (Id @ 28). He has not treated petitioner for his right hip, although he evaluated it to a degree. (Id @29)

On redirect, Dr Domb explained that a twisting injury which aggravates arthritis by causing damage to already damaged cartilage or by compressing osteophytes will not show on imaging as acute findings. (Id@30).

Dr. Neal's Testimony

Dr. Neal testified his fellowship training is in upper extremity, but he has a general orthopedic practice. (Resp ex 1, p5). Dr. Neal still does perform hip replacements, but he did far more when he did emergency room call. (Id@10) On exam performed May 5, 2020 Petitioner had a startup limp when he started walking, walked with a slightly more external rotation on the right, and he had hip pain walking. The left leg was a few millimeters shorter than the right. Left hip external rotation was less than the right, and he had left sided tenderness around his hip bursa. (Id at 15-16).

History was he was getting out of his truck, there are steps and a left sided hand bar, there's a deck behind the truck, he grabbed the hand bar with his left hand he was spinning around to get on the back deck, he turned sharply and his feet grabbed the corrugation on the metal, his body turned, his feet did not, and he twisted, feeling pain in his hip and groin. (Id @17-18) He considered twisting while stepping down an activity of daily life, and that twisting while stepping down would not cause sufficient force to aggravate bone arthritis, defining aggravation as a permanent worsening. (Id @ 19). Importantly, he admitted, absent an aggressive infection which destroys cartilage, "arthritis is a very slow process which develops over time" (Id @20). His opinion was petitioner may have felt pain that day, much like walking at Disney World or a long shopping trip, does not permanently aggravate arthritis, but is

a temporary manifestation. (Id @21)

If Dr Dworsky did not observe arthritis, there cannot be but minimal or normal wear and tear for someone 60 years old, but no traumatic arthritis or permanent worsening. (Id @23) He testified if there was an acute permanent worsening that started rolling the process downhill, he would not have expected him to be able to work full duties. He opined the etiology of the right hip arthritis would be the same as the left (Id@27) He testified to the definitions of chondromalacia and that over time the labrum can degenerate from the arthritic process. (Id @29) Osteoarthritis is a degenerative process which over time can become symptomatic itself without any activities at all. (Id@30).

April 9, 2020 a nurse practitioner noted left hip injection with one to two days relief, yet he told Dr Neal by his records there was no relief (Id@32). Clearly there was no long-term relief. Her assessment was severe hip arthritis exacerbated by a work injury, and that petitioner would be a good candidate for hip replacement surgery, something not noted by Dr Domb prior (for a correct record, Dr Domb himself from day one discussed a Birmingham hip replacement, not a total hip replacement, (Px 4, p18). As to a sudden increase in pain, petitioner from February to April went from 7/10 to 8/10 by the records, a worse pain score to some degree. (Id @33). Dr Neal felt the progression from February to April was genetic, as was the underlying root cause of the arthritis. (Id @35) Petitioner had told Dr Neal he was on Celebrex, an arthritic drug, for arthritis in his hands (Id @37) He discussed his disagreements with Dr Domb in their reports (Id 35-38). He also claimed medical literature, without citing any, that there's significant memory issues looking backwards in terms of

duration, onset and that people can be very erroneous or inaccurate, but even assuming petitioner was accurate on no prior symptoms, there comes a time when arthritis becomes symptomatic. If he never recalled pain until that day at work, that was the first day he felt arthritis symptomatically. (Id@40-43) Dr Neal felt MMI was moot since there was no accident, in his opinion (Id @45), but any pain he had that day would have resolved quickly.

On cross, his opinion remained that petitioner's degenerative condition "would have allowed his symptoms to be manifested during the described activity at work." In response to a question that his osteoarthritis makes him susceptible to pain once an activity occurs such as twisting at work as he described to you, the answer was "it may or may not." (Id @50) His verbiage in his report that "I do believe that the natural expected arthritis process is one which would allow him to experience the painful hip from the event he described, but did not cause the underlying degenerative hip condition which is painful," remained his opinion. He admitted the 5/10 pain for a month history he gave Dr Dworsky could be attributed to the twisting episode, if it was a strain, but if it was arthritis that's generally a "much shorter lasting."

Dr Neal (at page 56) testified that the pain at the time of his exam was arthritic. He then offered "If you ask me what could the pain have been due to at the time of Dr Dworsky's evaluation, which I was not asked, I can answer that question if you'd like but at my(sic) exam it was due to arthritis. (Id p56) At pages 56-57 when asked where in his two reports did he diagnose a strain at the time of Dr Dworsky's exam, he responded he was not asked. After being asked that if it was a strain as well, wouldn't he expect improvement in 4 weeks, to which he answered yes, he was then

asked that except for some initial improvement, isn't the history to Dr Dworsky pain 5/10 going on for a month?, he stated "I'm going to let the record speak for itself." (id @58-59) Then at page 59 he testified it may be in Mr Hess' case the sprain didn't get better. He then wavered that "I could be wrong and that he had no arthritic pain that date and it was all a strain, but it would not be unexpected that this was the first day he felt arthritic pain. (id @60)

He again claimed he was never asked as to what possible diagnosis he could have had on August 27(when he saw Dr Dworsky), yet the adjuster's question to him was "what is Mr Hess' diagnosis?". Is the diagnosis and/or diagnostic findings causally related to the reported July 31, 2020(sic) work injury? Please explain." To which he still wouldn't confess he had been asked the diagnosis, but only replied the arthritis would allow him to experience the painful hip from the event he described but did not cause the painful condition. (Id @61-62). He further claimed strain injuries could not aggravate osteoarthritis (Id @63) When asked at page 65 to assume Mr. Hess' pain generator was osteoarthritis as he had written, when would he expect it to subside since he's describing it as temporary, he responded he would not expect it to subside, but to progress, other than when someone takes a long walk like at Disney World and lessens the activity, the pain goes away. (Id @65-66)

Dr Neal never asked for or reviewed the x-rays taken by Dr Dworsky four weeks after the accident (Id @67-68). The report of "No evidence of significant degenerative changes" would have referred to the osteoarthritis. (Id @68) Yet when asked if the changes on x-ray from those reported by Dr Dworsky to those taken at his 5/5/21 exam show the arthritis had progressed significantly, he responded he didn't want to

make a statement on that since the 8/27/2020 report was silent on the presence or absence of osteoarthritis from degenerative change, even though he just admitted any degenerative changes referred to by Dr Dworsky was the osteoarthritis. When pressed on the issue, he switched to a different issue, that people can have significant symptoms with minimal x-ray findings or terrible arthritic findings with no symptoms. (Id@70).

He did admit the greater the amount of arthritis, the more likely a person will have symptoms, which evidences petitioner's claim of no pre-accident symptoms was consistent with the paucity of x-ray findings four weeks later, by either Dr Dworsky's or Dr Domb's actual reading. When asked this very question, though, Dr Neal would only admit that the lesser findings would be more supporting that he had a strain (Id @71-72). When asked again to assume those x-ray findings, would that make it more likely Mr Hess would be asymptomatic before July 31, he didn't understand the question. (Id @72-73)

He admitted that spine surgeons will pay attention to hips since symptoms from the back and hips can mimic each other (Id@74). Dr Neal did suggest it would be helpful to review the records of Dr Syed and Salehi to know with greater certitude about pre-existing symptoms (Id @75), and he was never furnished those records. (Id @ 77) Petitioner put in evidence the records of Dr Salehi, Px 2, and respondent only put in some post-accident records of Dr Syed (Rx 2), but nothing from before, although Dr. Syad was his primary care provider for 17 years (Neal report 5/27/21, p14). Dr Neal asked petitioner five different ways whether he had pre-accident hip pain (Id @78). When asked whether there was anything in the medical records that

Mr. Hess' condition improved either on imaging or reports of pain, he could only say that each record would so state (Id@81). He has never operated for hip arthritis unless the imaging was at the moderate level (Id@82). He denied saying arthritis is a very slow process. (Id @84), notwithstanding his statement at page 20 of his deposition that absent a cartilage infection, "arthritis is a very slow process which develops over time." Thus, when he wanted to claim petitioner's arthritis was pre-existing, he claimed arthritis was a very slow process to support the claim, but when confronted with the rapid progression after the accident, evidencing an acceleration from the accident, he refused to even acknowledge he made the statement.

The physical therapy Dr Dworsky prescribed would not have helped if the condition was osteoarthritis. He's seen patients who work with pain until a condition inhibits performance at work (Id @87). By March 4, 2021 petitioner's reported pain was 8/10. (Id @88) He testified "I don't view the event of that day to have been a true accident, but he did to in truth his hip plant and turn and twist." (T91)

Finally, when asked to assume the episode with the hip where his feet are planted, contemporaneous pain, and excluding improvement that day, and the pain never improves to the date of the Section 12 exam, except some relief from Celebrex, would he consider that a deterioration, he responded "understand those hypothetical statement, one might view it as deteriorating if it is assumed never to improve and worsen over time." (Id@95)

LEGAL CONCLUSIONS AND FINDINGS OF LAW

C. In support of the Arbitrator's decision regarding accident arising out of and in the course of employment, the Arbitrator makes the following findings and conclusions: it is clear that the truck, as is demonstrated in photos, has a configuration where the driver has to move, to get to the flatbed, from a step to a deck plate, both of which are corrugated, and at that time while grabbing the handle behind the cab his feet became stationary due to the corrugated surfaces and he twisted his left hip. The configuration makes it understandable why the histories in the records may contain variations, especially since docks are more commonly associated with trucking than would be a deck plate. There is evidence in the record of right hip pain at the same time, and it is impossible to twist or move one hip without moving the other, yet because of the severe pain in the left hip Petitioner did not claim to notice anything on the right hip other than significantly less right hip pain following the incident.

Petitioner testified he told the owner of the Company of the incident on the date of the claimed accident. He also testified that he told the owner let's give it a few days before I seek medical care. The petitioner testified he told his boss the following week that his pain had not improved, and he filled out an accident report on August 7, 2022. This testimony is unrebutted. It was also noteworthy that Petitioner had successfully completed a run before this, evidencing that he was able to work full duties without complaint earlier that day. The petitioner initially saw Dr Dworsky on August 27, 2020. Apparently, an earlier appointment was cancelled due to an electric outage. The

history in the initial medical record of Dr. Dworsky was that petitioner had instant left hip pain after turning on a dock of one month's duration. The petitioner also stated he was able to continue working (Px1 p9).

McAllister v. Illinois Workers' Compensation Comm'n, 2020 IL 124848, holds where an on-the-job incident, while performing actual duties, causes immediate pain, this constitutes an accident arising out of and in the course of the employment, even when the employee is only performing normal bodily movements. The activities of the Petitioner herein were well beyond those of the sous-chef rising up after unsuccessfully retrieving a container of carrots in McAllister. Sisbro v. Industrial Commission, 207 Ill. 2d 193 (2003) is particularly on point. There a trucker dismounted from his cab, there was no defect or anything unusual where his foot landed, yet the work activity resulted in a twisted ankle which aggravated or accelerated Charcot osteoarthropathy. Id. at 215.

The configuration of the truck herein resulted in petitioner twisting his hip due to his feet planting while hurrying to get the concrete panel unloaded before lunch so as to not waste an hour when the crane would stop operating. The Arbitrator does not believe that the history in the medical records of Dr. Dworsky referencing a turning or twisting incident on a dock as opposed to the deck of the truck is fatal to petitioner's claim. The Arbitrator felt that the petitioner was honest and believed his testimony to be credible during the hearing. It is very conceivable to the Arbitrator that the recording of the word dock as opposed to deck could have been a simple typographical error or simply hearing the wrong word.

Based on all of the above, the Arbitrator finds Petitioner sustained an accident arising out of and in the course of employment.

E. In support of the Arbitrator's decision regarding notice, the Arbitrator makes the following findings and conclusions: Petitioner testified he told his boss, an owner of the company, of the accident on the day it occurred. On August 7, 2020, Petitioner filled out, signed and handed to his boss the accident report, advising as to how it happened and what body part was hurt, in order to see Dr. Dworsky. Based on the above, the Arbitrator finds that petitioner gave respondent proper Notice in this case, well within the 45-day statutory requirement.

F. In support of the Arbitrator's decision regarding causal connection, the Arbitrator makes the following findings and conclusions: the Arbitrator considers the chain of events, the circumstantial evidence, including imaging, the medical records, petitioner's testimony, and the medical testimony. The circumstantial evidence found in the imaging is also significant to causal connection, in that the Petitioner went from what was, at worst, early mild to moderate arthritic changes in his left hip, which supports his claim that he was asymptomatic beforehand as being more likely than someone with severe arthritis, and a condition Dr Neal would not operate on, to severe arthritis and the need for hip surgery within months, with the condition all the while progressing while he was continuing to perform his full duties. As the Supreme Court said in a repetitive trauma context, "An employee who

continues to work on a regular basis despite his own progressive ill-being should not be punished." Durand v Industrial Commission, 224 Ill. 2d 53 at 70 (2006).

By the circumstantial evidence in the case, particularly the imaging, the Petitioner did not have significant hip arthritis on the date of the accident, July 31, 2020. Four weeks later, Dr. Dworsky felt there were no significant degenerative changes. Dr. Neal admitted that this would refer to the hip arthritis. The actual x-ray was also read by Dr. Domb, who found that as of that time, four weeks after the accident, the Petitioner had early mild to moderate hip arthritis. Dr. Domb testified that the accident could have caused the arthritis, but more likely it aggravated the arthritis. Dr. Domb explained in his testimony the mechanism of injury where trauma can aggravate or accelerate arthritis. Important to the Arbitrator, the circumstantial evidence herein is that Petitioner went from what was likely mild to moderate, arthritis at the time of his accident, to having significant arthritis five plus months later notwithstanding that the arthritic process is normally slow. It appears that the accident not only aggravated and accelerated the arthritis but did so at an extremely accelerated rate.

At the time of the MRI's ordered by Dr. Salehi, a right hip MRI was done, which also showed some arthritis, which is only relevant in that there was imaging evidence to support right hip symptoms, and that with such imaging he never required treatment on the right, yet with the trauma to the left and lesser findings on Dr Dworsky's x-rays, he was not only significantly symptomatic at the time of Dr. Dworsky's exam, but in the early stages of a significant progression.

Petitioner's arthritic pain went from zero at the time before the accident to 5 out of 10 to the time he saw Dr. Dworsky four weeks later, with no interim improvement, and then progressed to 6, 7, and 8 out of 10, to the extent that Dr. Domb took him off work April 9, 2021, approximately nine months post-accident. Dr. Domb performed a Birmingham hip resurfacing on the left hip on Petitioner July 20, 2021 (Px.5a). Petitioner returned to work November 8, 2021, three and one-half months later. Petitioner has been working for Respondent ever since, performing the same duties.

A recent case, which is and can be cited as persuasive under amended Supreme Court Rule 23, is Greater Peoria Mass Transit Dist. D/b/a Citibank v Illinois Workers' Compensation Commission, 2021 Il App (3d) 210223WC-U. There a Claimant had a pre-existing symptomatic condition, cervical degenerative disc disease. The Claimant, a bus driver, extended his right arm at shoulder level to grasp the steering wheel, and while doing that experienced extreme pain and numbness radiating from his neck down his right arm. He had been experiencing pain and numbness in the right shoulder and biceps on the day of the accident and for months prior thereto. The court cited a prior published opinion, Schroeder v Illinois Workers' Compensation Comm'n, 2017 Il App (4th) 106192WC, para 26, that "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 has been." Id. at p 13. The Court at page 14 of the order further cited Schroeder for holding that "where an accident accelerates the need for surgery, the claimant may recover under the Act." In Schroeder, a claimant with severe prior symptomatic degenerative changes in the spine was found to have aggravated and accelerated her condition due to increased symptoms even though there were no changes between MRIs and x-rays taken before and after the accident. Dr. Neal admitted there would have been a deterioration from the accident under the facts presented. The Arbitrator finds that the evidence in the case at bar is significantly stronger than and fits within all fours of the aforesaid two cases. He finds Dr. Domb better qualified and credible, and adopts his findings and opinions, and he finds Dr Neal not credible, something which is not new to the Commission. e.g., Downey v Village of Palatine, 18 IWCC 0712; Manos v Ford Motor Co, 18 IWCC 0325.

The Arbitrator also notes gaps in treatment while petitioner continued to work. The four-week gap to get into Dr. Dworsky was due to an electrical problem in his office which delayed the appointment so that it was four weeks after the incident rather than two. Petitioner and his boss had agreed to delay initial treatment to see if the condition improved, and the two weeks to get in and the two-week delay is insignificant.

Then, with Dr. Dworsky diagnosing a probable strain, petitioner testified he didn't want to run up a bill, so he worked instead of going to therapy until he saw Dr. Salehi and underwent an MRI four months later. In Pileggi v Cicero Fire Dept, 15

IWCC 0984, a firefighter injured his hip, went to the ER, and otherwise sought no treatment for 14 months. Like here, he thought it would get better. He had end stage arthritis for which he underwent a Birmingham hip resurfacing. Like here, he was asymptomatic before, and after the pain never went away. The Commission unanimously found causation.

Here, a four-month gap is not particularly lengthy, and is reasonably explained since Dr Dworsky found no significant degeneration and told him it was a probable strain, which to petitioner meant it would likely heal. When it didn't, and with groin pain being either a back or hip issue, it was discussed with Dr Salehi, a hip MRI was ordered, and treatment promptly began. The Arbitrator finds the gaps here to be not particularly lengthy, and reasonably explained.

Based on all of the above, the Arbitrator finds a causal connection between the accident of July 31, 2020 and the condition of the left hip requiring Birmingham hip resurfacing.

K. In support of the Arbitrator's decision regarding Temporary Total Disability Benefits, the Arbitrator makes the following findings and conclusions: Following the accident, Petitioner continued working. When he first saw Dr Domb February 18,2021, Dr. Domb inferred his condition would progress. Petitioner was 7/10, and was allowed to continue to work. The next visit, April 9, 2021, the pain increased to 8/10, and he was restricted to "sedentary," which respondent didn't offer. Following an injection and physical therapy, Surgery was July 20, 2021, and three and a half months later, November 4, 2021, Petitioner was released full at MMI to return to work, where he has been working ever since.

Based on the Arbitrator's opinion re causal relation and the unrebutted findings of Dr. Domb re the petitioner's ability to work, the petitioner is awarded TTD from April 9,2021 through Petitioner's release to return to work Nov. 4, 2021, a total of 30 weeks.

J. In support of the Arbitrator's decision regarding Medical, the Arbitrator makes the following findings and conclusions: The medical bills, petitioner's exhibits 8 through 19, were admitted into evidence without a hearsay objection with the understanding respondent was objecting to liability and that they should be subject to the appropriate reductions afforded by the Illinois Medical Fee Schedule if awarded. All treatment therein appears directed towards the left hip, or in the case of exhibit 15, Dr. Salehi's bill, a differential diagnosis including the hip. The medical bills entered into evidence total $226,875.09 are awarded subject to the Illinois Medical Fee Schedule. Respondent shall have a credit for sums it paid to the extent of $6,417.34, and should a claim be made against respondent for a bill from Adco solutions, it shall have a credit no greater than $8,222.56 toward such claim.

L. In support of the Arbitrator's decision regarding nature and extent of the injury, the arbitrator makes the following findings and conclusions:

Applying the factors under section 8.1b,

1/ No AMA impairment rating was offered into evidence by either party. The Arbitrator finds that this factor does not weigh in favor of decreased or increased permanence.

2/The occupation of the injured worker is a flatbed truck driver, which requires lifting up to 50 pounds and moving even greater weight, as well as sitting for long periods

of time. The Arbitrator finds that the relatively moderate to heavy nature of the petitioner's job duties weighs in favor of greater permanence.

3/The age of the employee at the time of injury was 62. The Arbitrator notes the petitioner is in the later stages of his work life expectancy. The petitioner will have to live with the effects of his injury and surgery for a much shorter time period than that of a younger worker. The Arbitrator finds that this factor weighs in favor of decreased permanence.

4/There was no evidence offered at trial that the petitioner sustained any earnings loss as a result of the injury or subsequent treatment. The Arbitrator finds that this factor weighs in favor of decreased permanence.

5/The evidence of disability corroborated by the treating medical records:

Petitioner underwent Birmingham hip resurfacing, which Dr. Domb explained was a better alternative to a total hip replacement as there would be more bone available when that additional surgery would be needed, and which total hip replacement was reasonably foreseeable. Petitioner testified the groin pain is gone, and the left hip pain is alleviated, but not totally gone. He can't run jog or go on long hikes without left hip pain. He still works at Mil-Ron, doing the same job. On longer runs, like Kenosha, later in the day he gets hip pain. His job is limited in that he just goes slower. (T43). He did return to Dr Domb after MMI, (Px 4c), reporting he felt better several months after surgery than the time of the exam, with pain 1/10 increasing to 3/10 and a limp he felt was mental. He had occasional aches and tightness performing work activities and lifting up to 50 pounds. He was given a script for physical therapy but did not testify he went. The Arbitrator adopts Dr Domb's testimony as to what a

Birmingham hip resurfacing is and does, being a significant surgery, which will lead to another. The petitioner was released to his pre-accident job duties on November 4, 2021 and has been performing thse duties through the date of the Hearing. The Arbitrator finds that this factor weighs in favor of increased permanence.

Based on all of the above, the Arbitrator finds that petitioner sustained a 30% loss of use of the left leg under Section 8(e) of the Act.

M. With respect to section 19(l) penalties, 19(k) penalties and Attorney fees pursuant to Section 16: The Arbitrator finds it was not wholly unreasonable, nor in bad faith and vexatious for the Respondent to rely on Dr Neal's opinion of no causal connection. As such, the Petition for penalties on the unpaid TTD pursuant to sections 19(k), 19(l) and attorneys' fees pursuant to section 16 of the Act is denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC031749
Case Name	Ronald Rowe v. The American Coal Company
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0297
Number of Pages of Decision	16
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Kirk Caponi
Respondent Attorney	Kenneth Werts, Julie Webb

DATE FILED: 7/7/2023

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ronald Rowe,

Petitioner,

vs. NO. 16WC 31749

American Coal Company,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of occupational disease, permanent disability, legal error, evidentiary error, section 1(d)- Section 1(f), 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 1, 2022, is hereby affirmed and adopted.

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

No bond is required for removal of this cause to the Circuit Court. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

July 7, 2023

SJM/sj
o-5/24/2023
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/s/ *Stephen J. Mathis*
Stephen J. Mathis

/s/ *Deborah J. Baker*
Deborah J. Baker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC031749
Case Name	ROWE, RONALD v. AMERICAN COAL COMPANY
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Kirk Caponi
Respondent Attorney	Kenneth Werts

DATE FILED: 6/1/2022

THE INTEREST RATE FOR THE WEEK OF JUNE 1, 2022 1.58%

/s/ Jeanne AuBuchon, 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

RONALD ROWE
Employee/Petitioner

v.

AMERICAN COAL COMPANY
Employer/Respondent

Case # **16** WC **031749**

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 **Herrin**, on **January 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 **Sections 1(d)-(f) of the Occupational Diseases Act**

FINDINGS

On **February 11, 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 not*** sustain an accident that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner's earnings were **$70,229.12** and the average weekly wage was **$1,350.56**.

On the date of accident, Petitioner was **58** years of age, ***married*** with **0** dependent children.

Petitioner claims no medical.

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

No benefits are awarded.

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

JUNE 1, 2022

PROCEDURAL HISTORY

This matter proceeded to trial on January 21, 2022, pursuant to Section 7 of the Illinois Workers' Occupational Diseases Act (820 ILCS 310) (hereinafter "the Act"). The issues in dispute are: 1) whether the Petitioner sustained an occupational disease arising out of and in the course of his employment, including whether the requirements of Sections 1(d)-(f) were met; 2) the causal connection between exposure to the occupational disease and the Petitioner's current condition of ill being; and 3) the nature and extent of the Petitioner's injury.

FINDINGS OF FACT

An Application for Adjustment of Claim was filed on October 17, 2016, wherein the Petitioner alleged he sustained an occupational disease of his lungs, heart, pulmonary system and respiratory tracts. (AX2) The Petitioner alleged he sustained an occupational disease as a result of inhalation of coal mine dust, including but not limited to coal dust, rock dust, fumes and vapors for a period in excess of 28 years, with the date of last exposure being February 11, 2016. (Id.)

The Petitioner was 58 years old at the time of his last exposure. (AX1) He lives in Johnston City, Illinois, with his wife. (T. 10) He graduated from high school and had no other formal education. (T. 10-11) In addition to coal dust, he was regularly exposed to and breathed silica dust, roof bolting glue fumes and diesel fumes. (T. 11) On the last date of exposure, the Petitioner was working as a pumper/examiner for the Respondent. (T. 12) He said he was exposed to coal dust on his last day of employment, at which time he was laid off due to the mine shutting down. (T. 12) He had since been working as a truck driver and yard man at Bob Stotlar Building Center and was working 52 hours per week. (T 13) He waits on customers, loads customers, loads trucks, gets loads together and delivers loads to customers. (T. 26) He said he loads wood by hand and by using forklifts. (T. 26-27)

The Petitioner began his mining career in 1979 as a bottom laborer with Old Ben Coal Company, where he worked for 14 years. (T. 14) As a bottom laborer, the Petitioner set timbers, ran equipment underground, roof bolted and shoveled spillage onto the belts. (T. 15, 18) He left Old Ben around 1993 and worked at Bob Stotler Building Center for about six years. (T. 18-19) He then went to work for the Respondent in 2002 as a laborer. (T. 19) About two or three years later, he began running a shuttle car, driving loads of coal from the face to the belt. (T. 20) After another two years, he became a pumper, setting up pumps to pump water out of the mines. (T. 20-21) In his last two years, he was an examiner – going around the mine checking the faces, returns and belt lines to make sure there are no fires and checking roofs for safety. (T. 21-22) He said that but for the layoff, he would still be working in the mines. (T. 25)

While working at the mines, the Petitioner underwent periodic chest X-ray screenings by the National Institute for Occupational Safety and Health (NIOSH). (T. 30) He received letters regarding the results of those screenings but, at the time of Arbitration, did not have copies. (Id.) The Respondent submitted NIOSH screenings from 1984, 2002, 2011 and 2015 that were read as negative. (RX9)

The Petitioner testified that he first started noticing breathing problems in his last two or three years working in the mines that caused him to get out of breath easily while doing a lot of walking. (T. 22) His breathing worsened until he left mining and improved since then. (T. 22-23) He said playing with his grandchildren and doing too much activity or a lot of walking makes it a little hard to breathe. (T. 23) He said he plays nine holes of golf once or twice a week. (T. 31-32) The Petitioner testified that that he has other health issues, including diabetes, high cholesterol, high blood pressure, a six-vessel heart bypass in 2009, a cardiac catheterization in 2017 and three stents in 2019 after suffering a heart attack. (T. 24-25, 28-29) These issues were

detailed in the Petitioner's medical records from September 2, 1999, through June 27, 2021. (RX4, RX5, RX6, RX7) In those approximately 20 years, the Petitioner sought treatment for upper respiratory infection and bronchitis in 2005, sinus infection in 2006, upper respiratory infections in 2008 and 2011, pharyngitis in 2006 and 2013 and acute sinusitis and cough in 2014. (RX4, RX5) Chest X-rays throughout that time were negative for pulmonary issues, but they were not B read. (RX5, RX6, RX7) On October 12, 2009, he underwent spirometry testing that showed FEV1 (forced expiratory volume) of 4.22, 94.1 predicted; FVC (forced vital capacity) of 3.56 liters, 97.6% predicted; and FEV1/FVC of 84.3%. (RX5) In 2020, the Petitioner told his cardiologist that he was doing heavy physical work at the lumber store and was tolerating it well. (RX7)

On September 26, 2016, Dr. Henry K. Smith, a "B-reader" radiologist, examined a chest X-ray of the Petitioner taken on September 12, 2016, and found interstitial fibrosis of classification p/s, in the bilateral mid to lower lung zones of a profusion 1/0. (PX2) He found no chest wall placques, classifications or large opacities. (Id.) He saw mild thickened interlobar fissures. (Id.) The Petitioner's heart size was within normal limits, and he had a calcified thoracic aorta. (Id.) Dr. Smith diagnosed the Petitioner with simple coal workers' pneumoconiosis (CWP). (Id.)

On March 4, 2017, at the request of the Respondent, Dr. Cristopher Meyer, a "B-reader" radiologist, reviewed the chest X-ray from September 12, 2016, and found no evidence of. (RX1, Deposition Exhibit B) He noted that the Petitioner's lungs were clear, and there were no small-rounded, small-irregular or large opacities. (Id.) In his report, Dr. Meyer disagreed with Dr. Smith's findings, stating that the examination was normal. (Id.) Dr. Meyer also reviewed the NIOSH X-ray from August 21, 2015, with identical results. (Id.)

At his deposition on November 3, 2017, Dr. Meyer testified consistently with his reports. (RX1) He explained that a profusion how B readers define the density of small opacities in the lung – with a zero signifying a normal lung, one being mild amount of disease, two being medium involvement and three being severe. (Id.) He said a profusion value fraction consists of the numerator of what the reader thinks the value is, and the denominator implies the other closest value. (Id.) He said a 1/0 profusion is a film that is right on the borderline between abnormal and normal. (Id.) Regarding his examination of the 2015 X-ray, which was taken six months before exposure ceased, Dr. Meyer stated it would be possible, but extremely improbable for CWP to show up another 2½ years later, which was when the September 12, 2016, X-ray was taken. (Id.) He said that symptomatic CWP should be evident on a chest X-ray. (Id.) He said that very rarely will simple pneumoconiosis progress once exposure to coal dust ceases. (Id.) He stated that treatment records, pulmonary function tests and a patient's complaints would not change his reading of an X-ray. (Id.)

Regarding CWP in general, Dr. Meyer agreed it is a chronic, progressive disease that can progress even after the miner leaves the exposure. (Id.) He also agreed that simple CWP can progress to life-threatening conditions, such as progressive massive fibrosis and cor pulmonale and that the rate of progression of CWP, and the shape, size and location of coal macules varies from miner and within the lungs of the same miner over time. (Id.) He acknowledged that a miner with a 1/0 profusion probably won't know he has CWP. (Id.) He said that rarely will a miner have profusion in the lower lung zones. (Id.) He acknowledged that two equally qualified "B-readers" of chest X-rays can disagree as to whether they think they are seeing small opacities. (Id.) He said it is important to recognize that reading X-rays is an interpretative skill, and that is why there are divergences of opinion. (Id.)

On May 23, 2017, the Petitioner saw Dr. Suhail Istanbouly, a board-certified practitioner in internal medicine, pulmonary medicine, critical care medicine and sleep medicine. (PX1, Deposition Exhibit 2) In his report, Dr. Istanbouly noted that the Petitioner had been experiencing a mostly dry, mild cough with no significant sputum production or hemoptysis intermittently for the past several years. (Id.) The Petitioner reported no nocturnal dyspnea and no significant exertional dyspnea. (Id.) He said he was able to walk for three miles without any breathing problems. (Id.) The Petitioner reported that he had chest pain, tightness and wheezing in February 2017 that have not recurred since. (Id.)

A spirometry test conducted that day was within normal range with FEV1 of 3.01 liters, 88 predicted; FVC of 3.57 liters, 84% predicted; and FEV1/FVC of 84%. (Id.) Dr. Istanbouly reviewed the chest X-ray from September 12, 2016, and performed a physical examination with normal results in all areas, including respiratory. (Id.) He diagnosed the Petitioner with early stage CWP. (Id.) He opined that long-term coal dust exposure was a significant contributor to the Petitioner's chronic respiratory symptoms of chronic intermittent cough and occasional chest tightness and wheezing. (Id.) He wrote that it was advisable from a medical standpoint for the Petitioner to avoid any further coal dust inhalation to prevent the progression of his lung disease. (Id.)

In a deposition on November 2, 2018, Dr. Istanbouly testified consistently with his report. (PX1) He said that the Petitioner's working six shifts per week over 28 years equated to 33½ years of mine exposure that he categorized as long-term heavy coal dust exposure. (Id.) He stated that there was a good possibility that the chest tightness, wheezing and mostly dry, intermittent, mild cough correlated to long-term coal dust inhalation and that the symptoms indicated underlying pulmonary pathology. (Id.) Dr. Istanbouly said it was possible to have injury or disease in the

lung despite having normal pulmonary function test results, normal blood gases and normal physical examination of the chest. (Id.) He said that even if exposure to coal mine dust ends, CWP can still progress. (Id.)

On cross-examination, Dr. Istanbouly acknowledged that the Petitioner did not meet the GOLD standard definition of having COPD but said it may be argued that intermittent cough and wheezing could be the beginning of early-stage COPD. (Id.) Dr. Istanbouly also said he did not review any of the Petitioner's prior medical records, but stated that would not change his diagnosis based on his reading of the X-ray, pulmonary function tests and his physical examination. (Id.)

The Petitioner underwent another set of lung function tests on August 7. 2017, at Methodist Hospital in Henderson, Kentucky. (RX3) The tests showed normal spirometry and diffusion capacity. (Id.)

A review of the Petitioner's medical records was conducted at the request of the Respondent on June 6, 2018, by Dr. James Castle, a board-certified physician in internal medicine, with a subspeciality in pulmonology. (RX2, Deposition Exhibit C) He reviewed the records that were submitted at arbitration, as well as the reports from Drs. Smith, Istanbouly and Meyer. (Id.) Dr. Castle, a former B reader, read the September 12, 2016, X-ray as showing no evidence of CWP. (Id.) He concluded that the Petitioner did not suffer from any pulmonary disease or impairment occurring as a result of his occupational exposure to coal mine dust. (Id.) He said the Petitioner did not have any significant physical findings indicating the presence of an interstitial process, except for one instance of crackles during an acute illness. (Id.) He noted that the Petitioner's pulmonary function tests were normal, showing no evidence of restriction or obstruction. (Id.)

Dr. Castle testified consistently with his report at a deposition on August 9, 2019. (RX2) His testimony regarding interpretation of chest X-rays and the physiology, progression and effects of CWP was similar to Dr. Meyer's testimony. (Id.) Regarding lung function testing, he said that looking at an individual's diffusion capacity would be of benefit to determine if CWP that was not showing up on an X-ray was causing impairment. (Id.) He explained that diffusing capacity is a measure of the lung's ability to take a gas out of the ambient air and get it into the bloodstream. (Id.) He said that if the diffusing capacity is normal, the blood-gas transfer mechanisms are normal, and the alveolar-capillary membrane, which is part of the interstitium of the lung, is intact. (Id.) He said it is the interstitium of the lung that gets scarred when an individual develops CWP. (Id.) He said the Petitioner's lung function tests told him there was no damage to the interstitium that he could discern. (Id.)

Regarding the impact of coronary artery disease, Dr. Castle stated that it can cause dyspnea on exertion or at rest with or without chest pain. (Id.) He opined that the Petitioner's degree of cardiac disease may result in significant shortness of breath – particularly with exertion. (Id.) He also said the Petitioner's obesity may result in significant shortness of breath as well as obstructive sleep apnea and physiologic abnormalities but said he did not think it caused the Petitioner any significant respiratory problems. (Id.)

On cross-examination, Dr. Castle acknowledged that a person could have pathologic or radiographic CWP and not have symptoms and have a normal diffusion capacity. (Id.) He said that even based on Dr. Smith's reading of the September 12, 2016, X-ray he did not believe the Petitioner would have a progressive massive fibrosis (PMF) lesion in his lifetime. (Id.) He denied that an examining physician would be in a better position than one reviewing records to determine whether a person had CWP, noting that an examination is a snapshot, while a review of historical

information and objective data over a period of time is more like a motion picture in comparison. (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 the Petitioner suffer an occupational disease which arose out of and in the course of his employment by the Respondent?

Section 1(d) of the Act provides that the term "Occupational Disease" means a disease arising out of and in the course of the employment or which has become aggravated and rendering disabling as a result of the exposure of the employment. Further, such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public.

The Arbitrator finds that the Petitioner has failed to prove by a preponderance of the evidence that he has an occupational disease as defined by the Act. Although Dr. Smith reported small opacities on the Petitioner's chest X-ray and Dr. Istanbouly diagnosed the Petitioner with CWP, there were no other indications of lung disease, such as chronic bronchitis, asthma, emphysema or any other form of COPD. Dr. Istanbouly identified intermittent cough and occasional chest tightness and wheezing as signs of disease. However, the Petitioner related only one incident of chest tightness and wheezing that occurred prior to his heart attack and placement of stents. The symptoms Dr. Istanbouly noted were did not appear to be intermittent or occasional from the records of the Petitioner's numerous doctor visits from 1999 through 2021. In addition, three sets of lung function tests showed normal functioning.

On the other hand, Drs. Meyer and Castle's opinions correlated with the Petitioner's broader medical history. Although they recognized that different B-readers could reach different

conclusions when reading X-rays and that Dr. Smith's reading was not necessarily "wrong," they pointed to a slight likelihood of the Petitioner developing lung disease. A slight likelihood does not suffice for proof by a preponderance of the evidence. In addition, Dr. Castle reviewed the Petitioner's voluminous medical records was able to give his opinions based on a 20-year history of the Petitioner's medical conditions – in his words, the full motion picture rather than a snapshot. Thus, the Arbitrator gives greater weight to Drs. Meyer and Castle's opinions.

Regarding the element of disablement, Section 1(e) of the Act provides defines the term as an impairment or partial impairment, temporary or permanent, in the function of the body or any of the members of the body, or the event of becoming disabled from earning full wages at the work in which the employee was engaged when last exposed to the hazards of the occupational disease by the employer from whom he or she claims compensation, or equal wages in other suitable employment. There was little to no evidence of disablement that could be connected to CWP. The Petitioner told Dr. Istanbouly that he was able to walk three miles without difficulty, and he testified that he plays nine holes of golf twice a week. He has been able to work more than 50 hours per week at a job that entails physical demands and told his cardiologist that he tolerated his duties well. Therefore, the Arbitrator finds that the Petitioner has not proved disablement by a preponderance of the evidence.

Lastly, Section 1(f) of the Act provides that no compensation shall be payable for or on account of any occupational disease unless disablement occurs within two years after the last day of the last exposure to the hazards of the disease. Based on the findings above, this issue is not reached.

Based on all of the above, the Arbitrator finds that the Petitioner has not proved by a preponderance of the evidence that he suffers from a compensable occupational disease, as defined by the Act, that arose out of and in the course of his employment with the Respondent.

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

In light of the findings above, the Arbitrator does not reach this issue.

Issue L: What is the nature and extent of the Petitioner's injury?

In light of the findings above, the Arbitrator does not reach this issue.

Issue O: Other issues: Disease, causation and Sections 1(d)-(f) of the Occupational Diseases Act.

These issues were addressed above under Issue C.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC021291
Case Name	Renata Paciora v. Presence Resurrection Medical Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0298
Number of Pages of Decision	20
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Jacob Wilhelm
Respondent Attorney	Jennifer Rizk-O'Lynnger

DATE FILED: 7/7/2023

/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

Renata Paciora,

Petitioner,

vs. NO. 17WC 21291

Presence Resurrection Medical Center,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, causal connection, prospective medical care, 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 August 19, 2022, is hereby affirmed and adopted.

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

No bond is required for removal of this cause to the Circuit Court. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

July 7, 2023

SJM/sj
o-5/10/2023
44

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

/s/ *Deborah J. Baker*
Deborah J. Baker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC021291
Case Name	Renata Paciora v. Presence Resurrection Medical Center
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	17
Decision Issued By	Joseph Amarilio, Arbitrator

Petitioner Attorney	Peter Bobber
Respondent Attorney	Jennifer Rizk-O'Lynnger

DATE FILED: 8/19/2022

/s/ Joseph Amarilio, Arbitrator

Signature

INTEREST RATE WEEK OF AUGUST 16, 2022 3.02%

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

RENATA PACIORA,
Employee/Petitioner

Case # **17 WC 21291**

v.

Consolidated cases: **N/A**

PRESENCE RESURRECTION MEDICAL CENTER,
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 **JOSEPH D. AMARILIO**, Arbitrator of the Commission, in the city of **CHICAGO**, on **4/26/2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **6/26/2017**, 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 not*** sustain an accident that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner earned $**49,978.49**; the average weekly wage was $**961.12**.

On the date of accident, Petitioner was **53** years of age, ***single*** with **0** dependent children.

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

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

ORDER

Claim for compensation denied. Petitioner failed to prove that she sustained an injury that arose out of her employment.

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/ *Joseph D. Amarilio*

Signature of Arbitrator Joseph D. Amarilio

August 19, 2022

ATTACHMENT TO ARBITRATION DECISION

STATEMENT OF FACTS AND CONCLUSIONS OF LAW

i. Procedural History

Ms. Renata Paciora (Petitioner), by and through her attorney, filed an Application for Adjustment of Claim for benefits under the Illinois Workers' Compensation Act. Petitioner claimed that on June 26, 2017 she sustained injuries that arose out of and in the course of her employment with Presence Resurrection Medical Center (Respondent). The parties stipulated that Petitioner provided Respondent with notice of her accident of June 26, 2017 within the time limits stated in the Act and that on said date Petitioner was a 53-year-old employee of Respondent. The parties agreed that Petitioner was earning an average weekly wage of $961.12. The parties further stipulated that Petitioner received $20.357.52 in nonoccupational indemnity disability benefits. (AX 1).

The hearing proceeded on six (6) disputed issues: 1. Whether Petitioner sustained accidental injuries that arose our of and in the course of her employment. 2. Whether Petitioner 's current condition ill-being is causally connected to the injury; 3. Whether the Respondent is liable for unpaid medical bills incurred and whether the unpaid bills are reasonable and necessary; 4. Whether Petitioner is entitled to temporary total disability benefits (TTD); 5. Whether Petitioner is entitled to permanent disability benefits; and, 6. Whether Petitioner is entitled to Section 19(k), Section 19(l) and Section 16 attorney fees. The threshold issue in this claim is whether Petitioner's accident arose our of her employment.

II. Statement of Facts

Ms. Renata Paciora was employed as an EEG Technician on the accident date of , June 26, 2017. (Arbitration transcript, hereafter "Tr." 11) Petitioner testified she had worked for Presence Resurrection Medical Center, hereafter Respondent, for approximately 4.5 years at that time. (Tr.10-11) She was born on July 19, 1963, making her 58 years old at the time of arbitration. (Tr.10) Petitioner testified that her position as an EEG technician requires moving a heavy portable EEG machine from the laboratory to the patient rooms. She then sets the machine up, prepares the patient for testing, and performs the test. She then unhooks the patient, cleans the machine, and disinfects everything prior to taking the machine back to the laboratory department. She testified that approximately 4 hours of her day is spent standing to perform this position. (Tr.25)

Petitioner worked a full day on June 26, 2017, 7:00 a.m. to 4:00 p.m. (Tr.18) It was a sunny and bright afternoon when she left work at 4:00 p.m. It had not rained, and the ground was dry. (Tr.20,33). Petitioner parked her car in the general hospital parking lot immediately next to a landscaped area filled with mulch. (Tr.17-18) Petitioner testified the area was filled with mulch and there was a tree a short distance from the curb casting a shadow on her car. She testified that she took a step, anticipating stepping onto the curb, which was approximately 6 inches tall, but her foot became caught between the mulch and the curb on the inside of the median. This caused her to trip and fall onto her left side. She felt severe pain in her left ankle. (Tr.18-20,46) Petitioner confirmed that her foot became caught in the mulch on the inside of the median, not in the parking lot. (Tr.46)

Petitioner testified there were no holes, cracks, or rocks in the parking lot that caused her to trip. (Tr.36) She testified she was walking in a parking lot between cars, not on the sidewalk. (Tr.35-36) She admitted there was no actual defect in the curb, which was not uneven or cracked.

(Tr.37) Petitioner testified there was no walkway where she approached the front side of her car, just a median with mulch and grass. (Tr.38)

After falling, Petitioner felt excruciating pain in the left foot and ankle and was not able to stand, so she called 911. She testified that the fire department arrived and picked her up from the mulch. Then paramedics arrived, placed her on a stretcher, and took her in an ambulance to the emergency room. (Tr.20) Chicago Fire Department records confirm a crew arrived and found Petitioner sitting on a stair chair in the care of a crew. She complained of left ankle pain and reported she tripped on a curb and fell. (Px1,p3;Rx.4,p1)

Petitioner testified she was admitted for surgery after being taken to the emergency room. (Tr.21) She was seen by Dr. Bhan in the emergency room on June 26, 2017 at Presence Resurrection Medical Center. Petitioner reported she fell in the parking lot while leaving work and presented to the emergency department due to ankle pain. X-rays revealed a left ankle trimalleolar fracture subluxation. An orthopedic consultation was ordered, and an open reduction internal fixation (ORIF) was scheduled for the following day. (Px2,p19)

Petitioner was seen for a consultation the following day, June 27, 2017, and surgery was scheduled for the later that day. Dr. Richard Hayek performed an ORIF of the left ankle trimalleolar fracture on June 27, 2017. The postoperative diagnosis included an unstable left ankle fracture, trimalleolar fracture, and subluxation. (Px2,p29) Petitioner testified he placed 14 screws and a plate in her left ankle. (Tr.21) Petitioner was discharged from Presence Resurrection Medical Center on June 28, 2017 and advised to follow up with Dr. Hayek in two weeks. In the meantime, she was advised to avoid weight-bearing on the left leg and to use crutches. (Px2,p6)

Petitioner testified that she continued treatment with Dr. Hayek at Northwest Orthopedic Sports Medicine postoperatively. (Tr.22) She presented to him on July 12, 2017. He obtained x-

rays which confirmed the hardware was well positioned. He diagnosed a trimalleolar fracture of the left ankle with routine healing, advised Petitioner to maintain non-weightbearing, and placed her in a short leg cast. He requested she return in four weeks for follow up. (Px3,p6) Petitioner testified that her daughter drove her to this appointment. On the way, they stopped by the location of the accident. She testified she was trying to figure out what happened. She concluded she must have gotten her foot stuck, because if she had tripped on the curb she would have fallen forward and landed on her car. (Tr.43) Dr. Hayek's medical records from this date do not include a description of the accident consistent with this testimony.

Petitioner saw Dr. Hayek several times between July 2017 and November 2017. On January 2, 2018, Dr. Hayek noted Petitioner had completed physical therapy. She reported 2/10 pain in the left ankle. Dr. Hayek noted she ambulated with a slow gait and that she reported she required a lot of rest breaks with weight-bearing activity. (Px.3,p16) Petitioner testified that she had restricted range of motion, swelling in the left ankle, and an problems with balance when she saw Dr. Hayek in January 2018. (Tr.26) However, the records show that on examination, there was no effusion in ankle, no instability, nonspecific medial discomfort, and a normal heel-toe gate. Dr. Hayek again noted the hardware was in good position, and the bones were consolidating and well healed. He noted Petitioner had to return to work or would lose her job. He released Petitioner full duty work on a trial basis. Though he noted no sign of surgical complication, he noted she may require hardware removal at a later date to improve her symptoms in the medial ankle. (Px3,p16)

Petitioner returned to Dr. Hayek on April 4, 2018 regarding her left ankle. She reported 3/10 pain. She advised Dr. Hayek she would like to discuss removal of the hardware. On examination, Petitioner complained of pain with palpation over the screw heads over the medial malleolus and tenderness over the fibular plate. He noted the hardware was in good position, and

the bone consolidation was well healed. He diagnosed a closed trimalleolar fracture of the left ankle, retained orthopedic hardware, pain in the left ankle and joints of the foot, and other chronic pain. He felt the retained hardware was causing Petitioner's pain, and discussed removal of the medial and lateral hardware, but not the anterior screw. He advised Petitioner that her pain may or may not improve. (Px3,p21)

Dr. Hayek performed a removal of the medial and lateral hardware with departmental removal on April 26, 2018. (Px3,p27) Petitioner returned to Dr. Hayek following this procedure on May 10, 2018, at which time she rated her pain 5/10. He noted no evidence of refracture of the tibiotalar joint and intact osteopenia on x-ray. He recommended she return in eight weeks for follow up. (Px3,p30)

Petitioner was last evaluated by Dr. Hayek on July 5, 2018. He noted she was one year post ORIF, and two months post removal of the medial and lateral hardware. She complained of stiffness in the morning that subsided with activity, and some pain with walking by the end of the day. However, she had no complaints of pain at the evaluation. She reported 0/10 pain. She reported substantial pain and functional improvement since the hardware removal. He requested she return in six months and released her to work as of July 9, 2018 without restriction. (Px3,p33)

Petitioner testified that the pain has lessened but had not gone away. She complained of pain in her left ankle, especially after prolonged standing or walking, or by the end of the day. She also testified she continued to have less than full range of motion in the ankle. (Tr.29) Petitioner testified that she used to be a very physically active person who was fit and healthy. She testified she used to jog once or twice a week but was now lucky if she could walk a mile without pain. (Tr.31) Petitioner testified she developed medical problems due to her inability to move for a prolonged period, including gaining 15 pounds, developing hypertension, and developing pain in

her right hip, right leg, and spine. (Tr.31-32) She testified she was seeing a doctor about her hip pain and hypertension, but she did not offer into evidence any corroborating medical records regarding this treatment or relating these conditions to her June 26, 2017 left ankle injury. (Tr.47) Despite these reports of pain and comorbid conditions, Petitioner did not return to Dr. Hayek in 2019 for a six-month re-evaluation, and she has not returned to him since July 2018.

Ms. Cheryl Dusenbery testified on behalf of the Respondent. She testified she is an Associate Health and Occupational Health Nurse at Presence Resurrection Medical Center and has worked at the facility for 26 years. She testified her responsibilities include participating in wellness initiatives for associates, maintaining yearly requirements such as vaccines and fit testing, and working with initializing and investigating workers' compensation claims. (Tr.50) Her job duties include maintaining records regarding workers' compensation claims and injured workers. This includes corresponding with other employees regarding injuries and injured employees. These records are maintained in the normal course of business and for each injured employee. (Tr.50-51)

Ms. Dusenbery testified that she sent a request to Petitioner's manager, Denise Walker, regarding this accident. Ms. Walker provided a written statement regarding her understanding of the accident on July 26, 2017. In this e-mail, she confirmed Petitioner called her to tell her she had fallen the parking lot and broke her leg. Petitioner could not recall whether she tripped over anything, but she believed she tripped over her own feet. (Tr.52-55;Rx4)

Ms. Dusenberry testified that she works at the location at which this accident occurred. She testified she is familiar with the parking garages and parking lots at this location, including the two employee parking garages. (Tr.55-56) She testified that employees are intended to, supposed to, and instructed to park in the employee parking garages. She confirmed that employees

are not advised that they may park in the public lot. (Tr.57) Ms. Dusenberry testified that she was working at this location in June 2017 and recalled the construction being performed on the employee parking garage. She testified that employees were never instructed not to park in those garages, and they were never told they were not required to park there during construction. (Tr.57-58) Included in Petitioner's associated health file is an e-mail regarding construction on the garage from May 2017 confirming flaggers were present to direct traffic during construction in the employee garage. There is no indication that employees were advised they were permitted to park in the general lot during construction. (Rx4)

Petitioner testified that she recalled calling her manager to discuss the accident but could not recall when she did so. She did not recall advising the manager that she tripped over her own feet. (Tr.40) Petitioner testified that she also could not recall what she told EMS regarding the accident. She testified she was in excruciating pain at the time of the accident and was not focused on the details of how she tripped. (Tr.41) Petitioner testified that, at first, she did not know what happened. However, when she returned to Dr. Hayek at the hospital on July 12, 2017, she and her daughter stopped by the location where the accident occurred. She testified that she was trying to figure out what happened that day. She testified that she believed she reached for the car door and her foot became stuck, because if she had tripped on the curb she would have fallen forward into the car. (Tr.42-43) Petitioner testified she knew she tripped on uneven mulch. (Tr.43) She testified she was in excruciating pain after the injury, pain so intense that she had never experienced anything like it before. She confirmed she was provided pain medications including Morphine and Norco at the hospital. She admitted she was heavily medicated and could barely remember the period of time in the hospital due to those medications. (Tr.48-49) She was, however, able to recall the specific details of the incident on July 12, 2017, two weeks after it occurred.

Petitioner testified that she did not receive TTD benefits for the period of June 27, 2017 through January 7, 2018, or April 26, 2018 through July 8, 2018, and that her medical bills were not paid by Respondent's workers' compensation carrier. (Tr.29-31) Petitioner admitted that she received long-term disability benefits and used her medical insurance through her employer regarding many of the bills. (Tr.44)

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 employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. *820 ILCS 305/1(b)3(d)*. To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980) including that there is some causal relationship between his employment and his injury. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 63 (1989) It is well established that the Act is a humane law of remedial nature and is to be liberally construed to affect the purpose of the Act - that the burdens of caring for the casualties of industry should be borne by industry and not by the individuals whose misfortunes arise out of the industry, nor by the public. *Shell Oil v. Industrial Comm'n,* 2 Ill.2nd 590, 603 (1954). Decisions of an Arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. *820 ILCS 305/1.1(e)*.

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

To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that he suffered a disabling injury that arose out of and in the course of the claimant's employment. An injury is accidental within the meaning of the Act when it is traceable to a definite time, place and cause and occurs in the course of employment unexpectedly and without affirmative act or design of the employee. *International Harvester Co. v. Industrial Comm*., 56 Ill. 2d 84, 89 (Ill. 1973). An injury occurs "in the course of' employment when it occurs during employment and at a place where the claimant may reasonably perform employment duties, and while a claimant fulfills those duties or engages in some incidental employment duties. 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. For an injury to 'arise out' of the employment its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. 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. *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124848, citing Caterpillar Tractor, 129 Ill. 2d at 58; *see also The Venture—Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728.

A workers' compensation claimant has the burden of proving by a preponderance of the evidence that her injury arose out of and in the course of her employment. Both elements must be present in order to justify compensation. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 203 (2003). "When an employee slips and falls, or is otherwise injured, at a point off of the employer's premises while traveling to or from work, her injuries are ordinarily not compensable under the Act." *Vill v. Industrial Comm'*n, 351 Ill. App. 3d 798, 803 (2004). Under such circumstances, the accident occurs outside "the course of" the employment. *Northwestern University v. Industrial Comm'n*, 409 Ill. 216, 221 (1951). There is a "parking lot exception," where courts have allowed recovery when the employee is injured in a parking lot provided by and under the control of the employer. *Vill*, 351 Ill. App. 3d at 803. If an employer allows employees and members of the general public to use the parking lot and contemplates that its employees will traverse the parking lot, a hazardous condition on the parking lot that causes a claimant's injury is compensable, regardless of whether the employer restricts or dictates its employees' use of the lot. *Archer Daniels Midland Co. v. Industrial Comm'n*, 91 Ill 2d 210, 21 (1990).

An injury arises out of employment only if it originates in a risk connected with or incidental to the employment. Where liability has been imposed, the injury occurred as a direct result of a hazardous condition on the employer's premises, Caterpillar *Tractor Co. v. Indus.* Comm'n, 129 Ill. 2d 52 (1989). (*see*, *e.g., Hiram Walker Sons, Inc. v. Industrial Comm'n* 41 Ill.2d 429 (1968).

The fact the parking lot where Petitioner was injured was used by the general public is immaterial where the injury is caused by a hazardous condition on the employer's premises.

The Arbitrator notes that at the time of the accident, the employee lot was under construction and therefore, not all parking spaces were available. Petitioner twisted her ankle

inside the landscaped median. The median is not designed for employees or the public as a walkway. The median does not include a walkway and is not intended for use as such.

The Arbitrator further notes that Petitioner's testimony regarding the mechanism of injury, falling on uneven mulch inside the median, is inconsistent with the medical records she offered as evidence. Petitioner's testimony regarding the accident was very detailed and specific. She testified she did not realize the mulch was lower than the curb due to its unevenness and a shadow from the tree, causing her to roll onto her left side when she stepped onto the curb. Despite this detailed description of the incident, Petitioner also testified that she was not certain how the accident occurred at the time of the injury due to being in excruciating pain. She further testified that, in the days following the accident, she was heavily medicated, causing poor recall of conversations she had with EMS, doctors, and her manager. Her subsequent recollection of how this accident occurred is not supported by the record.

The records from EMS indicate Petitioner reported she tripped on a curb; a curb that was in no way defective. The medical records from the emergency department reflect that Petitioner reported falling in the parking lot but include no information or mention of mulch. The correspondence from Petitioner's manager to Ms. Dusenbery indicates Petitioner believed she tripped over her own feet. There are no records or evidentiary materials that support Petitioner's testimony that she fell due to mulch in the median. By her own admission, Petitioner deduced what happened, rather than truly recollecting it. However, assuming *arguendo*, that she did fall in a gap between mulch and the side of the curb in the median, the accident would still not be compensable, as mulch does not constitute a defect based on Commission precedent in the case of *Souvenir v. Dovenmuehle Mortgage Company,* 19 WC 219, 17 WC 18956*,* which is factually similar to the

instant case. This Arbitrator is required under the Illinois Workers' Compensation Act to follow Commission decisions.

In *Souvenir*, the claimant stated that she stepped with her left foot out of her car and onto the median of her employers' parking lot. She noted that the grassy area inside the median was lower than the curb height and she did not expect it to be uneven. She tripped on the backside of the curb and fell forward onto the parking lot pavement. The claimant asserted that the curb height caused her to fall and that the grass area of the meridian was defective because the curb was about an inch to an inch and a half taller than the ground level of the grassy median. The arbitrator in *Souvenir* found that the claimant's accident did not arise out of her employment with the employer. The Illinois Workers' Compensation Commission affirmed. As in the case at bar, the arbitrator in *Souvenir* noted that the claimant's own testimony and the testimony of Respondent's witness, as well as the photographic evidence, demonstrated that there were no cracks, defects, or abnormalities in the curb. As in *Souvenir*, this Arbitrator emphasizes that his conclusion of non-compensability is not intended as a finding of fault or comparative negligence on behalf of the Petitioner. Although the Arbitrator is sympathetic to Petitioner's plight, under Illinois Workers' Compensation law, not every fall by an employee gives rise to an employer's liability. Based on the precedent of *Souvenir,* the Arbitrator concludes that, to find a pavement or area defective, there needs to be an objective and discernable defect, which was not present in this case.

In light of the above, and based the record as a whole, the Arbitrator finds that Petitioner failed to meet her burden of proving her accident arose out of and in the course of her employment. Accordingly, the Arbitrator concludes that the Petitioner is not entitled to benefits 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:

Based on the Arbitrator's conclusion that Petitioner did not sustain an injury which arose out of and in the course of her employment, the Arbitrator finds that her current conditions of ill-being are not causally related to a compensable injury under the Act. Therefore, this disputed issue is moot.

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:

Based on the Arbitrator's finding that Petitioner's accidental injury did not arise out of and in the course of her employment, the Arbitrator finds Respondent is not liable for medical expenses related to Petitioner's treatment. Therefore, this disputed issue is moot.

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

Based on the Arbitrator's finding that Petitioner's accidental injury did not arise out of and in the course of her employment, the Arbitrator finds Respondent is not liable for any temporary total disability benefits. Therefore, this disputed issue is moot.

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

Based on the Arbitrator's finding that Petitioner's accidental injury did not arise out of and in the course of her employment, the Arbitrator finds Petitioner is not entitled to a permanent partial disability award. Therefore, this disputed issue is moot.

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

Based on the Arbitrator's finding that Petitioner's accidental injury did not arise out of and in the course of her employment, the Arbitrator finds Petitioner is not entitled to a permanent partial disability award.

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

Based on the Arbitrator's finding that Petitioner's accidental injury did not arise out of and in the course of her employment, the Arbitrator finds that the Respondent is not liable for Section 19(k) penalties, Section 19(l) penalties, and Section 16 attorney fees

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC012873
Case Name	Luis Rodriguez v. Bully & Andrews
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0299
Number of Pages of Decision	16
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Randall Sladek
Respondent Attorney	Brian Koch

DATE FILED: 7/10/2023

/s/ Deborah Simpson, Commissioner

Signature

23IWCC0299

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: medical expenses	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LUIS RODRIGUEZ,

Petitioner,

vs. NO: 20 WC 12873

BULLEY & ANDREWS, LLC,

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 all issues and being advised of the facts and law, modifies the Decision of the Arbitrator as stated herein and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Petitioner, a tuck pointer, claimed multiple injuries to his left shoulder, low back, and left hip after falling from a ladder while at work on August 14, 2019. When this matter proceeded to a §19(b) hearing on December 14, 2021, the parties stipulated that the only body part in dispute was Petitioner's left hip. Both parties specified on the record that only the medical treatment related to Petitioner's left hip was disputed and that causation for all other body parts was agreed upon. (T. at 4-5). The relevant excerpt from the transcript reads as follows:

> Mr. Sladek: "…For clarification, this hearing involves strictly the causation and the prospective medical on the left hip. Causation otherwise is not contested, as I understand it.
>
> Mr. Koch: Correct. Mr. Rodriguez suffered a shoulder injury as well as a low back. The shoulder surgery and the shoulder injury has been accepted and paid for. If any medical bills later that Randy and I

find that have not been processed, Randy and I have an agreement that those will be sure to be processed per the Fee Schedule. The only issue in dispute today is relative to Petitioner's left hip, his need for medical treatment, his medical treatment that he secured.

Arbitrator: Okay. And so I presume that with medical bills being disputed, that's on the left hip?

Mr. Koch: Left hip only, yes." *Id.*

This exchange indicates that the parties stipulated on the record to Respondent's liability for the medical expenses Petitioner received for his left shoulder and lumbar spine. Since causation was not contested and established by the record for Petitioner's left shoulder, the Arbitrator's award of medical expenses related to Petitioner's left shoulder treatment should be affirmed. However, despite the above stipulation, the Arbitrator denied medical expenses for Petitioner's lumbar spine based on Dr. Steven Mather's §12 report. The Commission finds that the Arbitrator erred in doing so, as the Arbitrator's denial of expenses for the lumbar treatment is in direct contradiction to the parties' stipulation. In strict accordance with the parties' clear stipulation on the record that medical expenses were only being contested as to Petitioner's left hip injury, the Commission hereby modifies the Decision of the Arbitrator to include an award of medical expenses for the treatment of Petitioner's lumbar spine. In all other respects, including but not limited to the award of medical expenses for Petitioner's left shoulder treatment and denial of medical expenses for Petitioner's left hip treatment, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 11, 2022 is modified as stated herein. For all other issues not specifically modified herein, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS FURTHERED ORDERED that Respondent shall pay all reasonable and necessary medical services for the treatment related to Petitioner's lumbar spine condition, pursuant to the medical fee schedule, as provided in §8(a) and §8.2 of the Illinois Workers' Compensation Act. The Arbitrator's award of medical expenses related to Petitioner's left shoulder condition and denial of medical expenses related to Petitioner's left hip condition are otherwise affirmed.

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

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

IT IS FURTHER ORDERED that Respondent shall receive a 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 $15,000.00. 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.

July 10, 2023

DLS/met
O- 5/10/23
46

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

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

/s/*Deborah J. Baker*
Deborah J. Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC012873
Case Name	Luis Rodriguez v. Bully & Andrews
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Randall Sladek
Respondent Attorney	Brian Koch

DATE FILED: 8/11/2022

/s/Charles Watts, Arbitrator

Signature

INTEREST RATE WEEK OF AUGUST 9, 2022 3.04%

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)

Luis Rodriguez Case # **20** WC **012873**
Employee/Petitioner/ rsladek@krol-law.com
v.
Bulley and Andrews
Employer/Respondent/ bjkoch@wmlaw.com

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 **12/14/21**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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, **8/14/2019**, 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 for his left hip ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**89,104.60**; the average weekly wage was $**1,713.55**.

On the date of accident, Petitioner was **41** years of age, **married** with **0** dependent children.

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

Respondent shall be given a credit of $**24,316.15** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**24,316.15**.

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

ORDER

Respondent shall pay reasonable and necessary medical services of Physicians Immediate Care, Athletico, G&T Orthopedics and Pain Centers of Illinois for treatment related to the left shoulder and bicep, as provided in Section 8(a) of the Act.

Respondent shall pay no medical services for the lumbar spine pursuant to Dr. Mather's Section 12 report.

Petitioner's request for left hip arthroscopic labral repair femoroplasty, possible acetabuloplasty, microfracture, and capsular release is hereby denied. No causation is found for the left hip for the accident on 08-14-19.

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 11, 2022

Facts of Case

Mr. Rodriguez is a 42-year-old tuckpointer employed by Bulley & Andrews since 2010. Petitioner claims injury on August 14, 2019. On this date, petitioner claims he was on a ladder and the ladder flipped out, and he fell approximately nine to ten feet landing on a canopy and landed on his lower back and left shoulder. Petitioner could not continue to work on the initial date.

On the date of accident, petitioner reported to Physicians Immediate Care where x-rays were taken of his left shoulder and lower back. Petitioner was placed on light duty. Mr. Rodriguez proceeded with an MRI.

Petitioner returned to Physicians Immediate Care on September 3, 2019 with a consistent history of accident with low back pain as well as left shoulder pain with certain rotational movements of the left shoulder.

At that time, petitioner had participated in one appointment of therapy.

Relative to the left shoulder, petitioner was found to have tenderness about the left shoulder and left shoulder abnormality. Petitioner was diagnosed with a contusion of the left shoulder and returned for physical therapy of the left shoulder with the potentiality of ruling out a rotator cuff tear. Petitioner was allowed to return to work with no lifting over shoulder greater than twenty pounds using the left arm. Petitioner participated in Athletico physical therapy and returned to Physicians Immediate Care on September 16, 2019. At that point, petitioner's back pain had subsided and petitioner was continuing to complain of left shoulder pain with no resolution with PT, Prednisone muscle relaxant with a positive Hawkins and a positive Speed's test.

MRI – left shoulder

Mr. Rodriguez was subsequently referred for an MRI of the left shoulder that took place on September 19, 2019. According to the MRI report from Athlete Imaging in Bellwood, Illinois, petitioner was found to have a full thickness tearing involving at least the posterior two-thirds of the supraspinatus tendon insertion and regions of low-grade partial tearing of the infraspinatus subscapularis tendons with mild degenerative changes and no acute fracture. Petitioner had suspected anatomic variant Buford complex. Mr. Rodriguez returned to Physicians Immediate Care on September 23, 2019 with a result of the MRI not yet available.

Following the MRI, petitioner was referred for evaluation with Dr. Christos Giannoulias at the Illinois Back & Neck Institute. Dr. Giannoulias diagnosed petitioner with a left rotator cuff tear, left shoulder impingement and left shoulder pain for which he provided surgical intervention on October 1, 2019.

Postoperatively, petitioner initiated therapy at Athletico on October 22, 2019. Petitioner participated in therapy postoperatively at Athletico through January 9, 2020 having attended twenty-eight appointments and cancelling zero appointments. Petitioner subjectively reported left shoulder discomfort with overhead reaching activities. Petitioner as of January 9, 2020 was working in a fulltime status with restrictions.

Functional Capacity Exam

On January 13, 2020, a functional status report was issued by Athletico Physical Therapy. This issued in relation to petitioner's left shoulder. Petitioner was noted to be a tuckpointer in the functional status report with last date of employment August 14, 2019 with his current status being that of a fulltime employee with restrictions. At the conclusion of the January 13th functional status report, Mr. Rodriguez was recommended to transition to work conditioning treatment for functional job specific strengthening and endurance building. Petitioner was showing lack of functional endurance and myofascial mobility of the anterior muscular structure.

He was found to be able to safely lift forty pounds floor to waist, twenty pounds waist to shoulder, carry forty pounds and push and pull forty horizontal force pounds. Petitioner was found to be able to safely perform light physical demand activities. Petitioner was recommended for three weeks four times a week of work conditioning.

On January 14, 2020, petitioner returned to Dr. Giannoulias. Petitioner was found to have a left shoulder rotator cuff tear and low back strain. Dr. Giannoulias recommended continue physical therapy for the left shoulder but also suggested incorporation of some low back physical therapy. Petitioner was found to have shoulder elevation to 150 degrees and an external rotation to about 40 degrees. Dr. Giannoulias found a click with certain movements that petitioner indicates causes pain but then goes right away.

On January 16, 2020, Mr. Rodriguez returned to Athletico Physical Therapy for what was deemed to reevaluation. At this assessment, Mr. Rodriguez was noted to have constant low back pain with recommendation for physical therapy to address the limitations of the low back. Petitioner then initiated a course of physical therapy at Athletico for both left shoulder pathology and low back pain. Mr. Rodriguez participated in therapy at Athletico through February 10 for both his low back pain and left rotator cuff tear through February 10, 2020 when Athletico issued a functional status report. Petitioner was found to have improved left shoulder strength and endurance. With regards to the low back, he continued to display deficits in the hip, lumbar flexibility and myofascial tissue restriction and functional recruitment of the TRA. Petitioner was found to safely lift fifty pounds floor to waist, thirty pounds waist to shoulder, carry fifty pounds and push or pull forty-five horizontal force. Petitioner was referred to his treating physician for additional recommendations.

On February 11, 2020, Mr. Rodriguez returned to Dr. Giannoulias for left shoulder complaints. Petitioner was noting that his shoulder was doing better and he was working in physical therapy to build strength with continuation of complaints of low back pain. Dr. Giannoulias referred petitioner for pain management for further evaluation of treatment of the low back. As for the shoulder, Dr. Giannoulias found the petitioner was four months out of surgery and was making good progress as expected. Dr. Giannoulias recommended physical therapy ongoing with a four week follow up. Mr. Rodriguez returned to Athletico on February 13, 2020 and continued in an ongoing course of therapy at Athletico through a March 2, 2020 functional status report authored by Athletico. As of this date, Mr. Rodriguez had completed thirty-six skilled physical therapy treatment sessions postoperatively and was showing slow to mild progress towards therapeutic goals. Mr. Rodriguez recently began treatment for his low back SIJ pain and completed fifteen physical therapy sessions at the time of the exam. Petitioner noted overall improved SI joint and left shoulder strength however he continued to have increased symptoms with greater than four hours of work-related activities and heavy lifting. Petitioner showed improved left shoulder strength and endurance but exhibited proximal biceps tendon tenderness and myofascial restriction in the left anterior shoulder girdle. Petitioner's lift measurements included fifty pounds floor to waist, thirty pounds waist to shoulder and a carry of fifty pounds and a push/pull of forty-five horizontal force.

Petitioner remained in therapy through March 6, 2020 for both the left shoulder and low back.

Low back injection

On March 6, 2020, petitioner underwent a left sacroiliac joint injection under fluoroscopy at the Pain Centers of Illinois.

On March 10, 2020, Dr. Giannoulias reexamined petitioner at G&T Orthopedics. Relative to the left shoulder, Mr. Rodriguez noted that he was doing substantially better with his left shoulder and finishing up with his

physical therapy. On physical examination of the shoulder, petitioner had elevation to 160 degrees, external rotation to 50 degrees and internal rotation to the middle lumbar spine. Dr. Giannoulias noted that petitioner lacked about 10 degrees to 20 degrees in each plane and strength was 4 out of 5 in all planes. Dr. Giannoulias noted that petitioner is turning the corner and making great progress with an increase in restrictions to fifteen pounds and no overhead work. Dr. Giannoulias recommended a home exercise program over the next four to six weeks at which time he would see him again for possible discharge.

As of March 13, 2020, petitioner returned to Athletico (despite Dr. Giannoulias discharge to home exercise for the left shoulder). Petitioner appears to have continued in physical therapy for his low back through March 18, 2020 with reduced SI joint discomfort noted on March 18, 2020 and that petitioner lifted less frequently at work.

Low back injection

Petitioner was referred for low back pain to a Dr. Neema Bayran who recommended a left sacroiliac joint injection performed by a Dr. Hussain on March 6, 2020 with pain complaints as of April 28, 2020 relative to the lumbar spine 1 to 2 out of 10.

On April 28, 2020, Dr. Bayran's records include the following statement: "He claims that his pain started after he fell down injuring his left shoulder and low back on 8/14/19. I went back and reviewed all the records related to his preoperative. And could not find anything indicating that he reported low back pain prior to his left shoulder surgery. As a matter of fact, I saw him for preop anesthesia evaluation on September 26, 2019. He filed a questionnaire that day. I reviewed the questionnaire which shows he complained of pain in his left shoulder only quote fell and injury my left shoulder and he also only marked the left shoulder area on the body diagram. There is no indication in his records stating that he had pain in his lower back prior to his left shoulder surgery. Even though I believe that the patient's pain is related to sacroiliac dysfunction, I do not believe this is related to his injury of August 14 2019."

Left Shoulder injection

A repeat left shoulder injection was performed on April 29, 2020 at Athlete Images. Petitioner was found to be status post supraspinatus tendon repair with an undersurface superficial partial tearing of the posterior aspect of the tendon contiguous with a very small thickness cleft measuring 1 to 2 millimeters that appears to extend with the width of the labral tendon. Petitioner was also found to have mild intraarticular biceps tendonosis, acromioplasty changes and a small amount of subacromial bursal region fluid.

Left Shoulder MRI

On May 5, 2020, Dr. Giannoulias examined petitioner's left shoulder and reviewed the MRI personally. He did not see any evidence of rotator cuff failure with a little bit of inflammation of the AC joint and biceps. Dr. Giannoulias provided an injection into the biceps and AC joint with 80 milligrams of Kenalog and 6 ccs of 1% Lidocaine. Dr. Giannoulias recommended continued home exercise with a follow up in two weeks.

On May 19, 2020, petitioner was again examined by Dr. Giannoulias with reports that he was substantially better after the bicep injection. Dr. Giannoulias's examination of the shoulder revealed no tenderness over the biceps with elevation to 170 degrees and external rotator at 60 degrees and internal rotation to the lower lumbar spine strength 4 plus out of 5 with no crepitation. Dr. Giannoulias felt that petitioner looked pretty good with

regards to the shoulder and at that point he was going to "let him try to get back to regular work". He will then attempt a regular return to work and seek reevaluation in three weeks.

Petitioner has continued to work in a light duty capacity and on June 9, 2020 he reported pain over the proximal biceps. Dr. Giannoulias advised that he can either live with the symptoms or proceed with a biceps tenodesis.

Respondent's Section 12 Examination – low back

On June 18, 2020, Dr. Steven Mather performed a section 12 examination at the request of the Respondent. Dr. Mather addressed petitioner's low back with a report dated June 18, 2020. Dr. Mather diagnosed petitioner with a lumbar strain contusion with ongoing psychogenic pain and functional overlay. Dr. Mather opined that petitioner did not require any further medical treatment four weeks after the occurrence and required no work restrictions relative to the lumbar spine. Dr. Mather reviewed 17 physical therapy records from Athletico with no notation of back complaints from October 22, 2019 through December 6, 2019 and 11 visits from December 10, 2019 through January 9, 20202 with no complaints of back pain. Dr. Mather reviewed the medical records from Dr. Giannoulious with notation of lumbar spine complaints as of January 14, 2020. Dr. Mather reviewed the medical records from Dr. Bayran with regard to the SI joint dysfunction. In a report dated June 18, 2020, Dr. Mather opined that petitioner suffered a lumbar strain with no pathology noted on MRI. Dr. Mather opined that petitioner's pain was no longer related to the August 14, 2019 accident but appeared to be due to functional overlay and psychogenic sources.

Additional left shoulder & bicep treatment

On June 30, 2020, Mr. Rodriguez returned to Dr. Giannoulias with difficulty in his left shoulder. Petitioner reported pain in the shoulder anteriorly and that he was scheduled to see an independent medical examination coming up this week (for the low back). Petitioner was found to have tenderness over the biceps and a positive Speed's test with pain with resisted evaluation with near normal range of motion with no significant strength deficits. Dr. Giannoulias diagnosed petitioner with biceps tendonitis for which he recommended a biceps tenodesis. Dr. Giannoulias noted that petitioner wished to proceed with surgical intervention in the form of a biceps tenodesis. Dr. Giannoulias allowed petitioner to return to work in a restricted capacity of no lifting or carrying more than fifteen pounds with sitting five to eight hours, drive five to eight hours with no overhead work, no pushing and pulling and no climbing.

Respondent's Section 12 Examination – left shoulder

On July 20, 2020, Respondent requested a section 12 examination with Dr. Aaron Bare on the left shoulder. Dr. Bare related the current condition and the need for surgery to the work accident. Dr. Bare recommended a second procedure including left shoulder arthroscopy, debridement, arthroscopic distal clavicle excision and biceps tenodesis. If he chooses not to have that procedure performed, then he would have reached maximum medical improvement and should consider functional capacity evaluation to determine his functional capacity and determine if he is capable of doing more than 15 pounds of lifting. The need for further treatment is causally related to the injury that occurred on 08/14/2019.

Left hip treatment with Dr. Domb

Petitioner sought treatment with Dr. Domb on September 16, 2020 for his left hip. The history recorded by Dr. Domb notes "42 year old male presents with hip pain for about 1 year ago, after falling about 8 steps height. He refers that after the fall he also felt pain in his left shoulder and lower back." He advised Dr. Domb that he had pain for one year and that SI injections had not relieved this pain. Petitioner underwent an MR arthrogram of the left hip on September 17, 2020. Citing no evidence of pre-accident dysfunction of the hip, Dr. Domb found the condition causally related to the work accident.

Left shoulder surgery - #2 – left bicep surgery #1

On September 18, 2020, he underwent a second left shoulder surgery—arthroscopic biceps tenodesis, revision of the subacromial of the clavicle excision. Following surgery, petitioner continued post-op treatment with Dr. Giannoulias. As of November 17, 2020, petitioner was released to light duty as available.

Respondent's Section 12 examination - left hip

On December 9, 2020, Dr. Cherf performed a Section 12 evaluation of petitioner's left hip. Dr. Cherf was requested to address petitioner's left hip. Following his review of medical records as well as the physical examination, Dr. Cherf diagnosed petitioner as being one year and four months post work related accident on August 14, 2019 with a superior labral tear of his left hip that was documented on MRI arthrogram on September 17, 2020. Dr. Cherf noted that petitioner did not have complaints for treatment for the left hip with all medical records from Physicians Immediate Care and Dr. Giannoulias. The medical records forwarded to his attention did not mention any injury or workup of the left hip until September 17 of 2020 approximately thirteen months post injury. Dr. Cherf would expect Mr. Rodriguez to have had left hip symptoms and documentation in physician provider notes if the labral tear documented on the MRI arthrogram of September 17, 2020 were accurate in nature.

Based upon the records available, Dr. Cherf was of the opinion that it was unlikely the labral tear of the left hip is the result of a work related injury of August 14, 2019. There is no indication in the medical records of any left hip injury or treatment prior to September 16, 2020. That said, Dr. Cherf suggested it would be helpful to review of all the medical records to include the records from Physicians Immediate Care and Dr. Giannoulias. Dr. Cherf opined that petitioner's left hip would not require any treatment from a work-related injury of August 14, 2019. Dr. Cherf noted that petitioner would be considered maximum medical improvement considering his left hip in question nor did he require any work restrictions relative to the hip.

Dr. Domb recommends left hip surgery (labral tear)

Petitioner returned to Dr. Domb on February 18, 2021. Dr. Domb diagnosed petitioner with a labral tear in the setting of CAM and PINCER type femoroacetabular impingement. Dr. Domb recommended surgical intervention.

Petitioner continued treatment with Dr. Giannoulias and underwent an FCE. On March 30, 2021, Dr. Giannoulias assessed a permanent restriction for the shoulder of 40 lbs. lifting, pulling and pushing. Dr. Giannoulias noted no low back or hip condition that would limit the need for FCE.

Petitioner returned to Dr. Giannoulias on May 11, 2021 for an injection in the left shoulder. As of May 25, 2021, he reported that the injection had not resolved his pain and he had pulling sensation in the shoulder any time he lifted more than 20 lbs. Dr. Giannoulias did not feel much more could be done for the shoulder.

PETITIONER'S TESTIMONY

Petitioner was questioned extensively on cross-examination relative to his complaints of hip pain to various providers. The petitioner was questioned with the regard to medical treatment records at Physician Immediate Care (Petitioner Ex. 1) that predate the accident date of August 14, 2019 and after August 14, 2019. The medical records document that petitioner provided accident history as follows on April 17, 2019: "Patient states that he was at work carrying a mattress down a hall. On the died of the hallway as a piece of glass that fell and hit him in the leg. Patient denies that the glass shattered. Denies that there was a break in his jeans. States that he has some pain that extends the length of the cut and beyond to the knee and ankle when he is walking."

On cross examination, petitioner was questioned with regard to the level of detail contained in the Physician Immediate Care history of complaints on April 24, 2019 and May 1, 2019. Petitioner agreed that he provided the history of complaint to the provider.

On cross examination, petitioner agreed that he provided the following history of complaint on August 14, 2019; 41 year old male presents with complaints of L shoulder and low back pain, onset this AM; states he was on a ladder and it slipped; pt fell on L side onto plywood; denies hitting head, neck pain, LOC/AMS…" ON August 19, 2021, petitioner agreed to the history detailed at Physician Immediate Care as follows: "Pt states that sxs have improved but continues to experience L shoulder pain with certain mvmts, especially overhead; ttp to post and ant shoulder; states back pain with prolonged sitting or after long shift at work once medication wears off."

On cross-examination, petitioner agreed with the following history at Physician's Immediate Care on August 26, 2021: "Pain in the shoulder is still present when doing activities of daily living. Patient endorses pain in the shoulder with internal rotation. The patient also reports back pain as an abnormal symptom related complaint." Additionally, petitioner agreed that the history on September 3, 2019 was accurate as follows; "PT states feeling better since last visit. States still having pain in the left shoulder with certain movements. Still has some pain in the lower back, but improving overall. States he started PT this past weekend.

On September 16, 2019, petitioner agreed that he provided the history to Physicians Immediate Care that "back pain had improved, continues to experience low back pain with sitting and improved with movement. Completed 6 PT sessions, taking naproxen and muscle relaxant; states continues to experience L shoulder pain and popping, worse with twisting motions and gripping objects, reaching across body."

Petitioner testified that the history at Physician Immediate Care on Septmebr 23, 2019 noted no complaints to the lumbar spine.

Petitioner, on cross-examination agreed that he voiced no low back or hip related complaints at Athletico Physical therapy in therapy visits between the August 31, 2019 and January 13, 2020 for a total of 29 physical therapy sessions.

Petitioner, on cross-examination was also confronted with the medical records from Dr. Giannoulias from September 25, 2019 through January 16, 2020. Petitioner agreed that he provided no complaints of low back pain or hip pain to Dr. Giannoulias at any visit prior to January 16, 2020.

Petitioner voiced no low back or hip complaints to Dr. Giannoulias subsequent to his referral to Dr. Bayran.

Dr. Bayran treated petitioner from February 18, 2020 through May 12, 2020 on a referral from Dr. Giannoulias. Dr. Bayran medical records reflect bilateral hip examinations. On cross-examination, petitioner admitted to having no hip complaints to Dr. Bayran. Dr. Bayran treated petitioner for Left SI dysfunction with a release to

full duty for the lumbar spine as of March 17, 2020. As of April 17, 2020, Dr. Bayran noted "minimal pain in the left buttock and pelvis," and petitioner agreed with the history noted by Dr. Bayran.

Petitioner testified that Dr. Bayran did not find the SI Joint dysfunction to be related to the claimed event of August 14, 2019.

Petitioner testified that prior to the accident he was working full duty as a tuck pointer which would include carrying 60-70 lbs buckets of concrete. In his current light duty role related the left shoulder condition, he performs caulking, sweeping and other cleaning up. Petitioner testified that he would like to have surgery with Dr. Domb to address his left hip complaints.

Conclusions of Law

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law as set forth below. The claimant bears the burden of proving every aspect of his claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill.App.3d 706, 714 (Ill. App. 5th Dist. 1992).

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

It is well-established that an employee has the burden to prove by a preponderance of the evidence all the elements of his claim. *Parro v. Industrial Commission*, 260 Ill.App.3d 551 (1993). An injury arises out of one's employment if its origin is in a risk connection with incidental to the employment so that there is a causal connection between the employment and the accidental injury. *Technical Tape Corp v. Ind. Comm'n.,* 58 Ill.2d 226 (1974). Based on the review of the totality of the medical records and petitioner report of complaint before the claimed incident, the medical records after the claimed accident and the detailed history of complaints contained therein, along with the IME opinions of Drs. Bare, Mather and Cherf and the treatment recommendations of Dr. Giannoulias and Dr. Bayran, the Arbitrator finds that Petitioner's present left hip condition is not causally related to the claimed work event.

The Arbitrator notes that this Commission is not required to accept the opinion of a treating physician over that of an examining physician. *Prairie Farms Dairy v. Industrial Commission*, 279 Ill.App. 3d 546, 664 N.E.2d 1150 (1996). There is no case where the Appellate court, or the Illinois Supreme Court, has said that, as a matter of law, the Commission *must* give more weight to a treating physician's testimony than to that of an examining physician. Although the Appellate Court has said numerous times that the Commission *may* give more weight to a treating physician's opinion, the court has never stated that it is obligated to. See *O'Neal Brothers Construction Co. v. Industrial Commission*, 93 Ill.2d 30, 38, 66 Ill.Dec. 334, 442 N.E.2d 895 (1982).

In this instance, the Arbitrator finds the medical records as presented from Physicians Immediate Care, Dr. Giannoulias, Athletico and Dr. Bayran compelling in their lack of documentation of hip related complaints and the opinion of Dr. Cherf dated December 9, 2020. First, the treatment records, outline the fact that the petitioner is an excellent historian of his complaints and the accident. To wit, petitioner has no issue with detailing his area of complaints as petitioner was questioned extensively on cross-examination relative to his complaints of hip pain to various providers. The petitioner was questioned with the regard to medical treatment records at Physician Immediate Care that predate the accident date of August 14, 2019 and after August 14, 2019. As noted in the factual evidence, petitioner detailed his complaints relative to his left shoulder and low back up through and including September 16, 2019 and voiced no low back or hip complaints after September 23, 2019. Petitioner testified that the history at Physician Immediate Care on September 23, 2019 noted no complaints to the lumbar spine.

Petitioner, on cross-examination agreed that he voiced no low back or hip related complaints at Athletico Physical therapy in therapy visits between the August 31, 2019 and January 13, 2020 for a total of 29 physical therapy sessions.

Petitioner, on cross-examination was also confronted with the medical records from Dr. Giannoulias from September 25, 2019 through January 16, 2020. Petitioner agreed that he provided no complaints of low back pain or hip pain to Dr. Giannoulias at any visit prior to January 16, 2020.

Petitioner voiced no low back or hip complaints to Dr. Giannoulias subsequent to his referral to Dr. Bayran.

Dr. Bayran treated petitioner from February 18, 2020 through May 12, 2020 on a referral from Dr. Giannoulias. Dr. Bayran medical records reflect bilateral hip examinations. On cross-examination, petitioner admitted to having no hip complaints to Dr. Bayran. Dr. Bayran treated petitioner for Left SI dysfunction with a release to full duty for the lumbar spine as of March 17, 2020. As of April 17, 2020, Dr. Bayran noted "minimal pain in the left buttock and pelvis," and petitioner agreed with the history noted by Dr. Bayran.

Further, the Arbitrator notes that Dr. Bayran records further cast doubt on the petitioner's lower back condition when he entered the following into the medical records; "He claims that his pain started after he fell down injuring his left shoulder and low back on 8/14/19. I went back and reviewed all the records related to his preoperative. And could not find anything indicating that he reported low back pain prior to his left shoulder surgery. As a matter of fact, I saw him for preop anesthesia evaluation on September 2019. He filed a questionnaire that day. I reviewed the questionnaire which shows he complained of pain in his left shoulder only quote fell and injury my left shoulder and he also only marked the left shoulder area on the body diagram. There is no indication in his records stating that he had pain in his lower back prior to his left shoulder surgery. Even though I believe that the patient's pain is related to sacroiliac dysfunction, I do not believe this is related to his injury of August 14, 2019."

The medical records are devoid of hip related complaints until September 16, 2020. The Arbitrator finds most compelling that petitioner first reported hip complaints to Dr. Domb, in addition to left shoulder complaints and low back complaints. The detailed history documented by Dr. Domb: "42 year old male presents with hip pain for about 1 year ago, after falling about 8 steps height. He refers that after the fall he *also felt pain in his left shoulder and lower back. (emphasis added)"*

The petitioner as of September 2020 had undergone extensive medical care with various providers including 2 section 12 examinations. The medical records and section 12 reports are devoid of left hip related complaints until September 16, 2020. Dr. Domb notes the additional complaint of left hip pain as well as the low back and left shoulder. At no point prior to the visit with Dr. Domb had petitioner complained of left hip pain in addition to left shoulder pain and lumbar spine pain.

The Arbitrator finds the totality of the medical presentation compelling for the lack of documented hip complaints. Further the records are consistent with Dr. Cherf's Section 12 opinion that it was unlikely the labral tear of the left hip is the result of a work-related injury of August 14, 2019 as there is no indication in the medical records of any left hip injury or treatment prior to September 16, 2020.

Based upon the foregoing, the Arbitrator finds that petitioner's current condition of ill-being about his left hip is not related to his claimed work event August 19, 2019.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITONER REASONABLE AND NECESSARY AND HAS REPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

The treatment rendered at Physicians Immediate Care, Athletico, G&T Orthopedics and Pain Centers of Illinois are related to petitioner treatment for the left shoulder and are reasonable and necessary in conjunction with the causal connection findings as above. Accordingly, petitioner is awarded the following expenses:

G&T Orthopedic -- $1,930.00

Consistent with the opinion of Dr. Bayran, on the issue of causation of the sacroiliac joint dysfunction, only treatment related to the left shoulder incurred at Pain Centers of Illinois is hereby awarded:

Pain Centers of IL -- $10,651.55

Respondent shall be afforded a credit for all expenses processed via section 8.2 of the Workers Compensation Act.

Petitioner seeks medical expenses incurred at the American Hip Institute. Consistent with the findings on causal connection above, the following expenses are denied:

American Hip Institute -- $1,211.00

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

Section 8(a) of the Act entitles a claimant to compensation for all necessary medical, surgical and hospital services "thereafter incurred" that are reasonably required to cure or relieve the effects of injury. Procedures or treatment that have been prescribed by a medical service provider are "incurred" within the meaning of the statute, even if they have not yet been paid. *Plantation Mfg. Co. v. Industrial Comm'n*, 294 Ill.App.3d 705, 710 (Ill. App. 2nd Dist. 1997).

Petitioner seeks prospective medical treatment recommended by Dr. Domb including an left hip arthroscopy,hip arthroscopic labral repair femoroplasty, possible acetabuloplasty, microfracture, and capsular release. Regarding the issue of whether the Petitioner is entitled to any prospective medical care, following consideration of the testimony and evidence presented, the same is incorporated by reference, it is found that prospective medical care as recommended by Dr. Domb is denied because it is not the related to Petitioner's work accident.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC039367
Case Name	Luis Rios v. LC Auto Sales & IWBF
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0300
Number of Pages of Decision	24
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Adam Rosner
Respondent Attorney	Andrew Vella, Dan Kallio

DATE FILED: 7/10/2023

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LUIS RIOS,

Petitioner,

vs. NO: 16 WC 39367

LC AUTO SALES / ILLINOIS STATE TREASURER as *ex-officio* custodian of the INJURED WORKERS' BENEFIT FUND

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent-Employer and Respondent-Injured Workers' Benefit Fund herein and notice given to all parties, the Commission, after considering the issue of the whether there was an employer-employee relationship, accuracy of benefit rates and wage calculations, and the entitlement to incurred medical expenses as well as prospective medical care and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 21, 2021 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $261.78 per week for a period of 1 and 6/7 weeks, representing November 22, 2016 through December 5, 2016, 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 the reasonable, necessary and causally related medical expenses incurred in the care and treatment rendered between November 8, 2016 and January 16, 2017 for services rendered by the Rockford

Fire Department, MercyHealth, and Rockford Health Physicians, pursuant to §8(a) and subject to §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 §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $253.00 per week for a period of 40 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused a 8% loss of use of the person as a whole.

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

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

The Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund was names as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General's Office. This award is hereby entered against the fund to the extent permitted and allowed under §4(d) of the act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover from Respondent the benefits paid due and owing the Petitioner Pursuant to Section 5(b) and 4(d) of this Act.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $10,700.00. 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.

July 10, 2023

/s/ *Deborah J. Baker*

DJB/lyc

O: 6/14/2023

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC039367
Case Name	RIOS, LUIS v. LC AUTO SALES and STATE TREASURER AS EX OFFICIO CUSTODIAN OF THE IWBF
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	21
Decision Issued By	Gerald Napleton, Arbitrator

Petitioner Attorney	Pro Se Petitioner
Respondent Attorney	Adam Rosner, Dan Kallio

DATE FILED: 12/21/2021

/s/Gerald Napleton, Arbitrator
Signature

INTEREST RATE WEEK OF DECEMBER 21, 2021 0.16%

STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

☒ 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 Rios Case # **16 WC 39367**
Employee/Petitioner
v.
LC Auto Sales / Illinois State Treasurer as ex-officio of the Injured Workers' Benefit Fund
Respondent/Employer.

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 **Rockford**, County of **Winnebago**, on July 16**, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **November 8, 2016**, Respondent-Employer ***was*** operating under and subject to the provisions of the Act.

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

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-Employer.

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

In the year preceding the injury, Petitioner earned $**20,419.50**; the average weekly wage was $**392.68**

On the date of accident, Petitioner was **45** years of age, married with 0 dependent children.

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

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

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

ORDER

RESPONDENT SHALL PAY TEMPORARY TOTAL DISABILITY BENEFITS OF $261.78/WEEK FOR 1 AND 6/7 WEEKS FROM NOVEMBER 22, 2016 THROUGH DECEMBER 5, 2016 PURSUANT TO SECTION 8(B) OF THE ACT.

RESPONDENT SHALL PAY REASONABLE AND NECESSARY MEDICAL SERVICES FOR TREATMENT RENDERED BETWEEN NOVEMBER 8, 2016 AND JANUARY 16, 2017 FOR SERVICES RENDERED BY THE ROCKFORD FIRE DEPARTMENT, MERCYHEALTH, AND ROCKFORD HEALTH PHYSICIANS, PURSUANT TO SECTIONS 8(A) AND 8.2 OF THE ACT.

RESPONDENT SHALL PAY PETITIONER PERMANENT PARTIAL DISABILITY BENEFITS OF $253.00/WEEK FOR 40 WEEKS REFLECTING 8% LOSS OF USE OF THE PERSON AS A WHOLE

THE ILLINOIS STATE TREASURER AS *EX-OFFICIO* CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND WAS NAMED AS A CO-RESPONDENT IN THIS MATTER. THE TREASURER WAS REPRESENTED BY THE ILLINOIS ATTORNEY GENERAL'S OFFICE. THIS AWARD IS HEREBY ENTERED AGAINST THE FUND TO THE EXTENT PERMITTED AND ALLOWED UNDER §4(D) OF THE ACT. IN THE EVENT THE RESPONDENT/EMPLOYER/OWNER/OFFICER FAILS TO PAY THE BENEFITS, THE INJURED WORKERS' BENEFIT FUND HAS THE RIGHT TO RECOVER FROM RESPONDENT THE BENEFITS PAID DUE AND OWING THE PETITIONER PURSUANT TO SECTION 5(B) AND 4(D) OF THIS 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.

/s/ Gerald W. Napleton

Signature of Arbitrator

December 21, 2021

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Luis Rios Case # **16 WC 39367**
Employee/Petitioner

v.

LC Auto Sales. and
The Illinois State Treasurer as
Ex Officio Custodian of the
Injured Workers' Benefit Fund
Respondent/Employer.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was brought under the Illinois Workers' Compensation Act (the "Act") by the Petitioner, Luis Rios, and sought relief from the Respondent, LC Auto Sales and the Illinois State Treasurer as *Ex Officio* Custodian of the Injured Workers' Benefit Fund, ("IWBF").

Findings of Fact

Petitioner testified that his date of birth is October 7, 1970 making him 46 years old at the time of his alleged accident. On November 8, 2016 he was forty-five years old and married with no children. He was married and had no dependent children. He lived in Rockford on the date of the accident.

Petitioner testified that he began working as a mechanic and repossession agent for Respondent in 2013. LC Auto Sales is a used car sales business. Petitioner had no other co-workers. His supervisor was Julio Castellano who would schedule his hours. Petitioner was not required to clock in or out, but Julio would write down his hours. Petitioner used his own tools and kept them locked in a cabinet at LC Auto Sales. Petitioner also insured his tools himself. As a mechanic, he would inspect vehicles and make repairs as necessary. As a repossession agent, he would repossess vehicles from individuals who were behind on payments. Petitioner sometimes

rejected repossession jobs but he did not reject many for fear of being fired. Petitioner was paid $650 per week and no taxes were taken out. Petitioner testified on cross-examination that he made $14 per hour and worked six days a week. No employment contract was executed.

On November 8, 2016, While Petitioner was at Respondent's location an armed robbery occurred. Two individuals approached the shop from the back of the building. One of the individuals drew a gun, grabbed Petitioner by the arm and pulled him into the office. Petitioner witnessed the other individual beating his boss, Julio Castellano. The robbers demanded money which Petitioner denied having. When Petitioner told them that he didn't have any money, he was struck in the head with the firearm two times, fell to the floor, was then kicked several times, and struck in the head a third time. He testified he was kicked about the right and left side of his back, head, shoulder, and face. The individuals then left, and Julio Castellano called the police and an ambulance.

Petitioner was transported to Swedish American Hospital by ambulance where, according to his testimony, he stayed overnight. At the hospital he reported loss of consciousness during the robbery. His examination demonstrated a contusion of the left parietal bone, as well as diffuse lumbar, cervical, chest, and abdominal tenderness. He also suffered from a scalp hematoma. CT scans of the cervical and lumbar spine were normal. CT of the abdomen was normal with exception of a renal cyst. CT of the face showed some sinusitis. Petitioner was diagnosed with a closed head injury without cranial wound, and strain/sprains to the neck, chest, abdomen, and back. Petitioner was discharged.

The hospital records mention his was hit on his left side as opposed to his right side or both sides. Petitioner claims he was hit on both sides. When asked about why the records only note he

was hit on his left side and not his right or both sides he was unsure why records would indicate such.

On November 22, 2016 Petitioner sought treatment with Dr. Paul Schroeder at Rockford Health Systems (now Mercyhealth). He complained of pain on his left side, left shoulder, left side of face, left flank, and right upper leg. He complained of changes in his vision to his left eye. Physical exam showed scalp swelling, left shoulder pain, and left flank pain. He was diagnosed with a concussion, left shoulder pain, flank pain, chest pain, visual changes, and PTSD. He was taken off work at that point through December 5, 2016 and referred him for psychological care.

Petitioner followed up with Mercyhealth on November 30, 2016. He was taking Norco for pain and Xanax to relax. Dr. Schroeder against assessed Petitioner with PTSD, chest pain, and a concussion.

On January 16, 2017, Petitioner sought treatment with Ophthalmologist, Dr. John Alexander, for treatment to his left eye. The records note a history of his accident and that Petitioner complained of difficulty seeing. He was diagnosed with left exposure keratopathy, eyelid abnormality, and trauma to the left eye. He was prescribed artificial tears and gel for his eyes and recommended to see an oculoplastic ophthalmologist. He saw Dr. Alexander again on January 31, 2017 where his artificial tear and eye gel recommendation was continued.

Petitioner did not seek medical treatment for 11 months until December 16, 2017 when he saw Dr. Alexander again for issues with his eye. When asked about the 11-month gap in treatment, Petitioner testified that his pain had subsided but flared up again which caused him to seek treatment. Dr. Alexander recommended continuing with the artificial tears and gel.

On December 18, 2017, Petitioner returned to Mercyhealth with right shoulder pain, left eye visual loss, and back pain. He complained of an inability to work. He was diagnosed with

maxillary sinusitis, right shoulder pain, and left vision loss. He was referred to an orthopedic specialist.

On December 26, 2017 Petitioner saw Dr. Marko Krpan, an Orthopedist, at Mercyhealth for his right shoulder. The records note his shoulder was injured during a robbery and has gotten progressively worse. After physical examination and X-rays, he was diagnosed with a right rotator cuff tear, right labral tear, impingement syndrome, and adhesive capsulitis. He was placed on sedentary restrictions from work.

On February 24, 2018 Petitioner reported to the Mercyhealth emergency room complaining of upper right pain since his accident. He continued to follow up. An MRI was not performed due to claustrophobia. Dr. Krpan noted pain with range of motion, Hawkins, neet, and crossed arm adduction tests. Surgery was mentioned as a possibility.

The MRI dated March 28, 2018 revealed a near full-thickness rotator cuff tear, bursitis, mild ac joint arthritis, biceps tendon effusion, and increased labral signal suggesting possible labral tear. Petitioner followed up with Dr. Schroeder at Mercyhealth on April 2, 218 and Dr. Krpan on April 24, 2018. Petitioner underwent a right shoulder open rotator cuff repair, subacromial decompression, and right labral tear debridement on July 27, 2018. No physical therapy was performed. Petitioner testified he was unable to do physical therapy due to lack of insurance.

Petitioner testified that he returned to work with LC Auto Sales approximately eight months after the date of the accident though there is conflicting testimony that he may have returned to work within five months of his accident. Petitioner testified that LC Auto Sales paid him some money, “a couple hundred dollars” after his injury. He testified he worked for Respondent for another year and a half. He testified that he was paid $650.00 per week at a rate of roughly $14 per hour.

Petitioner acknowledged owning his own business called "Rios Rios Auto Service." He received 1099 tax forms from Respondent. Petitioner claims Respondent addressed checks to him personally, but Respondent claims checks were made to "Rios Rios Auto Service." No checks were admitted into evidence to corroborate either side. Petitioner also received cash payments. The 1099s in evidence name both the Petitioner, individually, and his business as "Luis A. Rios, Rios Rios Auto Service." Taxes were not removed from Petitioner's checks.

Petitioner testified that his hours were from 8am to 6pm but that he would sometimes arrive early. Petitioner was not required to wear a uniform. Petitioner used his own tools to complete his work. His tools were kept at Respondent's location. Petitioner received training on his own. Respondent paid for any materials required by Petitioner to perform his job. Petitioner testified that he had a mechanic's license and Respondent did not. Petitioner was allowed to work for other jobs but stated he only worked for Respondent. Petitioner stated that Julio Castellanos dictated Petitioner's schedule. Petitioner stated he was unable to reject jobs to be performed. He was instructed on which cars he was to repossess and that he could reject those jobs but only for reasons concerning distance or danger. Petitioner testified that he would be terminated if he were to reject jobs from Julio Castellanos. At times he would be sent home and told to return the next day. He was also allowed to go home if desired and return the next day.

Since the accident he has had trouble sleeping and performing household chores such as taking out the garbage and cleaning the bathroom and house. He complained of residual pain in his shoulder which makes it difficult to perform chores around his home. He still feels scared from his work accident. He testified that prior to his accident he never had any issues with his shoulder, head, ribs, or abdomen.

Respondent called Francisco Magana to testify. Francisco testified that he is a business manager at Respondent and his son, Julio, is the owner of the business. Francisco Magana was not present when the robbery occurred.

Francisco Magana testified that Petitioner came back to work four weeks after the incident and had performed "side jobs" during the four week period he was off work. He confirmed that Petitioner performed mechanic work and sometimes repossession work for Respondent. Other people were also available for hire for repossession work. He denied that Petitioner complained of an injury after returning to work with Respondent.

Francisco Magana testified that Petitioner started work at nine AM. That is when the business opened. Petitioner was free to come and go as he wished. Petitioner was never penalized for this because "he was his own boss." He testified that Petitioner was also working for other entities performing mechanic and landscaping work while Petitioner performed work at Respondent as he alleged that Petitioner admitted this to him. Francisco Magana did not observe Petitioner complain about any pain or injuries following the robbery and he observed no apparent physical issues with Petitioner.

Francisco Magana was shown Respondent's exhibits 4 and 5. He testified that these exhibits reflected payments made to Petitioner from January of 2015 through December of 2018. Francisco Magana testified that Petitioner requested that the checks be issued to Petitioner in his own name as opposed to his business name.

Francisco Magana was in charge of compensating Petitioner for his work and would pay him by check. Francisco testified that Petitioner wanted to be paid individually rather than as his company. Taxes were not taken out and Petitioner was given a 1099 at the end of each year. During cross-examination Francisco testified that Petitioner was employee under his supervision

but equivocated on redirect. He testified that Petitioner would only come to work when there was work to be completed. However, Francisco Magana testified on recross that he expected Petitioner to be at work from 9am to 5pm when there was there was work to be done.

Respondent called Julio Castellano to testify. Julio Castellano testified that he is one of the owners of Respondent company. He was present at the time of the robbery and was attacked along with Petitioner. Respondent would buy cars, one to three per week, and that two of the three would need repairs. Petitioner would perform the repair work. No mechanic other than Petitioner worked for Respondent. Petitioner fixed every car that required service.

Julio Castellano testified that it was just Petitioner, Francisco Magana, and himself that worked at Respondent. Mr. Castellano's job duties involve selling, cleaning, and completing the paperwork for cars. He is not a mechanic. He testified that Petitioner was not required to be at work at any certain time. Petitioner sometimes arrived after 9AM and left before 5PM. He was never penalized for coming and going at whatever time he wanted. Petitioner used all his own tools, used them as he wished if he had other jobs, and took them with him when his relationship with Respondent ended. Mr. Castellanos testified that Petitioner told him that he was working for other people and doing other side projects. He testified that Petitioner returned to work one month following the robbery. He further testified that Petitioner never indicated to him that he was hurt or under the care of a doctor following the robbery. Mr. Castellanos testified that Respondent now takes cars to another mechanic to be fixed.

CONCLUSIONS OF LAW

Regarding issue (A), whether Respondent was operating Under and Subject to the Illinois Workers' Compensation Act on November 8, 2016, the Arbitrator finds as follows:

The Arbitrator finds that on November 8, 2016, the Respondent was operating under and subject to the Illinois Workers' Compensation Act. Pursuant to Section 3, the Act automatically applies to a Respondent who meets any one of the seventeen listed "extra-hazardous" activities. Testimony at trial established that Respondent was engaged in business at the time of the accident as an auto sales and mechanic business. This falls under Subsection 15 as a business or enterprise in which electric, gasoline or other power-driven equipment is used in the operation thereof. All testimony in this matter demonstrated that Petitioner's duties were those of a mechanic working on gasoline-powered automobiles. No evidence was presented to the contrary. Accordingly, the Arbitrator finds that Respondent was operating under and subject to the Illinois Workers' Compensation Act on November 8, 2016.

Regarding issue (B), whether an employee-employer relationship existed, the Arbitrator finds as follows:

The Arbitrator finds that the record as a whole supports a finding that an employer-employee relationship between Petitioner and Respondent existed on November 8, 2016. Determining employer-employee relationships remains a vexatious issue in workers' compensation claims. Reviewing courts have used many factors to aid in this determination.

In *Ragler Motor Sales v. Industrial Comm'n*, 93 Ill.2d 66, 442 N.E.2d 903 (1982), the court found that the question of the employment relationship is a question of fact but stated that the court had been giving "increased significance to the nature of the work performed in relation to the general business of the employer." 442 N.E.2d at 905. The Fifth District reinforced this test in *City of Bridgeport v. Illinois Workers' Compensation Comm'n* where the court stated that a "factor of great significance is the nature of the work performed by the alleged employee in

relation to the general business of the employer." 2015 IL App 140532WC ¶38, (2015) citing *Ware v. Industrial Comm'n*, 318 Ill.App.3d 1117 (1st Dist. 2000). The Court continued to state, "because the theory of workers' compensation legislation is that the cost of industrial accidents should be borne by the consumer as a part of the cost of the product, this court has held that a worker whose services form a regular part of the cost of the product, and whose work does not constitute a separate business which allows a distinct channel through which the cost of an accident may flow, is presumptively within the area of intended protection of the compensation act." *Id.*, quoting *Ragler*, supra, 442 N.E.2d at 905. No single factor controls this issue's determination. The control of an employee's work remains an important factor. See *Crepps v. Industrial Comm'n.* 402 Ill. 606 (1949).

The record shows that Respondent set the hours in which Petitioner could work but allowed Petitioner to leave early if he desired. Petitioner testified that if he refused jobs he would likely be terminated. The record notes that Francisco Magana personally supervised Petitioner while he worked. Mr. Magana further testified that he could send Petitioner home if he was unhappy with his work. Assuming Petitioner could work as many or as few hours as he wished the record suggests that Petitioner was intended by Respondent to work from 9am to 6pm or some permutation therein. This is all compounded by the fact that Petitioner was paid on an hourly basis and was not paid per job or These factors suggest a level of control that goes beyond an independent contractor arrangement. The Arbitrator finds the testimony of Petitioner to be more credible than that of Mr. Magana or Mr. Castellano in this regard.

The Arbitrator further notes that Petitioner's work as a mechanic was integral to the nature of LC Auto Sale's business. Julio Castellano testified that Respondent was a business that bought and sold cars. Mr. Castellano testified that on average, he bought one to three cars per

week. Of those three cars, two of them would typically need work done. The record shows that Petitioner was the only mechanic who fixed the cars so that they could be sold. Mr. Castellano acknowledged that Petitioner's work was an integral part of Respondent's business.

The Arbitrator is not persuaded by Petitioner's tax status as being determinative of his employment status. The record is clear that Petitioner filled out 1099s which included the name of his own company, but the tax forms also name him individually. It was admitted that taxes were not taken out of his paychecks or cash he received. The records suggest that all payment receipts that Respondent introduced were made to "Luis A. Rios," not Petitioner's company. Respondent may claim this was done at Petitioner's request, but the Arbitrator finds Petitioner's testimony more credible in this regard. The evidence suggests that Respondent intended to pay Petitioner for his services as an individual, not under a company.

Based on the foregoing, the Arbitrator finds that an employer-employee relationship existed between Petitioner and Respondent on November 8, 2016.

Regarding issue (C), whether an accident occurred that arose out of and in the course of Petitioner's employment with Respondent, the Arbitrator finds as follows:

The Arbitrator finds that an accident did occur that arose out of and in the course of Petitioner's employment with Respondent.

Petitioner bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment. *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 194 (2002). There are three general types of risks to which an employee may be exposed: 1) risks that are distinctly associated with the employment, 2) risks that are personal to the employee, and 3) neutral risks that do not have any particular

employment or personal characteristic. *Potenzo v. Ill. Workers' Comp. Comm'n*, 378 Ill. App. 3d 113 (1st Dist. 2007).

The Arbitrator finds that Petitioner presented sufficient, credible evidence that Petitioner's injuries arose out of and during the course of work performed for Respondent. Petitioner's and Mr. Castellano's testimony, corroborated by the medical records, provides sufficient evidence that Petitioner was injured on November 8, 2016 during an armed robbery at Respondent's place of business. Petitioner was asked for money while he was working on a car in the service area, a gun was drawn, and Petitioner was violently escorted to the office with his boss. Money was again requested and denied resulting in the armed assailants striking Petitioner repeatedly. He sought immediate medical treatment after the incident. The medical records support that the injury occurred on that date in question. The record as a whole supports a finding that Petitioner was the victim of an armed robbery at Respondent's automotive sales location. Accordingly, the Arbitrator finds that Petitioner's injuries arose out of and in the course of his employment with Respondent.

Regarding issue (D), the Date of the Accident, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner presented sufficient, credible evidence that the accident occurred on November 8, 2016. Petitioner's unrebutted testimony was corroborated by Petitioner's medical records which reflect a date of injury of November 8, 2016.

Regarding issue (E), whether timely notice of the accident was given to Respondent, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner presented sufficient, credible evidence that notice of the accident was timely provided to the Respondent-Employer. The testimonial evidence in the record shows Petitioner and Julio Castellano were both victims of the same armed robbery at Respondent's location that caused Petitioner's injury. Mr. Castellano called emergency services on behalf of Petitioner. Accordingly, the Arbitrator finds that Respondent was provided timely notice of Petitioner's injury.

Regarding issue (F), whether Petitioner's condition of ill-being is causally related to his injury, the Arbitrator finds as follows:

The Arbitrator finds that some but not all of Petitioner's conditions of ill-being are causally related to his injury. The Arbitrator finds that Petitioner's Post-traumatic Stress Disorder, closed head injury, left parietal bone contusion, strains/sprains to the neck, chest, abdomen, back, and eye trauma and keratopathy are causally related to his injury. The Arbitrator does not find Petitioner's right shoulder issues that required surgery to be related to his injury.

The Arbitrator finds Petitioner's treatment immediately following his accident through January 16, 2017 to be related to his accident. After this, Petitioner does not seek medical treatment for 11 months. His ongoing complaint is related to right shoulder issues which required surgical intervention. The records demonstrate that Petitioner did not complaint of right-sided or right-shoulder issues when he reported to the hospital immediately after his injury. He complained of strikes to his head and left side. The records of Dr. Krpal, Petitioner's treating orthopedist, do not contain any explicit causal connection language connecting his injury with a rotator cuff tear that did not require treatment until 11 months after his accident. The Arbitrator is not persuaded by Petitioner's lack of insurance as the main reason behind this almost one-year

long gap in treatment as the record suggests he had coverage prior to this gap and subsequent to this gap via Medicaid.

That is not to say Petitioner's accident should be minimized. Petitioner's diagnosis of PTSD is well-supported by the record and Petitioner's testimony. His treatment for his PTSD was timely, albeit short-lived. The record supports a finding that Petitioner's experience with the armed robbery scarred him and caused PTSD. While treatment was general and not in the form of strict psychological care there is no evidence in the record to rebut this finding. Petitioner's ophthalmological issues of keratopathy and eye trauma are similarly well-supported by the record. The same can be said of his diagnosis of a left parietal bone contusion and strains/sprains to his neck, chest, abdomen, and back. For these reasons, the Arbitrator finds that Petitioner's Post-traumatic Stress Disorder, closed head injury, left parietal bone contusion, strains/sprains to the neck, chest, abdomen, back, and eye trauma and keratopathy are causally related to his injury. The Arbitrator does not find a causal relationship between Petitioner's right shoulder and his injury.

Regarding issue (G), Petitioner's earnings, the Arbitrator finds as follows:

Petitioner testified that he typically worked six days a week, typically from 8AM-6PM and was paid $14 hourly, or $650 per week. However, the evidence conflicts with Petitioner's testimony. There is evidence in the record that Respondent did not open until 9am, that Petitioner did not always stay until 5pm or 6pm, and that work for Petitioner could fluctuate. Moreover, the wage that Petitioner testified is not supported by the other evidence including Respondent's Exhibits 2,3,4 and 5. The pay records in evidence show dates of remittance but do not list or itemize dates Petitioner worked. Based on the evidence in the record, the Petitioner has worked

regularly for the Respondent since January of 2015 and earned in the year preceding his injury the amount of $20,419.50 reflecting an average weekly wage of 392.68.

Regarding issue (H), Petitioner's age, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner presented sufficient, credible evidence that at the time of the injury his date of birth is October 7, 1970 and he was 46 years old at the time of his injury.

Regarding issue (I), Petitioner's Marital Status, the Arbitrator finds as follows:

The Arbitrator finds that the evidence in the record supports a finding that Petitioner was married with no dependent children at the time of his accident.

Regarding issue (J), whether the Medical Services provided were Reasonable and Necessary, and whether Respondent paid all appropriate charges, the Arbitrator finds as follows:

Having found above, in section (F) that that Petitioner's Post-traumatic Stress Disorder, closed head injury, left parietal bone contusion, strains/sprains to the neck, chest, abdomen, back, and eye trauma and keratopathy are causally related to his injury, the Arbitrator finds that the medical treatment received by Petitioner from Rockford EMS, Swedish American Hospital, Dr. Schroeder, and Dr. Alexander for those issues to be reasonable and necessary. The Arbitrator further finds that Respondent has not paid for any of the bills in evidence. The bills were paid by Petitioner's Medicaid carrier and Respondent must reimburse Medicaid for such payments. Respondent shall pay for these related medical expenses incurred by Petitioner pursuant to Section 8(a) and section 8.2. of the Act. Having found no causal connection between the right

shoulder issues and his accident, the Arbitrator does not find the bills incurred after January 16, 2017 related to Petitioner's right shoulder to be reasonable and necessary.

Regarding (K), Temporary Benefits are due, the Arbitrator finds as follows:

The Arbitrator finds that Dr. Schroeder restricted Petitioner from work from November 22, 2016 through December 5, 2016. There is no evidence in the record that rebuts that Petitioner was restricted from work for this period time. There is testimony that Petitioner was restricted for several months and conflicting testimony that he returned to work after one month. Petitioner's testimony and medical records contain sporadic work restrictions from November 2016 to June 2017. Nevertheless, the medical records of Dr. Schroeder are self-explanatory. Respondent's records note that Petitioner was not paid during this period. Accordingly, Petitioner is entitled to temporary total disability benefits for that one and 6/7 weeks.

Regarding issue (L), the Nature and Extent of the injury, the Arbitrator finds as follows:

The Arbitrator notes that pursuant to Section 8.1(b) of the Act, 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 includes: (i) the reported level of impairment pursuant to AMA; (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.

Having found above, in section (F) that that Petitioner's Post-traumatic Stress Disorder, closed head injury, left parietal bone contusion, strains/sprains to the neck, chest, abdomen, back,

and eye trauma and keratopathy are causally related to his injury, the Arbitrator basis his finding regarding the nature and extent of Petitioner's injuries on those diagnoses.

Looking to the five criteria established by 8.1(b) and concerning the first factor: neither party sought an AMA rating. Accordingly, the Arbitrator gives no weight to this factor.

Looking to the second factor, Petitioner's occupation, Petitioner is a mechanic by trade and works in repossessions as well. The Arbitrator notes that while there is a disagreement as to when Petitioner returned to work as a mechanic he returned to his work with difficulty because of his PTSD. He was returned to full duty work. Accordingly, the Arbitrator gives substantial weight to this factor.

Regarding the third factor, Petitioner's age, the Arbitrator notes Petitioner was 46 years old and has many years of work ahead of him. The Arbitrator gives little weight to this factor. As far as future earnings capacity in factor four is concerned, there is no evidence in the record to show that Petitioner suffered any decrease or potential decrease in earning capacity. Accordingly, the Arbitrator gives no weight to this factor. Lastly, the evidence shows Petitioner suffers from some mild residual symptoms of his injuries. He does not have any permanent restrictions.

Based on the foregoing, the Arbitrator finds Petitioner suffered an 8% loss of use of the Person as a Whole.

Regarding issue (M), Penalties, the Arbitrator finds as follows:

No Petition for Penalties or supporting evidence was submitted into the record. No penalties are awarded.

Regarding issue (N), whether Respondent is due any Credit, the Arbitrator finds as follows:

The Arbitrator finds that Respondent-Employer is not entitled to a credit as no evidence of any entitlement to a credit was entered into evidence.

Regarding issue (O), whether the Injured Workers' Benefit Fund is Liable, the Arbitrator finds as follows:

The Illinois State Treasurer as ex officio custodian of the Injured Workers' Benefit Fund was named as a party respondent in this matter. Section 4 of the Workers' Compensation Act provides that the Fund is liable to pay benefits to an injured worker where the Respondent has failed to obtain insurance, and where Respondent has failed to pay benefits due. Petitioner submitted sufficient credible evidence by means of a certification from the National Council on Compensation Insurance Certificate demonstrating that Respondent-Employer was not insured at the time of the injury. Further, Petitioner provided sufficient credible evidence that notice of the proceedings were provided to the Respondent-Employer. Respondent-Employer was represented by counsel at the hearing.

Accordingly, the Arbitrator enters this award against the State Treasurer as *ex officio* custodian of the Injured Workers' Benefit Fund. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation paid to the Petitioner from the Injured Workers' Benefit Fund. The Employer-Respondent's obligation to reimburse the IWBF, as set forth above, is in no way limited or modified and is entirely independent and separate from Employer-Respondent's potential liability for fines and penalties set forth in the Act for its failure to be properly insured.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC015161
Case Name	Sean Lively v. State of Il/Chester Mental Health
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0301
Number of Pages of Decision	10
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Aaron Wright

DATE FILED: 7/10/2023

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Sean Lively,

Petitioner,

vs. NO. 20WC 15161

State of Illinois Chester Mental Health,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by both parties herein and notice given, the Commission, after considering the issues of permanent disability and credit,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 29, 2022, is hereby affirmed and adopted.

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

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

Pursuant to §19(f)(1) of the Act, this Decision and Opinion on Review of a claim against the State of Illinois is not subject to judicial review.

July 10, 2023
SJM/sj
o-5/24/2023
44

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

/s/ *Deborah J. Baker*
Deborah J. Baker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC015161
Case Name	Sean Lively v. State of Il/Chester Mental Health
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Aaron Wright

DATE FILED: 9/29/2022

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 27, 2022 3.85%

/s/ Jeanne AuBuchon, Arbitrator
Signature

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

September 29, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

SEAN LIVELY
Employee/Petitioner

v.

STATE OF IL / CHESTER MENTAL HEALTH
Employer/Respondent

Case # **20** WC **15161**

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 **Herrin, Illinois**, on **April 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 **May 19, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**45,362.93**; the average weekly wage was $**872.36**.

On the date of accident, Petitioner was **44** years of age, ***married*** with **3** dependent children.

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

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

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

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

ORDER

Respondent shall pay the reasonable and necessary medical services 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 permanent partial disability benefits of **$523.41**/week for **193** weeks, as provided in Sections 8(e)12 and 8(d)2 of the Act, because the injuries sustained caused the **20%** loss of Petitioner's left leg and the **30%** loss of Petitioner's body as a whole as a result of serious and permanent injuries sustained to Petitioner's left leg and cervical spine.

No credit for permanent partial disability of Petitioner's left leg due to the prior settlement contract is awarded.

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

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

SEPTEMBER 29, 2022

Jeanne L. AuBuchon
Signature of Arbitrator

PROCEDURAL HISTORY

This matter proceeded to trial on April 19, 2022, on all disputed issues, which are nature and extent of the Petitioner's injury and whether the Respondent is due a credit for a prior award for an injury to the Petitioner's left knee.

FINDINGS OF FACT

The Petitioner was employed by the Respondent as a security therapy aide when, on May 19, 2020, he was restraining a patient who was attacking a staff member and injured his neck and left knee. (T. 10-11) The Petitioner had sustained prior injuries to his left knee in 2005 but was not under active medical care at the time of the 2020 accident. (T. 11) He had no prior neck problems but did have low back surgery in 2006 or 2007. (Id.)

The Petitioner went to Chester Memorial Hospital immediately following the accident and complained of left shoulder pain, left arm pain with tingling and left knee pain with popping. (PX3) X-rays of Petitioner's left shoulder and knee showed only mild left knee degenerative disease. (Id.) He was diagnosed with sprains and was directed to follow up with his primary care provider and take over-the-counter medication. On May 22, 2020, the Petitioner saw his family physician, Dr. Reyes, who diagnosed pain in the left shoulder, likely rotator cuff strain versus tear, and pain in his left knee, likely ligament strain or possible meniscal tear. (PX4) Dr. Reyes recommended physical therapy and medication. Id.

On June 10, 2020, the Petitioner saw Dr. George Paletta, an orthopedic surgeon at The Orthopedic Center of St. Louis. (PX5) Dr. Paletta examined the Petitioner and took X-rays. (Id.) He ordered an MRI of the shoulder that was performed on June 24, 2020, and showed minimal findings, which Dr. Paletta reported would not account for Petitioner's symptoms. (Id.) Dr. Paletta

prescribed oral steroids, a steroid injection to the shoulder and an MRI of the cervical spine. (Id.) Both the injection and cervical spine MRI were performed on June 22, 2020. (Id.) Based on the findings of the MRI, Dr. Paletta referred the Petitioner to a spine surgeon. (Id.)

Regarding the Petitioner's left knee, Dr. Paletta recommended an MRI, which was performed on September 10, 2020, and showed a tear of the medial meniscus with a possible root equivalent. (Id.) Dr. Paletta surgically repaired the meniscus on October 12, 2020, and the Petitioner underwent physical therapy. (Id.) At his last visit to Dr. Paletta on December 22, 2020, the Petitioner was "doing quite well" overall and was released from care with no restrictions as to his left knee. (Id.)

Petitioner saw orthopedic spine surgeon Dr. Matthew Gornet on August 27, 2020, at The Orthopedic Center of St. Louis. (PX8) Dr. Gornet reviewed the cervical spine MRI and found disc herniations at C3-4 and C6-7 and a foraminal fragment at C5-6. (Id.) He prescribed medications and recommended a steroid injection, which was performed by pain management specialist Dr. Helen Blake on September 17, 2020. (PX8, PX9) The Petitioner reported to Dr. Gornet that the injection did not provide significant relief of his neck pain and headaches but only helped some of his arm symptoms. (PX8) After a CT scan showed no contraindications for surgery, Dr. Gornet performed a four-level disc replacement from C3-C7. (PX13)

Follow-up visits showed Petitioner's symptoms improved significantly. (PX8) He was kept off work, given medication and underwent physical therapy. (Id.) He was released to return to work full duty beginning May 15, 2021. (Id.) On his last visit of December 9, 2021, he reported minimal symptoms and was clinically doing well. (Id.)

The Petitioner testified that despite the improvement resulting from the surgeries, he still had knee and neck pain with activity. (T. 15-16) With regard to his knee, Petitioner noticed

popping and pain after physical activity. (T. 15) He is now a correctional officer and has to do occasional running and a lot of walking. (Id.) During the day, he stands on a concrete surface for 85-90% of his shift. (Id.) As to his cervical spine, the Petitioner testified that he experiences pain in his neck after physical activity and stiffness while driving. (T. 16) The Petitioner testified that his hobbies of snow skiing, hunting, fishing, and gardening have been adversely affected by both his injuries. (T. 16-17) He said he takes-over-the counter medication. (T. 15-16)

Regarding his prior left knee injury, the Petitioner testified that he had been working at Technicolor Universal in Pinckneyville, Illinois, and received a workers' compensation settlement but did not remember the percentage of disability he was awarded. (T. 18, 22) The Petitioner said his knee was worse now than with the first injury. (T. 24) No other evidence of the settlement was presented at arbitration nor was a stipulation as to a credit was presented with the parties' proposed decisions.

CONCLUSION

Issue (L): What is the nature and extent of the Petitioner's injury?

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law as set forth below. 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.** Neither party submitted an AMA rating. Therefore, the Arbitrator uses the remaining factors to evaluate the Petitioner's permanent partial disability.

(ii) **Occupation.** Petitioner continues to work for Respondent – now as a correctional officer. His job entails a lot of walking, occasional running and standing on concrete 85-90% of his workday. The Arbitrator places some weight on this factor.

(iii) **Age.** The Petitioner was 44 years old at the time of the injury. He has many work years left during which time he will need to deal with the residual effects of his injuries. The Arbitrator places significant 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.** Although the Petitioner was released to full duty without restrictions, he testified that he continues to experience pain and stiffness and many of his activities are adversely affected by his injuries. The Arbitrator puts significant weight on this factor.

Based on the foregoing evidence and factors, the Arbitrator finds that the Petitioner sustained serious and permanent injuries that resulted in the 30% loss of the body as a whole as to his cervical spine and 20% of his left leg.

Issue (N): Is Respondent due any credit towards PPD?

At Arbitration, the parties stipulated that Respondent is due a credit for permanent partial disability on Petitioner's left knee regarding Petitioner's prior settlement of a workers' compensation claim. However, no evidence of the settlement was presented at arbitration nor was a stipulation as to a credit was presented with the parties' proposed decisions. Therefore, the Arbitrator awards no credit.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC029539
Case Name	Antonio D'Alesio v. Walsh Construction
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0302
Number of Pages of Decision	21
Decision Issued By	Carolyn Doherty, Commissioner, Marc Parker, Commissioner

Petitioner Attorney	Zbigniew Bednarz
Respondent Attorney	Lauren Kus, Peter Carlson

DATE FILED: 7/10/2023

/s/Carolyn Doherty, Commissioner

Signature

DISSENT: /s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)	☐ Affirm and adopt (no changes)
) SS.	☐ Affirm with changes
COUNTY OF COOK)	☐ Reverse
	☒ Modify: Average weekly wage, benefit rates, TTD, TPD, maintenance, and PPD awards.
	☐ 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

ANTONIO D'ALESIO,

Petitioner,

vs. NO: 19 WC 029539

WALSH CONSTRUCTION CO. OF ILLINOIS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent, Walsh Construction Company of Illinois, herein and notice given to all parties, the Commission, after considering the issues of average weekly wage, benefit rates, causal connection, medical expenses, temporary total disability, temporary partial disability, maintenance benefits, permanent partial disability and vocational rehabilitation expenses and being advised of the facts of 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.

I. Overtime and Average Weekly Wage

The Arbitrator concluded that Petitioner's earnings preceding the accident, including overtime wages were $8,047.49, with a corresponding average weekly wage (AWW) of $2,917.31 using the "weeks and parts thereof" method. While Petitioner was never explicitly told that overtime was mandatory, the Arbitrator found overtime was "implicitly mandatory" and included overtime in the average weekly wage calculation. The Commission sees the evidence differently and finds the inclusion of overtime in the average weekly wage calculation was unsupported by the record. The Commission finds that the proper average weekly wage, excluding overtime, is $1,992.31 using the weeks and parts thereof method.

Section 10 of the Act explicitly states that overtime is to be excluded in calculating the average weekly wage. 820 ILCS 305/10 (West 2022). However, "overtime includes those hours

in excess of an employee's regular weekly hours of employment that he or she is not required to work as a condition of his or her employment or which are not part of a set number of hours consistently worked each week." Airborne Express, Inc. v. Illinois Workers' Compensation, 372 III. App. 3d 549, 554-555 (1st Dist. 2007); *see also* Tower Automotive v. Illinois Workers' Compensation Comm'n, 407 Ill. App. 3d 427, 436 (2011). The *Airborne* Court did not include overtime hours in the AWW because it found Petitioner was not required to work overtime as a condition of his employment and although the claimant consistently worked overtime, he did not work a set number of overtime hours each week. *Id.* at 555; (*see also* Freesen, Inc. v. Industrial Commission, 348 Ill.App.3d 1035 (2004)(finding the Commission erred in including overtime hours in its AWW calculation because there was no evidence overtime was a condition of employment claimant's employment, no evidence claimant consistently worked a set number of hours per week or that overtime hours were part of claimant's regular hours).

Here, as was the case in *Airborne*, Petitioner did not work a set number of overtime hours each week. *See* PX 9; T. 1519-1522. Further, as conceded to by Petitioner in their brief, there is no testimony from Petitioner, Mr. Golf, Mr. Duncan nor language in the union contract which states overtime was mandatory or a condition of his employment. In addition, there is no evidence to support a finding that Petitioner would be subject to discipline or termination if he refused to work overtime. *(compare to* Tower Automotive v. IWCC, 407 Ill.App.3d 427 (1st Dist. 2011)(the Court including overtime because the claimant testified that an employee was subject to discipline if he refused to work overtime). Rather, Mr. Golf, the business agent for the union testified on cross-examination that if a cement finisher did not want to work overtime, he would send that finisher to a job they can get done in 8.5 hours or less. (T. 64-66). Mr. Duncan, the superintendent for Respondent also testified that if a worker did not want to work overtime, they could leave the job site and it would be up to that worker if they want to return to work for Walsh. (T. 408-09). Therefore, the Commission finds that overtime was not mandatory in this case.

Lastly, the Commission observes that nothing in the case law discusses nor defines mandatory overtime as "implicit" or "constructive." As such, the Commission rejects the conclusion that overtime was implicitly mandatory in this case because Petitioner felt obligated to stay and /or that Petitioner could not readily leave the job site before the work was completed.

Having found that overtime was not mandatory, the Commission concludes that overtime wages should not have been included in the average weekly wage. It follows that the Commission modifies the AWW using the "weeks and parts thereof" method. The Commission observes that the pay stubs for Petitioner's employment with Respondent provide a time period of August 19, 2019 through September 15, 2019. (PX 9/T. 1519). Of note, Petitioner worked two Saturdays (August 31st and September 7th), totaling 24 hours, and was paid for those hours at a rate of time and half. Those two Saturdays should be included at a straight time rate because Mr. Duncan testified that project ran Monday through Saturday. (T. 79-80). Petitioner testified he was paid for Saturday, September 14, 2019 the day after his accident, but he did not actually work. As such the earnings from that specific day should be excluded. Petitioner received "show up" pay on September 3rd, which is properly excluded because he did not actually work that day. After excluding the earnings on September 3rd and September 14th, Petitioner worked a total of 112 regular hours over a period of 13 days (or 2.6 weeks). As such the calculation is as follows: 112 hours x $46.25/hour amounts to $5,180.00 in total earnings and $5,180.00 divided by 2.6 "weeks

and parts thereof" provides an average weekly wage of $1,992.31. The Commission concludes the correct AWW for this claim is $1,922.31.

II. Temporary Total Disability and Maintenance Benefits

The Arbitrator ordered Respondent to pay Petitioner temporary total disability (TTD) benefits totaling $130,036.40, representing $1,529.84 per week for 85 weeks for the time periods of October 11, 2019 through March 9, 2021 and April 26, 2021 through July 14, 2021, but excluding June 16, 2021. The Arbitrator also awarded maintenance benefits at a rate of $1,529.84 per week for the period of July 15, 2021 through September 17, 2021, totaling 9-2/7ths weeks.

The Commission's modification of Petitioner's average weekly wage requires a modification of the TTD and maintenance rates and benefits awarded. Using the modified average weekly wage of $1,922.31, the Commission adjusts the TTD and maintenance rates to $1,328.21 per week. As such, the Commission modifies the total TTD award to $112,897.85, representing the 85 weeks of TTD benefits awarded for the period of October 11, 2019 through March 9, 2021, and April 26, 2021 through July 14, 2021, excluding June 16, 2021. The Commission also modifies the maintenance award to $12,333.36, representing 9-2/7ths weeks for the time of July 15, 2021 through September 17, 2021.

III. Temporary Partial Disability

The Arbitrator ordered Respondent to pay Petitioner temporary partial disability (TPD) benefits totaling $4,678.96 representing 3-5/7 weeks for the time periods of September 16, 2019 through October 10, 2019 and June 16, 2021. As with the TTD award, the Commission's modification of Petitioner's average weekly wage requires a modification of the TPD award. The pay stubs indicate that Petitioner's gross wages exceeded the correct AWW of $1,992.31 for the pay period of September 16, 2019 through September 22, 2019. As such, the Commission also corrects the period of time in which TPD benefits are owed to reflect the pay periods of September 23, 2019 through October 13, 2019 and June 16, 2021 pursuant to the paystubs in evidence, as well as Petitioner's testimony. (See PX 10; PX 19 and T. 181).

The Commission provides the following updated calculations using the correct AWW of $1,992.31:

DATE	PAY PERIOD	WKS	WAGE	GROSS	DIFF	TPD
9/25/19	9/16/19 - 9/22/19	1	1,992.31	4,590.32	N/A	N/A
10/2/19	9/23/19 - 9/29/19	1	1,992.31	832.50	1,159.81	773.21
10/9/19	9/30/19 -10/6/19	1	1,992.31	832.50	1,159.81	773.21
10/16/19	10/7/19 - 10/13/19	1	1,992.31	415.25	1,577.06	1,051.37
N/A	6/16/21	1/7	284.62	80.00	204.62	136.41
					TOTAL	$2,743.20

As such, the Commission modifies the TPD award to $2,743.20, representing 3 -1/7 weeks.

IV. Permanent Partial Disability

The Arbitrator concluded Petitioner's injuries resulted in a loss of earnings pursuant to Section 8(d)1 of the Act and awarded Petitioner permanent partial disability (PPD) benefits in the amount of a maximum weekly benefit of $1,147.38 commencing on September 18, 2021 until the Petitioner reaches the age of 67 years old or five years from the date of the final award, whichever is later. The Commission affirms the award of PPD benefits pursuant to Section 8(d)1 but modifies the benefit rate. According to the union contract, if Petitioner was currently working as cement mason, he would make $49.75 per hour, which amounts to an AWW of $1,990.00 based on a 40-hour week. (*See* PX 16/T. 1777.) The Arbitrator correctly found that after his work injury, Petitioner is capable of earning $800.00 per week ($20.00 per hour x 40 hours per week) as a result of his employment as a groundskeeper. Therefore, the wage differential is correctly calculated as $1,990.00 – $800.00 = $1,190.00 multiplied by 66-2/3% which amounts to $793.33. Therefore, Petitioner is entitled to weekly payments in the amount of $793.33 beginning September 18, 2019, until he reaches the age of 67 years old or five years after the final award, whichever is later.

In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated November 17, 2022, is modified as stated herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner's average weekly wage for this claim is $1,992.31.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $1,328.21 per week commencing from October 11, 2019 through March 9, 2021, a period of 85 weeks of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary partial disability benefits in the amount of $2,743.20 for the period of September 23, 2019 through October 13, 2019 and June 16, 2021 as provided in Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $1,328.21 per week commencing from July 15, 2021 through September 17, 2021, a period of 9-2/7 weeks for maintenance benefits under Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits of $793.33/week beginning September 18, 2019 until he reaches the age of 67 years old or five years after the final award, whichever is later as provided in Section 8(d)(1) 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 the removal of this cause to the Circuit Court 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.

July 10, 2023

o: 06/16/23
CMD/jjm
045

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

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

CONCURRING IN PART AND DISSENTING IN PART

I concur with the majority's decision to affirm the Arbitrator's award of benefits to the Petitioner. However, I believe Petitioner's overtime wages should be included in his average weekly wage. Therefore, I dissent from that portion of the majority's decision. Business agent, Mr. Golf, testified that overtime was mandatory because concrete is a perishable product. He stated the work must be finished and that he would not send a worker to the worksite if he would not agree to work overtime. It is clear to me that Petitioner would not be given the opportunity to work an eight-hour shift if he did not agree to work overtime. Petitioner testified that overtime was mandatory because they didn't "stop the concrete." Respondent was in charge of the project and responsible for the concrete continually arriving at the worksite. I find Respondent's superintendent's testimony that Petitioner, or any worker, was free to leave the job site before the pour was completed not credible. Therefore, I dissent from the portion of the majority's decision excluding Petitioner's overtime wages from the average weekly wage calculation.

July 10, 2023

o: 06/16/23
MP/xxx
045

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC029539
Case Name	Antonio D'Alesio v. Walsh Construction
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	15
Decision Issued By	

Petitioner Attorney	Zbigniew Bednarz
Respondent Attorney	Peter Carlson

DATE FILED: 11/17/2022

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

/s/ Rachael Sinnen, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Antonio D'Alesio
Employee/Petitioner

v.

Walsh Construction
Employer/Respondent

Case # **19** WC **29539**

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, Illinois**, on **8/23/2022 and 9/21/2022**. 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 **Cost of vocational rehabilitation services pursaunt to Section 8(a)**

FINDINGS

On **9/13/2019**, 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 $**8,047.49**; the average weekly wage was $**2,917.31**.

On the date of accident, Petitioner was **43** 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 $**55,554.92** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**4,183.45** for other benefits, for a total credit of $**59,738.37**.

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 $1,529.84/week for 85 weeks, commencing 10/11/2019 through 3/9/2021, and 4/26/2021 through 7/14/2021, but excluding 6/16/2021 as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner maintenance benefits of $1,529.84/week for 9-2/7 weeks, commencing 7/15/2021 through 9/17/2021, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary partial disability benefits totaling of $4,678.96 reflecting 3-5/7 weeks (9/16/2019 through 10/10/2019, and 6/16/2021) as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits, commencing 9/18/2021, of $1,147.38/week, which is the maximum benefits, until Petitioner reaches age 67 or five years from the date of the final award, whichever is later, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

Respondent shall pay Petitioner directly for the outstanding medical services outlined in Petitioner's Exhibit 11 (with the exception of the Cement Masons Local 502 lien), pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act.

Respondent shall pay to Petitioner vocational rehabilitation expenses in the amount of $1,919.92, as provided in Section 8(a) of the Act.

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

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

NOVEMBER 17, 2022

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Antonio D'Alesio,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 19WC29539
Walsh Construction Co. of Illinois	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on August 23, 2022 and September 21, 2022 in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's Request for Hearing. Issues in dispute include causal connection, average weekly wage "AWW," unpaid medical bills, temporary total disability "TTD," temporary partial disability "TPD," maintenance, Respondent's credit of TTD, penalties/attorneys' fees under Sections 19(k), 19(l), and 16 of the Illinois Workers' Compensation Act "Act." Arbitrator's Exhibit "Ax" 1.

Petitioner's Job Duties

The Petitioner is a member of the Cement Masons labor union Local 502. (TA 1 of 2 at 76). He has been a member of Local 502 since 1995, over 25 years. (TA 1 of 2 at 76). The Respondent hired the Petitioner to work on a project pouring a runway at O'Hare Airport. (TA 1 of 2 at 78). Access to the runway was restricted so Petitioner would meet the crew at a nearby office, load into company vehicles that were driven by "badged" employees who were cleared to drive on the runway, and then stop at airport security before arriving to the pour site. (TA 1 of 2 at 79-87). The foreman, Zenon Heldak (a.k.a. "Ziggy") was badged. (TA 1 of 2 at 105). At the end of the workday, Ziggy would return with his vehicle, the crew would load back into the vehicles, follow Ziggy out of the airport, go out through security, and drive back to the Respondent's office. (TA 1 of 2 at 107-9).

Petitioner worked on an 8-person crew (6 cement finishers and two operating engineers). Finishers use a variety of hand tools to "finish" concrete while following a paver machine. (TA 1 of 2 at 87). The Petitioner described in detail how the crew works as an assembly line as well as the importance of not falling too far behind the paver machine as the concrete will start to harden. (TA 1 of 2 at 96-99). Petitioner explained that a finisher could not simply step away from his work without disrupting the choreography of the rest of the crew and there were not extra finishers

standing by. (TA 1 of 2 at 101-2). The Petitioner's work with the Respondent required him to lift a variety of items some of which could be over 50 pounds. (TA 1 of 2 at 112-17).

The Petitioner testified that he was paid weekly, and a normal work week would be 8 hours a day and 5 days a week for a total of 40 hours. (TA 1 of 2 at 117). In the event of rain, the crew would wait it out until the superintendent or foreman called off the work. (TA 1 of 2 at 109-10). He testified that he worked overtime because it was mandatory, and paystubs reflected overtime on all his workdays with the exception of an 8-hour day on September 14, 2019 and a day where he was given 2 hours "show-up time," because he is entitled to a minimum of 2 hours if he appears for work, but no work is performed. (TA 1 of 2 at 126-31).

Mr. Thomas Golf, a retired business agent for Cement Finishers labor union Local 502, testified on behalf of the Petitioner and explained the hours and rate of pay of Respondent per the area wide agreement admitted as Petitioner's Exhibit 12. (TA 1 of 2 at 18-19, PX 12). Mr. Golf also testified that while there was nothing in the agreement that indicated overtime was mandatory for cement finishers, if the nature of the project requires the finisher to work (deadlines, concrete hardening, etc.), that finisher cannot go home. (TA 1 of 2 at 42).

Mr. Mark Duncan (the project superintendent) testified on behalf of the Respondent. (TA 2 of 2 at 74). Petitioner testified that he had never seen Mr. Duncan prior to the day he first appeared in court. (TA 2 of 2 at 171-72). Mr. Duncan testified that no one on the project was required to work overtime and he never received a request from the Petitioner to not work beyond 8 hours even though Mr. Duncan was at the project every day. (TA 2 of 2 at 79). He further indicated that a cement finisher could leave the job site at any time as there were always badged co-workers and vehicles available. (TA 2 of 2 at 83-86).

Petitioner's Prior Medical History

The Petitioner testified that prior to his September 13, 2019 work accident, he had never sought medical treatment related to his right shoulder. (TA 1 of 2 at 151). He had previously injured his left shoulder, which required surgery, but never the right. (TA 1 of 2 at 152). He testified that he returned to work after the left shoulder surgery about three years before his work accident. (TA 1 of 2 at 153). Prior to his work accident, he had never been recommended surgery on his right shoulder. (TA 1 of 2 at 153-54). Before his accident, he had never experienced any pain or significant issues in his right shoulder, nor had he ever missed time from work due to his right shoulder. (TA 1 of 2 at 154). While the Petitioner previously owned a couple of landscaping businesses with his family called ASK Landscaping and Grass Monkey, he did not do any work for those businesses between September 13, 2019 and the present. (TA 1 of 2 at 231, TA 2 of 2 at 50).

Work Accident of September 13, 2019

On September 13, 2019, the Petitioner was pulling a bull float while he was walking backwards. (TA 1 of 2 at 145). He tripped over a false board and fell on his right shoulder. (TA 1 of 2 at 146). He noticed an immediate onset of pain; his other crew members contacted the safety manager, Mr. Tom Moran, as well as the foreman Ziggy, who were not present at the time. (TA 1 of 2 at 147).

Mr. Moran arrived at the job site and transported the Petitioner back to the Respondent's office. (TA 1 of 2 at 148). He completed an accident report at that time, but he did not seek medical treatment. (TA 1 of 2 at 148). The Petitioner and Mr. Moran agreed to wait to see how the shoulder felt over the weekend. (TA 1 of 2 at 148). He was paid for the following day (a Saturday) but did not actually work. (TA 1 of 2 at 149). The following Monday, September 16, 2019, he returned to the office and met with Mr. Moran. (TA 1 of 2 at 150). Mr. Moran drove him to Physicians Immediate Care (PIC) for initial treatment. (TA 1 of 2 at 150).

Petitioner's Medical Treatment

The Petitioner initially treated at PIC who ordered an MRI of the right shoulder, that was performed on September 30, 2019 at A&E Diagnostics. (TA 1 of 2 at 155-56, PX 1 at 37, PX 2 at 3-4). PIC recommended a course of physical therapy, which the Petitioner began on October 9, 2019 at Athletico. (TA 1 of 2 at 156, PX 1 at 79, PX 4 at 95).

The Petitioner elected to seek out his own choice of provider in Dr. Steven Chudik, an orthopedic surgeon who he first saw on October 11, 2019. (TA 1 of 2 at 157, PX 3 at 22). Dr. Chudik reviewed the MRI, diagnosed the Petitioner with a right shoulder rotator cuff tear, and recommended surgery. (TA 1 of 2 at 157, PX 3 at 22-29).

Respondent's IME with Dr. Aribindi

The Respondent requested a Section 12 examination with Dr. Ram Aribindi that was performed on March 9, 2020. (TA 1 of 2 at 158, RX 2). Dr. Aribindi opined that there was no need for a rotator cuff repair as he felt the pathology was in the labrum. He opined that the Petitioner's right shoulder exam was "suggestive of labral pathology," recommended a steroid injection shoulder, an MR arthrogram, and possible surgery if no improvement from the injection. (RX 2 at 6).

Dr. Chudik performed the injection on May 1, 2020 and reiterated his recommendation for surgery when the Petitioner returned and continued to have shoulder complaints. (TA 1 of 2 at 158-9, PX 3 at 33-7).

Dr. Aribindi was provided with surveillance footage of the Petitioner taken on June 13, 2020 while in his garage at home. (RX 3, 7). Dr. Aribindi opined that the video showed, among other things, the Petitioner "elevating the right arm to the overhead position without difficulty." (RX 3 at 1). As a result, Dr. Aribindi opined that the Petitioner had no right shoulder pathology; he did not require any further treatment and could return to work without restrictions. (RX 3 at 2). In reliance on this report, the Respondent terminated TTD benefits on or about July 15, 2020, and denied Dr. Chudik's recommended surgery. (TA 1 of 2 at 139, RX 12). Dr. Aribindi's testimony at his evidence deposition on January 15, 2021 was consistent with his prior reports. (RX 1).

At trial, the Petitioner was asked to review three surveillance videos the Respondent submitted as Respondent's Exhibit 7 and Exhibit 10. In one video, Petitioner is seen attempting to reach overhead to grab bean bag boards that weigh 11 pounds each but used a step stool to avoid reaching overhead to lift the boards. (TA 1 of 2 at 193-98, RX 7, PX 7).

Petitioner's Surgery with Dr. Chudik

On July 28, 2020, Dr. Chudik proceeded with arthroscopic surgery. (TA 1 of 2 at 159). Dr. Chudik intraoperatively visualized a "right rotator cuff tear" of the "subscapularis" as well as "torn superior labral tissue." (PX 3 at 41, 43). After visualizing the two tears, he performed repairs of both among other procedures. (PX 3 at 41-45). Dr. Chudik took intraoperative photographs during the surgery. (PX 6 at 47-48).

Dr. Chudik testified on behalf of the Petitioner by way of an evidence deposition on December 16th and 28th, 2020. (PX 6). Dr. Chudik explained that both he and Dr. Aribindi turned out to be right; Dr. Aribindi suspected a labral tear, whereas Dr. Chudik suspected a rotator cuff tear. (PX 6 at 46). Dr. Chudik discovered the presence of both when he performed surgery on the Petitioner which are seen on the intraoperative photographs taken during the surgery. (PX 6 at 47-48). Based on the mechanism of injury, the immediate onset of pain after the accident, the positive findings on the MRI, as well as the intraoperative visualization of the tears during surgery, Dr. Chudik opined that the Petitioner's September 13, 2019 work accident caused the present condition of ill-being in his right shoulder. He further opined that the surgery and physical therapy were reasonable and necessary medical treatment for that diagnosis. (PX 6 at 54-55). Dr. Chudik reviewed the surveillance footage from June 13, 2020 but explained that Petitioner's injuries would not necessarily prohibit him from lifting his arm above shoulder height; it would prevent him from being able to vigorously work with the shoulder. (PX 6 at 61-62).

Following post-operative physical therapy, the Petitioner saw Dr. Chudik on March 9, 2021. (TA 1 of 2 at 160, PX 3 at 75). Dr. Chudik recommended a course of work conditioning, but the Petitioner declined and requested to be released back to work instead. (TA 1 of 2 at 160, PX 3 at 76). The Petitioner explained that he needed to return to work because he had not seen any income in around 8 months at that stage. (TA 1 of 2 at 160). Dr. Chudik released him to full-duty work on a trial basis. (TA 1 of 2 at 160, PX 3 at 76).

Petitioner's Work with Lampignano & Sons

Petitioner attempted to return to full-duty work as a cement finisher and his union's business agent found him work at two cement contractors: Lampignano & Sons and Abbey Paving & Sealcoating. (TA 1 of 2 at 160-61). The Petitioner testified that this work was similar to that which he was doing for the Respondent, but he was unable to tolerate the pain long term and was unable to keep those jobs. (TA 1 of 2 at 162-164).

Mr. Mike Lampignano, the owner of Lampignano & Son Construction (a concrete company) testified on behalf of the Respondent by way of an evidence deposition on August 22, 2022. (RX 21). Mr. Lampignano observed the Petitioner performing curb and sidewalk work, which required framing in the morning and pouring concrete a few hours later. (RX 21 at 8). He testified that the Petitioner did not perform any overhead lifting. (RX 21 at 10). Mr. Lampignano denied that the Petitioner complained of any pain. (RX 21 at 9). He testified that he asked the Petitioner to return the following day, but Petitioner declined because he would not work full-time. (RX 21 at 11).

The Petitioner subsequently returned to Dr. Chudik on April 6, 2021 who documented the Petitioner's desire but struggle to return to work as a cement finisher. (TA 1 of 2 at 165, PX 3 at 78-9). Untimely Dr. Chudik recommended an FCE and removed him from work again. (TA 1 of 2 at 166, PX 3 at 82-83). The FCE was completed on April 30, 2021, the Petitioner returned to Dr. Chudik on May 7, 2021 who reviewed the FCE results and released him to work pursuant to the restrictions outlined in the FCE. (TA 1 of 2 at 166, PX 3 at 87). The FCE revealed deficiencies in the right arm versus the left. The Petitioner could bilaterally lift up to 47.8 pounds, and that he could lift bilaterally overhead 19.2 pounds. (PX 5 at 411).

The Petitioner next returned to Dr. Chudik on June 22, 2016 and requested a course of work conditioning, which he began at ATI on June 28, 2021. (TA 1 of 2 at 166-67, PX 3 at 97, PX 5 at 380). However, by July 2, 2021, work conditioning was discontinued due to difficulty with range of motion of the right shoulder and the therapist recommended using the April 30, 2021 FCE to determine the Petitioner's functional capabilities. (PX 5 at 365, 367). On July 14, 2021 Dr. Chudik discharged him from care and imposed permanent restrictions based on the FCE. (TA 1 of 2 at 167-68, PX 3 at 94).

Petitioner's Work with GCA

In May of 2021, the Petitioner began looking for a new job, keeping job logs that show contact for over 150 prospective employers between May 3, 2021 and August 9, 2021. (TA 1 of 2 at 179, PX 17). On September 19, 2021, Petitioner started work for GCA Education Services, which is a groundskeeping and custodial contractor for high schools. (TA 1 of 2 at 182-4, RX 22 at 8). The Petitioner's job duties include emptying garbage cans, collecting trash and yard waste around the school grounds, as well cutting grass, and trimming foliage with weed whackers, edgers, backpack blowers and lawn mowers. (TA 1 of 2 at 185). He started earning $17 per hour; by January of 2022 he received a merit-based raise to $20 per hour. (TA 1 of 2 at 186, PX 17 at 2, 9).

Mr. Trevor Garcia (a facility operations manager for AMB Industries[1]) testified on behalf of the Respondent by way of an evidence deposition on September 16, 2022. (RX 22). He testified to the job description contained in Respondent's Exhibit 13. Mr. Garcia stated that the requirements of the groundskeeper role were within the Petitioner's restrictions. (RX 22 at 45-46). He testified that the Petitioner never complained about physical difficulty doing the job, or any pain in his right shoulder. (RX 22 at 30, 35-37).

The surveillance videos admitted as Respondent's Exhibit 10 depict the Petitioner working for GCA on September 27, 2021 and September 29, 2021. (TA 1 of 2 at 203, RX 10). The Petitioner is seen riding a lawnmower, lifting garbage out of garbage cans with the primary use of his left hand, carrying a hedge trimmer with his left hand, using a grabber device with his right hand to pick up litter from the ground to place it into a bucket he is holding with his left hand, and attempting to use a pull-cord to start the gas-powered hedge trimmer first with his right arm unsuccessfully and then switching to his left arm. (TA 1 of 2 at 216-20, RX 10).

In March of 2022, the Petitioner went off of work for an unrelated heart condition and was laid off when he was released back to work in July of 2022. (TA 1 of 2 at 188). At trial, the Petitioner

[1] ABM Industries is a facilities contractor that owns GCA. (RX 22 at 5, 7).

had resumed his job search and was waiting for a response following an interview for another landscaping position at Loyola University in Chicago that pays $20.00 an hour. (TA 1 of 2 at 188).

Evidence Deposition of Ms. Kathleen Mueller

Ms. Kathleen Mueller, a vocational counselor for 10 years, testified on behalf of the Petitioner by way of an evidence deposition on August 31, 2021. (PX 14). She described the Petitioner as a 45-year-old man who emigrated from Italy in 1979. (PX 14 at 18-19). The Petitioner reported that he did not attend high school, nor did he have a GED. (PX 14 at 22). Ms. Mueller opined that the Petitioner had a "singular work history" as a cement finisher. (PX 14 at 25). Ms. Mueller testified that based on the dictionary of occupational titles, it was her understanding that cement finishing was "heavy" work that could require lifting up to 100 pounds. (PX 14 at 70). Ms. Mueller opined that the Petitioner has lost access to his prior occupation as a cement finisher due to his restrictions, and as a result, he sustained a reduction of his earning capacity. (PX 14 at 40-41). Ms. Mueller performed vocational testing and a transferable skills analysis, which led her to identify several appropriate jobs for the Petitioner including cage maker, stone splitter, and mold maker, which are light jobs related to the concrete and machinery industries. (PX 14 at 34-35). In the medium category, she identified drywall applicator, trimmer, steel post installer and a boiler reliner. (PX 14 at 35). After researching wages for these jobs, Ms. Mueller concluded that the Petitioner could likely earn between $11.80 per hour and $19.00 per hour. (PX 14 at 37-38).

CONCLUSIONS OF LAW

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

Issue F, whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. Even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. Thus, a claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." International Harvester v. Industrial Com., 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982).

The Petitioner provided unrebutted testimony that, prior to his work accident, he never sought medical treatment or had been recommended surgery for his right shoulder. (TA 1 of 2 at 151, 153-54). Prior to his work accident, he never experienced significant pain in the right shoulder, nor did his right shoulder ever affect his ability to work. (TA 1 of 2 at 154). The Petitioner testified

that he had a *left* shoulder surgery in 2016 but had been working without restrictions since then. (TA 1 of 2 at 76, 153). As a result, the Petitioner established that his right shoulder was in a "previous condition of good health."

The Petitioner also established that he suffered a traumatic injury involving his right shoulder insofar as he fell directly on his right shoulder in the undisputed work accident. (AX 1, TA 1 of 2 at 146). He explained that he immediately felt pain in his right shoulder following the accident. (TA 1 of 2 at 146). This is further corroborated by the Petitioner's treating medical records. (PX 1 at 12). Both Dr. Chudik and Dr. Aribindi testified that the mechanism of injury is consistent with rotator cuff and labral tears. (AX 1, PX 6 at 55-56, RX 1 at 26, 109).

The Arbitrator finds the opinions of Dr. Chudik to be more credible than the opinions of Dr. Aribindi. The Petitioner experienced temporary relief after undergoing an extraarticular injection that addressed both the rotator cuff and labral pathologies. When Dr. Chudik performed arthroscopic surgery on July 28, 2020, he visualized both the supraspinatus tear that he suspected, as well as the labral tear that Dr. Aribindi suspected. (PX 6 at 46). Additionally, Dr. Aribindi initially opined that the Petitioner required work restrictions and possible surgical intervention to address his labral pathology. After watching surveillance footage that Dr. Aribindi described as depicting overhead lifting, he opined that the Petitioner required no further treatment and could return to work without restrictions. The Arbitrator does not find Dr. Aribindi's final opinions to be persuasive as Petitioner was often obscured in the surveillance footage, was not lifting overhead, and was lifting below the weight restrictions initially recommended by Dr. Aribindi. (RX 1 at 122, 131-32, 138).

Based on the above, 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:

Section 10 of the Act "provides four different methods for calculating average weekly wage. (1) By default, average weekly wage is 'actual earnings' during the 52-week period preceding the date of injury, illness or disablement, divided by 52. (2) If the employee lost five or more calendar days during that 52-week period, 'whether or not in the same week,' then the employee's earnings are divided not by 52, but by 'the number of weeks and parts thereof remaining after the time so lost has been deducted.' (3) If the employee's employment began during the 52-week period, the earnings during employment are divided by 'the number of weeks and parts thereof during which the employee actually earned wages.' (4) Finally, if the employment has been of such short duration or the terms of the employment of such casual nature that it is 'impractical' to use one of the three above methods to calculate average weekly wage, 'regard shall be had to the average weekly amount which during the 52 weeks previous to the injury, illness or disablement was being or would have been earned by a person in the same grade employed at the same work for each of such 52 weeks for the same number of hours per week by the same employer.'" *Sylvester v. Indus. Comm'n*, 197 Ill. 2d 225, 230-31 (2001).

The Arbitrator relies on the credible testimony from the Petitioner and a representative from his union, Mr. Golf. The Petitioner could not easily leave before the work was completed due to the

nature of the job as pouring concrete is a time sensitive matter. (TA 1 of 2 at 34-35, 88-96). This was consistent with the testimony of Mr. Duncan, the Respondent's concrete superintendent on the project. (TA 2 of 2 at 75). Additionally, the Petitioner could not leave the job site on his own accord even if he wanted to because Petitioner was pouring concrete on a runway at O'Hare Airport which had restricted access. (TA 1 of 2 at 78). The Arbitrator considers the testimony of Mr. Duncan, Respondent's witness, but does not find his testimony credible regarding the accessibility of the job site.

Not only does the Arbitrator find that overtime was mandatory but further finds that the Petitioner's overtime hours were consistent. The Petitioner's credible testimony is consistent with his paystubs, which reveal he worked overtime 13 out of the 13 days he worked. (TA 1 of 2 at 130-31; PX 9). The Petitioner, Mr. Golf and Mr. Duncan all testified that a regular workday was 8 hours long, and a regular work week was 5 days long, for a total of 40 hours per week. (TA 1 of 2 at 25-26, 28, 117, TA 2 of 2 at 78, 80). The Petitioner provided unrebutted testimony that he missed a total of 6 days for reasons outside of his control, like inclement weather. (TA 1 of 2 at 120-30).

As a result, the Arbitrator finds that the Petitioner's average weekly wage should be calculated by dividing his total earnings, at straight-time, by the weeks and parts thereof he actually worked. The record shows that he actually worked a total of 13 days prior to his work accident (or 2.6 weeks) of which he worked a total of 164 hours[2]. His pay records reveal an hourly rate of $46.25 per hour at all relevant times. (PX 9). As a result, the Petitioner's average weekly wage is based on $46.25 per hour multiplied by 164 hours, or $7,585.00. $7,585.00 divided by the 2.6 "weeks and parts thereof" the Petitioner worked provides an average weekly wage of $2,917.31.

As a result, the Arbitrator finds that the AWW calculated pursuant to Section 10 of the Act was $2,917.31.

Issue J, whether the medical services that were provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

The "two-doctor rule" refers to Petitioner's choice of providers as described in Section 8(a) of the Act. Section 8(a) of the Act states a Respondent is responsible for "(1) all first aid and emergency treatment; plus (2) all medical, surgical and hospital services provided by the physician, surgeon or hospital initially chosen by the employee or by any other physician, consultant, expert, institution or other provider of services recommended by said initial service provider or any subsequent provider of medical services in the chain of referrals from said initial service provider; plus (3) all medical, surgical and hospital services provided by any second physician, surgeon or hospital subsequently chosen by the employee or by any other physician, consultant, expert, institution or other provider of services recommended by said second service provider or any subsequent provider of medical services in the chain of referrals from said second service provider…" 820 ILCS 305/8.

[2] The Arbitrator excludes the 2 hours of "show up time" he received on September 3, 2019, as well as the 8 hours of pay he received on the day after his accident, September 14, 2019. (PX 9).

Throughout his treatment, the Petitioner always maintained a chain of referrals within the Respondent's choice of provider, and his own two choices of providers. He first sought treatment with Physicians Immediate Care at the direction of the Respondent. (TA 1 of 2 at 150, PX 1). The doctors are Physicians Immediate Care referred him to A&E Diagnostics for an MRI of the right shoulder. (TA 1 of 2 at 155, PX 1 at 37, PX 2). After several weeks, the Petitioner elected to seek out his own choice of physician in Dr. Steven Chudik. (TA 1 of 2 at 157, PX 3). Dr. Chudik referred him for physical therapy at both Athletico and ATI Physical Therapy. (PX 3, PX 4, PX 5). Dr. Chudik performed surgery at Salt Creek Surgery Center. (PX 6 at 142). Anesthesia services for that surgery were provided by Midwest Anesthesia Partners. (PX 11 at 26). Dr. Chudik credibly testified that all the Petitioner's treatment, including the surgery, was reasonable and necessary. (PX 6 at 54). Dr. Aribindi did not agree Dr. Chudik as to the necessity of the surgery; however, the Arbitrator having found Dr. Aribindi unpersuasive on the issue of causation extends that finding to his opinion to the reasonableness and necessity of the surgery.

The Arbitrator finds that the lien from the Petitioner's health insurance through the Cement Masons Local 502 is unrelated to the September 13, 2019 work accident. A review of the lien reveals that the dates of service for the charges do not correspond with any of the treatment contained in the record. (PX 11). The Arbitrator finds that it appears the majority of these charges are related to the Petitioner's unrelated heart condition in the Spring and Summer of 2022. (TA 1 of 2 at 186-88, PX 11).

As the Arbitrator finds that the Petitioner's current condition of ill-being in his right shoulder is causally related to his work accident, the Arbitrator further finds that the medical treatment provided to the Petitioner has been both reasonable, necessary and within the two-doctor rule.

The Arbitrator orders Respondent to pay Petitioner directly for the outstanding medical services outlined in Petitioner's Exhibit 11 (with the exception of the Cement Masons Local 502 lien), pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act.

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

The Arbitrator, having found that the Petitioner's current condition of ill-being in his right shoulder is causally related to his work accident, further finds that all of the lost time the Petitioner incurred was likewise related to the work accident.

The Petitioner credibly testified that he was restricted to light-duty work from September 16, 2019 through October 10, 2019. (TA 1 of 2 at 154-55, PX 1 at 15-16, PX 3 at 21). He was then removed from work entirely by Dr. Chudik from October 11, 2019 through March 9, 2021. (TA 1 of 2 at 157, 160, PX 3 at 21, 22, 76). The Petitioner was released to full-duty work thereafter until Dr. Chudik again removed him from work beginning April 26, 2021. (TA 1 of 2 at 166, PX 3 at 84). Other than one day of work at Royal Pools for $80.00 on June 16, 2021, the Petitioner remained off of work until July 14, 2021 at which time Dr. Chudik released him back to work with permanent restrictions based on the FCE. (TA 1 of 2 at 1607-68, 180-81, PX 3 at 96, 19). The Petitioner subsequently conducted a diligent self-directed job search from approximately May 3, 2021 through August 9, 2021. (PX 15 at 56, PX 17). In August 2021, he secured an interview with his

new employer, GCA, and started working on September 18, 2021. (TA 1 of 2 at 182-84, RX 22 at 8, 20, RX 13 at 42, PX 18 at 1-2). For calculating temporary partial disability benefits, the Arbitrator turns to Petitioner's Exhibit 10, which contains the light-duty pay records, as well as Petitioner Exhibit 19 which documents the pay rate and first day of work at Royal Pools. (TA 1 of 2 at 180-81, PX 10, PX 19).

Based on the above, the Arbitrator finds Respondent liable for 85 weeks of TTD benefits (October 11, 2019 through March 9, 2021 and excluding June 16, 2021) at a weekly rate of $1,529.84; TPD benefits totaling $4,678.96 (reflecting 3 5/7 weeks from September 16, 2021 through October 10, 2019 and June 16, 2021); and maintenance benefits of $1,529.84 per week for 9 2/7 weeks, commencing July 15, 2021 through September 17, 2021 as provided in Section 8(a) of the Act.

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

Section 8(d) of the Act details two types of compensation for employees who are permanently and partially disabled. Section 8(d)(1) provides for a wage differential award; alternatively, section 8(d)(2) provides for a percentage-of-the-person-as-a-whole award. See Jackson Park Hospital v. Illinois Workers' Compensation Comm'n, 2016 IL App (1st) 142431WC, ¶ 2, 47 N.E.3d 1167

Section 8(d)(1) of the Act sets out the two requirements for a wage differential award. Under section 8(d)(1), an impaired worker is entitled to a wage differential award when (1) he is "partially incapacitated from pursuing his usual and customary line of employment" and (2) there is a "difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident." 820 ILCS 305/8(d)(1)

The Petitioner suffered a severe injury to his right shoulder resulting in tears to both the supraspinatus in his rotator cuff and his superior labrum, which required surgery to correct. (TA 1 of 2 at 159, PX 3 at 41-45). The Petitioner attempted to return to work as a cement finisher but credibly testified that he did not feel he could continue doing that kind of work long-term. (TA 1 of 2 at 162-64; TA 2 of 2 at 53; PX 21 at 23-24). The Arbitrator relies on the testimony of the Petitioner, his union representative Mr. Golf, his supervisor Mr. Garcia, and his vocational counselor Ms. Mueller credible on this issue. The Petitioner's right shoulder injury resulted in permanent restrictions removing him from his prior occupation. Specifically, his overhead lifting, and other lifting restrictions fall below the demands of his prior occupation as a union cement finisher. These limitations prevent him from being able to use the tools of his trade, as well as lift and move the necessary materials needed to perform the work.

The Arbitrator finds that "the average amount which [the Petitioner] would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident" is equal to his average weekly wage in this case: $2,917.31. 820 ILCS 305/8(d)(1). For the "average amount which he . . . is able to earn in some suitable employment or business after the accident," the Arbitrator finds the Petitioner is capable of earning $20.00 per hour, for an

average of 40 hours per week. 820 ILCS 305/8(d)(1). This results in a current average earning capacity of $800.00 per week. Deducting the current earning capacity from his full performance wage results in a difference of $2,117.31; 66-2/3% of this difference is $1,411.54. As this amount is larger than the maximum 8(d)(1) benefit of $1,147.38, the Arbitrator finds that his wage differential benefit is the maximum of $1,147.38. The Arbitrator finds that the Petitioner's current earning capacity could have been reasonably determined at the time he started working for GCA: September 18, 2019.

As a result, the Arbitrator finds that the Petitioner shall receive a wage differential benefit of $1,114.38 per week beginning September 18, 2019 and ending when the Petitioner reaches age 67.

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. Aribindi's opinions was not unreasonable or vexatious.

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

The Arbitrator finds that the Respondent is due a total credit of $59,738.37, which is the sum of $55,554.92 in previously paid TTD benefits, and an additional $4,183.45 paid as an advance against permanency. The Arbitrator notes that Respondent's Exhibit 12 reveals $55,554.92 in TTD payments, and an additional $4,183.45 in PPD payments. (RX 12).

Accordingly, the Arbitrator finds that the Respondent is due a total credit of $59,738.37.

Issue O, whether Respondent has paid all appropriate charges for vocational rehabilitation services per Section 8(a), the Arbitrator finds as follows:

Section 8(a) of the Act provides for vocational rehabilitation and mandates that the employer pay all maintenance costs and expenses "incidental" to a program of "rehabilitation." 820 ILCS 305/8(a) (West 2006). "A claimant is generally entitled to vocational rehabilitation when he sustains a work-related injury which causes a reduction in his earning power and there is evidence that rehabilitation will increase his earning capacity." *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1019 (2005). The Supreme Court, in *National Tea v. Industrial Comm'n*, 97 Ill.2d 424, 433 (1983), held that determining whether a claimant is entitled to vocational rehabilitation to restore him to his pre-injury earning capacity depends upon the particular circumstances of each case. *Id.* Such a standard, however, should not be inflexibly applied. *Id.*

Ms. Mueller provided unrebutted testimony that the Petitioner was removed from his prior occupation as a cement finisher for Walsh Construction. (PX 14 at 40). This resulted in a reduction in his earning capacity, which could be increased with the implementation of vocational rehabilitation services. (PX 8 at 40-41). Ms. Mueller credibly testified that her invoice for the initial assessment and vocational testing totaled $1,919.92. (PX 14 at 51-52, PX 15 at 12). The Arbitrator further finds that the Petitioner did have a genuine intention to return to work and that

he made a good faith attempt to look for work given his limitations. As a result, the Arbitrator finds that it was reasonable to undergo an initial assessment and vocational testing with Ms. Mueller.

Based on the above, the Arbitrator orders Respondent to pay Petitioner directly for unpaid vocational rehabilitation services in the amount of $1,919.92 per Section 8(a) of the Act.

It is so ordered:

Arbitrator Rachael Sinnen

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC018802
Case Name	Joshua Page v. UPS Cach
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0303
Number of Pages of Decision	17
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Dana Kieras, Michael Youkhana
Respondent Attorney	Adam Cox

DATE FILED: 7/11/2023

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Joshua Page,

Petitioner,

vs. NO: 20 WC 018802

UPS Cach,

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, temporary total disability, medical expenses, prospective medical treatment, and nature and extent (if the Arbitrator found Petitioner had reached MMI), and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

Prior to the start of the Arbitration hearing, the parties stipulated to a July 21, 2020, accident that arose out of and in the course of Petitioner's employment and to timely notice of that accident. However, Respondent disputed causal connection, liability for medical bills, and liability for temporary total disability (TTD) benefits after March 10, 2021. Respondent also disputed the need for prospective medical treatment consisting of an C3-5 discectomy and fusion, as recommended by Drs. Chunduri, Koutsky, and Sampat. The parties acknowledged that Respondent had paid $6,734.74 in TTD and agreed to stipulate to an MMI date of March 9, 2021, if the Arbitrator accepted the opinions of Respondent's §12 examiners and rejected Petitioner's treaters' recommendations for prospective care.

Findings of Fact

On July 21, 2020, the 42-year-old Petitioner was employed by Respondent to load and unload packages from delivery trucks. On that date, Petitioner was standing on the ground when he was struck in the neck at ear height by a falling package weighing 50-65 pounds and traveling a foot or two from the truck before striking him. He hit his left hip as he fell and felt immediate pain in his neck and back, although he did not bleed or seek any treatment at that time. Instead, he completed his shift, working less than an additional half hour.

The next morning, Petitioner sought treatment at Ingalls Memorial Hospital. Neither these notes nor any reports from his primary care physician appear in the record. However, on July 28, 2020, Petitioner was evaluated by Dr. Eugene Lipov at Illinois Orthopedic Network (ION) for neck, upper and lower back, left hip, and left groin pain. Subsequently, Dr. Chunduri, also from ION, assumed Petitioner's care and continued to treat him at the time of arbitration. He provided two cervical epidural steroid injections, a lumbar injection, and medications with only temporary improvement in Petitioner's complaints. Physical therapy was ordered but was not authorized by Respondent. Petitioner continued to suffer pain in his neck and lower back, as well as numbness and tingling in both hands.

According to the radiologist's and Petitioner's treating doctors' readings, MRIs of Petitioner's lumbar and cervical spine revealed a significant disc herniation at L5-S1 and smaller herniations at C3-4 and C4-5. An EMG of Petitioner's upper extremities showed C5 radiculopathy and suggested possible right carpal tunnel syndrome. Dr. Chunduri referred Petitioner to Dr. Sampat for a surgical consult, and Dr. Sampat agreed with Dr. Chunduri's recommendation for C3-5 discectomy and fusion. However, Dr. Sampat did not appreciate a herniation at L5-S1 and diagnosed instead a lumbar strain. A subsequent EMG of Petitioner's lower extremities was normal.

Dr. Koutsky at ION also evaluated Petitioner, finding his complaints of intermittent hand numbness "classic for cervical radiculopathy." He agreed that Petitioner might require the fusion surgery.

Respondent obtained a §12 evaluation from Dr. Biafora at Hand to Shoulder Associates. Dr. Biafora found that Petitioner did not have carpal tunnel syndrome (CTS) or any other pathology in his right hand, observing that Petitioner's complaint of hand numbness that occurred about three times a week and did not wake him at night did not constitute a symptom of CTS. Dr. Biafora also denied there was a causal connection between Petitioner's hand numbness and the mechanism of his accident or his repetitive lifting at work. He concluded Petitioner could return to work with regard to his hand numbness.

Dr. Hsu provided a second §12 evaluation for Respondent, focused on Petitioner's low back, neck and hand complaints. Dr. Hsu reviewed Petitioner's MRIs and found age-appropriate spondylosis and osteophyte complexes at C3-4 and C4-5, but no evidence of cord compression or

disc protrusions at either the cervical or lumbar level. He found the mechanism of injury a possible cause of acute soft tissue strains but opined it would not have aggravated or accelerated any pre-existing condition. According to Dr. Hsu, although Petitioner was not yet at maximum medical improvement at his exam on January 18, 2021, MMI was anticipated within six weeks.

Petitioner never received physical therapy because Respondent refused to authorize it. However, he did complete a home exercise program. At arbitration, Petitioner denied that he had ever before injured his back or neck.

The Arbitrator judged Petitioner to be only "somewhat credible." He questioned whether Petitioner had pre-existing neck conditions based on Dr. Lipov's initial evaluation. The doctor noted Petitioner had prior work injuries and opined Petitioner's current complaints were the result of a re-exacerbation of his prior symptoms. The Arbitrator also questioned whether Petitioner was exaggerating his symptoms, noting that his negative reactions to the epidurals were so extreme as to be unbelievable. He also noted that Dr. Sampat agreed with Dr. Hsu's finding that there were no herniations visible on Petitioner's lumbar MRI. As a result, the Arbitrator accorded Respondent's §12 examiner's opinions more weight than those of Petitioner's treating doctors at ION. He concluded that Petitioner had suffered cervical and lumbar strains as a result of his work accident and adopted the parties' stipulated date of March 9, 2021, as the end date for medical expenses and temporary total disability benefits. Prospective medical treatment was denied. The Arbitrator awarded Petitioner medical expenses through March 9, 2021, TTD for 32-1/7 weeks, and PPD of 8% loss of use of the person-as-a-whole.

Conclusions of Law

The Commission views the evidence differently and finds the opinions of the radiologist and Petitioner's treating physicians with regard to the herniations revealed by the cervical MRI more persuasive that the opinion of Respondent's expert, Dr. Hsu. The radiologist who read Petitioner's MRI films was able to identify and measure the protrusions at C3-4 and C4-5, and the ION doctors found these herniations to be a competent cause of Petitioner's symptoms. Dr. Hsu was the only physician to disagree with the radiologist's interpretation of the cervical films, and the Commission is not persuaded by his dissenting opinion. Additionally, Dr. Hsu had not reviewed the EMG of Petitioner's upper extremities which confirmed a cervical radiculopathy. Drs. Chunduri, Koutsky and Sampat all related Petitioner's herniations to his work accident, and even Dr. Hsu admitted that the accident caused what he deemed soft tissue strains.

Based upon the diagnoses of Petitioner's treating physicians, the radiologist's reading of the cervical MRI, the EMG showing cervical radiculopathy, and the ION doctors' causation opinions, the Commission finds Petitioner's current cervical condition to be causally connected to his work accident. Petitioner's treating physicians' opinions are supported by the medical records.

The Commission therefore modifies the Decision of the Arbitrator and finds that the Petitioner established that his current cervical condition of ill-being is causally related to the July 21, 2020, work-related accident. The Commission further finds that the medical treatment provided to the Petitioner post-March 9, 2021, was reasonable and necessary for the treatment of his cervical injury and that Petitioner continued to be totally disabled as a result of these injuries at the time of arbitration. The Arbitrator's Decision terminating medical and temporary total disability benefits related to the cervical injury as of March 9, 2021, is hereby vacated. Petitioner has not reached MMI with regard to this injury and requires additional treatment, specifically the discectomy and fusion recommended by his ION physicians. The Commission further finds that Petitioner reached MMI with regard to his lumbar and hip injuries by March 9, 2021. The Arbitrator's award of 8% loss of use of the person-as-a-whole under §8(d)2 is vacated, and the matter is remanded to the Arbitrator for further proceedings.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 3, 2022, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the outstanding amounts as found on ION's bill (Petitioner's Exhibit 2) for medical expenses under §8(a) of the Act and subject to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner an additional 71-1/7 weeks of temporary total disability at the rate of $208.66/week commencing March 10, 2021, through July 20, 2022, the date of hearing, pursuant to §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for the cervical disc discectomy and fusion recommended by Dr. Sampat, as well as all reasonable and necessary attendant care, as provided in §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 $14,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

July 11, 2023

mp/dak
r-6/15/23
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	20WC018802
Case Name	PAGE, JOSHUA v. UPS CACH
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Michael Youkhana, Matthew Harding
Respondent Attorney	Adam Cox

DATE FILED: 10/3/2022

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 27, 2022 3.85%

/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

Joshua Page
Employee/Petitioner

v.

UPS Cach
Employer/Respondent

Case # **20** WC **18802**

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 **Charles Watts**, Arbitrator of the Commission, in the city of **Chicago**, on **July 20, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **July 21, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**10,015.68**; the average weekly wage was $**208.66**.

On the date of accident, Petitioner was **42** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**6,734.74** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**6,734.74**.

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

ORDER

Petitioner reached maximum medical improvement for related low back and cervical strains on March 9, 2021. Respondent's liability for medical treatment and expenses ends after March 9, 2021. Prospective medical treatment, and specifically the surgery anterior cervical discectomy and fusion Dr. Sampat recommended, is denied.

Respondent shall pay Petitioner temporary total disability benefits of $208.66/week for 32-1/7ths weeks, commencing 7/28/2020 through 3/9/2021, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $**6,734.74** for TTD, $**0.00** for TPD, and $**0.00** for maintenance benefits, for a total credit of $**6,734.74**.

Respondent shall pay Petitioner permanent partial disability benefits of $208.66/week for 40 weeks, because the injuries sustained caused the 8% 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.

OCTOBER 3, 2022

Signature of Arbitrator

FINDINGS OF FACT

Petitioner is a 43 year-old, right hand dominant male employed by Respondent as a loader/unloader. (Tr. p.9) Specifically, the job required him to clear packages out of trucks, and also load trucks with packages. (Tr. pp.9-10, 29-30)

It is undisputed that Petitioner had a work-related accident on July 21, 2020. (Arb. Ex1) On that date, he was standing on the ground when struck on the neck at about ear height by a falling package while unloading. (Tr. pp.10-12, 31-32, 43-44, 54) Petitioner estimated the weight of this small box he thought contained nuts and bolts was 50-65 pounds. (Tr. pp.11, 32) Petitioner estimated the box was closer than arm's length when it started to fall, and traveled a foot or two before it hit him. (Tr. pp.32-33) After being hit by the box, he struck his left hip and felt injuries to his neck and back. (Tr. p.12)

Petitioner denied having any prior injuries to his neck or back. Petitioner did not lose consciousness. (Tr. pp.11-12, 34, 44) He did not bleed, bruise or seek first aid and finished unloading the rest of the truck through the end of his shift about 5-10 minutes later. (Tr. pp.43-45)

Initial Treatment

Petitioner testified he went to Ingalls Memorial Hospital the next morning. (Tr. pp.28-29) The Arbitrator notes that Petitioner did not submit any medical records from Ingalls Memorial Hospital into evidence.

At the instruction of his lawyer, Petitioner presented to Dr. Eugene Lipov of Illinois Orthopedic Network (ION) on July 28, 2020, for complaints of pain in his neck, upper back, low back, left hip and left groin. (Px1, pp.1-2, and Tr. pp.13-14, 29) Dr. Lipov noted Petitioner "did have pre-existing pain and many of his symptoms are a re-exacerbation of prior symptoms." (Px1, p.1) Lumbar and cervical MRIs were recommended, and Petitioner was restricted from working. *Id.*

Petitioner underwent MRIs of his neck and low back on September 19, 2020. (Px1, pp.6-9) The low back study revealed multilevel spondylosis with a 5.5mm disc herniation at L5-S1 (Px1, p.6). The neck MRI revealed spondylitic changes, with a 2.5mm central disc herniation at C3-4 and a 3mm disc herniation at C4-5, with mild and moderate bilateral stenosis at the respective levels. (Px1, pp.8-9)

On August 26, 2020, Petitioner "presented for follow up phone consult for his neck, hip and low back pain." (Px1, p.5) MRI studies and physical therapy were recommended. Petitioner testified he never had a telephonic visit, and all appointments were "in person" although sometimes the providers would call to check on him, referencing after his injections. (Tr. pp.46-47, 54-55) His first injection happened about two months later on October 29, 2020. (Px1, p.23)

On October 8, 2020, Dr. Chunduri of ION examined Petitioner, noting a primary complaint of significant pain and paresthesia in the upper extremity, most apparent in the hand. (Px1, p.10)

Dr. Chunduri was suspicious of carpal tunnel syndrome, and possible cervical radiculopathy. *Id.* He recommended an EMG of the upper extremities and continued to restrict Petitioner from work. *Id.* The study was completed on October 16, 2020, and revealed abnormal results suggesting bilateral C5 radiculopathy and mild right median nerve mononeuropathy suggestive of carpal tunnel syndrome, without evidence of left ulnar or median nerve neuropathy. (Px1, pp.15-18). Dr. Chunduri reviewed the EMG at the exam on October 22, 2020 and recommended an epidural steroid injection at C5-6. (Px1, p.19) That was administered on October 29, 2020. (Px1, p.23)

Petitioner testified he felt fine for a day or two after the injection, then his right back became sore, "like a charley horse," with associated sharp pain, tingling hand, and his feet went numb. (Tr. pp.16-17)

On November 12, 2020, Petitioner returned to Dr. Chunduri for neck and low back complaints. (Px1, pp.28-29). He testified at that time, "I was in a lot of pain. It was like stuck. I couldn't move it that much." (Tr. p.17) Dr. Chunduri continued to keep Petitioner off work, and recommended another epidural injection along with a surgical consultation. (Px1 p.28)

Section 12 Examinations

On December 10, 2020, Petitioner attended a Section 12 examination with Dr. Biafora, with the report entered as Respondent's Exhibit 1. Petitioner reported to Dr. Biafora about a month earlier he had a neck injection resulting in some improvement in his neck and hand numbness. (Rx1, p.2) After reviewing the treatment records (including the upper extremities EMG), taking a work history and conducting a comprehensive physical examination, Dr. Biafora opined that Petitioner did not have a condition of ill-being for his right hand. (Rx1, pp.2-5). In support, Dr. Biafora noted Petitioner's intermittent complaints of numbness occurred about three times a week and did not wake him at night. Dr. Biafora affirmed that "manifestation of numbness three times weekly did not suggest a pathologic condition." (Rx1, pp.5-6) Dr. Biafora reviewed the raw EMG data, and "would be hesitant to assign a diagnosis of right carpal tunnel syndrome" based on the result, expressly adding he did not believe Petitioner had carpal tunnel syndrome. (Rx1, p.5). Dr. Biafora added that he did not find the essential functions of a loader/unloader, which Petitioner did for approximately 11 months, would have caused, contributed or accelerated carpal tunnel syndrome. (Rx1, p.6) For functionality, Dr. Bairfora stated Petitioner did not have a right hand condition that prevented him from doing his regular job duties.

Dr. Wellington Hsu conducted a Section 12 examination of Petitioner's cervical and lumbar spines on January 18, 2021, with the corresponding report admitted into evidence as Respondent's Exhibit 2. Petitioner's chief complaints were neck pain, back pain, and bilateral hand numbness and tingling. (Rx2, p.2) Petitioner said regarding this examination, "I think he had me bend over and asked me how much pain I was in, and I told him like 7 and a half, 8. And that was it." (Tr. p.21) Dr. Hsu's report relates he tested range of motion in the neck and low back, strength in the upper and lower extremities, did a gait examination, Waddell's testing, straight leg raise testing

in the sitting and supine positions, and other provocative testing. (Rx2, p.3) Spurling's, Lhermitte's and Hoffman's signs were negative. His review of the neck MRI found age-appropriate spondylosis, posterior osteophyte complexes at C3-4 and C4-5, and no evidence of cord compression. (Rx2, p.3) Dr. Hsu opined that the mechanism of injury was consistent with causing acute soft tissue strains, but found no evidence to suggest an aggravation, acceleration, or exacerbation of any pre-existing condition. Dr. Hsu found Petitioner had not reached MMI, which was anticipated to happen in four to six weeks, at which time Petitioner could resume unrestricted work. (Rx2, pp.4-5)

Dr. Hsu issued an addendum report, dated May 20, 2021, admitted into evidence as Respondent's Exhibit 3. Dr. Hsu reviewed additional records, including Dr. Chunduri's March 25, 2021 report and the May 15, 2021 EMG. (Rx3, p.1) Dr. Hsu opined that none of his opinions changed, adding that Petitioner had soft tissue injuries to his neck and back and did not suffer cervical disc protrusions as Dr. Chunduri believed, from the work accident.

Post-Section 12 Examination Treatment

Petitioner underwent an EMG of his lower extremities on May 15, 2021. (Px1, pp.40-43) This was a normal study. (Px1, pp.40-41)

On June 4, 2021, Petitioner was examined by Dr. Koutsky of ION for complaints of numbness in his hands, sharp neck pain, extreme low back pain and occasional feet numbness. (Px1, pp.46-48 and Tr. p.22) Dr. Koutsky disagreed with Dr. Hsu that Petitioner had "simple strains," reasoning that Petitioner's neck pain radiating down his upper extremities with "some" numbness and tingling were "classic for cervical radiculopathy." (Px1, p.47) Dr. Koutsky recommended physical therapy. *Id.*

Petitioner returned to Dr. Chunduri on June 25, 2021, at which time a second epidural injection at C4-5 was ordered along with home exercises. (Px1, p.49 and Tr. p.23) This was changed to bilateral injections by Dr. Chunduri on September 23, 2021 (Px1, p.52)

At the referral of Dr. Chunduri, Petitioner saw Dr. Sampat on December 14, 2021, who commented at length about what he believed the cervical imaging revealed, but "the lumbar MRI did not show evidence of a large herniation." (Px1, pp.55-58) The low back diagnosis given at that time was a lumbar strain. (Px1, pp.58)

A second epidural injection for the neck was recommended, which was done at the C5-6 level on January 13, 2022. (Px1, pp.57, 60 and Tr. pp. 24-25) Petitioner testified this second injection caused pain, "worse than I have ever felt in my life." (Tr. p.25) When asked why by his attorney, he said, "I don't know. I was in a lot of pain. It was sharp, shooting down the back of my neck real bad. I was like in a lot of pain. It was worse than I ever felt before even the shots, before I even got the shots." (Tr. p.25) Petitioner testified the new onset of symptoms lasted a week or week and a half. (Tr. p.25)

Petitioner had a telemedicine follow-up with Dr. Chunduri on February 3, 2022. (Px1, p.64) Dr. Chunduri wrote that after the second injection the upper extremity symptoms improved, but the neck did not. *Id.*

At Dr. Chunduri's instruction, Petitioner returned to Dr. Sampat on April 12, 2022. At that time, cervical spine surgery was recommended. (Px1, pp.66, 68 and Tr. pp.26-27) The specific surgery ordered is an anterior cervical discectomy and fusion from C3 to C5. (Px1, p.68)

When asked about other issues presently, Petitioner testified, "…I can't explain it. My nerves, I guess my nerves. Like I don't know. Something with my nerves. It makes my hands tingle." On cross examination Petitioner indicated that the location of his pain was:

1. On the lateral left side of his neck, between his ear and his shoulder. (Tr. p.35)
2. For the "right" side of his neck, slightly posterior above his shoulder blade but not up only about halfway to the shoulder, and almost straight down his spine. (Tr. pp.35-36)
3. Petitioner made no indication about any pain being present in his arms.

Concerning his upper extremities, Petitioner testified that he had no pain in his right arm and his left arm was "fine" at the time of trial. (Tr. p.37) Prior to the second injection Petitioner testified he had numbness and tingling throughout the entirety of both his left and right hands, and his right arm up to the elbow. (Tr. pp. 37-40)

When asked about his compliance with Dr. Chunduri's recommended home exercise program, Petitioner replied that he only used a cold machine on his neck and did nothing else. (Tr. pp.40-41). No written instructions for home exercises were given to Petitioner. (Tr. P.41) Petitioner said, he told me to go back and forth. He said 'try and do it every day.'" (Tr. p.41)

Petitioner's hip had not bothered him for 6-7 months prior to trial. (Tr. p.43) He testified the hip didn't bother him at all. (Tr. p.43)

Petitioner testified after the accident his legs went numb from nerve damage in his neck. (Tr. p.51) He testified that both doctors told him that, and "for a fact" knew Dr. Chunduri was one of them. *Id.* Petitioner testified he has not had leg symptoms since two to three weeks after the second injection on January 13, 2022 (Px1, Tr. p.52) He manages his daily symptoms with over-the-counter ibuprofen (10-12 per day) and uses cannabis. (Tr. pp.45-46, 52-53)

CONCLUSIONS OF LAW

With respect to issue (f), is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds as follows:

It is axiomatic that the Petitioner bears the burden of establishing, by a preponderance of credible evidence, all the elements of his claim. *Illinois Institute of Technology v. Industrial Commission*, 68 Ill.2d 236, 369 N.E.2d 853 (1977). The requirement that the Petitioner prove "by a preponderance of the evidence" all elements of his claim means that he must present evidence which is more credible and convincing to the mind and, when viewed as a whole, establishes the facts sought to be proved as more probable than not. *In Re: K.O.,* 336 Ill. App. 3d 98 (2002). The mere existence of testimony does not require its acceptance by the Commission. *Smith v Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983). The facts of each case must be closely analyzed to be fair to the employee, the employer, and to the employer's workers' compensation carrier. *Three "D" Discount Store v Industrial Commission*, 198 Ill.App.3d 43, 556 N.E.2d 261, 144 Ill.Dec. 794 (4th Dist. 1989).

It is in the provenance of the Arbitrator to weigh and resolve conflicting testimony, to make determinations of credibility and findings of fact, and to determine where the preponderance of the evidence lies. *Pazara v. Indus. Comm'n.*, 405 N.E.2d 767, 769 (Ill. 1980).

A. Petitioner's Credibility

The Arbitrator observed Petitioner at trial and reviewed the medical evidence and finds him somewhat credible. Petitioner answered questions easily and at normal conversational speed. One concern is that Petitioner testified multiple times that he never injured his neck or back prior to his work accident. Yet his earliest medical record expressly refutes that and characterizes his clinical presentation as a re-exacerbation of prior symptoms. Dr. Hsu's Section 12 report similarly reports Petitioner reporting of a prior neck injury, which Petitioner "did not recall" doing at the time of trial.

The Arbitrator also is concerned with Petitioner's testimony of worsening symptoms after each of the steroid injections strange. This would be an unusual response to injections and the medical records do not corroborate his testimony about adverse reactions to the injections. Dr. Sampat's report of 4/12/22 says, "he had nearly full relief for a few days and then his pain returned." (Px1, p.68)

Petitioner's comments about the totality of Dr. Hsu's Section 12 examination being a simple bend over instruction do not comport with the multiple physical examination findings contained in the doctor's report.

The Arbitrator finds Petitioner's testimony about his physical complaints to be a bit exaggerated.

B. Medical Evidence

The Arbitrator finds the opinions of Dr. Biafora persuasive concerning Petitioner's right hand. More precisely, the Arbitrator agrees that the evidence does not support Petitioner has a

condition of ill-being in his hand. Although the EMG study revealed right median neuropathy, the severity was merely "mild" and all such abnormalities on EMGF testing require clinical correlation. The intermittent nature of Petitioner's hand numbness complaints do not suggest an acute carpal tunnel syndrome. Assuming *arguendo* Petitioner has/had acute carpal tunnel syndrome, the Arbitrator does not find that being struck in the neck by a package to be a sufficient mechanism for that condition to become symptomatic. Thus, the Arbitrator concludes Petitioner does not have a condition of ill-being in his right hand related to the July 21, 2020 accident.

Concerning the left hand, the Arbitrator notes several mentions in the medical records of occasional left hand numbness and tingling. EMG testing for the left upper extremity and hand was negative, and provocative testing such as Tinel's testing has consistently been negative. Similarly as with the right hand, the Arbitrator finds Petitioner has no condition of ill-being in his left hand related to the July 21, 2020 accident.

Concerning Petitioner's neck and low back, the Arbitrator agrees with Dr. Hsu's opinions that the work-related injuries were strains. Petitioner's surgeon, Dr. Sampat, appears to agree as of the most recent lumbar diagnosis he rendered on December 14, 2021.

As it concerns the neck, Dr. Hsu noted negative Spurling's, Hoffman's and Lhermitte's signs, all tests for nerve compression and active radiculopathy. Dr. Hsu found age-appropriate degeneration without evidence of cord compression when reviewing the cervical MRI from September 19, 2020.

The Arbitrator also notes the size of the protrusion in Petitioner's low back being over twice as large as those in Petitioner's neck (5.5mm vs. 2.5mm and 3mm). Despite the size of the same described disc finding being so much greater, Petitioner's own surgeon (Dr. Sampat) opined there was no evidence of disc herniation. It is not surprising that Dr. Hsu did not find evidence of work-related disc herniations in Petitioner's low back and neck. One explanation could be the osteophytes Dr. Hsu observed in the neck, which the other physicians did not comment about in their reports.

Also, the EMG for the lower extremities was normal, and the upper extremity the EMG was not. However, as stated above, the Arbitrator struggles to find a plausible medical explanation for why a blow to one's neck might result in the right wrist compression present on the abnormal EMG study. The Arbitrator finds that where Petitioner physically indicated he had symptoms did not necessarily comport with the location of the C5 protrusion noted on the MRI.

Lastly, Dr. Hsu opined that the mechanism of injury was consistent with causing acute soft tissue strains, but found no evidence to suggest an aggravation, acceleration, or exacerbation of any pre-existing condition.

The Arbitrator concludes that the package that fell, while possibly as heavy as Petitioner claims, is not the type of mechanism that supports Dr. Chunduri's diagnosis, nor the recommendation

for surgery. Moreover, Petitioner's clinical presentation, between the locations of discomfort indicated and what is contained in his treatment records do not match expected dermatomal patterns.

The parties stipulated that if no causation was found for Petitioner's current condition of ill-being, that March 9, 2021 is his date of reaching maximum medical improvement (MMI). (Tr. p.7) The Arbitrator adopts this agreement.

With respect to 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 services, the Arbitrator finds as follows:

By virtue of Petitioner reaching MMI on March 9, 2021, and no controversy for charges incurred prior to that date. Petitioner remains responsible for all medical expenses incurred after March 9, 2021, including the lone charge submitted into evidence of $212.15 from ION.

With respect to issue (k), what temporary benefits are in dispute, the Arbitrator finds as follows:

Following the determination of issue "f" on causation, no temporary benefits are owed after March 9, 2021.

Petitioner claimed temporary total disability (TTD) benefits from July 22, 2020 through the date of hearing, July 20, 2022, a period of 104 weeks. Petitioner offered no evidence of work restrictions until Dr. Lipov on July 28, 2020. As a consequence the appropriate TTD period is July 28, 2020 through March 9, 2021, a period of 32-1/7ths weeks. At Petitioner's TTD rate of $208.66, he would be owed a total of $6,706,93. Respondent slightly paid more, for a stipulated credit to it of $6,734.74.

With respect to issue (l), what is the nature and extent of the injury, the Arbitrator finds as follows:

Petitioner's accident occurred after September 1, 2011. As a consequence, his permanent partial disability shall be assessed in accordance with §8.1b of the Act.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no relevant permanent partial disability impairment report and/or opinion was submitted into evidence. Dr. Biafora found a 0% disability rating for the right hand, but in the context of no right hand injury sustained. The Arbitrator agrees there is no hand injury related to the work accident. The Arbitrator therefore gives no weight to this factor for the work injuries to Petitioner's neck and back.

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 loader unloader at the time of the accident and that he is able to return to his pre-injury line of work. The Arbitrator notes the job has a heavier physical demand. Because of this, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 42 years old at the time of the accident. Because his age places him closer to the start of his expected work life than the end (assuming age 67) but being near the midpoint 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 Petitioner was released to unrestricted work. Also, there is no evidence his current ability to earn will not equal or exceed his pre-accident weekly earnings of $208.66. The Arbitrator 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 Petitioner sustained a bulge/protrusion and soft tissue injuries to his neck and back that presented discomfort toward eight to nine months after his accident. Petitioner also received injections. He is ultimately able to return to unrestricted work. His reported complaints in the medical records are considered with caution, noting the above concerns about Petitioner's overall veracity. Because of this, the Arbitrator therefore gives moderate weight to this factor within the range of expected values for similar cases with objective findings on imaging studies and soft tissue strain injuries that were treated with injections.

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 8% loss of use of person as a whole pursuant to §8(d)(2) of the Act.

With respect to issue (o), other – prospective medical care, the Arbitrator finds as follows:

In light of Petitioner reaching MMI on March 9, 2021, with no further treatment indicated, this issue becomes moot. Prospective medical treatment, and specifically the surgery anterior cervical discectomy and fusion Dr. Sampat recommended, is denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC026862
Case Name	Andres Santos v. Arcelormittal
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0304
Number of Pages of Decision	25
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Michael Casey
Respondent Attorney	Miles Cahill

DATE FILED: 7/12/2023

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANDRES SANTOS,

Petitioner,

vs. NO: 17 WC 26862

ARCELORMITTAL,

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 whether the Illinois Workers' Compensation Commission has jurisdiction, the causal connection and 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 August 16, 2022 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $702.00 per week for a period of 125 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused a 25% loss of use as a person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $702.00 per week for a period of 88.55 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused a 35% loss of use of his left arm.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $7,136.80 for medical expenses, as provided in §8(a) and subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the compensation benefits that have accrued from September 9, 2017 through January 20, 2022 in a lump sum, and shall pay the remainder of the award, if any, in weekly payments.

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

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

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

July 12, 2023

DJB/lyc
O: 6/14/23
43

/s/ *Deborah J. Baker*

/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC026862
Case Name	SANTOS, ANDRES v. ARCELORMITTAL
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	22
Decision Issued By	Jeffrey Huebsch, Arbitrator

Petitioner Attorney	Michael Casey
Respondent Attorney	Miles Cahill

DATE FILED: 8/16/2022

/s/ Jeffrey Huebsch, Arbitrator
Signature

INTEREST RATE FOR WEEK OF AUGUST 16, 2022 3.02%

A Santos v. ArcelorMittal,17 WC 026862

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

Andres Santos
Employee/Petitioner
v.
ArcelorMittal
Employer/Respondent

Case # **17** WC **026862**

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 B Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **01/20/22**. 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 **9/9/17**, 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.

The Parties agreed that Petitioner's average weekly wage was $**1,170.00**.

On the date of accident, Petitioner was **47** 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 $**9,476.01** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**9,476.10**.

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $702.00 per week for a period of 213.55 weeks because the injuries sustained caused petitioner to suffer the 25% loss of use as a person as a whole and the 35% loss of use of his left arm, in accordance with §§8(d)2 and 8(e) of the Act.

Respondent shall pay reasonable and necessary medical expenses of $7,136.80, as provided in §§8(a) and 8.2 of the Act, and as is set forth below.

Respondent shall pay Petitioner the compensation benefits that have accrued from 9/9/2017 through 1/220/2022 in a lump sum, 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.

/S/ Jeffrey Huebsch
Signature of Arbitrator

August 16, 2022

FINDINGS OF FACT

Petitioner is 6 feet 3 inches tall and at hearing weighed 320 pounds. On the accident date of September 9, 2017 he weighed between 280 and 290 pounds.

On September 9, 2017 he was an employee of Respondent, ArcelorMittal. He started working for Respondent and its predecessor about January 2006. The name of the predecessor company that he started working for was ISG. Petitioner applied for the job with ISG in Riverdale, Illinois. Petitioner's brother, who worked at the Riverdale plant, gave him the lead and an application to apply. Petitioner went personally to the Riverdale plant, where he filled out papers and gave the application to the plant manager, Gary Norgren. Petitioner then filled out additional papers with regard to taxes and had to undergo a couple of tests. At the end of that, Mr. Norgren told Petitioner he was hired and had to return the next day to do some more paperwork and interviews. Petitioner returned the next day and had to have a one-on-one interview at the plant. The next day Petitioner and other applicants were put in a room and according to their grade and scores they were able to pick a job. All of that transpired at the Riverdale plant. After the 3rd day, the applicants were taken through the Riverdale plant and shown the different jobs. At the end of that, Petitioner picked a job and started working in that job the following day. Petitioner was paid by respondent for all those 4 days. Petitioner was being trained while he was doing his job at the plant. That continued until he was able to do the job on his own. All during that time he was paid salary every day he was there. Petitioner's understanding was that he was an employee from the first day when Mr. Norgren said he was hired. He worked gunning the furnace for about a year before he switched inside the plant to another job inside the Riverdale plant. He continued working at the Riverdale plant until he was laid off in 2008. He was off on layoff for about 6 months. He collected unemployment compensation during that time. He was then called back to the Riverdale plant. He did not have to fill out any new application forms when he was called back. There was no new paperwork that he had to fill out. There was only a drug test and physical tests that had to be performed. After Petitioner was called back to work, he continued to work at the Riverdale plant. The union covering the Riverdale plant merged with the union covering the Indiana Harbor plant so that Petitioner was able to bid on jobs at the Indiana Harbor plant. The Indiana Harbor plant is located in East Chicago, Indiana. There were more hours available at the Indiana Harbor plant, so Petitioner bid on a job at the Indiana plant and transferred to the Indiana plant. He did not have to file any papers to transfer to the Indiana plant. The only thing he had to do was bid on the job. The Indiana plant was also owned by Respondent. At the Indiana plant, he worked at Winter Rail. He worked in that job until 2010. In 2010 there was a slow down at the Indiana plant, so Petitioner wanted to return to the Riverdale, Illinois plant. Petitioner put in a bid for a job at the Riverdale plant and he was then transferred back to the Riverdale plant. The Riverdale plant at this time was still owned by the same employer that had hired him. He did not have to fill out any paperwork, other than the bid, to effect that transfer back to the Riverdale plant. Petitioner worked at the Riverdale, Illinois plant for about a year. He then

transferred back to the Indiana Harbor plant in 2011 for a job that paid more. He did not have to reapply for that job. There was no paper work that he had to fill out to be accepted as an employee at the Indiana plant. In 2011 at the Indiana plant his job was Rail, operating engines and trains. He has continued in that work at the Indiana plant until the date of hearing. Petitioner worked continuously at the Indiana plant from the time he transferred back there in 2011 up to the accident date of September 9, 2017. After the first application he put in when he first started working in 2006 there was no other application process that he had to put in for any transfer at any time that he made any movement between any of the 2 plants. The name of the company that Petitioner started working for in 2006 was International Steel Growth. He made application to apply for work on March 30, 2005. ISG is a different company from ArcelorMittal. The company changed from ISG to ArcelorMittal sometime in 2006. There were no layoffs when Petitioner worked for ISG between 2005 and 2006 and no layoffs between 2006 and 2008. The first layoff occurred when ArcelorMittal owned the company. The first layoff was on December 31, 2008. Petitioner had received a letter indicating that the economy was slowing and was being laid off. (RX 2) In 2008, Petitioner was living in East Chicago, Indiana. Petitioner completed both Illinois and Indiana withholding paperwork in 2008. In 2013, Petitioner filled out Indiana paperwork to change taxes from 1 to 0 so that he would not be charged Indiana taxes at the end of the year. (RX 4) When Petitioner transferred to the railroad position at Indiana Harbor, he did not have to fill Illinois withholding paperwork. He only had to fill out Indiana withholding paperwork. He was given an Indiana identity card at the plant in Indiana Harbor. There were no other forms that Petitioner remembers filling out when he transferred from Illinois to Indiana Harbor. The only paper he remembers filling out was the bid for the job. When he arrived at the Indiana plant, there were operators and conductors that were trainers for the job. There was no certification that he got when he arrived at the Indiana Harbor plant as result of that training.

Petitioner testified that Ken Knaga was the accountant at the Riverdale Illinois plant. After the transfer to the Indiana Harbor plant, he was continuing to get checks paid from Riverdale, Illinois. After he went to Indiana Harbor, East Chicago, Petitioner still sent timesheets to Riverdale. He was sending timesheets to Ken Knaga. That continued for a couple months while he was in Indiana Harbor that they were sending timesheets over to Riverdale so that they would get paid from Riverdale. He was told they were only loaned into Indiana Harbor. They weren't permanent there. Timesheets were faxed to Riverdale. Petitioner did not know if he was a permanent employee in Indiana Harbor, but he was working there. At sometime in 2009, Petitioner started getting paid from Indiana Harbor. Petitioner was working at the 3210 Watling St. East Chicago, IN plant before and at the time of the date of the accident. The last time that Petitioner worked at 13500 S. Prairie, Riverdale, Illinois was 2011. For the 6 years that he worked at the Indiana plant, no Illinois unemployment insurance taxes were taken out of his paycheck. There was no background check or any information that had to be given by him to the Department of Homeland Security for Petitioner be admitted to the East Chicago, Indiana plant.

Petitioner filled out an application for benefits in Indiana under the Indiana Worker's Compensation Act after the accident. When his workers' compensation benefits in Indiana terminated and he was found to be at maximum medical improvement, he returned to work. That was December 3, 2017. (RX 6)

When Petitioner was laid off from the Riverdale plant, he accepted Illinois unemployment insurance benefits. After he transferred to Indiana Harbor, he never accepted Illinois unemployment insurance benefits. Petitioner testified he thought that he worked in Riverdale for a year and then transferred back to Indiana Harbor in 2011. Petitioner continues to have contact with the Respondent's Riverdale, Illinois plant. His contact is with Doris Tanner who was in charge of medical and in charge of Petitioner's pension. Petitioner's pension is paid from Illinois, not from Indiana. When he retires, he has to contact Doris Tanner. Doris Tanner works in the Riverdale, Illinois plant. Petitioner last spoke to Doris about 2 years ago regarding his retirement. The pensions from Riverdale and from Indiana are 2 different pensions.

The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of his employment by Respondent on September 8, 2017. The accident occurred in Indian. Petitioner's job at the Indiana Harbor plant was a conductor with automotive engines and trains. Petitioner was standing on the front gondola-car of a 7-gondola-car train that was being pushed by a locomotive at the rear of the 7-gondola-car train. Petitioner was standing on the stairs on the side of the lead car with a radio to communicate with the engineer operating the engine of the train. As the train was moving forward in a dark area, Petitioner was crushed between the car on which he was hanging on the side and an adjacent train-car. Petitioner heard his ribs break and he fell to the ground. He called the operator and the command center. An ambulance and the fire department came. He was transported by ambulance to St. Catherine Hospital in East Chicago, Indiana. (PX 1, PX 2)

The records of ArcelorMittal Indiana Harbor EMS were admitted in evidence as PX 1. These records document that on 9/9/2017 Petitioner was found laying supine next to a train car. Petitioner complained of left forearm and wrist and right side of his chest. He was bleeding from the back of his head. Petitioner was transported by ambulance to St. Catherine's Hospital. (PX 1)

The records of St. Catherine Hospital were admitted in evidence as PX 2. These records disclose the following. On 9/9/17, St. Catherine Hospital emergency room records document: 47-year-old male who was riding on the side of the railcar was sideswiped by another railcar. This resulted in a fall and blunt trauma. He presented to the ER stable with a scalp laceration and right chest pain. Was found to have a right hemopneumothorax and associated rib fractures. He has a left wrist fracture. Scalp laceration was stapled by the ER physician. (PX 2, p 153)

On 9/11/17, Dr. Paula Benchik noted in the St. Catherine Hospital record: the patient remains in ICU for traumatic right hemopneumothorax. After examination review of labs and vitals, Dr. Benchick assessment and plan was: 1. Traumatic right hemopneumothorax. The patient has chest tube in place. 2. Multiple right-sided fractures. Patient at this time is sedated with propofol. 3. Subcutaneous emphysema should resolve. 4. Right lung contusion is severe. The patient will be supported. 5. Acute hypoxic respiratory failure. The patient is requiring mechanical ventilation at this time. 6. Head trauma with laceration, appears stable. 7. Mild transaminitis, most likely related to liver trauma. 8. Basilar atelectasis will hopefully improve. 9. Sepsis and pneumonia treated with broad-spectrum antibiotic coverage. 10. Acute kidney failure. 11. Leukemoid reaction with sepsis. Continue antibiotics. (PX 2, p 149-150)

On 9/14/17, at St. Catherine Hospital, Dr. Robert W. Coates, MD, performed surgery. Postoperative diagnosis: left distal radius shaft fracture. Procedure performed: Open reduction internal fixation left distal radius shaft fracture with plate and 8 screws. (PX 2, p 172-173)

On 9/19/17, at St. Catherine Hospital, Dr. Bassem Srour, MD, performed bronchoscopy with a postoperative diagnosis: multiple rib fractures; right posterior loculated effusion; trapped lung due to multiple broken ribs impinging on lung parenchyma; right lower lobe entrapped by pleural thickening. The procedures were described as: VATS converted to right mini thoracotomy for decortication; drainage of posteriorly placed loculated hemothorax. (PX 2, p 173-174)

On 9/19/17, at St. Catherine Hospital, Dr. Amjad Q Syed, MD, performed surgery. Postoperative diagnoses: right-sided posterior loculated hemothorax; multiple rib fractures; multiple broken rib impingement on the lung parenchyma; hypertension; asthma. Procedures performed: video-assisted, thoracoscopic surgery converted to muscle sparing mini-thoracotomy on the right side; extensive decortication of middle and right lower lobes; drainage of posterior loculated hemothorax; partial resection x2. (PX 2, p 175-177)

On 9/27/17, at St. Catherine Hospital, Dr. Muhammad M Kudaimi, MD, performed surgery. Preop diagnosis: respiratory failure, coma. Postop diagnosis: esophageal ulcer, gastritis. Procedure performed: percutaneous endoscopic gastrostomy. (PX 2, p 178-179)

On 10/2/17, at St. Catherine Hospital, Dr. Kendar A Kakodkar, MD, performed surgery. Preoperative diagnosis: respiratory failure. Postoperative diagnosis: respiratory failure. Procedure: tracheostomy. (PX 2, p 179-180)

On 10/3/17, Petitioner was discharged from St. Catherine's Hospital and transferred to LTAC (long-term acute care). Discharge diagnoses were: traumatic right hemopneumothorax, multiple right-sided rib fractures, subcutaneous emphysema, right lung contusion, acute hypoxic respiratory failure secondary to trauma, head trauma with laceration, mild transaminitis

secondary to abdominal contusion and liver trauma, basilar atelectasis, sepsis with pneumonia, acute renal failure. (PX 2, p 151-152)

On 10/3/17, St. Catherine Hospital/Regency Hospital records document: patient is now transferred to Regency Hospital in East Chicago for further antibiotic management and respiratory management. (PX 2, p 140)

Medical records of St. Catherine Hospital/Regency Hospital document Petitioner underwent acute rehabilitation from 10/4/17 through 10/16/17. (PX 2, p 56-137)

Admitted in evidence as PX 3 are the medical records of Regency Hospital. These records reflect that Petitioner was admitted to Regency Hospital on 10/3/17. (PX 3, p8-9) Petitioner underwent antibiotic management and respiratory management, physical therapy, occupational therapy and speech therapy were ordered. (PX 3, p 13-14)

On 10/14/17, St. Catherine Hospital/Regency Hospital records document neurology consult. Impression: 1. Critical illness myopathy; 2. Multiple fractures of ribs with right lung contusion and hypoxic respiratory failure. Patient did have traumatic head injury; however, only sustained a small laceration, with CT findings unrevealing. He does exhibit mild hypoxic ischemic encephalopathy as well, with inappropriateness, jocular alertness, and fluctuating mood. Plan: we will monitor his clinical course in acute rehabilitation and recommend PT, OT and speech. (PX 2, p 147-148)

On 10/16/17, Regency Hospital records reflect Petitioner was discharged. Discharge diagnoses were: contusion to chest, contusion to abdominal wall, flail chest, multiple rib fractures, fracture to the left wrist, debility, morbid obesity, hypertension, asthma, respiratory distress. Hospital course was noted: patient was transferred to LTAC for aggressive therapy as well as continued care. Patient is on a feeding tube and tolerating well. Yet some leaking from the stroma in his trach, which is making talking difficult and has been corrected. Patient came off ventilator. He was on BIP AP now he is off BIP AP. He most likely has sleep apnea. He will be watched very closely at this time, he has done well and is stabilized to the point that he could be transferred to acute rehabilitation. He is on feeding tube at this time. Speech will continue to work with him. He was aspirating 3 days ago. He is ambulating at this time. (PX 3, p 17)

Petitioner testified he continued to be treated by Dr. Paula Benchik after discharge from the hospital. The records of Benchil Medical Center/Dr. Paula Benchik were admitted in evidence as PX 4.

On 11/4/17, Benchik Medical Center/ Dr. Paula Benchik-Abrinko, MD. document the following. Chief complaint on 9/9/17 went to the ER after he suffered a blunt trauma, he was riding in a railcar when he was struck by another car and fell down, had scalp laceration and some pain in the left wrist and chest. Evaluated by ER and found to have hemopneumothorax

secondary to rib fractures on the right side. Placed on chest tube. Admitted upon x-ray and CT scan on 9/9/17 for further evaluation. Was seen by Dr. Benchik Dr. DeLeo, Dr. Demir, Dr. Bringol, Dr. Syed, Dr. Kudaimi, Dr. Kekodkar, Dr. Atassi, Dr. Montero, Dr. Richardson. Discharge from the hospital on 10/27/17. Sent home with a G-tube in place but is back on normal eating habits. Was told the G-tube will be removed once he is completely healed. Is currently complaining of leg swelling and daughter said he is not walking how he should be. He has not started therapy yet and is getting weaker. (PX 4, p 3)

Petitioner testified that, after discharge from St. Catherine Hospital, he started physical therapy at Rehabilitation and Sports Medicine Centers, Respondent's facility in Indiana Harbor on November 8, 2017. T 35. While in therapy on November 8, 2017, Petitioner developed severe pain and inability to breathe. He was readmitted to St. Catherine's Hospital on November 9, 2017 through November 13, 2017, through the emergency room, because of a diagnosis of acute deep vein thrombosis and pleural emboli.

The 11/9/17 through 11/13/17 St. Catherine Hospital records reflect: admission from Emergency Room. (PX 2, p 12-55) Note of Dr. Paula M Benchik-Abrinko, MD: I had seen Pt in my office on 11/04/17; he had been discharged approximately a week and ½ earlier from acute rehab and was supposed to be in an aggressive therapy program; there was some confusion between the discharging people in rehab and the people at Arcelormittal, but they had no knowledge that the therapy was not happening and I called the physical therapist on 11/4 questioning why they have not started; he stated they were waiting for approval from Arcelormittal and they were not even aware that he was in therapy or the home health that was set up by the rehab people because they felt that this is the home health that needed to be set up per protocol; I called the medical director and canceled the home health which he was not showing up and was not effective and started him in aggressive therapy at Arcelormittal with the physical therapist at the plant with transportation; physical therapist noted increased swelling on the day of admission, which was 11/9 and shortness of breath at his child's school walking a longer distance than he is normally used to since his severe injury; presented to the emergency department, was found to have an acute right lower extremity DVT in the popliteal vein with bilateral pulmonary embolism; he was anticoagulated and placed into ICU; patient also has a history of right lung scarring residual from previous hemopneumothorax, debility secondary to critical care myopathy and neuropathy, and small bilateral pleural effusions. Assessment and plan: 1. Acute right lower extremity deep venous thrombosis in the popliteal vein; patient is on Eliquis for 6 months; 2. Bilateral pleural emboli; the patient is anticoagulated and most likely related to sedentary activity for one week after discharge, coagulopathy panel is in progress; 3. Right lung scarring, residual from previous hemopneumothorax; 4. Debility secondary to critical care myopathy and neuropathy; 4. Small bilateral pleural effusions; at this time patient will transfer to IMCU; he is markedly improved. (PX 2, p 21-22)

Petitioner testified that as of November 21, 2017, he continued to complain of shortness of breath and any activity would make it difficult to breathe.

On 11/21/17, Benchik Medical Center/ Dr. Paula Benchik-Abrinko, MD. records document the following. Patient last seen here on 11/4/17 for hospital follow-up from the work accident. Due to that accident, patient started aggressive physical therapy at ArcelorMittal. On 11/9/17, physical therapist noticed increasing swelling to the lower right leg. The patient also complained of shortness of breath when walking at his child's school, it was a longer distance than he is used to normally walking. Patient went to the ER due to the right lower leg pain and shortness of breath. While in the ER, patient was found to have an acute right lower extremity DVT in the popliteal vein found via venous Doppler lower extremity with bilateral pulmonary embolism and pleural effusion in the right lung via CT scan and angiogram. Labs showed mild anemia, mild leukopenia, no thrombocytopenia, D-Dimer was significantly elevated. Admitted to hospital on 11/9/17. Placed in ICU on oxygen. Seen by Dr. Srour and placed the patient on Lovenox. Upon discharge, the patient had his G-tube removed by Dr. Kudami. Discharge from the hospital on 11/13/17. At the time of discharge patient was put on Eliquis until 11/17/17, then instructed patient to switch to 5 mg b.i.d. for 6 months. Sent home on cardiac and weight reduction diet. Here for hospital follow-up visit. Patient said he is feeling good and is not sure when he is going to return back to work. Shortness of breath still needs some work. Gets very short of breath with activity. Assessment was: hypertension, DVT, pleural embolism, bilateral pleural effusions, obesity, respiratory distress, right lung scarring, residual from previous hemopneumothorax, debility secondary to critical care myopathy and neuropathy, obstructive sleep apnea, deep vein thrombosis of leg, pleural effusion. (PX 4, p 20)

On 11/30/17, Benchik Medical Center/ Dr. Paula Benchik-Abrinko, MD. records document: Seen in the office today. Able to return to work on 12/4/17; light sedentary office work; only working 6-8 hours daily, no more than 5 days a week; is not able to lift more than 10 pounds and needs parking close to his work location; will continue to participate in physical therapy. (PX 4, p 31)

Petitioner testified he returned to work in an accommodated sedentary position with Respondent on 12/4/17. He would just sit in the cafeteria. He was paid full salary and remained in that job for one year.

On 12/12/17, Benchik Medical Center/ Dr. Paula Benchik-Abrinko, MD. patient here for checkup. Patient states his wrist feels as if the bone moves improperly. Patient states it pops up. (PX 4, p 3)

Petitioner testified he continued to have difficulty and pain in the wrist and was seen by Dr. Robert Coates, who had performed the surgery on his wrist. The medical records of Orthopedic Specialists of Northwest Indiana/Dr. Robert Coates MD, were admitted in evidence as PX 5.

On 12/15/17, Orthopedic Specialists of Northwest Indiana /Robert Coates MD records document: first postoperative visit after open reduction and internal fixation of the left distal

radius fracture; he had a prolonged ICU stay due to subsequent rib injuries sustained during the injury which caused this fracture; initial injury was back in September; he is currently in therapy for his left wrist but complains of pain with weight bearing in the left upper extremity. X-rays of left wrist show well-heeled extra-articular fracture of the distal radius. Impression: left extra-articular distal radius fracture approximately 3 months status post open reduction and internal fixation; continue therapy for the left wrist. (PX 5, p 15) Work status: no use of affected extremity; no repetitive pushing, pulling, grasping. No carrying of anything with the left upper extremity. (PX 5, p 26).

On 1/3/18, Benchik Medical Center/ Dr. Paula Benchik-Abrinko, MD. here for 2 week follow-up due to right sided rib pain. Pain is about a 4. Did see Dr. Srour on 12/28/17. Plan: DVT continue Eliquis; pulmonary embolism stable continue Eliquis; bilateral pleural effusions stable; obesity continue to do low-fat diet; respiratory distress stable; right lung scarring residual from previous hemopneumothorax stable; debility secondary to critical care myopathy and neuropathy continue physical therapy at ArcelorMittal; obstructive sleep apnea stable; umbilical hernia stable; PEG to exit site healing well; umbilical hernia stable; right rib pain due to previous injury when getting crushed between 2 trains at work; left wrist pain stable see Dr. Coates on 1/12/18. (PX 4, p 60)

On 1/11/18, Benchik Medical Center/ Dr. Paula Benchik-Abrinko, MD. records document: here for 2 week follow-up due to right sided rib pain. Pain is about 4. (PX 4, p 70)

On 1/19/18, Orthopedic Specialists of Northwest Indiana/Robert Coates MD. records document the following. Currently going through occupational therapy, showing progress with range of motion, pain and strength with the left upper extremity. Height 75 inches weight 290 pounds. Impression: left extra-articular distal radius fracture with multiple bilateral rib fractures; continue occupational therapy for the left wrist and left upper extremity; lifting restrictions of 10 pounds; will need to transition from occupational therapy to work hardening and work conditioning program and noted to resume his previous job activities. (PX 5, p 14)

On 2/16/18, Orthopedic Specialists of Northwest Indiana/Robert Coates MD. notes: has been in occupational therapy for the left wrist. Impression: will have him continue occupational therapy focusing on range of motion, modalities and strengthening for the left upper extremity; when they feel that he is progressed enough to begin a work hardening/work conditioning program they may begin with that; due to his poor pulmonary function from the multiple rib fractures and the prolonged intubation, he will not be able to return to his previous level of functioning without a dedicated work hardening conditioning program. (PX 5, p 13)

Petitioner testified he had low back pain since the date of the accident and was seen by Dr. Dasari. The medical records of Midwest Interventional Spine Specialists/Dr. Dasri were admitted in evidence as PX 6.

On 3/1/18, Midwest Interventional Spine Specialists/Dr. Satish Dasari records document the following. Reason for appointment low back pain. 47-year-old male presents with complaint of low back pain for 9/8/17; pain is described as sharp; exacerbating factors include driving, weather; relieving factors include medication, laying down; injured as workplace on 9/8/17; crushed between 2 railcars resulted in multiple right-sided rib fractures and hemopneumothorax; also had a fracture of his left distal radius; taken to St. Catherine's Hospital where he states he was there for 2 months; he underwent surgery for the pneumothorax as well as repair of the fracture of his left radius; discharged 2 months later around October 27, 2017; started physical therapy but develop severe pain in his calves; he was then found to have DVT with pulmonary embolism; he was placed on Eliquis for this; continues to do physical therapy and has returned to light duty work with a desk job; he notes that he gets low back pain at a baseline this is a 2 out of 10 most of the days but when there is change in weather he states the pain is 7/10. He is unable to go to work because of this increased low back pain; pain is axial in nature; he describes this as an achy sensation laying on his back; taking medication seems to relieve the pain; when the pain is severe, he states he is unable to stand, walk, bend or lift; he has been using NSAID S for his pain. Assessment: degenerative disc disease lumbar; work related injury; myalgia. RX MRI lumbar spine. Patient has axial back pain starting around T 12 in the midline and this pain goes down to L4. Pain is much more significant at T 12-L2 area. Paraspinal muscles are not tender. RX MRI study of lumbar spine. Work related injury. Continue light duty with this job no bending lifting. (PX 6, p 4-5)

On 3/7/18, Community Hospital, MRI lumbar spine. RX by Dr. Satish Dasari, MD. (PX 7)

On 3/8/18, Midwest Interventional Spine Specialists/Dr. Satish Dasari, MD. records document the following. He feels better today, as the weather has improved; pain is 3-4/10; MRI on 3/7/18 was reviewed today. DDD at L4-5 and L5-S1 with small protrusion to the center and right at L5-S1; mild foraminal stenosis bilateral L5-S1. Assessment: 1. Spinal enthesopathy of thoracolumbar region; 2. DDD lumbar; 3. Work related injury; 4. Myalgia; 5. Spinal enthesopathy thoracic region. Treatment: T12-L1 interspinous ligament injection under fluoroscopic guidance; this will be both diagnostic and hopefully therapeutic. Continue light duty with desk job, no bending lifting. (PX 6, p6-7)

On 3/16/18, Orthopedic Specialists of Northwest Indiana/Robert Coates MD. notes: history was complicated with multiple rib fractures which led to a prolonged intubation due to poor lung function; has been in a therapy program and has transitioned to a work hardening/ work conditioning program; he complains of some soreness and discomfort in the left arm but his range of motion and function has significantly improved. Impression: left extra-articular distal radius fracture; he needs further treatment, therapy or mobilization for his left distal radius fracture; I believe he has reached MMI as far as his distal radius diagnosis is concerned; unfortunately, he is still significantly deconditioned from the multiple rib fractures and prolonged intubation; recommend continuation of the work hardening, work conditioning

program with functional capacity evaluation to determine his current work capabilities; I will see him for follow-up on as needed basis for his left wrist. Work status: MMI reached. (PX 5, p 12.) Returned to work with no restrictions 3/16/18. (PX 5, p 23)

On 3/21/18 Midwest Interventional Spine Specialists/Dr. Satish Dasari, MD. records document: STEROID INJECTION. Operation: T 12-L1 interspinous injection under fluoroscopy. Postoperative diagnosis: Enthesopathy thoracolumbar spine. (PX 6, p 9)

Petitioner testified that the steroid injection did help with his pain.

On 4/4/18, Midwest Interventional Spine Specialists/Dr. Satish Dasari, MD chart note indicates: He underwent an interspinous ligament injection at T 12-L1 two weeks ago following which he has noted 70% relief; pain is a 2/10 today. Assessment: 1. Spinal enthesopathy of thoracolumbar region; 2. DDD lumbar; 3. Work related injury; 4. Myalgia; 5. Spinal enthesopathy, thoracic region. Treatment: 1. His pain remains around the T 12-L1, L2 area in the midline. This pain gets worse when he is flexing forward. The pain does not radiate anywhere. I feel we are probably dealing with enthesopathy of the thoracolumbar spine. Based on his excellent response to the interspinous ligament at T12-L1 I feel it was an enthesopathy. He is doing well with minimal pain. ROM is excellent of thoracolumbar spine. I will discharge him from my care at this time. He is at MMI from his spine pain. 2. DDD lumbar. He has mild degenerative disc disease L4-5 and L5-S1 with a small protrusion to the center and right of L5-S1. 3. Work-related injury continue light duty with desk job until he is cleared by the rest of his physicians. (PX 6, p 11-12)

On 4/9/18, Benchik Medical Center/ Dr. Paula Benchik-Abrinko, MD. notes: pain when walking, can't move properly. Began yesterday night. Occurs when temperature changes or weather changes. Pain located in the right side of the ribs and left leg. Takes Tylenol. Change to ibuprofen 800 mg. Lose weight. (PX 4, p 72)

On 4/17/18, Benchik Medical Center/ Dr. Paula Benchik-Abrinko, MD. notes: chronic right-sided pain. Patient to the office for lab results and chronic right-sided pain. Pain has been present since accident 9/8/17. (PX 4, p 90)

On 4/21/18, Benchik Medical Center/ Dr. Paula Benchik-Abrinko, MD. notes: patient here because he fainted at physical therapy yesterday 4/20/18. Was on treadmill and therapy for 30 minutes and had syncope episodes. Sugar was 142 vitals were stable. He is going to wear 48 hour Holter monitor to coincide with treadmill. (PX 4, p 92)

On 5/3/18, Benchik Medical Center/ Dr. Paula Benchik-Abrinko, MD. notes: here for 24 hour Holter monitor results. No further syncope or pre-syncope, tingling to both feet at 30 minutes on treadmill. no calf pain. HM was negative. (PX 4, p 102)

On 5/8/18 Orthopedic Specialists of Northwest Indiana/Robert Coates MD notes: after completion of a comprehensive evaluation protocol and review of medical data, the claimant is granted a 1% whole person permanent partial impairment based on the current work-related injury of 9/9/2017. This is impairing has been calculated according to the Guides to the Evaluation of Permanent Impairment, 6th edition, 4th printing, October 2014, by the American Medical Association. For upper extremity impairment ratings, if there are multiple diagnoses that carry an impairment rating, they are combined and then converted into a whole person rating. This claimant, the diagnosis based impairment for the extra articular left distal radius fracture yielded in upper extremity rating of 2% and since there was no other ratable diagnoses, this total was converted to a whole person impairment rating using table 15/11 which can be found on page 420 of the Guides. A 2% upper extremity rating translates into a 1% whole person permanent partial impairment rating. (PX 5, p 8-10)

On 6/6/18, Benchik Medical Center/ Dr. Paula Benchik-Abrinko, MD. patient here to discuss results of EMG and CT. EMG acute on chronic right greater than left L5-S1 radiculopathy suggested core strengthening exercises; still in PT at inland steel; BP is 140/70 this morning was 114/68 at PT testing. SOB with walking and needed disability placard. Sees Dr.Srour 6/24/18 otherwise stable. (PX 4, p 120)

On 12/18/18, Benchik Medical Center/ Dr. Paula Benchik-Abrinko, MD. records document: 3 month follow-up patient states with the weather change he has minor right rib pain due to past injury, but states that it is normal. Patient denies any chest pains or SOB. Still light duty at work. (PX 4, p 144)

On 5/21/19, Benchik Medical Center/ Dr. Paula Benchik-Abrinko, MD. blood pressure check up. Whole body aches with weather change. (PX 4, p 172)

On 11/26/19, Benchik Medical Center/ Dr. Paula Benchik-Abrinko, MD. records document: FMLA paperwork, back pain post bending, cannot work in the cold and there is no job, so he is off until warm weather. (PX 4, p 202)

On 4/16/20, Benchik Medical Center/ Dr. Paula Benchik-Abrinko, MD. records document: no SOB, off work since 11/17/19 wasn't able to work secondary to cold-weather was trying to return to regular duties 4/1/20, but clinic would not allow secondary to covid risk and underlying chronic pulmonary problems. (PX 4, p 212)

Petitioner testified that he continues to see Dr. Paula Benchik after the accident. She is his Primary Care Physician. He sees her every 2 to 3 months. Petitioner testified that his chronic pulmonary condition is he gets shortness of breath in cold air. He received a restriction of not working outdoors, anything under 40°. Respondent is accommodating the restrictions. When the cold weather is gone, he goes back to his regular duties. He went back to his regular duties in April 2019. He continued to work in that job from April 2019 to the date of hearing.

He is working full duty at that job. He notices when he does his job that he doesn't have much strength in his arm to grab and he notices that, especially when he is hanging onto the gondola, so he usually cradles the gondola. He uses his right hand more than his left, even though he is right hand dominant, he still has problems with his left wrist. He continues to have the plate and screws embedded in his left wrist. Petitioner testified when he is climbing up the stairs or the ladder of the engine it feels like somebody is ripping it off and there is a sharp pain that runs down his arm. When he does a simple oil change, loosening a bolt, he can't pull it he has to switch arms to loosen it and get down with his left hand but just the pulling alone gives him a sharp pain through the whole arm. When he tries to pull with his left arm notices a sharp pain that runs down his arm. He uses his his right hand more. He still has to hang onto the side of the trains as they are moving, advising the operator of the train where to go and where to stop. In that position he is holding onto the ladder which is located on the side of the gondola, hanging on the side of that ladder, supporting his full weight with his arm. He can't put his whole weight on his left arm, so he uses his right arm. Before the accident he was able to support his weight with his left arm. The reason he does not use his left arm now while hanging off the side of the train is because of the plate in his left arm. He uses his right arm more now at work than he did before the accident. In his activities at home, he does things different now. When he is carrying groceries up to the 2nd floor of his home where he lives, he stalls in between because he runs out of air. He was on one occasion hammering something at home with his left hand and felt pain, so he had to switch to his right hand. When he runs out of air going up the stairs, he has to use an inhaler prescribed by Dr. Srour. He was using that inhaler at the time of hearing. He uses it twice a day, depending on the job he is doing. Ten or fifteen years ago, he did use an inhaler when he had pneumonia. He used it for a couple of months. He never had any problems with his breathing. At work when he has to walk 30 or 40 cars to check on the brakes, he has to slow down and take his time walking because he runs out of air if he doesn't pace himself. He now uses the inhaler 2 to 3 times a day. He now works outdoors, but is allowed to come indoors when it is 40°. He was able to work in his regular job all the way until November and when the weather hits under 40°, they keep him indoors. Respondent accommodates him and allows him to come inside. When he is indoors, he does different jobs. When the weather warms up above 40°, he goes back on the lead and does the same job he was doing, back on the trains. Other than the nebulizer/inhaler, there is no other medication that Dr. Benchik has prescribed to treat his injuries as result of the work accident. Petitioner last saw his treating physician, Dr. Benchik, in September of 2021. He saw her also in July 2021. He did not have records and only had physical checkup to check how he is doing. Dr. Benchik had given him prescriptions for a total of 6 nebulizers September 2019. As of the date of hearing he hasn't used all 6, but has one remaining. He leaves one nebulizer at work and carries one with him. Over the course of 2019 through 2021 he went through 5 nebulizers. Dr. Coates gave him an impairment rating based on his wrist. He has not seen any orthopedist for his left hand or arm in 2021. Respondent sent Petitioner to Athletico for an evaluation regarding his restrictions. No doctor has given him restrictions since 2019. His back pain got better after the injections.

Admitted in evidence as Petitioner's Exhibit 1 is the ArcelorMittal Indiana Harbor ambulance report.

Admitted in evidence as Petitioner's Exhibit 2 are the medical records/bill of St. Catherine Hospital.

Admitted in evidence as Petitioner's Exhibit 3 are the medical records/bill of Regency Hospital.

Admitted in evidence as Petitioner's Exhibit 4 are the medical records/bill of been checked Medical Center/Dr. Paula Benchik-Abrinko MD.

Admitted in evidence as Petitioner's Exhibit 5 are the medical records/bill of orthopedic specialists of Northwest Indiana/Dr. Robert Coates MD.

Admitted in evidence as Petitioner's Exhibit 6 are the medical records/bill Midwest Interventional Spine Specialists/Dr. Satish Dasari, MD.

Admitted in evidence as Petitioner's Exhibit 7 are the medical records/bill of Community Hospital.

Admitted in evidence as Petitioner's Exhibit 8 is a list of the unpaid bills with bills attached consisting of a bill of Nephrology Associates of Northern Illinois for dates of treatment 9/11/17, 10/4/17, 10/16/17. These dates of treatment are noted as "Subsequent Hospital Care." The medical provider is identified as Yves Frantz Brignol MD. After payments and adjustments there is a documented balance of $7,136.80.

Admitted in evidence as Respondent's Exhibit 1 is the employment application of Andres Santos, date of application 3/30/2005.

Admitted in evidence as Respondent's Exhibit 2 is a letter dated November 4, 2008 from ArcelorMittal addressed to "All Riverside Bargaining Unit Employees." The document has signature of Andres Santos with an indication, "interested in working at Indiana Harbor."

Admitted in evidence as Respondent's Exhibit 3 is a letter dated December 31, 2008 from ArcelorMittal addressed to Andres Santos. The letter indicates that Petitioner is being laid off effective January 5, 2009.

Admitted in evidence as Respondent's Exhibit 4 is a State Of Indiana Employee's Withholding Exemption and County Status Certificate in the name of Andres Santos dated 2/14/2013 claiming zero exemptions.

Admitted in evidence as Respondent's Exhibit 5 is the Illinois Worker's Compensation Commission Application for Adjustment Of Claim herein, captioned "Andres Santos versus ArcelorMittal" dated September 12, 2017.

Admitted in evidence as Respondent's Exhibit 6 is an Agreement To Compensation of Employee & Employer under the Indiana Worker's Compensation Board in the name of Andres Santos.

Admitted in evidence as Respondent's Exhibit 7 is a Report Of Temporary Total Disability TTD/Temporary Partial Disability TPD Termination Under The Indiana Worker's Compensation Board in the name of Andres Santos.

Admitted in evidence as Respondent's Exhibit 8 is a list of payments made by Respondent of medical and TTD paid to or on behalf of Petitioner.

Admitted in evidence as Respondent's Exhibit 9 is an Attending Provider Statement dated 11/26/19 in the name of Andres Santos.

Admitted in evidence as Respondent's Exhibit 10 are excerpts of the medical records of Dr. Satish Dasari, for treatment rendered on 4/4/18.

Admitted in evidence as Respondent's Exhibit 10 are excerpts of the medical records of Dr. Satish Dasari for medical treatment rendered on 4/10/19.

CONCLUSIONS OF LAW

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

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between his employment and his 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)

The Arbitrator finds Petitioner's testimony to be credible.

WITH RESPECT TO ISSUE (A) WAS RESPONDENT OPERATING UNDER AND SUBJECT TO THE ILLINOIS WORKERS' COMPENSATION ACT-IS THERE ILLINOIS JURISDICTION?, THE ARBITRATOR FINDS:

The Illinois Workers' Compensation Commission has jurisdiction over claims for work injuries which occur in Illinois; or where the contract of hire is made in Illinois; or where the employment is principally localized in Illinois. 820 ILCS 305/1(b) 2

The accident occurred in Indiana.

The evidence adduced does not convince the Arbitrator that Petitioner's employment by Respondent was principally localized in Illinois. He has been working at the Indiana Harbor plant since 2011.

The Arbitrator finds that Illinois jurisdiction in this case is proper, as the contract of hire occurred in Illinois.

Clearly, the contract of hire with ISG occurred in Illinois. Petitioner applied at the Riverdale facility, was interviewed there and began his employment there in January of 2006. He never had to fill out another employment application with Respondent or to work at Respondent's Indiana facility. None of Petitioner's testimony or of the documents submitted by Respondent demonstrate that there was a clear cessation of Petitioner's employment or that he ever had to undergo a rehire or new hire process.

The only contract of hire occurred in Illinois and, thus the claim for compensation is properly considered under the Illinois Workers' Compensation Act.

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

Petitioner was crushed between the moving train on which he was hanging as a part of his job duty and an adjacent train. He immediately heard and felt his ribs being fractured and he fell to the ground.

Ambulance records and the hospital and medical records in evidence demonstrate medical providers diagnosed Petitioner's condition as a result of the accidental injury as: 1. Traumatic right hemopneumothorax. 2. Multiple right-sided rib fractures. 3. Subcutaneous emphysema 4. Right lung contusion. 5. Acute hypoxic respiratory failure secondary to trauma. 6. Head trauma with laceration. 7. Mild transaminitis, secondary to abdominal contusion and liver trauma. 8. Basilar atelectasis 9. Sepsis and pneumonia 10.

Acute kidney failure. 11. Leukemoid reaction with sepsis. 12. Left distal radius shaft fracture. 13. enthesopathy, thoracic region. Additionally, during physical therapy prescribed to treat the work injury Petitioner was noted to have increased swelling in his leg. Petitioner developed acute right lower extremity deep vein thrombosis (DVT) and bilateral pulmonary emboli and pleural effusion in the right lung. Dr. Benchik causally related these conditions to Petitioner's work injury and the treatment of the work injury.

The Arbitrator finds based on the weight of credible evidence (Petitioner's testimony and the medical records)that that these diagnoses are causally related to the work injury of 9/9/2017. Petitioner underwent surgery on 9/14/17 consisting of open reduction internal fixation of a left distal radius fracture, plate and 8 screws; bronchoscopy on 9/19/17 consisting of VATS converted to right mini-thoracotomy for decortication and drainage of posteriorly placed loculated hemothorax; surgery on 9/19/17 consisting of thorascopic surgery converted to muscle-sparing minithoracotomy on the right side extensive decortication of the middle and right lower lobes, drainage of posterior loculated hemothorax and partial resection of the ribs times 2; surgery on 9/27/17 consisting of percutaneous endoscopic gastrostomy; surgery on 10/2/17 consisting of tracheostomy; injection on 3/21/18 consisting of T12-L1 interspinous ligament steroid injection. Dr. Satish Dasari causally related the lumbar condition to the work injury.

The Arbitrator finds that Petitioner's current condition of ill-being, as described above, is causally related to the work accident of 9/9/17.

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 Parties stipulated that Respondent agrees they have paid or will pay the causally related bills.

Petitioner Exhibit 8 identifies certain medical expenses that Petitioner claims are causally related to the work accident. The Arbitrator finds these bills are causally related to the work accident, as they are for nephrology services rendered in connection with Petitioner's hospital admissions related to the subject work injury.

Accordingly, Respondent shall pay Nephrology Associates of Northern Illinois $7,136.80, pursuant to §§8(a) and 8.2 of the Act and subject to the Illinois 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 IS THE NATURE AND EXTENT OF THE INJURIES?, THE ARBITRATOR FINDS:

Dr. Paula Benchik described Petitioner's intolerance of working in the cold as secondary to his "underlying chronic pulmonary problems." Dr. Benchik noted that Petitioner cannot work in the cold. Petitioner credibly testified he has shortness of breath when he is in the cold, below 40°. As a result, he does not work outdoors when the temperature drops below 40°. Dr. Benchik noted Petitioner gets "very short of breath with activity" and noted Petitioner's right lung scarring was residual from previous hemopneumothorax, and he had debility secondary to critical care myopathy and neuropathy. Dr. Coates documented Petitioner's "poor pulmonary function from the multiple rib fractures and the prolonged intubation…" Petitioner testified when he runs out of air, he uses the inhaler that was prescribed by his treating physician. Petitioner credibly testified that carrying groceries upstairs to his 2nd floor home causes shortness of breath and he has to pause at the landing before he proceeds up to the 2nd floor. At work when he has to walk to check the brakes on a 30 to 40 car train, he now has to walk slowly to pace himself or he becomes short of breath. When he attempts to use his left arm and hand to hold onto the ladder on the side of the train, he feels a sharp pain that runs down his arm and he has to switch to cradling the ladder with his other arm. He cannot support his full weight hanging on the side of the train with his left arm as he was able to before the accident. When doing a simple oil change if he attempts to loosen a bolt with his left arm he feels pain and has to switch to his right arm.

The evidence does demonstrate that Respondent accommodated Petitioner's cold weather deficits and allowed him to come indoors and not work in the cold when the temperature is below 40°. This speaks well for Respondent and Petitioner.

Section 8.1(b) of the Act requires the Commission's consideration of five factors in determining permanent partial disability:

1. The reported level of impairment;
2. Petitioner's occupation;
3. Petitioner's age at the time of the injury;
4. Petitioner's future earning capacity; and
5. Petitioner's evidence of disability corroborated by treating medical records.

Section 8.1(b) also states, "No single factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by a physician must be explained in a written order." The term "impairment" in relation to the AMA Guides to the Evaluation of Permanent Impairment 6th Edition is not synonymous with the term "disability" as it relates to the ultimate permanent partial disability award.

With regard to subsection(i) of Section 8.1(b)b, the Arbitrator notes that the record contains an impairment rating of 1% of man as a whole as determined by Dr. Coates, pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment for the Petitioner's fractured distal radius injury. The doctor noted that Petitioner had a 2% impairment rating of the left arm as result of the left arm radial fracture with retained plate and screws. The doctor noted that because there were other body parts that were injured in the accident that this impairment rating of the left arm should be translated to an impairment rating of man as a whole and, as such, came to the conclusion that the 2% impairment rating of the left arm equates to a 1% impairment of the man as a whole. The fracture was said to be in the metadiaphyseal region of the radius, which is in the distal end of the radius, but clearly involves the arm, even though the fracture was said to be in the wrist. The Arbitrator gives this factor moderate weight in determining the level of permanent partial disability. Petitioner continues to have pain in the left arm in activities at work, hanging onto the side of the train, changing oil. The Arbitrator notes that Petitioner continues to have the retained hardware consisting of a plate and screws in his left arm. The Arbitrator notes that no impairment rating was given for any of the other injuries sustained as result of the work accident. Those injuries included a chronic pulmonary problem that has resulted in Petitioner having shortness of breath with activities and not being able to work his job outside when the temperatures below 40°. He is required to use an inhaler prescribed by his treating physician which he testified he now uses the inhaler 2 to 3 times a day. He developed a DVT and pulmonary emboli.

With regard to subsection (ii) of Section 8.1(b)b, the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed in Rail, operating engines and trains. As described by Petitioner that required him to hang off the side of multicar trains being pushed by a locomotive to give direction to the operator of the locomotive as to when to stop and when to move. This required him to work outdoors. As a result of the work injury, Petitioner is no longer able to work outdoors when the temperature falls below 40°. He also is unable to hang off the side of the car using his injured left arm. Respondent has accommodated Petitioner and allowed him to come indoors when the temperature is below 40°. The Arbitrator finds that Petitioner has a physically demanding job and gives this factor moderate weight in determining PPD.

With regard to subsection (iii) of Section 8.1(b)b, the Arbitrator notes that Petitioner was 47 years old at the time of the accident. Because of Petitioner's middle age and long likely work life, the Arbitrator finds the effects of the injury to his wrist and arm and chronic pulmonary condition have a more significant impact. The Arbitrator gives this factor signficant weight in determining PPD.

With regard to section(iv) of Section 8.1(b)b, Petitioner's future earnings capacity, the Arbitrator notes that there is no evidence that Petitioner's future earning capacity is impacted by the work accident injuries as Petitioner has returned to work and Respondent is accommodating

Petitioner's work restrictions. The Arbitrator gives this factor appropriate weight in determining PPD.

With regard to section(v) of Section 8.1(b)b, evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner continues to have pain in the left arm in activities at work, hanging onto the side of the train, changing oil. The Arbitrator notes that Petitioner continues to have retained hardware in his arm consisting of a plate and screws. Other injuries include a chronic pulmonary problem that has resulted in Petitioner having shortness of breath with activities and not being able to work his job outside when the temperature is below 40°. He is required to use an inhaler prescribed by his treating physician. He now uses the inhaler 2 to 3 times a day. As indicated above, Dr. Paula Benchik described Petitioner's intolerance of working in the cold as secondary to his "underlying chronic pulmonary problems." Dr. Benchik noted that Petitioner cannot work in the cold. Petitioner credibly testified he has shortness of breath when he is in the cold, below 40°. As a result, he does not work outdoors when the temperature drops below 40°. Dr. Benchik noted Petitioner gets "very short of breath with activity" and noted Petitioner's right lung scarring, residual from previous hemopneumothorax, and debility secondary to critical care myopathy and neuropathy. Dr. Coates documented Petitioner's "poor pulmonary function from the multiple rib fractures and the prolonged intubation…" Petitioner testified when he runs out of air, he uses the inhaler that was prescribed by his treating physician. Petitioner credibly testified that carrying groceries upstairs to his 2nd floor home causes shortness of breath and he has to pause at the landing before he proceeds up to the 2nd floor. At work when he has to walk to check the brakes on a 30 to 40 car train, he now has to walk slowly to pace himself or he will become short of breath. When he attempts to use his left arm and hand to hold onto the ladder on the side of the train, he feels a sharp pain that runs down his arm and has to switch to cradling the ladder with his other arm. He cannot support his full weight hanging on the side of the train with his left arm as he was able to before the date of the accident. When doing a simple oil change, if he attempts to loosen a bolt with his left arm, he feels pain and has to switch to his right arm. The evidence does demonstrate that Respondent accommodated Petitioner and allowed him to come indoors and not work in the cold when the temperature is below 40°. This factor is given great weight in determining PPD.

Based upon 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 the left arm pursuant to section 8(e) of the Act and 25% loss of use of the person as a whole, pursuant to section 8(d)2 of the Act, as result of the chronic pulmonary condition and other injuries as identified above.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC019437
Case Name	INSURANCE COMPLIANCE v. CLEVZ TREE SERVICE
Consolidated Cases	
Proceeding Type	Petition for Penalties
Decision Type	Commission Decision
Commission Decision Number	23IWCC0305 – 19INC00035
Number of Pages of Decision	6
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Nicole Werner
Respondent Attorney	

DATE FILED: 7/13/2023

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

- [x] 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

Illinois Workers' Compensation Commission,
Insurance Compliance Division,
Petitioner,

vs. No. 20 WC 19437

Clevz Tree Service,
Respondent.

DECISION AND OPINION RE: INSURANCE NON-COMPLIANCE

Petitioner, Illinois Workers' Compensation Commission, Insurance Compliance Division, brings this action by and through the Office of the Illinois Attorney General, against the above-captioned Respondents. Petitioner alleges a violation of Section 4(a) of the Illinois Workers' Compensation Act (the Act), for Respondent's failure to procure mandatory worker's compensation insurance. Proper and timely notice was given to all parties.

Petitioner alleges that Respondent knowingly and willfully lacked workers' compensation insurance for a total of 1080 days between January 1, 2015 and November 30, 2018. A hearing was held before Commissioner Marc Parker in Collinsville, Illinois, on June 20, 2023. Petitioner appeared and presented the testimony of Investigator Michael Cummins. Respondents did not appear.

The Commission, after considering the record in its entirety and being advised of the applicable law, finds that Respondent Clevz Tree Service knowingly and willingly violated Section 4(a) of the Act during the period in question. As a result, Respondent shall be held liable for non-compliance with the Act and shall pay a penalty in accordance with Section 4(d) of the Act. The Commission hereby assesses the penalty of $500.00 per day for 1,080 days ($540,000.00).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Investigator Cummins testified he began an investigation of Clevz Tree Service as a result of a workers' compensation claim filed against that company. Clevz Tree Service came under the mandatory insurance clause of the Act, but upon investigation, Mr. Cummins found that it did not have workers' compensation insurance.

2. Investigator Cummins sent a notice of non-compliance to Cleve Ellis, owner of Clevz Tree Service during the time in question. Mr. Ellis acknowledged that Clevz Tree Service did not have a workers' compensation policy; he implied that he would get one, but never did.

3. On May 16, 2023, Mr. Ellis verbally agreed to pay, within 30 days, a fine to settle this matter. He acknowledged there would be a hearing on June 20, 2023 in this matter if he did not pay, whether or not he appeared. Mr. Ellis did not pay the agreed upon settlement within 30 days of May 16, 2023, and the hearing proceeded on June 20, 2023.

4. At the June 20, 2023 hearing, Investigator Cummins testified about the steps he conducted in his investigation of Clevz Tree Service. He searched several databases that indicate employers' revenue and insurance history. Records from the Illinois Department of Revenue indicated that Clevz Tree Service wasn't reporting payroll taxes. He searched the National Council on Compensation Insurance database which indicated that Clevz Tree Service was without workers' compensation insurance. He checked with the Office of Self-Insurance and learned that Clevz Tree Service was not self-insured.

5. Investigator Cummins testified he is aware of at least one workers' compensation claim filed against Clevz Tree Service. The Commission's records show that the Clevz Tree Service was named a Respondent in claim number 19 WC 554, filed by injured worker, Mark Milligan, though that claim was dismissed.

6. Petitioner's Exhibit 3 is a certified statement from the National Council on Compensation Insurance showing that at no time during the period in question did Clevz Tree Service have a workers' compensation policy. The Commission notes that the NCCI certification in this case is prima facie proof that Respondent did not have the required workers' compensation insurance for the period in question. (Rule 9100.90(d)3(D) of the Rules Governing Practice before the Illinois Workers' Compensation Commission.)

7. Petitioner's Exhibit 5 is a certified record from the Illinois Secretary of State, showing that Clevz Tree Service was never incorporated with the Secretary of State.
8. Petitioner's Exhibit 7 is a certified statement from the Commission's Office of Self-Insurance stating that at no time during the period in question was Clevz Tree Service self-insured.

9. Petitioner's Exhibit 8 is a certified record from the Illinois Department of Employment Security, showing that Clevz Tree Service reported, during the period in question, making payroll for 3 to 10 employees.

10. The Illinois Department of Revenue provided certified records showing Clevz Tree Service was reporting revenue during the period of non-compliance while they were in operation. This indicates that Respondent was in fact operating and generating revenue during the period of non-compliance.

11. Respondent's owner, Cleve Ellis, admitted before the June 20, 2023 hearing, that Clevz Tree Service did not have workers' compensation insurance during the period in question. He did not appear at the scheduled June 20, 2023 hearing, or offer any testimony or exhibits or testimony into evidence.

Pursuant to Section 3 of the Act, certain employers and their employees are automatically subject to the provisions of the Act if they engage in specific businesses including: "the erection, maintaining, removing, remodeling, altering or demolishing of any structure," *820 ILCS 305/3(1)*; "construction, excavating or electrical work," *820 ILCS305/3(2)*; and, "any business or enterprise in which electric, gasoline or other power driven equipment is used in the operation thereof." *820 ILCS 305/3(15)*.

The Commission finds, based on the work performed by Clevz Tree Service as disclosed in the testimony of Investigator Cummins, that pursuant to Section 3, Respondent was automatically subject to the provisions of the Illinois Workers' Compensation Act and was required to carry workers' compensation insurance.

Regarding the issue of penalties, Section 4(d) of the Act states in part:

> "Upon a finding by the Commission, after reasonable notice and hearing, of the knowing and willful failure or refusal of an employer to comply with any of the provisions of paragraph (a) if this section or the failure or refusal to comply with any order of the Illinois Workers' Compensation Commission pursuant to paragraph (c) of this Section disqualifying him or her to operate as a self-insurer and requiring him or her to insure his or her liability, the Commission may assess a civil penalty of up to $500.00 per day for each day of such failure or refusal after the effective date of this amendatory Act of 1989. The minimum penalty under this Section shall be the sum of $10,000.00. Each day of such failure or refusal shall constitute a separate offense." *(820 ILCS 305/4(d).*

Here, Mr. Ellis was the owner of Clevz Tree Service for the entire time at issue, and he acknowledged that during the period in question, he failed to secure and maintain any workers' compensation insurance coverage for Clevz Tree Service. The certification from NCCI shows that

Clevz Tree Service was without workers' compensation insurance from July 20, 2005 through March 20, 2019.

In the instant case, the Commission finds that the length of time in which the Respondent had been violating the Act by failing to obtain workers' compensation insurance was significant. Respondent failed to have insurance for 1,080 days. Respondent's failure to pay any workers' compensation insurance for over two years is a flagrant and willful violation of the law.

The Commission finds that Petitioner has met its burden of proving that Respondent: operated a business in Illinois; was properly served with notice, and was legally required to maintain Workers' Compensation insurance but conducted business for 1,080 days without workers' compensation insurance. The Commission also finds that Petitioner proved that such violation was knowing and willful because Mr. Ellis was aware and understood that he was required to obtain workers' compensation insurance for the employees of Clevz Tree Service. Accordingly, the Commission finds that Respondent is liable for a penalty for failure to comply with Section 4(a) of the Act. The Commission hereby assesses against Respondent a fine totaling $540,000.00, for the period of 1,080 days that Respondent was without workers' compensation insurance coverage.

IT IS THEREFORE ORDERED BY THE COMMISSION that Clevz Tree Service pay to the Illinois Workers' Compensation Commission the sum of $540,000.00, as provided in Section 4(d) of the Act.

Pursuant to Commission Rule 9100.90, once the Commission assesses a penalty against an employer in accordance with Section 4(d) of the Act, payment shall be made according to the following procedure:

1) payment of the penalty shall be made by certified check or money order made payable to the Illinois Workers' Compensation Commission;

2) payment shall be mailed or presented within 30 days after the final Order of the Commission or the order of the court on review after final adjudication to:

Department of Insurance
Attn: Insurance Compliance
122 S. Michigan Ave, 19th Floor,
Chicago, IL 60603; or

3) as otherwise directed by www.iwcc.il.gov.

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

July 13, 2023

MP/mcp
r-06-20-23
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	19WC023640
Case Name	Robert Herring v. City of Alton
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0306
Number of Pages of Decision	12
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Steven Selby
Respondent Attorney	Matthew Kelly

DATE FILED: 7/17/2023

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROBERT HERRING,
Petitioner,

vs. NO: 19 WC 23640

CITY OF ALTON,
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, temporary total disability benefits, medical expenses, credit, and the nature and extent of Petitioner's permanent partial disability, and being advised of the facts and law, changes the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner worked for the City of Alton repairing and maintaining sewer lines. On May 15, 2019, he was working on a sewer during a flood. He got tangled in vegetation and fell on both knees. Respondent stipulated to accident but disputed that the accident caused his condition of ill-being which required his bilateral total knee arthroplasties. Specifically, on the issue of causation, which is the basis for Respondent's argument against the accident being compensable, the Commission agrees that although Petitioner had significant arthritis in his knees bilaterally, the accident aggravated his condition at least to the extent that it accelerated the need for the arthroplasties that were performed.

The Arbitrator awarded Petitioner 25 weeks of temporary total disability benefits, medical expenses submitted into evidence, and awarded Petitioner 172 weeks of permanent partial disability benefits representing loss of the use of 40% of each leg. The Commission agrees with the Arbitrator's analysis regarding causation, medical expenses, and the nature and extent of Petitioner's permanent partial disability and affirms and adopts those aspects of the Decision of the Arbitrator.

Prior to testimony, the Arbitrator noted that the parties stipulated that Respondent should be awarded credit for whatever medical expenses that were paid under Respondent's group health insurance, pursuant to §8(j) of the Act. No amount of the credit to be awarded was specified. Nevertheless, in the order section, the Arbitrator specifically awarded $0 on credit. Although Respondent did not technically preserve the issue on review, it argues the issue in its brief.

In its brief, Respondent argues the Arbitrator erred in not awarding 8(j) credit, though it does not specify the credit to which it deems to be entitled. In his brief, Petitioner concedes to the stipulation. Accordingly, the Commission changes the Decision of the Arbitrator to clarify that Respondent shall receive credit for any and all medical expenses paid under its group health insurance.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated May 25, 2022 is hereby changed as specified above and is otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses identified in Petitioner's exhibit 5, pursuant to §8(a) and subject to the applicable medical fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $799.09 per week for a period of 25 weeks, that being the period of temporary total incapacity for work under §8(b).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner partial permanent disability benefits in the amount of $719.18 for 172 weeks because the injury sustained caused the loss of the use of 40% of the right leg and loss of the use of 40% of the left leg.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for any payments for medical expenses paid by Respondent's group medical insurance under §8(j) 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.

July 17, 2023

DLS/dw
O-5/24/23
46

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

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

/s/*Deborah J. Baker*
Deborah J. Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC023640
Case Name	HERRING, ROBERT v. CITY OF ALTON
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	Steven Selby
Respondent Attorney	Matthew Kelly

DATE FILED: 5/25/2022

THE INTEREST RATE FOR THE WEEK OF MAY 24, 2022 1.53%

/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

Robert Herring
Employee/Petitioner

v.

City of Alton
Employer/Respondent

Case # 19 WC 23640

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on March 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 May 15, 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 $62,329.30; the average weekly wage was $1,198.64.

On the date of accident, Petitioner was 57 years of age, single with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 5, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall pay Petitioner temporary total disability benefits of $799.09 per week for 25 weeks, commencing May 18, 2020, through November 8, 2020, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $719.18 per week for 172 weeks because the injury sustained caused the 40% loss of use of the right leg and 40% loss of use of the left leg, as provided in Section 8(e) of the Act.

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

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

William R. Gallagher, Arbitrator

MAY 25, 2022

ICArbDec p. 2

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment by Respondent on May 15, 2019. The Application alleged that Petitioner "Fell on log in woods during flood duty" and sustained an injury to "bilateral knees" (Arbitrator's Exhibit 2). Respondent stipulated Petitioner sustained a work-related injury, but disputed liability on the basis of causal relationship. In regard to temporary total disability benefits, Petitioner claimed he was entitled to temporary total disability benefits of 25 weeks, commencing May 18, 2020, through November 8, 2020. Respondent agreed Petitioner was disabled during the aforestated period of time, but disputed liability for same (Arbitrator's Exhibit 1).

Petitioner worked for Respondent for over 30 years performing sewer maintenance work. Petitioner's job duties included maintaining/repairing sewer lines, digging holes, operating heavy equipment such as backhoes and excavators, getting in/out of holes, and standing/moving on uneven surfaces.

Shortly after Petitioner sustained the accident, Respondent contracted out its sewer line maintenance to Illinois American Water. In June, 2019, Petitioner obtained a job with Illinois American Water doing essentially the same job duties he performed while employed by Respondent.

Petitioner testified that on May 15, 2019, there was a flood which affected the city of Alton, in particular, the downtown area. Petitioner was performing flood duty in downtown Alton. Petitioner said there were a number of other employees present doing sandbagging, carrying pump/hoses, etc. Petitioner received a call and was informed there was sewage backup into the woods and he was directed to go there. Petitioner testified he was walking in a hilly area of the words that contained a significant amount of vines. Petitioner's legs got caught in the vines which caused him to fall on a log striking both of his knees. Petitioner testified that, at that time, he experienced a burning sensation in both of his knees, more on the left than right.

Petitioner testified he had problems in both of his knees prior to the accident of May 15, 2019. Petitioner testified he received treatment for right and left knee symptoms in 2013, underwent left knee surgery and received injections into his right knee in 2013. Petitioner stated he also received some treatment for both of his knees in June, 2018.

Petitioner testified that after he was treated for knee symptoms in 2013, he was able to return to work to his regular job for Respondent. Petitioner stated he was able to work afterward and performed all of his regular job duties.

Medical records for treatment Petitioner received prior to May 15, 2019, were received into evidence. On February 12, 2013, Petitioner was evaluated at Midwest Occupational Health by Lynn Brown, a Nurse Practitioner. At that time, Petitioner complained of right knee pain and gave a history of stepping off of a trailer and experiencing a "pop" in his right knee. NP Brown's examination findings were benign and she diagnosed Petitioner with right knee pain. She obtained an x-ray of Petitioner's right knee which revealed early osteoarthritic changes. She directed Petitioner to use a knee support and over-the-counter medication as needed (Respondent's Exhibits 2 and 3).

When NP Brown saw Petitioner on February 19, 2013, his condition was essentially the same. She ordered an MRI scan of Petitioner's right knee (Respondent’s Exhibit 2).

The MRI of Petitioner's right knee was performed on February 27, 2013. According to the radiologist, the MRI revealed abnormal blunting of the inner margin of the posterior horn of the medial meniscus which did not meet the criteria for a tear, large joint effusion and a moderate Baker's cyst (Respondent's Exhibit 3).

On June 8, 2018, Petitioner sought medical treatment from Dr. Panayiotis Ellina for bilateral knee pain which he related to an accident which had occurred three days prior. According to the medical record, Petitioner was pouring concrete and standing when his feet got stuck causing him to fall in a twisting motion which affected both of his knees. Dr. Ellina did not make a specific diagnosis, but directed Petitioner to return on June 25, 2018. When Petitioner was seen at that time, he had minimal pain in the right knee and no pain in the left knee. Dr. Ellina opined Petitioner had a bilateral knee injury which was "resolving well" (Respondent's Exhibit 2).

Subsequent to the accident of May 15, 2019, Petitioner was, at the direction of Respondent, evaluated at Midwest Occupational Medicine on May 17, 2019, when he was seen by Lynn Brown, a Nurse Practitioner. Petitioner informed NP Brown of the accident of May 15, 2019, and that he had been seen for bilateral knees symptoms in the past. NP Brown ordered x-rays and opined Petitioner had bilateral knee pain subsequent to the fall and directed Petitioner to apply ice and take over-the-counter medication (Petitioner's Exhibit 3).

NP Brown again saw Petitioner on June 6, 2019, and reviewed the x-rays she had previously ordered. She noted it revealed Petitioner had mild tricompartmenal osteoarthritis in both knees. Because of Petitioner's ongoing symptoms, she ordered MRI scans of both knees (Petitioner's Exhibit 3).

NP Brown last saw Petitioner on June 18, 2019, and she reviewed the MRI scans which were performed on June 14, 2019. In regard to the MRI of the left knee, she noted it revealed severe degeneration of the midbody of the medial meniscus, a small osteophyte of the femoral condyle, tricompartmental osteoarthritis of the margins of the patella, severe chondrosis and large joint effusion. In regard to the MRI of the right knee, she noted it revealed a complex tear of the medial meniscus, chondrosis of the medial compartment, joint effusion and a small Baker's cyst. She opined Petitioner's symptoms were due to underlying chronic degenerative disease (Petitioner's Exhibit 3).

Petitioner was subsequently treated by Dr. John Stirton, an orthopedic surgeon, who initially evaluated Petitioner on August 5, 2019. At that time, Petitioner informed Dr. Stirton of the accident of May 15, 2019, and complained primarily of pain in the left knee. Dr. Stirton noted Petitioner had severe osteoarthritis in the left knee and he recommended conservative treatment. He administered an injection into the left knee at that time (Petitioner's Exhibit 1; Deposition Exhibit 2).
Dr. Stirton subsequently saw Petitioner on November 26, 2019. At that time, he administered another injection into Petitioner's left knee and also administered an injection into Petitioner's right knee. He opined Petitioner would probably require a total knee arthroplasty (Petitioner's Exhibit 1; Deposition Exhibit 2).

Over the next several months, Petitioner continued to receive conservative treatment from Dr. Stirton. However, Dr. Stirton ultimately performed total knee arthroplasty surgeries on Petitioner's left knee and right knee on May 18, 2020, and August 3, 2020, respectively (Petitioner's Exhibit 2).

At the direction of Respondent, Petitioner was examined by Dr. Richard Lehman, an orthopedic surgeon, on January 7, 2021. In connection with his examination of Petitioner, Dr. Lehman reviewed medical records and diagnostic studies for treatment Petitioner received both before and after the accident of May 15, 2019. Dr. Lehman noted the medical records and diagnostic studies revealed Petitioner had a long history of bilateral knees symptoms prior to the accident of May 15, 2019. He opined Petitioner had a long standing degenerative process in both knees which was not affected by the accident of May 15, 2019. While he agreed the arthroplastic surgeries which were performed were medically reasonable, he opined they were not related to the accident of May 15,

2019, but to the long term degenerative changes. He also noted Petitioner had other factors which would have an impact on his knee condition, namely, Petitioner being obese and diabetic (Respondent's Exhibit 1; Deposition Exhibit 2).

Dr. Stirton was deposed on December 11, 2020, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Stirton's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Specifically, in regard to causality, Dr. Stirton testified the accident in which Petitioner fell onto his knees was a causative factor in Petitioner's knee condition and the need for the knee replacement surgeries he performed (Petitioner's Exhibit 1; p 10).

On cross-examination, Dr. Stirton acknowledged Petitioner had severe degenerative osteoarthritis in both knees which pre-existed the accident. He further agreed that any activity of daily living could have caused a significant exacerbation of his condition to warrant further treatment, including the injections and knee surgeries he performed. On redirect examination, Dr. Stirton testified Petitioner's falling onto his knees would have been a traumatic aggravation of Petitioner's underlying condition (Petitioner's Exhibit 1; pp 14, 24).

Dr. Lehman was deposed on August 3, 2021, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Lehman's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. In regard to causality, Dr. Lehman testified he reviewed the medical records and MRI scans of Petitioner's knees and opined Petitioner had pre-existing long term degenerative arthritis in both knees. Dr. Lehman testified this condition was not altered or exacerbated by the accident of May 15, 2019 (Respondent's Exhibit 1; pp 15-17).

On cross-examination, Dr. Lehman agreed Petitioner had an increase in his symptoms subsequent to the accident. Without Petitioner experiencing this increase in his symptoms, Dr. Lehman could not specify a date in which a Petitioner would have ultimately required knee arthroplasties (Respondent's Exhibit 1; p 27).

At trial, Petitioner testified the bilateral knee symptoms he experienced subsequent to the accident were much more severe than anything he had experienced prior to the accident. Petitioner stated he is able to move his knees, but is not able to go all the way down on his hands and knees because he has considerable difficulty getting up. Petitioner stated he continues to experience numbness in the outside portions of both of his knees and they both regularly "pop."

Petitioner acknowledged he was able to return to work following the surgeries and was able to perform the same job duties he did prior to sustaining the accident. As noted herein, subsequent to the accident, Petitioner obtained another job with Illinois American Water, but his job duties were essentially the same as what they were when he was employed by Respondent.

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 in regard to his knees is causally related to the accident of May 15, 2019.

In support of this conclusion the Arbitrator notes following:

There was no dispute Petitioner sustained a work-related accident on May 15, 2019, when he fell landing on both of his knees.

There was no question that, prior to the accident of May 15, 2019, Petitioner had bilateral knee issues for which he had sought medical treatment and had pre-existing degenerative arthritis in both knees.

Petitioner credibly testified that he had knee symptoms prior to the accident of May 15, 2019, but the symptoms he experienced afterward were much more severe than anything he experienced prior to the accident of May 15, 2019.

Petitioner's treating physician, Dr. Stirton, testified the accident of May 15, 2019, was a causative factor in Petitioner's knee condition and the need for the knee replacement surgeries he performed. While he agreed that any activity of daily living could have caused an exacerbation of the condition to where additional medical care/treatment would be indicated, he testified the accident in question was a traumatic aggravation of Petitioner's knee condition.

Obviously, Petitioner had participated in activities of daily living for a significant period of time without his having a recommendation that he undergo total knee arthroplastic surgeries.

Respondent's Section 12 examiner, Dr. Lehman, opined Petitioner had longstanding pre-existing arthritic changes in both knees which were not altered or exacerbated by the accident of May 15, 2019; however, he could not testify as to when Petitioner would have ultimately required total knee replacement surgery in the absence of Petitioner having sustained the accident.

Based on the preceding, the Arbitrator finds the opinion of Dr. Stirton more persuasive than that Dr. Lehman in regard to causality.

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

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 5, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

In support of this conclusion the Arbitrator notes the following:

There was no dispute as to the reasonableness and necessity of the medical treatment provided to Petitioner.

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

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 25 weeks commencing May 18, 2020, through November 8, 2020.

In support of this conclusion the Arbitrator notes following:

Petitioner and Respondent stipulated Petitioner was temporarily totally disabled during the aforestated period of time.

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

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of 40% loss of use of the right leg and 40% loss of use of the left leg.

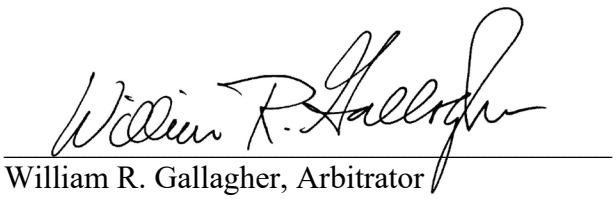
In support of this conclusion the Arbitrator notes the following:

Neither Petitioner nor Respondent tendered an AMA impairment rating. The Arbitrator gives this factor no weight.

Petitioner was employed as a sewer maintenance worker at the time he sustained the accident and was able to return to that same occupation afterward. Petitioner's job duties are physically demanding and require him to maintain/repair sewer lines, get in/out of holes, operate heavy equipment and walk/stand on uneven surfaces. The Arbitrator gives this factor significant weight.
Petitioner was 57 years old at the time he sustained the accident and 60 years old at the time of trial. Petitioner has approximately seven years before he will reach normal retirement age. The Arbitrator gives this factor minimal weight.

There was no evidence the injury had any effect on Petitioner's future earning capacity. The Arbitrator gives this factor moderate weight.

Subsequent to the accident, Petitioner received injections in both knees and ultimately underwent total knee replacement surgery in both knees. Petitioner continues to experienced symptoms consistent with the injury he sustained. The Arbitrator gives this factor significant weight.



William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC039267
Case Name	David Dwight Loless v. City of Waterloo Police Department
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0307
Number of Pages of Decision	27
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	David Jerome
Respondent Attorney	Matthew Kelly

DATE FILED: 7/18/2023

/s/ Deborah Simpson, Commissioner

Signature

23IWCC0307

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: causal connection	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAVID DWIGHT LOLESS,

Petitioner,

vs. NO: 16 WC 39267

CITY OF WATERLOO POLICE DEPARTMENT,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering all issues and being advised of the facts and law, modifies the Decision of the Arbitrator as stated herein and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof.

The Commission affirms and adopts the Arbitrator's causal findings as to the left knee injury that Petitioner, a police lieutenant, sustained from stepping into a hole while making a traffic stop and DUI arrest on November 21, 2016. However, the Commission reverses the Decision of the Arbitrator as it pertains to Petitioner's alleged left ankle injury and finds that Petitioner failed to prove that his left ankle condition was causally related to the work accident.

Prior to the accident, Petitioner was diagnosed with a lateral ligamentous left ankle sprain on March 16, 2011 after attempting to restrain a criminal. Petitioner treated conservatively with Dr. Thomas Fox for his left ankle sprain until May 11, 2011, at which time Dr. Fox indicated that Petitioner's left ankle sprain was resolving and he did not anticipate it resulting in any long-term issues. Petitioner did not otherwise have any left ankle problems leading up to the work accident on November 21, 2016.

The first mention of any post-accident left ankle pain in Petitioner's treatment records was not until September 6, 2017, which was almost ten months after the accident. At that time, Dr. Corey Solman diagnosed Petitioner with left lateral ankle pain with a possible peroneus brevis tear. Dr. Solman opined that it was reasonable to conclude that the accident where Petitioner fell in a hole had also caused an injury to his left ankle. Dr. Solman suggested that the left knee was

a distracting injury, so Petitioner did not experience increasing left ankle pain until his knee had started feeling better.

However, when he was deposed by the parties, instead of testifying that the left ankle injury occurred at the time of the original accident, Dr. Solman testified that the surgical realigning of Petitioner's knee could have caused or aggravated his left ankle problems. Dr. Solman testified that although falling into a hole could have also injured Petitioner's left ankle, he believed that the surgical realignment of the left knee was what had aggravated the left ankle.

There is a discrepancy between Dr. Solman's deposition testimony that the left ankle injury occurred at the time of the knee surgery and his treatment note that said the left ankle injury occurred at the time of the original work accident. Petitioner, on the other hand, presented an all-together different theory as to how his left ankle injury occurred. Petitioner testified that he did not injure his ankle at the time of the accident and instead injured both of his ankles after the fact while participating in physical therapy. Based on this, there are three different versions presented in the record as to how the left ankle injury may have happened, including it happening at the time of the original accident, it happening at the time of the knee realignment surgery, or it happening at the time of Petitioner's post-surgical physical therapy. The Commission finds that deciding on which of these three scenarios resulted in the left ankle injury is pure speculation, upon which liability cannot rest. For this reason, the Commission finds that Petitioner failed to meet his burden of proving that his left ankle condition was causally related to the work accident. Accordingly, the Commission denies all workers' compensation benefits relating to Petitioner's left ankle.

The Commission would also like to correct the typographical errors contained in the following sentence found on the bottom of page 13 of the Decision of the Arbitrator, which reads: "Issue (F): Is Petitioner's current condition of ill-being, specifically her tennis elbow and cubital tunnel syndrome, causally related to the accident?" Arb. Dec., p. 13. Since Petitioner is a male claiming left lower extremity injuries, the Commission corrects the typographical errors contained in said sentence so that it instead reads: "Issue (F): Is Petitioner's current condition of ill-being, specifically his left knee and left ankle injuries, causally related to the accident?"

In all other respects not specifically stated herein, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 30, 2022 is modified as stated herein. For all other issues not specifically modified herein, the Commission affirms and adopts the Decision of the Arbitrator, including the Arbitrator's findings as to Petitioner's left knee condition.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner failed to prove that the current condition of his left ankle is causally related to the work accident sustained on November 21, 2016. Accordingly, all workers' compensation benefits for Petitioner's alleged left ankle injury are hereby denied. The Commission otherwise affirms and adopts the Arbitrator's finding of causation and award of benefits for Petitioner's left knee injury.

IT IS FURTHER ORDERED that the following sentence on page 13 of the Decision of the

Arbitrator be modified to correct the typographical errors contained within: "Issue (F): Is Petitioner's current condition of ill-being, specifically her tennis elbow and cubital tunnel syndrome, causally related to the accident?" The Commission changes said sentence to instead read: "Issue (F): Is Petitioner's current condition of ill-being, specifically his left knee and left ankle injuries, causally related to the accident?"

IT IS FURTHER ORDERED that Respondent pay to Petitioner interest pursuant to §19(n) of the Illinois Workers' Compensation Act, if any.

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

There is no bond for the removal of this cause to the Circuit Court by Respondent pursuant to §19(f)(2) of the Act. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

July 18, 2023

DLS/met
O- 5/24/23
46

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

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

/s/*Deborah J. Baker*
Deborah J. Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC039267
Case Name	LOLESS, DAVID DWIGHT v. CITY OF WATERLOO POLICE DEPARTMENT
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	23
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	David Jerome
Respondent Attorney	Matthew Kelly

DATE FILED: 3/30/2022

THE INTEREST RATE FOR THE WEEK OF MARCH 29, 2022 1.05%

/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

DWIGHT DAVID LOLESS,
Employee/Petitioner

Case # **16 WC 039267**

v.

Consolidated cases:

CITY OF WATERLOO POLICE DEPARTMENT
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 **JEANNE L. AUBUCHON**, Arbitrator of the Commission, in the city of **COLLINSVILLE**, on **November 23, 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 11/21/16, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**73,805.16**; the average weekly wage was $**461.04**.

On the date of accident, Petitioner was **54** 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 $33,117.70 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $ **33,117.70**.

ORDER

Respondent shall pay the reasonable and necessary medical services of outlined in Petitioner's Exhibit 17, as provided in § 8(a) of the Act. Respondent shall be given credit for medical benefits that have been paid through its group carrier, 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 § 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $**946.22**/week for **34 4/7** weeks, commencing 11/23/16 through 8/3/17; 11/21/17 to 12/13/17, as provided in Section 8(b) of the Act. Respondent shall pay Petitioner maintenance benefits of $**946.22/**week for **31 4/7** weeks, commencing 12/14/17 through 7/15/18, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**775.18**/week for **125** weeks, because the injuries sustained caused the **25**% loss of the **body as a whole**, as provided in § 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.

Jeanne L. AuBuchon

Signature of Arbitrator

MARCH 30, 2022

PROCEDURAL HISTORY

This matter proceeded to trial on November 23, 2021, on all issues. The issues in dispute are: 1) whether the Petitioner sustained accidental injuries that arose out of and in the course of his employment; 2) the causal connection between the accident and the Petitioner's left knee and ankle conditions 3) payment of medical bills; 4) entitlement to TTD from November 23, 2016, through August 3, 2017, and November 21, 2017, through December 13, 2017, and maintenance from December 14, 2017, through July 15, 2018; and 5) the nature and extent of the Petitioner's injury.

FINDINGS OF FACT

At the time of the accident on November 21, 2016, the Petitioner was 54 years old and employed by the Respondent as a lieutenant assigned to the street as a first-line supervisor answering calls and performing traffic enforcement. (T. 13-14) Shortly before 6:00 p.m., the Petitioner conducted a DUI traffic stop on Illinois Route 3 – a two-lane state highway with an asphalt shoulder about three feet wide dropping off into a grassy ditch. (T. 17-19) After arresting the driver, the Petitioner cleared out the back of his squad car and walked back to the front of the car to take the driver and put her in the back of his vehicle. (T. 20) He said that on his way to the front of the vehicle, he stepped over a hole/washout. (Id.) He said that on the way back to put the driver in the back seat, she walked around the depression, and he stepped into it with his left foot while turning and heard a pop in his left knee. (Id.)

Sgt.Trin Daws was at the scene when the incident occurred acting as the Petitioner's cover officer. (T. 145-146) He said he did not see the Petitioner injure his knee, and the Petitioner did not tell him that he injured his knee. (T. 145) He acknowledged that it was dark at the time of the arrest, and the side of the road where the arrest took place was partly rock, partly grass and uneven. (T. 150-151)

Both parties submitted dash-cam video of the arrest, and the Respondent submitted dash-cam videos of the Petitioner after the incident and in the month leading up to the incident. (PX20, RX4, RX5, RX6) A video of the arrest was played during the arbitration with the Petitioner narrating and pinpointing the moment when he stepped in the hole. (PX20, T. 21-25)

The Petitioner testified that afterwards he felt pressure in the front of his knee below his kneecap and burning in the back of his knee. (T. 26) He said he carried on with the arrest because he had to do his job. (T. 27) He said he was able to stand on his knee, but as his shift went on his symptoms worsened, and he went to his home to get some Tylenol. (T. 28, 31) Another dash-cam video captured the Petitioner at his home. (RX5, T. 31) He returned to the scene to relieve Sgt. Daws and supervise the towing of the vehicle but because of his knee, he did not get out of his car, as he normally would do. (T. 74-75) He finished his shift but had no other calls or any events that required physical effort. (T. 35) He said that when he returned home, his knee was swollen and had a knot almost the size of a chicken egg. (T. 35-36) The following day, the Petitioner completed an accident report describing the incident consistently with his testimony. (PX1)

The Petitioner admitted having osteoarthritis in his left knee, but said he was never diagnosed with an anterior cruciate ligament (ACL) tear in that knee and had no problems with that knee when he started work that day. (T. 33-34, 37) He said his left leg was his good leg, and his right knee was five years overdue for replacement. (T. 38) He had occasional injections to that knee, but never any work restrictions. (T. 38-39) He admitted that he would limp, but attributed it to his right knee and said was capable of working full duty. (T. 40, 90-91)

Sgt. Daws testified that he had seen the Petitioner walk with a limp for the past ten years but could not say which leg The Petitioner was favoring. (T. 144, 147) He said the Petitioner

shied away from activities involving long durations of standing and walking. (Id.) He recalled an instance on the firing range when he saw the Petitioner jogging, then fall and roll. (T. 144-145)

The Petitioner had a prior meniscectomy of his left knee in the 1970s, right medial meniscus surgery in the late 1980s and right ACL reconstruction and an arthroscopy around 1986. (PX6) He was under the care of Dr. Thomas Fox, an orthopedic surgeon at Mid County Orthopaedic Surgery & Sports Medicine beginning in November 2008, when he presented with bilateral knee pain with the right "a lot worse" than the left. (PX8) He received two rounds of viscosupplement injections in October 2009 and April and May 2010. (Id.) Dr. Fox performed steroid injections on both knees on April 13, 2011; December 14, 2011; April 11, 2012; August 1, 2012; September 19, 2012; January 9, 2013; June 17, 2013; September 25, 2013; March 19, 2014; June 19, 2014; October 1, 2014; April 29, 2015; July 15, 2015; October 22, 2015; March 2, 2016; June 29, 2016; and September 30, 2016. (PX8)

During this course of treatment, the Petitioner complained of pain being worse in his right knee than his left, and, in several instances, Dr. Fox removed fluid from the right knee but none from the left. (Id.) X-rays during that time showed more degeneration in the right knee than the left. (Id.) On September 19, 2012, Dr. Fox had planned on performing surgery on the right knee. (Id.) There were notations in the records of the Petitioner putting off right knee replacement. (Id.) The Petitioner explained that his knee pain was much different after the accident than prior. (T. 129) He said his arthritis pain was an ache that came and went that he ranked as one or two out of ten, but the pain in this left knee after the accident was eight or nine out of ten. (T. 129-130)

The Petitioner testified that after he informed Police Chief Michael Douglas of the incident on November 22, 2016, Chief Douglas sent him to Mercy Corporate Health, where he was diagnosed with a sprain of the medial collateral ligament of the left knee, was prescribed

medication and was placed on restricted duty. (T. 42, PX6) He returned to Mercy Corporate Health on December 1, 2016, and was given an additional diagnosis of other spontaneous disruption of the ACL of the left knee. (Id.) He was ordered off work until December 13, 2016. (Id.) Dr. Nicholas Carper stated in his report that the cause of the Petitioner's problem was related to work activities. (Id.)

The Petitioner saw Dr. Fox on December 13, 2016, and reported pain and swelling in his left knee – stating that the pain was worse than any of his past arthritis pain. (PX8) Dr. Fox diagnosed a sprain of an unspecified ligament of the left knee, performed a cortisone injection, ordered an MRI and took the Petitioner off work until further notice. (Id.)

On December 28, 2016, the Petitioner saw Dr. Corey Solman, Jr., an orthopedic surgeon at Orthopedic Sports Medicine & Spine Care Institute. (PX3, Deposition Exhibit 2) Dr. Solman reviewed Dr. Fox's records dating back to November 13, 2008, performed a physical examination and reviewed the MRI, of which he stated appeared to show a tear of the ACL along with some bruising along the mid portion of the lateral femoral condyle and tibial plateau that he said was indicative of an acute ACL injury. (Id.) Dr. Solman reported that the meniscectomy in the 1970s was a prevailing factor in the development of the Petitioner's osteoarthritis, but the work accident was the prevailing factor in the development of the ACL tear. (Id.) Dr. Solman prescribed medication, bracing and physical therapy but noted that it would be likely that a total knee arthroplasty would be more beneficial and provide more optimal functional outcomes. (Id.) He placed the Petitioner on restricted duty. (Id.) On January 6, 2017, Dr. Solman ordered the Petitioner off work until January 25, 2017. (Id.)

The Petitioner underwent physical therapy from January 3, 2017, through March 24, 2017, for a total of 32 visits. (PX10) He was discharged on March 28, 2017. (Id.) Throughout therapy,

the Petitioner made improvements, but he continued to present with impairments involving range of motion, soft tissue mobility, strength, flexibility, posture, gait, pain, balance, weight bearing and joint mobility. (Id.)

At a follow-up visit on January 25, 2017, Dr. Solman found that conservative treatment had failed, and he recommended a knee replacement. (PX3, Deposition Exhibit 2.) He said the left ACL could not be reconstructed due to poor indications, and the only surgery that would help stabilize the knee and take away the pain would be a knee replacement. (Id.) Dr. Solman continued his off-work order indefinitely. (Id.)

On February 27, 2018, a Section 12 examination was performed by Dr. Mark Miller, an orthopedic surgeon at The Orthopedic Center of St. Louis. (RX7) He reviewed medical records, X-rays and the MRI. (Id.) His interpretation of the MRI was that the Petitioner had a chronic ACL tear, however, he stated that the Petitioner had a functional knee that allowed him to be active. (Id.) He said the work accident "would be considered to be a triggering event," and optimal treatment that that point would be a knee replacement. (Id.) He explained that the work injury – hyperextension injury and valgus load to the knee – caused aggravation of a pre-existing endstage arthritic knee to the point that it was no longer functional. (Id.) He said the treatment to date had been reasonable and necessary. (Id.)

Dr. Solman performed a bilateral total knee arthroplasties on March 27, 2017. (PX3, Deposition Exhibit 2, PX12) During his stay at Des Peres Hospital, the Petitioner received therapy services. (PX12) He was discharged on March 30, 2017, and went to Delmar Gardens South for skilled nursing and rehabilitation until April 7, 2018. (PX13)

On May 19, 2017, Dr. Solman continued off-work orders until the Petitioner's next visit. (PX3, Deposition Exhibit 2) He continued off-work orders on June 23, 2017, and returned the

Petitioner to restricted duty on July 28, 2017. (Id.) Dr. Solman continued the work restrictions on September 6, 2017; October 6, 2017; and November 3, 2017. (Id.) The Petitioner underwent physical therapy ATI Physical Therapy from April 28, 2017, through November 17, 2017, for a total of 66 visits. (PX10)

The Petitioner testified that during physical therapy, he developed problems with his left ankle. (T. 51) Later in his testimony, he said both ankles were affected by the physical therapy. (T. 87-88) The Petitioner reported left ankle pain to Dr. Solman on September 6, 2017, and said it was holding him back in physical therapy for his knee. (PX3, Deposition Exhibit 2) Dr. Solman opined that the Petitioner suffered an ankle injury at the time of the work accident, but did not realize it because of focus on his knee. (Id.) On November 3, 2017, Dr. Solman gave the Petitioner a steroid injection in his ankle and prescribed physical therapy. (Id.) The Petitioner had therapy on his ankle from October 16, 2017, through December 21, 2017, for a total of 16 visits. (PX10) He testified that the physical therapy and cortisone injection resolved his ankle symptoms. (T. 52)

Another Section 12 evaluation was conducted on November 13, 2017, by Dr. John Krause, another orthopedic surgeon at The Orthopedic Center of St. Louis who performed the examination under the business name of John O. Krause Consulting, LLC. (RX3, Deposition Exhibit 2) Dr. Krause reviewed medical records and examined the Petitioner. (Id.) In the medical records were notes that showed the Petitioner suffered a broken ankle in 2011. (Id.) Dr. Krause agreed with Dr. Miller that the ACL tear was chronic. (Id.) He found the left knee case to be remarkable because the Petitioner had no nonoperative treatment from the work injury, noting that Dr. Solman saw the Petitioner on one visit and recommended a total knee replacement at the next visit. (Id.) However, the records as noted above showed the Petitioner did have physical therapy before surgery. (PX3, Deposition Exhibit 2) Dr. Krause said the Petitioner did not need ongoing

treatment nor work restrictions, stating that the Petitioner should be able to do everything required of a police officer. (Id.)

Regarding the Petitioner's left ankle, Dr. Krause stated that the medical records did not support a causal relationship between the work injury and the Petitioner's left ankle pain. (Id.) He said it was unreasonable to conclude that the Petitioner injured his ankle and did not mention it to any provider for ten months. (Id.)

The Petitioner testified that Dr. Krause spent less than ten minutes with him and would not allow the Petitioner to answer his questions – cutting him off before he was finished answering. (T. 55) He denied telling Dr. Krause that he was overdue for knee replacements on both knees and denied that Dr. Fox discussed replacing his left knee. (T. 82) The Petitioner stated that until Dr. Krause's report, the Respondent was paying his medical benefits and TTD. (T. 79-80)

Despite Dr. Krause's full-duty release, the Petitioner felt that he was not capable of being a street cop because of his left knee and the restrictions placed on him by Dr. Solman that the Respondent refused to accommodate. (T. 57-59) The Petitioner said that he had to use accrued vacation time and sick leave. (T. 62)

On November 29, 2017, Dr. Solman ordered a functional capacity evaluation (FCE). (PX3, Deposition Exhibit 2) The FCE performed on December 6, 2017, at ApexNetwork Physical Therapy found that the Petitioner's functional abilities were not consistent with the duty demands of a police officer. (PX15) The main limiting factors were: decreased lifting tolerances, difficulty and inability to assume lower level positions/weight bearing/crawling and decreased agility with jogging/running/lateral/quick movements. (Id.) The Petitioner put forth acceptable effort during the evaluation. (Id.)

At a follow-up visit with Dr. Solman on December 13, 2017, the Petitioner reported feeling much better after having the knee replacement but continued having left knee discomfort with aggressive activities. (PX3, Deposition Exhibit 2) Dr. Solman also found the Petitioner to be at maximum medical improvement and gave permanent work restrictions of office work only with the ability to elevate his legs as needed, no lifting more than 50 pounds, no confrontation or inmate contact, no stair climbing while carrying more than 25 pounds and no kneeling. (Id.)

The Petitioner said that Chief Douglas informed him that the department did not have a position for him within his restrictions after January 1, 2018, so he applied for line-of-duty disability benefits. (T. 91-92) He said he withdrew that application and pursued a non-work-related disability pension because he was living with limited income for more than two years. (T. 92) He said, "the city waited me out." (Id.) In his application for line-of-duty disability benefits, the Petitioner gave a description of the incident consistent with his testimony and the dash-cam video, except that he wrote that he was holding the arrestee by the handcuffs when he stepped in the hole and that Sgt. Daws did not have a line of sight to the incident. (RX2) The Petitioner explained the differences between his testimony regarding the incident and his application because he filled out the application by memory and had not yet seen the dash-cam video. (T. 95-96)

On April 17, 2018, Dr. Solman testified consistently with his reports. (PX3) Regarding his opinion as to what happened when the Petitioner stepped in the hole, Dr. Solman testified that the Petitioner hyperextended his knee, which can cause sprains of the ligaments of the knee – especially the ACL – as well as strains to the structures around the knee and significant bruising of the cartilage surfaces and bone marrow of the femur and tibia. (Id.) He said that type of injury can aggravate an underlying arthritic condition. (Id.)

Regarding his choice of performing knee replacement rather than reconstructing the ACL, he said such a procedure can strain the knee and make the arthritis worse. (Id.) He said the only way to correct the problem was a knee replacement. (Id.) He acknowledged that the Petitioner likely would have needed knee replacements at some point, but the work injury tipped the scale. (Id.) He said the Petitioner's knee symptoms prior the accident were not severe enough to take the next step and undergo knee replacement, as he was still functioning in his job. (Id.) As to his intraoperative observations of the Petitioner's ACL, Dr. Solman did not see any chronicity to the tear. (Id.) But on cross-examination, he stated that he was not focused on the ACL tear during the surgery and did not note it in his surgical report. (Id.) He agreed that even if the ACL tear predated the Petitioner's work injury, that injury could aggravate the tear and necessitate surgery. (Id.) But he maintained that he believed the ACL was fully torn at the time of the accident. (Id.)

As to the Petitioner's left ankle, Dr. Solman stated that the knee replacement realigned the Petitioner's bowlegged knee, which brought the shin and ankle in a different position, causing the muscles in the ankle to work differently. (Id.) He said this could have caused the tendinitis the Petitioner suffered in his left ankle. (Id.) On cross-examination, Dr. Solman acknowledged that he stated in his reports that the work incident may have directly caused the ankle injury but clarified that he believed the alignment issue was more of the main factor for the ankle injury. (Id.)

Dr. Solman testified that he ordered the FCE to see where the Petitioner was in terms of his ability to return to normal work duties or if he would need permanent restrictions. (Id) Dr. Solman also testified that the Petitioner appeared to be honest and forthright regarding his symptoms and the symptoms appeared to be consistent with his findings. (Id.) He agreed with the findings in Dr. Miller's report. (Id.) Regarding Dr. Krause's report, he pointed out that Dr.

Krause's specialty was the foot and ankle and disagreed with his conclusion that the Petitioner should be able to do everything required of a police officer. (Id.)

Dr. Krause testified consistently with his report at a deposition on June 15, 2018. (RX3) He explained that he found the Petitioner could work full duty without restrictions because he had reasonable range of motion, was seven months out from his surgery and had no significant pathology in his ankle. (Id.) He disagreed with Dr. Solman's testimony that the Petitioner's ankle injury may have been caused by the straightening of the bowed leg – calling that opinion "absurd." (Id.) He said it was possible that Petitioner injured his ankle during physical therapy. (Id.)

Although he did not state it in his report, Dr. Krause testified that he disagreed with Dr. Miller's opinion that the work injury aggravated the Petitioner's arthritis in his knee and turned it from functional to non-functional. (Id.) He said the Petitioner had severe degenerative joint disease dating back to 2012, and there was no objective evidence that the Petitioner's condition worsened after the work accident. (Id.)

Regarding his examination of the Petitioner, which he said took 40 minutes, Dr. Krause stated that he did not recall having the Petitioner do any squatting or bending, did not think he had the Petitioner do any kneeling and did not have the Petitioner do any climbing, running, carrying, lifting, pushing or pulling. (Id.) When asked if he asked the Petitioner if he had problems performing any of those activities, Dr. Krause said the Petitioner did not report any problems but did not say if he asked. (Id.)

Dr. Solman issued another report on September 11, 2018, after having reviewed the dash-cam videos. (PX4, Deposition Exhibit 1) He believed the video of the arrest and of the Petitioner afterwards lent credibility to the fact that the Petitioner's injury occurred at that time and corroborated his and Dr. Miller's diagnoses. (Id.) Dr. Solman testified consistently with his report

at a deposition on January 8, 2019. (PX4) He said that the mechanism of injury he saw on the video was consistent with the Petitioner's version of the events, and sucht a mechanism of injury did not need to be a dramatic twisting event as long as there was some type of force on the knee – an axial force where the bones hit each other or a slight twisting force. (Id.) He said that where a person already had diseased tissue in the knee or is older than 45 or 50, a lesser amount of force can cause an injury that would be needed to cause injury to a healthier, younger person. (Id.) Dr. Solman also testified that before the accident, it was possible that the Petitioner could have gone on for an indeterminate amount of time before needing surgery on his left knee. (Id.)

On July 26, 2018, the Petitioner underwent a vocational rehabilitation evaluation by Delores Gonzalez, a vocational rehabilitation counselor at Gonzalez & Associates. (PX5, Deposition Exhibit 1) Ms. Gonzalez interviewed the Petitioner; reviewed his work history, medical records, Dr. Miller's report, the FCE and depositions of Dr. Solman and Dr. Krause; and conducted vocational testing and a transferability of skills analysis. (Id.) With the permanent work restrictions placed on the Petitioner by Dr. Solman, Ms. Gonzalez opined that the Petitioner was employable – with accommodations for his restrictions – as a police aide, police clerk or police radio dispatcher. (Id.) She identified hindrances to his potential for employment or vocational rehabilitation as his advanced age, work experience limited to a single industry and reduced residual functional capacity. (Id.) Ms. Gonzalez testified consistently with her report at a deposition on April 1, 2019. (PX5)

The Petitioner testified that he looked for work and found a temporary job in manufacturing beginning July 15, 2018. (T. 65) At the time of arbitration, he was driving a tractor-trailer truck for Beelman Truck Company. (T. 66) He said that if he stands for more than 15 minutes, his leg

goes numb and gets unstable and shaky. (T. 69) He said he can't kneel and experiences pain in his knee if he is "on it way too much." (T. 70-71)

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.* At the time the Petitioner alleges he stepped in the hole and injured his knee, he was conducting an arrest, which was a reasonable activity in conjunction with his employment. The key issue is whether the Petitioner did, in fact, step in a hole. From the dash-cam video of the arrest, the Petitioner was able to pinpoint the exact moment when he stepped in the hole. However, the video itself is not helpful, as the arrestee's legs block the view of the Petitioner's leg. The Petitioner can be seen walking around the spot where he identified the hole to be as he walked to his car prior to leading the arrestee to the car. The arrestee also steps around that spot, and the Petitioner steps on that spot while walking behind the

Petitioner. Afterwards, he appears to look at the ground where he stepped. Sgt. Daws testimony also is not helpful, as it appears he is not looking at the Petitioner's leg, and he acknowledged that it was dark. As to inconsistencies in the Petitioner's testimony and his disability application, these are small details of no real consequence. The Arbitrator finds the Petitioner to be credible, and there was no evidence that compelled a different conclusion. Therefore, the Arbitrator finds that the Petitioner's injury occurred in the course of his employment.

The "arising out of" component is primarily concerned with causal connection. *Id. at ¶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.* The Arbitrator finds that walking on the uneven ground on the shoulder of the road in the dark was an act the Petitioner would reasonably be expected to perform and was a risk directly associated with his employment.

Thus, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that his injuries occurred in the course of and arose out of his employment.

Issue (F): Is Petitioner's current condition of ill-being, specifically her tennis elbow and cubital tunnel syndrome, causally related to the accident?

An accident need not be the sole or primary cause as long as employment is a cause of a claimant's condition. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill. 2d 193, 205 (2003). An employer takes its employees as it finds them. *St. Elizabeth's Hospital v. Illinois Workers' Compensation Comm'n,* 371 Ill. App. 3d 882, 888 (2007). A claimant with a preexisting condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Comm'n,* 92 Ill. 2d 30, 36 (1982).

The doctors disagreed on what impact the work accident had on the Petitioner's degenerated knee. Dr. Solman believed the accident tore or worsened an existing tear in the ACL. Dr. Miller believed the accident aggravated the Petitioner's degenerated knee and accelerated the Petitioner's need for surgery. Dr. Krause did not give a causation opinion regarding the Petitioner's knee in his report but did give an opinion that there was no causal connection because there was no objective evidence that the Petitioner's condition worsened after the accident. The Arbitrator gives no weight to Dr. Krause's opinion regarding the Petitioner's left knee because he did not examine the Petitioner nor conduct any testing on his prior to his surgery.

Regarding the dash-cam videos before and after the incident, they showed the Petitioner walking with an unusual gait. The Petitioner's gait before the accident was a bow-legged swaying rather than a limp. He did not appear to favor one side over the other. After the accident, he appeared to favor his left side. Dr. Solman reviewed the videos and believed they were consistent with a mechanism of injury that would cause the Petitioner's left knee injury.

In addition to or aside from expert medical testimony, 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 III.App.3d 92, 96-97, 631 N.E.2d 724 (1994); *International Harvester v. Indus. Comm'n*, 93 111.2d 59, 442 N.E.2d 908 (1982). The circumstantial evidence supports Drs. Solman and Miller's opinions. The Petitioner was able to perform his duties prior to the accident and was unable to afterwards. Although knee replacement surgery had been recommended earlier, there were no plans to perform the surgery at the time of the accident. He was actively receiving treatment for his knees leading up to the accident in the form of periodic steroid injections. It appeared that some of the injections the Petitioner had were prophylactic in nature, as he would get injections prior to events where he would be on his feet for extended periods of times. On one instance in 2014, they were performed after an acute incident. The pain-relieving effects of the injections seemed to last anywhere from three to six months at a time. However, the Petitioner was able to perform his duties as a police officer during this time.

Regarding the Petitioner's left ankle injury, an employee is entitled to benefits where a second injury occurs due to treatment for the first. See *Shell Oil Co. v. Indus. Comm'n*, 2 Ill. 2d 590, 119 N.E.2d 224 (1954); *International Harvester Co. v. Indus. Comm'n*, 46 Ill.2d 238, 263 N.E.2d 49 (1970); *Lincoln Park Coal & Brick v. Indus. Comm'n*, 317 Ill. 302, 148 N.E. 79 (1925); *Harper v. Indus. Comm'n*, 24 Ill.2d 103, 180 N.E.2d 480 (1962), *Brookes v. Indus. Comm'n*, 78 Ill.2d 150, 399 N.E.2d 603 (1979); *Tee Pak, Inc. v. Indus. Comm'n*, 141 Ill.App.3d 520, 490 N.E.2d 170 (1986). 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. *Vogel v. Indus. Comm'n*, 354 Ill. App. 3d 780, 786, 821 N.E.2d 807, 812 (2005). "Every natural consequence that flows from an injury that arose out of and in the course of the claimant's employment is compensable unless caused by an

independent intervening accident that breaks the chain of causation between a work-related injury and an ensuing disability or injury." *Vogel*, 354 Ill. App. 3d 780, 786, 821 N.E.2d 807, 812 (2005). Where the second injury occurs due to treatment for the first, there is no break in the causal chain. *International Harvester supra*.

Dr. Solman believed the Petitioner's ankle injury was causally related to the incident – whether that be by stepping into the hole or as a consequence of the surgery. Dr. Krause wrote in his report that it was unreasonable to conclude that the ankle injury occurred at the time of the original incident and added in his testimony that Dr. Solman's theory that the injury was a consequence of the surgery was "absurd."

The Petitioner had no problem with his left ankle before the work accident, and there was no evidence of an intervening accident. From the evidence, it did not appear that the Petitioner injured his ankle in the original incident. Rather, the problem emerged during his physical therapy following surgery. Whether it was the straightening of the knee from surgery or the physical therapy itself, the Petitioner's ankle sprain was causally related to the original incident, as there was no independent intervening accident that broke the causal chain.

Therefore, the Arbitrator finds that the Petitioner's left knee and ankle conditions are 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 causation findings above and the doctors' findings that the treatment was reasonable and necessary, the medical services as listed in Petitioner's Exhibit 17 are found to be reasonable and necessary. Therefore, the Arbitrator orders the Respondent to pay these medical expenses 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 K: What temporary benefits are in dispute? (TTD and maintenance)

According to the Request for Hearing (AX1), the parties dispute temporary total disability benefits for the periods of November 23, 2016, through August 3, 2017, and November 21, 2017 through December 13, 2017, and maintenance benefits for the period of December 14, 2017 through July 15, 2018.

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.

The Petitioner was placed on restricted duty on November 22, 2016, and taken off work on December 1, 2016. Dr. Fox continued the off-work order, and Dr. Solman returned the Petitioner to restricted duty on December 28, 2016. On January 6, 2017, Dr. Solman ordered the Petitioner off work and continued these orders until July 28, 2017, when he placed the Petitioner on restricted duty. After his examination on November 13, 2017, Dr. Krause found that the Petitioner could work full duty. Dr. Solman's work restrictions continued until he found the found the Petitioner

to be at maximum medical improvement and gave permanent work restrictions on December 13, 2017. The FCE found that the Petitioner was unable to perform the duties of a police officer. The Petitioner began working within his restrictions on July 15, 2018.

Regarding Dr. Krause's opinion that the Petitioner could perform his duties as a police officer, there was information that he did not have in reaching this conclusion -- a job description detailing the physical demands of the job or seeing the Petitioner perform tasks to test his physical abilities. Furthermore, Dr. Solman was in a better position to determine the Petitioner's capabilities based on his history of treating the Petitioner and becoming familiar with his condition and its progression. Therefore, the Arbitrator gives greater weight to the opinions of Dr. Solman and the FCE evaluator and finds that the permanent restrictions were reasonable.

Based on this, the Arbitrator finds that the Petitioner was entitled to TTD benefits from of November 23, 2016, through August 3, 2017, and November 21, 2017 through December 13, 2017, and maintenance benefits from December 14, 2017 through July 15, 2018. The Respondent is entitled to a credit of $33,117.70 in TTD benefits paid.

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 lost his occupation as a police officer, along with all of the benefits that came along with having worked his way up the ranks to lieutenant. He working as a truck driver and is able to perform his duties within his permanent restrictions. The Arbitrator places significant weight on this factor.

(iii) **Age.** The Petitioner was 54 years old at the time of the injury. He has several work years left during which time he will need to deal with the residual effects 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's activities are permanently restricted. He testified that he is unable to stand for long periods of time and cannot kneel. The Arbitrator places significant weight on this factor.

Based upon the above factors and the record taken as a whole, the Arbitrator finds an award for loss of use of the Petitioner's leg and foot does not adequately compensate the Petitioner for the loss sustained. Rather, the Arbitrator finds that the appropriate award should be for loss of an occupation as provided in Section 8(d)(2) of the Act because the Petitioner is not able to return to his usual and customary duties as a police officer. The Arbitrator in making such finding is guided by the decision of the commission in *O'Leary v. City of Chicago*, 98WC8840, 07IWCC743, and the cases cited therein, including *Barfell v. U.E. and C. Catalytic Inc*., 96IIC1299, and *Ridgeway v. TLC*, 02IWCC65692, 11IWCC0920, 2011WL5014274. Therefore, the Arbitrator finds the

Petitioner sustained permanent partial disability to the extent of 25% of the person as a whole due to the loss of occupation under Section 8(d)(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.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	03WC021947
Case Name	Stephen K Ryjewski v. Humana Inc
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0308
Number of Pages of Decision	15
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Philip D Blomberg
Respondent Attorney	Jamie VandenOever

DATE FILED: 7/20/2023

/s/ Amylee Simonovich, Commissioner

Signature

23IWCC0308

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Stephen Ryjewski,

Petitioner,

vs. NO: 03 WC 21947

Humana, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

This matter comes before the Commission on Respondent's Motion to Modify Section 8(f) Award and Petitioner's Petition for Fees and Costs. Former Commissioner Tyrrell conducted a hearing in this matter on December 7, 2022, in Chicago, IL. The Commission, having thoroughly considered the totality of the evidence, hereby denies both motions in their entirety.

Procedural Background

Petitioner worked for Respondent as a senior sales representative from 1991 through 2004. He sold professional medical services by directly soliciting groups and brokers. On April 30, 2001, Petitioner tripped over a computer cord while walking to his assistant's cubicle. Petitioner initially complained of pain and numbness down the right leg. Petitioner began treatment with Dr. Bernstein, as he had performed Petitioner's prior lumbar fusion with instrumentation from L4-S1 in the early 1990s.

Petitioner returned to work in May 2001 and worked for approximately two years. On April 27, 2004, Petitioner underwent a decompression laminectomy at L1-L2. He continued to complain of significant pain after the surgery and remained off work. Petitioner continued to undergo pain management treatment. The case proceeded to hearing on June 6, and July 6, 2007. Petitioner was 60 years old at that time. At the hearing, Petitioner testified that the large doses of prescription narcotics he took provided little pain relief and affected his concentration. He testified that he only performed light housework and ran short errands. In the October 1, 2007, Arbitration Decision, the Arbitrator determined Petitioner was permanently totally disabled due to his chronic severe pain and his continued use of heavy doses of prescription narcotics that affected his cognitive function. The Arbitrator also relied on Dr. Bernstein's opinion that Petitioner was permanently totally disabled.

Respondent filed a Petition for Review, and in its December 8, 2008, Decision, the Commission affirmed and adopted the Arbitration Decision. Respondent then filed an appeal of the Commission Decision to the Cook County Circuit Court. On April 7, 2010, the circuit court affirmed the award of permanent total disability. Respondent then filed an appeal to the Illinois Appellate Court. On June 27, 2011, the appellate court also affirmed the award of permanent total disability.

In February 2017, Respondent filed the pending motion seeking to modify the 2007 permanent total disability (PTD) award pursuant to Section 8(f) of the Act. In May 2022, Petitioner filed his pending motion seeking fees and costs pursuant to the Act. In his April 2023 response to Respondent's motion, Petitioner also questioned the Commission's authority to consider Respondent's motion.

Findings of Fact

December 7, 2022, Hearing

On the date of hearing, Petitioner was 75 years old. Petitioner testified that he never returned to work in any capacity since the arbitration hearing. He testified that Dr. Bernstein has never cleared him to return to work. Petitioner testified that he last saw Dr. Bernstein in either 2017 or 2018. He testified that he continues to see Dr. Noren, his pain management doctor, every two months. Petitioner denied that Dr. Noren has ever cleared him to return to work. He testified that he currently takes Norco as prescribed by Dr. Noren. He testified that Dr. Noren no longer prescribes any additional medication for Petitioner's symptoms. Petitioner testified that Norco does not really manage his symptoms. He testified that Norco somewhat keeps his pain under control, but does not affect his spasms.

Petitioner testified:

> I get spasms starting in my—I get pain in my lower back, and the spasms usually go down both my right and left legs, where I will either fall down, my wife has to manipulate my muscles with magnesium sulfate. And they last for periods of time for 20 minutes to a half hour, and they occur daily.

(Tr. at 25-26). Petitioner testified that he suffers from spasms at least twice each day. Petitioner testified that he is only able to sleep for a few hours at a time. Petitioner testified that he can stand during the spasms, but he must brace himself against something and he tries to stretch his leg. Petitioner testified that he is unable to walk, sit, or lie down when a spasm occurs.

Petitioner testified that he has never been pain free since the 2001 work accident. He denied engaging in any physical activity around the house and testified that occasionally he helps his wife roll out the garbage cans. He testified that the garbage cans are not heavy and he only rolls them approximately 25 feet. Petitioner denied engaging in activities such as cutting grass, shoveling, washing windows, or painting. He testified that he occasionally does laundry, but he can only carry an armful of clothes weighing approximately four to five pounds. Petitioner testified that he helps with the dishes, but he can only stand at the sink for 8-15 minutes. Petitioner testified that he

spends his days watching TV or listening to the radio while sitting or lying on a sofa. He testified that he stays on the first floor of his house and only goes upstairs two or three times each week to shower. Petitioner testified that he no longer takes walks; instead, he sits on his front porch.

Under cross-examination, Petitioner testified he traveled from Arlington Heights, IL to the Commission for the hearing. He testified that his wife drove him to the Cumberland 'L' station and he rode the train to downtown Chicago. Petitioner agreed that he sits or lies on his sofa and at times sits on a chair throughout each day. He agreed that he frequently changes positions while watching TV. Petitioner agreed that while he was in the U.S. Army Reserves, he trained as a dental technician. He has a degree in public accounting and worked as an insurance underwriter. Before working for Respondent, he worked for other insurers selling insurance products, including life insurance and health insurance. Petitioner testified that he has not been licensed to perform that work in 14 years and he does not know the current relevant laws.

Petitioner agreed that since 2010, he has been able to drive and run errands, including shopping. He agreed that he often goes to the bank alone and is comfortable independently conducting financial transactions. He agreed that he drove a Honda SUV from 2010-2018. He agreed that during that period, he loaded items into the cargo area of the SUV, including coolers, luggage, and totes. He agreed that some of those items weighed up to 20 pounds. He testified that the laptop he used for work before his injury weighed approximately 15 pounds. He testified that he uses a laptop at home and estimated it weighs approximately four pounds.

Respondent's Exhibit 1 is comprised of 11 video files containing surveillance footage of Petitioner at various points from 2010 through 2018. The earliest footage was filmed on October 11, 2010, and the most recent footage was filmed on June 19, 2018. The footage recorded in October 2010 briefly shows Petitioner driving his SUV, visiting a bank, and taking out a bag of garbage. (RX 1 at 2010-11-11_12_13). Two video files contain surveillance footage recorded on July 7, 2011. The first file shows Petitioner at an outdoor recreation area. Petitioner is seen standing for at least 10 minutes and repeatedly casting a fishing rod without any apparent discomfort. (RX 1 at 2011-7-7 Part 1). The second July 7, 2011, video file continues to show Petitioner at the recreation area. Petitioner is seen standing for approximately 30 minutes while occasionally leaning against a rail without any apparent discomfort. Respondent played part of this footage during the hearing. Petitioner agreed that the footage shows him pulling a cart with a cooler and a bucket. He also agreed that the footage shows him loading the items into the cargo area of his SUV.

Surveillance footage from 2014 was filmed during five days in September and October. (RX at 2014-9-30 & 2014-10-2_5_6_9). The footage primarily shows Petitioner running errands on various days and driving his SUV. Respondent played footage taken on October 9, 2014. The footage shows Petitioner pulling a luggage cart containing luggage and various items that Petitioner identified as his mother's bags. Petitioner agreed that the footage shows him placing everything on the luggage cart, as well as his mother's walker, into his SUV. Petitioner testified that his mother's walker weighed approximately 10-15 pounds. The footage also shows Petitioner driving to a second location and carrying the items into a house.

Surveillance footage filmed in February 2015 briefly shows Petitioner walking outside and

driving on a snowy day. (RX 1 at 2015-2-8_9). Footage filmed in March 2015 briefly shows Petitioner walking stiffly after exiting his SUV. (RX 1 at 2015-3-16). When Petitioner later returns to his vehicle, he appears to walk normally. Surveillance footage filmed in July 2016 shows Petitioner standing outside his house while talking to someone for less than 10 minutes. (RX 1 at 2016-7-30_31). Respondent played footage from July 31, 2016. Petitioner testified that he is shown loading a car battery into his SUV. He agreed that the battery weighed at least 20 pounds. Petitioner testified that he drove to an AutoZone and either exchanged his old battery or bought a new battery. The footage shows Petitioner carrying the new battery using only his left arm and placing it in his vehicle.

Respondent played footage taken June 16, 2018. (RX 1 at 2018-6-14_15_16_17_18_19). Petitioner testified that he was bringing in WeatherTech mats he bought for his wife. The footage shows Petitioner emptying items out of an SUV and vacuuming the mats while they are on the ground. Petitioner then vacuums various parts of the interior of the SUV, including the cargo area. Respondent also played footage from June 17, 2018. Petitioner testified he was carrying three or four empty shelves from his garage and placed them in the cargo area of his SUV. The footage also shows Petitioner wheeling a full garbage bin from his garage to the street. Petitioner is not seen using a cane in any of the surveillance footage.

Under further examination, Petitioner confirmed that he continues to drive and infrequently lifts items weighing over 20 pounds. He testified that he would not be able to work on a laptop full time. He testified that he is not capable of earning wages for full time work.

While the parties were submitting exhibits, Petitioner experienced a painful spasm and had to leave the hearing room for approximately 10 minutes.

Although Petitioner and several doctors were questioned regarding specific office visit notes, neither party submitted treatment records. However, an October 14, 2020, lumbar MRI revealed moderate to severe concentric central spinal canal and bilateral foraminal stenosis at L2-L3 related to degenerative disc and facet disease that had progressed since a November 2012 lumbar MRI and a November 2013 CT myelogram. (PX 4).

Expert Opinions and Testimony

Dr. Alexander Ghanayem—Respondent's Section 12 Examiner

Dr. Ghanayem, a board-certified orthopedic surgeon who specializes in treatment of the spine, examined Petitioner and reviewed medical records at Respondent's request on March 16, 2015. (RX 2 at Exh. 2). Petitioner complained of back pain with bilateral buttock, posterior thigh, and calf pain down to his feet. He also reported having back spasms approximately twice a day. Dr. Ghanayem's examination revealed tenderness at the paraspinal musculature with range of motion of around 10 degrees of extension and 45 degrees of flexion. There were no focal motor deficits in the lower extremity; however, Petitioner had decreased sensation to the back of the calves. Dr. Ghanayem reviewed the 2013 CT scan and interpreted it as showing a healed fusion with some degenerative arthritis above the fusion. He interpreted the 2012 lumbar MRI as showing the prior fusion and degeneration higher up the lumbar spine without any ongoing

neurocompressive lesions. Dr. Ghanayem also reviewed surveillance footage filmed during the period of 2011-2015.

Based on his review of the surveillance footage, Dr. Ghanayem opined:

> [Petitioner] behaves in a manner that would be consistent with him functioning at least at the light and perhaps even medium demand level. He stands, sits, walks, drives, and lifts things up without any difficulty…he is clearly functional within the light-to-medium demand level based on the surveillance that encompasses four years…Given his age and the degeneration above his fusion (which is age appropriate), it would be reasonable for him to consider capping his lifting at 20 pounds. If he decides to return back to work, which he most certainly has the capability to do so, an ergonomic desk chair would be appropriate…

(RX 2 at Exh. 2).

Dr. Ghanayem testified via evidence deposition on January 10, 2018, on Respondent's behalf. (RX 2). He testified that the lack of ongoing neurological lesions on the 2012 lumbar MRI was consistent with his exam finding of no neurological focal deficits. Regarding the surveillance footage, he testified:

> So it's not like a smoking gun. It's not like the guy's out there chopping wood and, you know, bending rebar and stuff like that…he's just carrying on like a normal person, you know, walking, talking…
> …
> You know, he stands, he sits, he walks, he drives. He lifts things that are appropriate. I said in my report obviously he's not working as a laborer, but he's you know, functioning as kind of a normal person, you know, light to medium demand level as I saw it.

(RX 2 at 16-17).

Dr. Ghanayem testified that physically, Petitioner should be able to work with restrictions including no repetitive bending and a 20-pound weight limit. He testified that Petitioner required an ergonomic workstation and appropriate desk chair. He also recommended that Petitioner move around throughout the day and stretch occasionally.

Under cross-examination, Dr. Ghanayem testified that Petitioner's lumbar extension and flexion during his examination were on the lower end of normal. He testified that the reduced range of motion would affect Petitioner's ability to function relative to performing manual labor, but would not affect his ability to work with a 20-pound weight limit.

Dr. John Prunskis—Respondent's Section 12 Examiner

Dr. Prunskis examined Petitioner and reviewed medical records and surveillance footage at Respondent's request on August 24, 2015. (RX 3 at Exh. 2). He is board certified in

anesthesiology with qualifications in pain management. Petitioner complained of primarily low back and right leg pain. Petitioner reported that his pain medications improved his level of pain to 6-7/10. Dr. Prunskis noted that Petitioner had a slight gait abnormality and favored the right leg. His examination did not reveal any pain upon palpation. Dr. Prunskis diagnosed Petitioner with post lumbar laminectomy syndrome. He recommended Petitioner change his medication regimen. He opined that changing Petitioner's medications would have the same, or better, therapeutic effect and would improve Petitioner's cognitive ability. He opined that Petitioner could return to work, particularly given his physical exam and the surveillance footage.

Dr. Prunskis testified via evidence deposition on behalf of Respondent on January 18, 2018. (RX 3). He testified that he reviewed surveillance footage covering the period of June 2011 through October 2014. Dr. Prunskis denied seeing any evidence of cognitive deficits or impairments during his examination of Petitioner. He testified that after examining Petitioner, and reviewing the surveillance footage and medical records, he believed Petitioner could return to work. He testified that a 20-pound weight limit would be appropriate.

Dr. David Hartman—Respondent's Section 12 Examiner

Dr. Hartman, a board-certified clinical and forensic neuropsychologist, examined Petitioner at Respondent's request on September 26, 2016. (RX 4 at Exh. 2). The doctor performed various tests and reviewed surveillance footage as well as medical records. He opined that the Commission's prior determination that Petitioner is permanently totally disabled from work could not be reconciled with the normal lifting, carrying, and recreational activities he observed Petitioner performing in multiple surveillance videos. Petitioner reported constant low back pain radiating down both legs. He reported that nothing improved his pain. He also complained of experiencing spasms at least twice each day that affected his sleep.

Dr. Hartman opined that while Petitioner nominally cooperated with all the testing, there was evidence of implausible test performance. He opined:

> Current neuropsychological screening tests were essentially normal, with no evidence of a decline. There was evidence of inconsistency and symptom magnification in objective test results, indicating that [Petitioner's] complaints to treaters are likely exaggerated and that he cannot be relied upon to provide accurate self-assessment of symptoms, severity or degree of disability associated with complaints. There is no diagnosable psychological impairment, generally or attributable to the 2001 event in question. Pain-related disability and limitations are demonstrably malingered in the [context] of highly functional surveillance behavior. A diagnosis of Malingering is the only appropriate diagnosis related to psychological and neuropsychological disability claim. Claims that [Petitioner] has opioid induced cognitive impairment have no support in current objective assessment…To the degree that [Petitioner] has occasional back pain or discomfort, they are insufficient to prevent his engagement in recreational and other activities.

(RX 4 at Exh. 2).

Dr. Hartman testified via evidence deposition on Respondent's behalf on December 8, 2016. (RX 4). He testified that there was a "…rather marked discrepancy between [Petitioner's] videoed activities versus what he reports are his stated limitations." (RX 4 at 11). The doctor testified that the tests he performed were objective measurement devices. He further testified, "There is no neuropsychological or cognitive or emotional or drug-related impairment that would prohibit him from returning to work. He just is motivationally indisposed shall we say." (RX 4 at 35).

Under cross-examination, Dr. Hartman agreed that his practice does not include spinal surgery or pain management. He also testified that he does not prescribe medication. He testified that Petitioner's results regarding malingered symptomatology were not wildly exaggerated. The doctor testified that the main impediment to a return to work was Petitioner's lack of motivation. Under further examination, Dr. Hartman testified that a return to work would be a good therapeutic tool for Petitioner because it would allow Petitioner to engage in useful activities and to focus less on his pain.

Joseph Belmonte—Respondent's Vocational Expert

Mr. Belmonte, a certified rehabilitation counselor, authored a report dated February 17, 2016, at Respondent's request. (RX 5 at Exh. 3). He reviewed his prior 2007 vocational report, and the narrative reports authored by Drs. Ghanayem and Prunskis. He also examined data published by the U.S. Dept. of Labor and the State of Illinois regarding wages and job availability. Mr. Belmonte determined that the two best descriptors of Petitioner's prior jobs were an insurance sales agent at a light physical demand level and a group insurance special agent at a sedentary physical demand level.

After reviewing federal and state occupational employment projections, he opined that insurance agent jobs were projected to grow 14.4% throughout the state from 2012-2022. Mr. Belmonte reviewed federal and state occupational employment projections to assess the availability of insurance agent jobs. He opined that due to projected growth and labor replacement needs, the average annual job openings in Illinois for insurance agent jobs was projected to be 830. Mr. Belmonte wrote that according to the Dept. of Labor Occupational Outlook Handbook, insurance sales agent jobs were projected to grow 9% from 2014-2024—faster than the overall average for occupations. He wrote that his preliminary search of indeed.com revealed a significant number of insurance sales and sales management positions available at salaries commensurate with that of Petitioner's pre-injury salary. Mr. Belmonte opined that based on the provided medical documents, that "…there is no basis to determine that [Petitioner] has not been employable in the intervening years between 2007 at the time of my first evaluation and the present time or that he is unemployable at this time." (RX 5 at Exh. 3).

Mr. Belmonte testified via evidence deposition on Respondent's behalf on December 12, 2017. (RX 5). He testified that when forming his opinions, he assumed Petitioner could return to work with a 20-pound weight restriction and the use of an ergonomic desk chair, that Petitioner did not suffer from any cognitive impairment, and that Petitioner was able to operate a motor vehicle. He testified that based on the information he reviewed when writing his 2016 report, Petitioner is employable. Mr. Belmonte testified:

> …this man was restricted to light-duty function overall. So that 20-pounds of lifting is the upper limit of lifting for an individual in a light-duty job where lifting is required. There are light-duty jobs where lifting is not required. He would then be able to meet the light-duty physical demand level. I did not see any specific things that would have restricted him to purely a desk job. That probably would not have concerned me much anyway because in this line of occupation you're not really doing physical work. You may be traveling about, driving here and there, in the office of your customer or the home of your customer. You may be carrying a briefcase…But, again, you're not transporting large amounts of information, you know, heavy files, things along those lines typically in this line of work.

(RX 5 at 14-15). He testified that Petitioner was a match for the functional parameters identified for the insurance sales jobs and the job requirements. Mr. Belmonte testified that he found available positions that met Petitioner's restrictions.

Dr. Richard Noren—Treating Physician

Dr. Noren, a board-certified anesthesiologist and pain medicine specialist, authored a report at Petitioner's request on August 16, 2017. (RX 6). He reviewed Dr. Ghanayem's March 16, 2015, report, Dr. Prunskis' August 24, 2015, report, and Dr. Hartman's September 26, 2016, report. He wrote that Petitioner had been on the same medications for several years with unchanged doses for pain complaints relating to his back injury. He wrote that Petitioner had intermittently reported increased pain and spasms fluctuating in severity over the prior seven to eight years. He wrote:

> At this time, I have not specifically reviewed any surveillance of [Petitioner]. He is seen in my office and appears to be functioning at a sedentary level of function. He reports intermittently that he needs to change position due to his subjective pain complaints. He has been on stable doses of medication. I am unable to disagree with Dr. Ghanayem's assessment, that he appears to be capable of at least a light duty level of function should the surveillance…[be] correct. It is likely these medications have provided him the current level of function in the palliative management of his spine pathology.

(RX 6). Dr. Noren wrote that Petitioner had never reported any specific cognitive impairment associated with his use of opiate analgesics.

Dr. Noren testified via evidence deposition on behalf of Petitioner on March 28, 2018. (PX 1). He began treating Petitioner in 2003. He testified that he continued to prescribe medication for pain management. When he last examined Petitioner on August 24, 2017, Petitioner was taking Zanaflex—a muscle relaxant for muscle spasms, Cymbalta—an antidepressant classified for pain management, Topamax—an anticonvulsant used for neuropathic pain, and Norco—a narcotic analgesic for pain.

Dr. Noren testified that he did not anticipate Petitioner's medication regimen would change much because Petitioner's regimen had primarily remained the same since at least July 2010. Dr.

Noren testified that Petitioner was capable of sedentary activity and did not recall ever releasing Petitioner to return to work. He denied that during the years he had treated Petitioner, he saw any indication of Petitioner exaggerating his symptoms or malingering.

He testified that it was unlikely that Petitioner would be able to maintain a 40-hour workweek after being off work over ten years. Regarding Petitioner's complaints of pain, the doctor testified:

> He reports that his pain currently fluctuates from month to month. Typically, I see him every three months. He'll have periods of time that he'll report to me that the pain is sometimes worse, sometimes better. It's a pretty typical pattern for somebody with his diagnosis and the length that he's had chronic pain.

(PX 1 at 15). Dr. Noren testified that he considered a 10-pound weight limit appropriate for sedentary activity.

Under cross-examination, Dr. Noren testified that Petitioner could work at a sedentary level for an unknown number of hours per week. He testified that Petitioner likely would have increased pain depending on how many hours he worked and the job requirements. Regarding his examinations of Petitioner over the prior few years, Dr. Noren testified, "[Petitioner] comes in the same every time. He has an antalgic gait. He says that the medicines help, but they don't make everything better, and he's satisfied with the limitations that the medicines give him without side effects." (PX 1 at 31). Dr. Noren testified that Petitioner could return to work with a 10- 15-pound weight restriction. He agreed that Petitioner could likely lift up to 20 pounds occasionally. Dr. Noren testified that Petitioner's use of Norco would not prevent a return to work. Under further examination, Dr. Noren testified that based on his experience it was unlikely and unexpected for someone like Petitioner to return to even a sedentary for a 40-hour workweek. However, he testified that some patients like Petitioner might be able to do so.

Dr. Noren prepared a second report at Petitioner's request on November 22, 2021. (PX 2; RX 7). Dr. Noren wrote that Petitioner was taking Norco 10 mg four times a day and was no longer taking Zanaflex, Cymbalta, or Topamax. He wrote:

> Since the last note of August 2017, he has had no interventional pain management treatment. He has discontinued several of the medications due to underlying health issues. He remains on the Norco with partial benefit of his chronic pain. It is my opinion that he will continue to require low-dose narcotic analgesics for the treatment of his chronic pain…At this time, there were no further plans for any interventional pain management…

(PX 2; RX 7). The doctor wrote that he recently recommended a trial of physical therapy due to Petitioner's complaints of increased episodes of falling. He also wrote that Petitioner ambulated with a cane at times and had an antalgic gait in the office.

Dr. Avi Bernstein—Treating Physician

Dr. Bernstein, a board-certified orthopedic surgeon specializing in spinal surgery, testified via evidence deposition on December 4, 2018, on Petitioner's behalf. (PX 3). He agreed that he restricted Petitioner from all work in March 2006 and denied that restriction had changed. He testified that when he last saw Petitioner in May 2018, Petitioner complained of increased low back pain and falling. Before that visit, Dr. Bernstein had not seen Petitioner since December 2013.

Under cross-examination, he testified a person would not necessarily be precluded from working solely due to their age of 71 years old—Petitioner's age at that time. He testified that he would possibly change his opinion that Petitioner is permanently disabled if surveillance footage showed Petitioner performing activities such as lifting items weighing up to 20 pounds.

Conclusions of Law

The Commission must address three issues. First, the Commission must determine whether it has the authority to consider Respondent's pending motion. The Commission must then determine whether Respondent met its burden of proving a modification of the longstanding permanent total disability award is warranted. The Commission must also determine whether Petitioner met his burden of proving he is entitled to an award of fees and costs relating to his defense of Respondent's motion. After considering the relevant case law, the Commission finds it has the authority to consider Respondent's motion seeking to modify the PTD award pursuant to Section 8(f). However, the Commission finds Respondent did not meet its burden of proving a modification of the PTD award is appropriate. Finally, the Commission denies Petitioner's motion seeking fees and costs.

Jurisdiction

The Commission, as an administrative body, only has powers granted to it by the legislature. *See Alvarado v. Indus. Comm'n*, 216 Ill. 2d 547*,* 553 (2005). Thus, the Commission's powers are limited to actions explicitly authorized by statute. *Id*. Petitioner argues the Commission lacks jurisdiction because Respondent's motion is time-barred by the 30-month limitation for the review of certain awards established in Section 19(h). After considering the facts and relevant legal precedent, the Commission finds it has the authority to consider Respondent's motion.

Section 8(f) of the Act establishes the procedure for modifying a PTD award. In relevant part, it states:

> If any employee who receives an award under this paragraph afterwards returns to work or is able to do so, and earns or is able to earn as much as before the accident, payments under such award shall cease. If such employee returns to work, or is able to do so, and earns or is able to earn part but not as much as before the accident, such award shall be modified so as to conform to an award under paragraph (d) of this Section. If such award is terminated or reduced under the provisions of this paragraph, such employees have the right at any time within 30 months after the date of such termination or reduction to file petition with the Commission for the

purpose of determining whether any disability exists as a result of the original accidental injury and the extent thereof.

In *King v. Indus. Comm'n*, the Illinois Supreme Court considered whether the 30-month time limit for a party to review certain awards pursuant to Section 19(h) of the Act applied to the modification of a PTD award pursuant to Section 8(f). 189 Ill. 2d 167, 171-73 (2000). The court stated that "[t]he remedy provided in [S]ection 8(f) is separate from the remedy contained in [S]ection 19(h)." *Id*. at 73. The court determined that the 30-month limitation set by Section 19(h) does not apply to an employer's motion seeking a Section 8(f) modification of a PTD award. The plain language of Section 8(f) does not place any time limitation on when an employer may seek a modification of a PTD award. Therefore, the Commission finds it has the authority to consider Respondent's motion.

Section 8(f) Modification

Section 8(f) allows the Commission to *terminate* a PTD award if a claimant returns to work, or is able to do so, and is able to earn as much as they did before the work accident. The Commission can *reduce* a PTD award when the claimant returns to work, or is able to do so, and is able to earn part of their pre-accident earnings. "Accordingly, a [S]ection 8(f) petition for modification looks to whether the employee has returned to work or is able to do so and to the employee's earnings or ability to earn." *King*, 189 Ill. 2d at 172 (citations omitted). The employer bears the burden of proof and must show that the claimant's award should be modified.

After carefully considering the totality of the evidence, the Commission finds Respondent failed to prove Petitioner's current condition meets the requirements of a Section 8(f) modification of his PTD award. The effect of the passage of time relating to both Petitioner's age and Respondent's evidence is simply too much for Respondent to overcome.

An award of permanent total disability is appropriate "…when the employee can make no contribution to industry sufficient to earn a wage." *Lenhart v. Ill. Workers' Comp. Comm'n*, 2015 IL App (3d) 130743WC at ¶ 32 (citation omitted). The Commission must consider Petitioner's age, the nature of his disability, training, and work experience when assessing whether Petitioner continues to be permanently totally disabled. *See Keystone Steel & Wire Co. v. Indus. Comm'n*, 85 Ill. 2d 178, 183 (1981) (citing *E.R. Moore Co. v. Indus. Comm'n*, 71 Ill. 2d 353 (1978)).

In 2008, the Commission affirmed the Arbitrator's conclusion that Petitioner is permanently totally disabled due to his physical condition. The Arbitrator emphasized the number of medications, including narcotics, Petitioner took to manage his pain as well as the effects those powerful medications had on Petitioner's cognitive function. Dr. Noren, Petitioner's pain management doctor, confirmed that by November 2021, Petitioner's longstanding medication regimen had drastically changed. While Petitioner's regimen previously included Norco, Cymbalta, Topamax, and Zanaflex, in 2017 Petitioner began to wean off everything except Norco. Dr. Noren also confirmed that Petitioner's current Norco prescription is weaker than the dosage he took at the time of the 2007 arbitration hearing. Furthermore, Drs. Noren and Hartman agreed that Petitioner's use of Norco did not cause any cognitive or functional deficits. Thus, the Commission believes the prior concerns regarding Petitioner's diminished cognitive function are

no longer applicable.

While Petitioner's reduced medication and improved cognitive function during the fifteen years since the 2007 arbitration hearing is certainly a positive change in Petitioner's condition, this does not mean his physical condition has truly improved. Petitioner credibly testified regarding his chronic pain and the ways in which his life and activities are severely limited by that pain. Petitioner credibly testified that his symptoms prevent him from sleeping more than approximately two hours at a time, and that this causes him to nap at least twice a day. Furthermore, Petitioner credibly testified regarding the significant spasms he endures at least twice daily. In fact, the Commission observed Petitioner's behavior and mannerisms when he experienced a spasm at the end of the December 2022 hearing. Petitioner's testimony that he is unable to sit or even lie down during a spasm was confirmed by the behavior the Commission observed. Furthermore, the Commission finds Dr. Noren's opinions and observations regarding the legitimacy of Petitioner's chronic complaints most credible. After all, Dr. Noren has treated Petitioner since 2003 and has the advantage of knowing the progression of Petitioner's complaints and his behavior over the past two decades. Dr. Noren denied ever seeing any indication that Petitioner was malingering or exaggerating his complaints.

Respondent submitted surveillance footage showing snippets of Petitioner's daily life for a total of approximately 21 days over a period of eight years. The Commission notes the most recent footage was filmed a little more than four years before the December 2022 hearing. Any potentially useful footage Respondent submitted is no longer current; thus, it did not aid the Commission in assessing Petitioner's current condition. Even if the Commission found some of the submitted footage compelling, Petitioner and Dr. Noren credibly testified that his physical condition frequently changed over the years. Furthermore, Petitioner was taking much more medication to address his chronic pain, including Cymbalta, Zanaflex, and Topamax during the period covered by Respondent's surveillance footage. Dr. Noren testified that after August 2017, Petitioner began to wean off most of his medications. By November 2021, Petitioner was only prescribed Norco to manage his chronic pain. The Commission also notes that Drs. Ghanayem and Prunskis examined Petitioner in March 2015 and August 2015 respectively. Thus, their opinions regarding his physical capabilities are not very useful in the Commission's assessment of Petitioner's current condition.

Petitioner's treating doctors as well as Respondent's Section 12 examiners generally agreed that physically, Petitioner could at least perform sedentary work. However, the Commission does not need to determine whether Petitioner can work with a 10-pound, 15-pound, or even 20-pound weight restriction. Petitioner's physical capability is only one factor in the Commission's assessment of his ability to obtain employment. After considering the totality of the evidence, the Commission finds Petitioner's advanced age and prolonged time off work present significant barriers to his ability obtain employment and earn wages.

In 2016, Mr. Belmonte concluded a stable labor market existed for Petitioner to return to work as an insurance agent. However, the Commission notes that Mr. Belmonte did not identify Petitioner's age and almost two decades away from the work force as factors he considered when forming his opinions. This is astonishing considering these are perhaps the two most important factors that affect Petitioner's ability to work and earn wages. In 2016, Petitioner turned 69 years

old. While he certainly is well-educated and had a successful career as an insurance agent, Petitioner testified that he no longer is licensed to sell insurance products and has not been licensed to do so in over 14 years. He also is unaware of the current state of the relevant laws. Mr. Belmonte ignored the fact that Petitioner likely does not qualify for any of the jobs he identified during his search. Instead, Petitioner would need to go through the process of learning the relevant regulations and would need to obtain a new license. Mr. Belmonte's opinion lacks credibility because of his patent failure to address these glaring issues that severely limit Petitioner's ability to obtain employment. The Commission finds that regardless of Petitioner's physical capabilities, Petitioner's overall circumstances continue to render him permanently totally disabled.

After considering all the evidence, the Commission finds Respondent failed to meet his burden of proving Petitioner's PTD award should be modified.

Petition for Fees and Costs

Finally, the Commission denies Petitioner's motion for fees and costs. In his motion, Petitioner seeks fees and costs pursuant to Sections 4, 8, 16, and 19 of the Act. Petitioner does not identify any case law that authorizes the Commission to award fees and costs pursuant to Sections 4 and 8 of the Act. Petitioner also does not offer an explanation regarding the Commission's authority to award fees and costs pursuant to Sections 16 and 19 of the Act due to Respondent's pursuit of a modification pursuant to Section 8(f).

Penalties pursuant to Section 19(l) of the Act are applicable when an employer "…shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits." However, an award of penalties and attorney fees pursuant to Sections 16 and 19(k) of the Act requires a much higher burden. Section 19(k) of the Act addresses "…situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose. This is apparent in the statute's use of the terms 'vexatious,' 'intentional' and 'merely frivolous.'" *McMahan v. Indus. Comm'n.*, 183 Ill. 2d 499, 515 (1998). Section 16 of the Act uses the same language and applies to the same situations as Section 19(k) penalties. There is no provision in the Act that authorizes the Commission to even contemplate an award of penalties and/or fees without evidence that an employer has failed to pay or has unreasonably delayed the payment of benefits. In this case, Petitioner does not even allege that Respondent has engaged in such behavior. Therefore, the Commission must deny Petitioner's motion.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent's Motion to Modify Section 8(f) Award is hereby **denied**.

IT IS FURTHER ORDERED that Petitioner's Petition for Fees and Costs is hereby **denied**.

IT IS FURTHER ORDERED that Petitioner continues to be permanently totally disabled and Respondent shall continue to pay to Petitioner permanent total disability benefits of $956.32/week for life, as provided in Section 8(f) of the Act.

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.

o: 5/23/23
AHS/jds
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July 20, 2023

/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	19WC028767
Case Name	Aaron J Shirley v. Village of Clarendon Hills - Police Department
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0309
Number of Pages of Decision	14
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	David Figlioli
Respondent Attorney	John Fassola

DATE FILED: 7/21/2023

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

AARON J. SHIRLEY,

Petitioner,

vs. NO: 19 WC 28767

VILLAGE OF CLARENDON HILLS –
POLICE DEPARTMENT,

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 causation, temporary total disability and maintenance, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, but makes several clarifications as outlined below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission finds that Petitioner's July 8, 2019 Functional Capacity Assessment does not accurately describe whether Petitioner is capable of fulfilling the job requirement, as stated in the September 2019 Police Sergeant job description, of having the "ability to apply techniques of self-defense and **use necessary force to apprehend and restrain** violent or hostile individuals." *Rx4, T.475 (Emphasis added).* Petitioner testified he is concerned that, "I will not be able to defend myself or others when it comes down to it." *T.86.* Chief Dalen admitted that "there's always that concern" if an officer seemed to have an inability to restrain or control an individual and one of those concerns would be injury to a fellow officer or an innocent

citizen. *T.157.* Dr. Burra testified that he would not have released Petitioner to unrestricted work as a sergeant (even with the 50 pound lifting requirement) because "I don't think he can function at a -- what I would say in an unrestricted fashion, without risks to himself or without risks to -- if they're involved as a group, as a team in any of the police activities as I understand, I think this would just put him at risk." *Px4 at 30.* Finally, Dr. Saltzman testified that he did not have any information about a sergeant's activities regarding patrol and arrests and "All I have is that the updated job description modified the lifting requirement from 100 pounds to 50 pounds." *Rx1 at 43*. Therefore, we change the rationale contained in the Arbitrator's Decision to find that Petitioner was unable to return to his pre-injury job as a police sergeant.

However, having so found, we nevertheless agree with the Arbitrator that Petitioner failed to prove that he is entitled to vocational rehabilitation and maintenance benefits but do so for different reasons. We hereby strike all but the first sentence in paragraph 2 under the Conclusions of Law section and replace with the following:

> As the appellate court recently stated:
>
> A claimant is generally entitled to vocational rehabilitation when he sustains a work-related injury which causes a reduction in his earning power and there is evidence that rehabilitation will increase his earning capacity." *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1019, 832 N.E.2d 331, 295 Ill. Dec. 180 (2005); see also *National Tea Co. v. Industrial Comm'n*, 97 Ill. 2d 424, 432, 454 N.E.2d 672, 73 Ill. Dec. 575 (1983)). A claimant is not required to request vocational rehabilitation before being entitled to an award of maintenance. *Greaney*, 358 Ill. App. 3d at 1019. A claimant may be "properly awarded maintenance benefits for the period of time he was undertaking his self-created and self-directed rehabilitation program," including a self-directed job search. *Roper Contracting*, 349 Ill. App. 3d at 506. However, if the claimant is not engaged in some type of physical rehabilitation program, formal job training, or a self-directed job search, the employer is not obligated to provide maintenance.

Currey v. Illinois Workers' Compensation Comm'n, 2022 IL App (1st) 210829WC-U, ¶¶ 67-68

In the case at bar, Petitioner was a high-wage-earning police sergeant who earned over $100,000 a year. As discussed in more detail below regarding maintenance benefits, after Petitioner's light duty accommodation was terminated by Respondent, Petitioner obtained two jobs on his own. The first was earning $13 an hour at Bass Pro shops in Missouri, which Petitioner quit because it interfered with him returning to Illinois for his pension disability evaluations, which were unrelated to this workers' compensation claim. *T.105-6*. Petitioner's second (and current) job is as an insurance agent, which Petitioner began on November 22, 2021. *T.80*. Petitioner testified that he earned approximately $5,000 in commissions since he started. *T.81-82*. Since the hearing was held on January 21, 2022, this means that Petitioner earned approximately $5,000 in his first two months at that insurance job.

Although the first job ($13 per hour at Bass Pro Shops) could be seen as evidence of a reduction in earning power, the second job cannot because, although having only earned $5,000 over his first two months, there is no evidence in the record to find that the maximum (or even average) salary for an insurance agent is less than he had been earning as a police sergeant. Moreover, even if Petitioner had proven that the maximum he could earn as an insurance agent was, for example, $50,000 a year, there is no evidence in the record that "rehabilitation will increase his earning capacity." *See Currey, supra*. We, therefore, find that Petitioner failed to prove that he is entitled to vocational rehabilitation services. We note that, although Petitioner's brief asks for a vocational assessment pursuant to Rule 9110.10 (*P-brief at 21*), this appears to be the first time this request was made.

Regarding maintenance benefits, Petitioner chose to base his claim, at the hearing, on his own job search efforts. Petitioner claims to be entitled to maintenance benefits from April 10, 2021 (the day after his last day of light duty work at Respondent) through January 21, 2022 (date of hearing). Petitioner testified that he moved to Missouri because he was not receiving income or benefits and had to relocate somewhere with a lower cost of living. *T.76-77*. He testified:

Q. And when you relocated to Missouri, did you start looking for work?
A. I did.
Q. And did you look for work within your restrictions that Dr. Burra provided to you?
A. I did. *T.77.*

He started a spreadsheet listing the places to which he was applying. *T.77*. When asked if the job search log (*Px10*) was "an exhaustive list" of all the places he applied to between September 20, 2021 and December 17, 2021, Petitioner responded, "I think it's pretty accurate." Id. However, he also testified:

Q. Now, ultimately you did find a job with Bass Pro Shops in early September; is that correct?
A. Correct.
Q. And what type of a position was that?
A. It was like a security position, but it was more of adherence to company policies and making sure that things were being effectively handled like your inventory control and watching cameras and checking for alarms and assisting corporate with some of the functions inside the facility. *T.78-79.*

This testimony is confusing because the job that Petitioner "ultimately" found at Bass Pro Shops began in "early September," which was before Petitioner even started his job search log. Petitioner then testified:

Q. And what were you paid for that position?
A. It was approximately $13, I think, and seven cents an hour.

Q. Now, you worked at that position for approximately two weeks; is that correct?
A. That's correct.
Q. And why did you leave that position?
A. During the interview, I had related my position with my former employer, the Village of Clarendon Hills, and some of my needs that I would have to do because of my scheduling and trips I'd have to make back to Illinois. They said that they were aware of it, and then after the two weeks I already saw numerous times where they had scheduled me times where I was expected to be back here for evaluations. So I ultimately had to resign from the position because they couldn't work within my schedule that I needed.
Q. You continued to look for work after resigning that position; is that correct?
A. I did.

T.79-80. On cross-examination, Petitioner testified:

Q. You testified that you worked there a couple of weeks, but then you couldn't keep the job because of -- what are you talking about? You had evaluations?
A. That's when I was scheduled to come back for my evaluations for the pension board doctors.
Q. Because you applied for a union disability pension?
A. Yes, sir.
Q. So there would have been a total of three evaluations you had to take?
A. Yes, sir.
Q. So then did you voluntarily give up that job because it was conflicting with those evaluations?
A. I did.
Q. So you were not terminated from them?
A. I was not terminated.

T.105- 106. In other words, Petitioner voluntarily quit his job at Bass Pro Shops because he needed to periodically return to Illinois for evaluations regarding his union disability pension, which is a separate proceeding unrelated to his workers' compensation claim. On redirect examination, Petitioner also testified:

Q. Mr. Fassola asked you a question from April when you were advised you could no longer work the light-duty position up until your job search started in September. He asked you if you had performed any job search during that period of time, and your answer was no. Why is it that you were unable to perform a job search during that period of time?
A. It was a huge change in my life of not receiving any more salary or income, you know, from the career that I loved and we knew we needed to pivot and change because of what was going to happen with my income going forward. I knew that

> we were going to relocate, so I didn't want to take a job before I had the sale of my house to actually be able to move because I didn't want to start and stop numerous jobs while I was trying to move.

T.111-12. On recross, Petitioner testified;

> Q. Between April and August you didn't look for work down in Missouri where you were going to be moving?
> A. Correct, because I would hate to treat an employer unfairly if my house, like, for instance, didn't sell and I couldn't relocate. *T.111.*

We first point out that Petitioner never testified that he looked for employment in Illinois before deciding to move to Missouri. There is no evidence that he could not have found a job in Illinois that paid as much as he had been previously earning. Second, Petitioner admitted that he did not look for jobs between April 2021 and the beginning of September when he was hired at Bass Pro Shops job because "I didn't want to take a job before I had the sale of my house to actually be able to move because I didn't want to start and stop numerous jobs while I was trying to move." *T.112.* Therefore, Petitioner is not entitled to maintenance for the period from April to September because he was not actively engaged in a self-directed job search.

Furthermore, once Petitioner obtained the job at Bass Pro Shops in early September, he voluntarily chose to leave that job in order to deal with issues related to his pension disability, which was a separate proceeding from his workers' compensation claim. Under the circumstances here, we decline to award maintenance after Petitioner had already proven that he was capable of finding a new job.

However, for the sake of argument, the next question would be whether Petitioner's job search from September 20, 2021 through December 17, 2021 is evidence of a diligent job search. Petitioner's job search log (*Px10*) reflects only 24 contacts over this almost three-month period, which is about eight contacts a month broken down as follows:

> September – 7 contacts on 6 days
> October – 11 contacts on 4 days; no contacts between 10/14/21 and 11/20/21
> November – 1 contact; no contacts between 11/20/21 and 12/17/21
> December – 5 contacts (all on 12/17/21)

We find that this is not evidence of a diligent job search. Furthermore, this is not even evidence of an *unsuccessful* job search because he did find the job as an insurance agent, which he started on November 22, 2021. *T.80.*

Therefore, we find that Petitioner has failed to prove entitlement to vocational rehabilitation services and maintenance benefits because he was successful in obtaining two jobs (the first one of which he voluntarily quit), he did not engage in a diligent but unsuccessful job search, and there is no evidence that his current job represents the most he is capable of earning such that it would prove a reduction in earning capacity.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 3, 2022 is hereby affirmed and adopted with the changes noted above.

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

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

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

Pursuant to §19(f)(2) of the Act, Respondent is not required to file an appeal bond in this case. 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.

July 21, 2023

/s/ *Maria E. Portela*

/s/ *Deborah J. Baker*

/s/ *Kathryn A. Doerries*

SE/
O: 5/23/23
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ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC028767
Case Name	SHIRLEY, AARON J v. VILLAGE OF CLARENDON HILLS - POLICE DEPARTMENT
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Gerald Granada, Arbitrator

Petitioner Attorney	David Figlioli
Respondent Attorney	John Fassola

DATE FILED: 3/3/2022

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

/s/Gerald Granada, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Aaron J. Shirley
Employee/Petitioner

v.

Village of Clarendon Hills - Police Department
Employer/Respondent

Case # **19** WC **028767**

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 **Gerald Granada**, Arbitrator of the Commission, in the city of **Geneva**, on **January 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. ☐ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **March 15, 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 $**100,629.36** ; the average weekly wage was $**1,935.18**.

On the date of accident, Petitioner was **39** years of age, ***married*** with **4** dependent children.

Respondent ***has*** 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 $**0** under Section 8(j) of the Act.

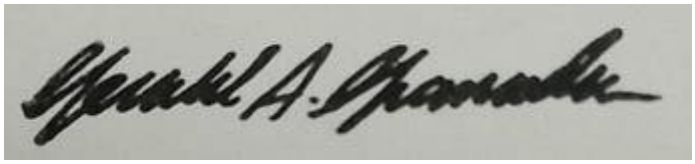
ORDER

Petitioner's claim for maintenance benefits is denied.

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

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

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



MARCH 3, 2022

Signature of **Arbitrator Gerald Granada**

FINDINGS OF FACT

This case involves Petitioner Aaron Shirley, who alleges injuries sustained while working for Respondent Village of Clarendon Hills Police Department on March 15, 2019. Respondent disputes Petitioner's claims with the issues being: 1) causation and 2) maintenance.

Petitioner sustained an injury while working as a Police Sergeant for the Respondent on March 25, 2019. On that date, he was called to an ambulance assist for a psychiatric patient at an Elementary School. The Petitioner assisted in lifting the 120-pound student onto a cot with two other individuals. The student was actively resisting and kept trying to jump off the cot. While attempting to pin the student down, the Petitioner reported that he felt a pop in his right shoulder.

Petitioner initially was seen at Concentra and was recommended to undergo an MRI. The MRI was performed and revealed a torn labrum of the right shoulder. Petitioner was cleared to work light duty, performing more administrative functions, while still overseeing investigations. The parties stipulated that there was no lost time related to the injury through April 9, 2021.

Following the MRI, Petitioner came under the care of Dr. Giridhar Burra. Dr. Burra confirmed a SLAP tear to the right shoulder and provided Petitioner the option to pursue surgery. Petitioner instead opted for conservative treatment. Following a course of physical therapy, he was again presented with the option of surgery, which he again declined, and was therefore recommended to undergo a Functional Capacity Evaluation.

Regarding his decision to not pursue the arthroscopic surgery, Petitioner testified that he was familiar with other individuals, including other police officers, who had undergone surgery for a similar condition, and their outcome was worse following the surgery. Petitioner further testified that those individuals had the exact same injury as he did. He also asserted that he was not aware of any individual who had ever had a successful arthroscopic surgery to the shoulder. Petitioner also referred to a neurological problem, described as a defect on his brain stem, from which he suffered migraines. However, he admitted that he had never been advised by any medical professional that this condition created a risk in association with arthroscopic surgery.

On July 8, 2019, Petitioner underwent the Functional Capacity Evaluation. He testified that he gave a full effort during the FCE and denied that he self-terminated activities during the FCE due to his own perception of pain. The FCE report, which was admitted into evidence as part of Petitioner's Exhibit 5, reflects numerous instances in which Petitioner self-terminated activities after saying that he could not do anything further.

In the Functional Capacity Evaluation, Petitioner tested at a lifting level up to 65 pounds at the chair level on an occasional basis. (PX5, p.33) Initially, this was determined to be inconsistent with the Village's job description for Police Sergeant. However, Police Chief Paul Dalen testified that, after reviewing the Functional Capacity Evaluation, he did not believe Petitioner's position as a police sergeant required lifting above 65 pounds. Therefore, he prepared a memorandum, which was admitted into evidence as Respondent's Exhibit 3, expressing his concern over the existing job description and commenting on the actual physical requirements for the job (i.e., lifting to 50 pounds). Chief Dalen testified that there had previously been consideration to amending the job description, prior to the date of Petitioner's injury. The police sergeant job description was revised, effective September 2019, with the new description

referencing the lifting requirement up to 50 pounds. Chief Dalen further testified that the job description for all police officers was amended in 2021 to reflect lifting requirements up to 50 pounds.

On August 25, 2019, Petitioner underwent an Independent Medical Evaluation with Dr. Matthew Saltzman. Dr. Saltzman agreed with Petitioner's restrictions in light of the Functional Capacity Evaluation. (RX1) However, he also noted that the memo from Chief Dalen clarified that Petitioner's job did not require lifting above 50 pounds. (RX1) He subsequently prepared an Addendum report, following his review of the revised job description, and opined that Petitioner was capable of returning to work in a full duty capacity. (RX1)

Petitioner declined to return to work after he was requested to return full duty following the Independent Medical Evaluation. Petitioner testified that he did not attempt a return to full duty before declining the opportunity. He was ultimately accommodated with a restricted duty assignment, with more administrative responsibilities. Petitioner testified that he did go out on calls on a limited basis while working in this light duty capacity. Petitioner acknowledged that the light duty job offer was temporary in nature. Chief Dalen authored a memorandum reflecting that, as of October 3, 2019, Petitioner was advised that the accommodated position was not permanent, and that the Department was hoping he would either opt to return to full duty or opt to pursue the recommended arthroscopic surgery. (RX 5)

Much of Petitioner's testimony centered on his description of the job duties of a police sergeant for the Respondent. Petitioner emphasized the fact that the Respondent is a small police department, and on any given shift, there may be only one or possibly two additional officers other than the sergeant. Therefore, Sergeants would perform patrol work. This would include arresting individuals, domestic incidents, traffic stops, and paramedic assists. He also testified that he worked as the Tactical commander for the county-wide SWAT team. This required him to wear gear weighing an additional 65 pounds and might require him to carry as much as 300 pounds. However, Petitioner admitted that being a full duty police sergeant for Respondent did not require him to be part of the SWAT team, and his engagement in the SWAT activities was voluntary on his part.

Petitioner testified that his last day of work for the Respondent was April 9, 2021. He was advised that they could no longer accommodate his light duty position. Petitioner testified that he did not attempt to return to full duty after being advised that restricted duty would no longer be available. He also testified that he did not return to his doctor at that time to clarify his work restrictions. He had not undergone any medical treatment for his shoulder since being released by Dr. Burra on July 19, 2019. There was no updated documentation of any physical capability testing beyond July 2019.

Petitioner testified that he relocated to Missouri in August 2021. Petitioner offered into evidence a job search log that shows that Petitioner looked for employment beginning in September 2019, following his move to Missouri. (PX 10) Petitioner testified that he did not look for a job between April and September 2019 because he knew he was relocating. He also did not look for a job in Missouri prior to relocating. There was no evidence presented of any job search between April 9, 2021, and September 20, 2021. No documentation was presented into evidence of a request for vocational services. Petitioner testified that he has applied for a Duty Disability Pension.

Petitioner testified that he did accept employment at Bass Pro Shop in Missouri in a security position. He described the pay as being approximately $13.07 per hour. He worked approximately two weeks in this job, and then voluntarily left that employment, explaining that he felt it interfered with his ability to

participate in his duty disability pension examinations. Petitioner found another job in November working for Global Life Liberty National as an Insurance Agent. He could not specify how much he had earned in commissions at that position and estimated a total of approximately $5,000.00 over a three-month period.

Petitioner testified that as of the date of trial, he still has clicking and popping in his shoulder. He also described burning, pain and weakness. He feels a loss of strength when lifting away from his body. He described it as difficult for him to perform his daily activities, or to participate in prior activities such as martial arts, rock climbing and golfing.

Petitioner presented the testimony of Petitioner's treating orthopedist Dr. Giridhar Burra via evidence deposition. In his testimony, Dr. Burra noted that he diagnosed Petitioner with a SLAP lesion and associated biceps tendonitis. (PX4, p.14) He agreed that he offered Petitioner all treatment options including surgery. (PX4, p.17) He also offered conservative treatment including exercises to stabilize his shoulder. (PX4, p.18) He was asked by Petitioner's attorney regarding a number of risk factors for arthroscopic shoulder surgery. (PX4, pp.22-24) On cross-examination, Dr. Burra noted that as of the date of his last visit, Petitioner had good strength testing. (PX4, p.32) His decreased level of functionality was related to pain complaints. (PX4, pp.32-33) Dr. Burra testified that Petitioner's best chance of alleviating his pain complaints was to proceed with surgery. (PX4, p.39) He agreed that the majority of his patients return to full functionality after pursuing the surgery. (PX4, p.36) He also agreed that the benefit of the surgery vastly outweighed the potential risks. (PX4, p.38) He noted that Petitioner had very little chance of improving to full function after having elected not to undergo surgery. (PX4, p.39) Dr. Burra explained that Petitioner, having refused to undergo the surgery, was advised to continue the shoulder stabilization exercises following discharge. (PX4, p.42, 46) Because he has not seen Petitioner again, he does not know whether he performed stabilization exercises or whether his condition has improved. (PX4, p.43) He testified that when he last saw the Petitioner in July 2019, he did not believe he would be capable of performing his regular duty work as a police officer. However, he could not accurately state what Petitioner's functional capacity was at that time. (PX4, pp.43)

Respondent presented the evidence deposition testimony of Dr. Matthew Saltzman. Dr. Saltzman testified regarding his Independent Medical Evaluation on August 15, 2019. He testified that after having received a job description indicating a weight requirement for Petitioner's police sergeant position of lifting 100 pounds, he was then provided a memorandum from the police chief modifying the weight requirement to 50 pounds. (RX1, pp15-16) On examination, Petitioner had full range of motion and full strength. (RX1, p.15) He agreed with the diagnosis of SLAP tear. (RX1, pp.11-12) He described the type of surgery that he would have recommended if he were treating the Petitioner. (RX1, p.13) He is aware that Petitioner declined the surgery as of the date of his examination. Based on the clarification of Petitioner's job requirements, he opined that Petitioner was capable of returning to full duty employment as a police sergeant with the Village of Clarendon Hills. (RX1, p.20) When asked about the risks of shoulder surgery, Dr. Saltzman described the risks as rare. (RX1, p.50) He reiterated that the benefits of surgery far outweigh the potential risks, and that the majority of patients with this condition elect to undergo surgery. (RX1, p.50)

CONCLUSIONS OF LAW

1. With regard to the issue of causation, the Arbitrator finds that the Petitioner has met his burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's testimony and the medical evidence which show that Petitioner sustained a SLAP lesion and associated biceps tendonitis in his right arm following his undisputed March 15, 2019 work accident. Petitioner refused to undergo the surgery that both his treating surgeon and the Respondent's IME agree could potentially improve Petitioner's condition – with both experts agreeing that the majority of patients return to full functionality after pursuing the surgery, and that the benefit of the surgery vastly outweighed the potential risks. Given his refusal for further medical treatment, Petitioner underwent an FCE that placed him with restrictions of lifting no more than 65 pounds. There was no evidence offered of any subsequent or intervening injuries involving Petitioner's right arm. As such, the Arbitrator concludes that the Petitioner's current condition of ill-being is causally connected to his March 15, 2019 work accident.

2. Regarding the issue of maintenance, the Arbitrator finds the that the Petitioner has failed to meet his burden of proof. This finding is supported by the witnesses' testimony, the documentary evidence, and the medical evidence. Petitioner is claiming entitlement to maintenance after he refused to continue working for Respondent on Aril 9, 2021 when he was advised that his temporary light duty job position was ending, and he was asked to return to full duty work as a police sergeant. Petitioner had previously undergone an FCE that placed him at a 65-pound lifting restriction, but the full duty position of police sergeant had since been amended to only require lifting up to 50 pounds. Petitioner did not make any attempt to try returning to full duty work with Respondent. Petitioner did not attempt to get any clarification on his return-to-work restrictions from his treating physician in light of the FCE. He made no demand for vocational rehabilitation, nor did he look for alternative work at that time because he knew he was moving out of state. After moving out of Illinois, Petitioner found another job doing security work, but quit that job because it interfered with his application for a duty disability pension from Respondent. The Arbitrator notes that the Petitioner refused to undergo the medical treatment that according to both his treating surgeon and the IME doctor, could return him to full functionality. It appears from the facts that the Petitioner has refused all possibilities of returning to work full duty for Respondent, as further evidenced by his move out of state and his application for a duty disability pension. For these reasons, the Arbitrator refuses to award maintenance benefits.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC025600
Case Name	Glenn Heinen v. MK Industries Inc
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0310
Number of Pages of Decision	10
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Rocco Motto
Respondent Attorney	David Gore

DATE FILED: 7/21/2023

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Glenn Heinen,

Petitioner,

vs. NO: 20 WC 025600

MK Industries, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 4, 2022 is hereby affirmed and adopted.

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

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

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.

July 21, 2023

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MEP/ypv
049

/s/ *Maria E. Portela*

/s/ *Deborah L. Simpson*

/s/ *Amylee H. Simonovich*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC025600
Case Name	HEINEN, GLENN v. MK INDUSTRIES, INC
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Gerald Granada, Arbitrator

Petitioner Attorney	Rocco Motto
Respondent Attorney	David Gore

DATE FILED: 3/4/2022

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

/s/Gerald Granada, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Glenn Heinen
Employee/Petitioner

v.

MK Industries, Inc.
Employer/Respondent

Case # **20 WC 25600**

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 **Gerald Granada**, Arbitrator of the Commission, in the city of **Geneva**, on January 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 **11/13/17**, 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 not*** sustain an accident that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner earned $96,687.24; the average weekly wage was $1,859.37.

On the date of accident, Petitioner was 56 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**.

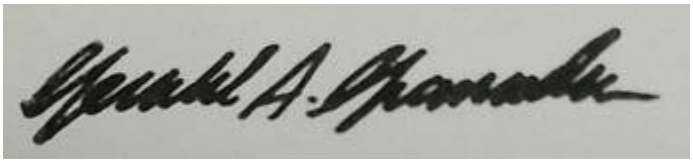
Respondent is entitled to a credit of $ **0** under Section 8(j) of the Act.

ORDER

Petitioner has failed to prove accident. Therefore, benefits are denied.

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

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



march 4, 2022

Signature of **Arbitrator Gerald Granada**

FINDINGS OF FACT

This case involves Petitioner Glenn Heinen, who alleges to have sustained injuries while working for the Respondent MK Industries on November 13, 2017. Respondent disputes Petitioner's claims with the issues being: 1) accident; 2) notice; 3) causation; 4) medical expenses; 5) TTD; and 6) nature and extent.

Petitioner has worked as a union journeyman sheet metal worker since 1983. He alleges to have incurred an accident while working as a sheet metal worker for Respondent on November 13, 2017. Petitioner testified that his job involved installation of ventilation material and equipment. His job requirements and duties as a sheet metal worker were identical for all of his employers. His job with Respondent also involved loading tools and equipment he needed onto a scissors lift which would take them into the air to perform his job. Often he was required to use mechanical equipment to get his tools and equipment up to the scissors lift to be elevated to install materials. Petitioner testified that the majority of work he performed was done overhead. Petitioner would work with a partner and testified that the weight of equipment being installed could vary from 60 to 1,000 pounds.

Petitioner testified that prior to November 13, 2017, he experienced pain in his bilateral shoulders. From July 1, 2017, through November 13, 2017, petitioner worked a job at Turano Bread in Bolingbrook, Illinois. He testified that the job involved the installation of indoor heating units. The Turano Bread job lasted 3 1/2 to 4 months and involved overhead work using both arms. Petitioner testified that he began noticing pain coming from his shoulders November 13, 2017.

On October 16, 2017, Petitioner sought treatment with his general practitioner, Dr. Singh with CR Medical Group. (RX 1). Upon presentation to Dr. Singh, petitioner was advised to undergo X-rays of his shoulders. Dr. Singh diagnosed petitioner with pain in the right and left shoulders and recommended petitioner see an orthopedic surgeon. (PX1).

On November 13, 2017, petitioner presented to Dr. Robert Thorsness at Hinsdale Orthopedics for consultation regarding his bilateral shoulders. Upon presentation to Dr. Thorsness, petitioner reported experiencing pain in his shoulders for years that had progressively gotten worse. He reported his pain being as 3 out of 10 on a 10 point pain scale. He described his pain as being dull and located in both shoulders. Petitioner denied incurring an injury at work. (PX 2). Dr. Thorsness diagnosed petitioner with bilateral biceps tendinitis and recommended bilateral shoulder injections. (PX 2). Petitioner received injections to both shoulders and continued working. On December 11, 2017, Dr. Thorsness recommended petitioner undergo MRIs of both shoulders. On January 2, 2018, Dr. Thorsness diagnosed petitioner with arthritis of the glenohumeral joint of the left shoulder and recommended petitioner undergo an injection to the left shoulder. Dr. Thorsness returned petitioner to work. (PX2).

Petitioner ceased employment with respondent MK Industries in February 2018 because of a layoff (RX 1). Upon being laid off, petitioner obtained work through Local 265 of the Sheetmetal Workers Union with HTH Mechanical Services. (RX1) Petitioner worked consistently after leaving employment with respondent. (RX1). Petitioner worked 1200 hours in 2018 subsequent to being laid off by respondent. (RX1). Petitioner never worked for respondent subsequent to his layoff in February 2018. (RX1).

On April 6, 2018, petitioner returned to Dr. Thorsness' office for evaluation. He reported that the injections provided significant relief and requested bilateral injections for his shoulder pain. Petitioner continued to deny any injury at work. (PX 2). Dr. Thorsness diagnosed petitioner with bilateral shoulder

osteoarthritis and performed injections to both shoulders. On July 9, 2018, petitioner presented to physician's assistant Kristopher Bridgeman at Hinsdale Orthopedics for evaluation. Petitioner requested repeat bilateral glenohumeral injections for his pain complaints. Petitioner underwent bilateral injections and was returned to work with instructions to follow up in 3 months. (PX2)

On October 15, 2018, petitioner returned to Hinsdale Orthopedics for evaluation by physician's assistant Bridgeman. Petitioner reported that his shoulder pain had resolved for 3 months but stated the pain had returned and requested repeat injections. Petitioner underwent repeat bilateral shoulder injections and was returned to work.

On January 14, 2019, petitioner presented to Dr. Thorsness. Petitioner reported that the prior injection provided him with relief and stated that his shoulder pain had not worsened, however, was still present. Upon examination, petitioner was noted to be tender to palpation at the bicipital groove in both shoulders and continued to be diagnosed with bilateral shoulder osteoarthritis. Petitioner was provided with bilateral glenohumeral injections and instructed to follow up for re-evaluation in 3 to 4 months. Petitioner then returned to Dr. Thorsness at Hinsdale Orthopedics on April 15, 2019. He reported significant improvement in his pain complaints until 5 weeks prior. His pain complaints were 5-6/10. Upon examination, petitioner was noted to have tenderness to palpation to the bicipital groove of the left shoulder and the bicipital groove and trapezial area of the right shoulder. Dr. Thorsness recommended, and petitioner underwent, repeat bilateral glenohumeral joint cortisone injections. On July 5, 2019, petitioner's examination findings remained unchanged, and petitioner was provided with repeat glenohumeral injections. On October 21, 2019, petitioner requested to proceed with joint replacement on the left shoulder. Upon examination, petitioner was noted to complain of significant left shoulder pain secondary to glenohumeral joint arthritis. Dr. Thorsness recommended petitioner undergo a left anatomic total shoulder arthroplasty. On August 6, 2020, petitioner underwent a left shoulder replacement. Dr. Thorsness restricted petitioner from work post-surgery. Petitioner was released to return to work light duty as of October 26, 2020. On February 8, 2021, petitioner returned to Dr. Thorsness, who noted petitioner was doing well regarding both shoulders with near full range of motion and no pain. Petitioner was placed at maximum medical improvement and discharged from care at that time.

On September 10, 2021, petitioner presented to Dr. Nikhil Verma at Midwest Orthopedics at Rush for the purpose of an Independent Medical Examination. (RX 2). Petitioner reported an acute onset of bilateral shoulder pain, left greater than right, on November 13, 2017. Petitioner reported that prior to November 13, 2017, he had some shoulder pain and soreness, but required no formal treatment. Petitioner reported that he woke up that day with significant pain and difficulty moving the arm to the point that he was unable to work. Dr. Verma's physical exam showed normal findings in both shoulders, with no evidence of instability with interior/posterior transitional testing. Petitioner's neurological exam results were also normal. Dr. Verma diagnosed petitioner with bilateral shoulder osteoarthritis status post left total shoulder arthroplasty. Dr. Verma noted that petitioner sustained no injury or trauma as he had longstanding chronic symptoms consistent with underlying degenerative disease. Dr. Verma noted that the petitioner had symptoms that predated the injury based upon the medical records. Further, Dr. Verma noted that radiographic findings clearly predated any alleged injury. (RX 2).

Petitioner testified that he continued to work through the date of surgery. Petitioner eventually retired in December 2021. His current complaints are decreased range of motion and throbbing pain in both shoulders. He denies any subsequent injuries to his shoulders.

CONCLUSIONS OF LAW

1. With regard to the issue of accident, the Arbitrator finds that the Petitioner has failed to meet his burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's testimony and the medical evidence. Petitioner testified that he began noticing pain in his shoulders in October, 2017 as noted in Dr. Singh's records. The medical records indicate that petitioner presented to Dr. Thorsness at Hinsdale Orthopedic on November 13, 2017, however, petitioner failed to report an accident or injury to Dr. Thorsness on that date. Petitioner specifically denies any accident, injury or trauma at work in the medical history given to Dr. Thorsness on November 13, 2017. Additionally, Dr. Thorsness clearly indicates in his March 8, 2021, narrative report that petitioner had been experiencing shoulder pain for a number of years and that the injuries had manifested themselves prior to November 13, 2017. Petitioner's testimony did not establish either an acute incident of injury, nor did he describe with any detail any specific repetitive activity that was either contemporaneous with his complaints of pain or that would rise to the level of a repetitive trauma accident. Given these facts, the Arbitrator concludes that the Petitioner failed to prove that he sustained an accident while working for the Respondent on November 3, 2017.

2. Based on the Arbitrator's findings regarding the issue of accident, all other issues are rendered moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC028895
Case Name	Anthony Bongiorno v. State of Illinois – Illinois Department of Transportation
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0311
Number of Pages of Decision	15
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Patricia Lannon Kus
Respondent Attorney	Dan Kallio

DATE FILED: 7/21/2023

/s/Maria Portela, 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

Anthony Bongiorno,

Petitioner,

vs. NO: 18 WC 028895

State of Illinois/IDOT,

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 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.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 10, 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.

July 21, 2023

o052323
MEP/ypv
049

/s/ *Maria E. Portela*

/s/ *Kathryn A. Doerries*

/s/ *Amylee H. Simonovich*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC028895
Case Name	BONGLORNO, ANTHONY v. STATE OF ILLINOIS/IDOT
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Michael Glaub, Arbitrator

Petitioner Attorney	Patricia Lannon Kus
Respondent Attorney	Dan Kallio

DATE FILED: 5/10/2022

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

/s/Michael Glaub, Arbitrator
Signature

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

May 10, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

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

Anthony Bongiorno
Employee/Petitioner

v.

State of Illinois/IDOT
Employer/Respondent

Case # **18** WC **28895**

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 **Michael Glaub**, Arbitrator of the Commission, in the city of **Waukegan,** on **3/29/2022**. 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

ss

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

FINDINGS

On **1/15/2018** 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 **$74,243.52**; the average weekly wage was **$1,427.76.**

On the date of accident, Petitioner was **55** 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 **$ 160,595.66** for TTD, **$ 0** for TPD, **$ 40,523.27** for maintenance, and **$ 0** for other benefits, for a total credit of **$ 201,118.93**

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$951.84**/weeks for ***163-1/7* weeks**, commencing **1/22/18 through 3/8/21**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner maintenance benefits of $**951.84**/week for **47 weeks,** commencing **3/9/21** through **1/31/22**, as provided in Section 8(a) of the Act.

Respondent shall be given a credit of $**201,118.93** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of **$1,564.19**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**790.64** per week for **250 weeks**, because the injury sustained caused the 50% loss of the as a whole, as provided in Section 8(d)2 of the Act.

Michael Glaub
Signature of Arbitrator

MAY 10, 2022

STATE OF ILLINOIS)
)
COUNTY OF MCHENRY)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Anthony Bongiorno
Employee/Petitioner

v.

State of Illinois/IDOT
Employer/Respondent

Case #18 WC 28895

FINDINGS OF FACT

The Petitioner, **Anthony Bongiorno,** was employed as a highway maintainer for the State of Illinois. He began his employment with the State on October 21, 2001. The job of a highway maintainer involved a variety of tasks consisting of maintenance repair and upkeep of roads. During snow and ice conditions the Petitioner would operate snowplows. In the summer he would cut grass and repair and clean sewers. His job was heavy in nature. He would routinely lift over 75 lbs.

On January 15, 2018, the Petitioner was plowing a road and hit a two-inch steel plate with a plow injuring his neck and back. He continued working for a few days and then saw Dr. Bruce Montella at Midwest Sports Medicine & Orthopedic Surgical Specialists. He advised the doctor he had pain in his low back and neck. The doctor performed cervical and lumbar x-rays and ordered MRI's of both the cervical and lumbar spine. He recommended a course of therapy and pain medications and told the Petitioner to follow-up in 3 weeks (Px. #1, pg. 5).

The Petitioner had previously injured his low back and neck in 2007 and 2009. He had previously undergone a spinal fusion at L4-L5 following those injuries. However, he was able to return to work for the State performing all of his job duties after those injuries.

The Petitioner underwent MRI's on February 6, 2018. The cervical MRI showed a broad right-sided disc herniation at C5-C6 and a broad based posterior disc herniation at C6-C7. The lumbar MRI showed post-fusion changes at L4-L5 and disc protrusions and herniations indenting the thecal sac at L3-L4 and L5-S1 (Px. #1, pg. 58-59).

When the Petitioner returned to Dr. Montella on February 21, 2018, the doctor prescribed therapy and advised him to remain off work (Px. #1, pg. 8). The Petitioner started physical therapy for his neck and back at Athletico on February 26, 2018 (Px. #1, pg. 69).

The Petitioner returned to Dr. Montella on March 20, 2018 at which time he prescribed a series of epidural steroid injections into his back. The Petitioner underwent the injections on June 4, and July 16, 2018 (Px. #1, pg. 16,25). The Petitioner remained in physical therapy during this period of time.

The State had the Petitioner evaluated by Dr. Howard An on June 15, 2018. Dr. An felt that the Petitioner's accident was consistent with his history and aggravated his pre-existing lumbar condition. He recommended a facet joint injection and opined that he could be a candidate for a lumbar fusion. Dr. An also stated that the Petitioner's neck condition would hopefully get better with additional conservative treatment (Rx. #3).

The Petitioner continued under the care of Dr. Montella until March 5, 2019. When he saw the Petitioner on that date, the doctor noted that his pain was worsening over time and that he should undergo surgery for his low back. Dr. Montella referred the Petitioner to Dr. Gregory Drake at Core Orthopedics for additional treatment (Px. #1, pg. 48).

The Petitioner saw Dr. Drake on April 2, 2019. The doctor recommended a lumbar fusion at L5-S1 and sent the Petitioner for an updated MRI (Px. #2, pg. 3).

Petitioner underwent surgery at Alexian Brothers Medical Center on May 29, 2019. Dr. Drake performed an anterior lumbar interbody fusion at L5-S1 with the insertion of cages and instrumentation (Px. #2, pg. 93-96).

Following surgery, the Petitioner started therapy at Harvard Physical Therapy. He continued to follow-up with Dr. Drake. The Petitioner developed some drainage at the incision site and the doctor placed him on antibiotic regimen (Px. #2, pg. 15).

The State had the Petitioner reevaluated by Dr. An on July 23, 2019. The Petitioner was still complaining of neck pain. Dr. An stated that the treatment for the lumbar spine was reasonable and necessary and that he would recommend therapy and an epidural steroid injection for the cervical spine. Dr. An further stated that Petitioner could only do sedentary work with no lifting greater than 15 lbs. and avoid frequent bending and twisting of his neck and back (Rx. #3).

The Petitioner continued under the care of Dr. Drake who kept him off work. Dr. Drake stated that the Petitioner was continuing to experience left buttock pain as well as neck and left arm pain. When he examined the Petitioner on October 31, 2019, Dr. Drake diagnosed cervical radiculopathy. He advised the Petitioner to stop smoking and to continue utilizing the bone stimulator in regards to his back. He also recommended EMG testing (Px. #2, pg. 23-25).

The Petitioner continued to obtain physical therapy for his neck. When he returned to Dr. Drake on February 20, 2020 he advised the doctor that his neck and low back were feeling worse since starting therapy again. Dr. Drake prescribed 4 weeks of work conditioning and told the Petitioner to remain off work (Px. #2, pg. 32-34).

The State sent the Petitioner back for a third examination with Dr. An on February 28, 2020. Dr. An recommended a cervical epidural steroid injection and some possible therapy for lumbar spine strengthening. He felt that the Petitioner should plateau and then an FCE could determine his restrictions (Rx. #3).

The Petitioner underwent an epidural steroid injection in the cervical area on July 11, 2020 (Px. #2, pg. 51). Following the injection, the Petitioner returned to Dr. Drake. On November 24, 2020, Dr. Drake recommended an FCE and then a possible return to work with permanent restrictions (Px. #2, pg. 1).

The FCE was performed at Athletico. The therapist stated the Petitioner had given a consistent effort and could function at the medium physical demand level. However, the heaviest weight he would be able to lift was 35 lbs. from 12 inches to waist. The therapist noted that the physical demand level of his prior job was heavy and defined by a lift of 75 lbs. on an occasional basis. The therapist concluded that Petitioner did not demonstrate the physical capabilities and tolerances to return to his prior job (Px. #2, pg. 114-115).

The Petitioner's final visit with Dr. Drake was on February 11, 2021. At that time, the doctor reported that he was at a status regarding the fusion that had been performed in 2019. He noted that the Petitioner was still taking Norco which had been prescribed by his PCP doctor. He stated that the Petitioner should continue with a home exercise program. He gave the Petitioner permanent work restrictions consisting of no lifting over 35 lbs. and no prolonged driving. He determined that Petitioner had reached MMI (Px. #2, pg. 63).

During the time the Petitioner was under medical treatment, the State conducted surveillance beginning on November 4, 2019. Jenn Brown, the regional manager of Frasco Investigative Services, testified at the hearing. Ms. Brown stated that she was not present when the video was taken and never personally observed the Petitioner.

Surveillance was conducted over a 3-day period on November 4, November 7 and November 9, 2019. On the first day of surveillance, which lasted 4 hours from 10:15 a.m. to 2:15 p.m., no activity was seen. On the second day, November 7, 2019 surveillance was conducted for 8 hours from 6:00 a.m. to 2:00 p.m. The Petitioner was observed cleaning off snow from his vehicle and unloading some contents from his car. He threw out some trash. The amount of the weights was unknown. The Petitioner testified that he never lifted anything over 20 lbs at that time.

On November 9, 2019, the investigator conducted surveillance for 10 hours from 7:00 a.m. to 5:00 p.m. The Petitioner was observed driving his car and going to various locations. He was seen lifting and carrying some items and bending at the waist. The total video taken over the three days amounted to only 61 minutes.

The Respondent stipulated that the Petitioner's condition of ill-being was causally related to the injury and stipulated to the period of temporary total disability. The Respondent also had Dr. An review the video that had been taken. Dr. An opined that the Petitioner's medical treatment incurred had been reasonable and necessary and that he might be able to consider work conditioning to improve his functional capacity. He felt that Petitioner's progress was more favorable than when he had last seen him in February 2020, but he stated that an FCE would be needed if he could not return to work full duty (Rx. #3 May 12, 2020 report).

The State did not take the Petitioner back to work after the FCE. He began receiving maintenance benefits. The Petitioner testified that he applied for a reasonable accommodation through the State but they were not willing to accommodate his permanent restrictions. He also stated that he began looking for work outside the State of Illinois.

The Petitioner testified that he moved to Texas during the first week in January, 2022. His maintenance benefits were terminated by Tristar on December 31, 2021 at the time he left Illinois. However, he did continue his job search in Texas and eventually located employment at Toro in El Paso. The Petitioner testified that he is currently making $12.50 per hour, which is substantially less than what he earned at IDOT. He stated that he did not graduate high school and his prior jobs, other than through the State, had been working in junk yards and performing mechanical work. He does not have clerical experience.

The Petitioner testified that he still has stiffness in his neck, pain in his low back and down his leg. He continues to use Norco and Tylenol.

Conclusions of Law

J. Has Respondent paid all appropriate charges for reasonable and necessary medical services?

The Petitioner submitted into evidence a bill from Adco Billing in the amount of $1,564.19, for medication prescribed by Dr. Drake on May 6, 2019. The doctor prescribed Medi-Laxx, Ondansetron, Baclofen and C-III Trezixe capsules and tablets. Dr. Drake's office note from May 6, 2019, stated that these medications were needed as the Petitioner was undergoing surgery on May 29, 2019.

The Respondent stipulated that the Petitioner's condition of ill-being was causally related to the injury. Since no other evidence was submitted, the Arbitrator finds that the medication ordered by the treating surgeon was reasonable, necessary and related to the Petitioner's injury. Therefore, the Arbitrator finds that Respondent shall pay to Petitioner the sum of $1,564.19 to cover the costs of the medication pursuant to the Illinois Fee Schedule.

K. What temporary benefits are in dispute? Maintenance.

The Respondent stipulated that Petitioner was temporary totally disabled from January 22, 2018 through March 8, 2021. During that time, the Petitioner was initially unable to work. He was released with permanent restrictions from Dr. Drake on February 11, 2021 with restrictions of no lifting greater than 35 lbs. and no prolonged driving. He was deemed to be at Maximum Medical Improvement (Px. #2, pg. 63).

The State began paying maintenance benefits to the Petitioner on March 9, 2021. The Petitioner applied for a reasonable accommodate with the State of Illinois since he could no longer work at IDOT. The State would not provide him with another job. The Respondent never provided vocational rehabilitation and the Petitioner found employment on his own.

The Petitioner moved down to Texas but continued looking for work. The Respondent terminated benefits on December 31, 2021 even though Petitioner was not working and was still looking for employment.

The Petitioner moved to Texas the first week of January 2022. He continued his job search and eventually found employment at Toro in El Paso. The Petitioner began working at Toro on February 1, 2022. Copies of payroll stubs from Toro were placed into evidence showing that he was working for Toro and only making $12.50 per hour (Px. #3). The Petitioner was still working at Toro at the time of the Arbitration hearing.

The Arbitrator concludes that Petitioner was entitled to maintenance benefits from the date benefits were terminated on December 31, 2021 through January 31, 2022. Therefore, the Petitioner is owed an additional 4-3/7 weeks of maintenance benefits in addition to the prior benefits which were stipulated to by the parties.

L. What is the nature and extent of the injury?

Pursuant to Section 8.1b(b) of the Act, the following factors are to be considered in determining the level of permanent disability for accidental injuries occurring on or after September 1, 2011: (i) 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 employees' future earning capacity; (v) evidence of disability corroborated by the treating medical record.

With regard to Subsection (i) of Section 8.1b(b), the Arbitrator notes that there was no permanent partial impairment report or rating submitted into evidence by either party. Therefore, the Arbitrator gives no weight to this factor.

In regard to Subsection (ii) of Section 8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that the Petitioner was employed as a highway maintainer at the time of his injury. The Arbitrator notes that the petitioner's job duties were relatively heavy in nature. Due to this injury, the Petitioner was unable to return to work in that capacity and had a loss of career. The Petitioner eventually found employment as a forklift driver. Since the Petitioner was unable to return to work as a highway maintainer as a result of this injury, the Arbitrator finds that this factor weighs in favor of increased permanence.

With regard to Subsection (iii) of Section 8.1b(b), the age of the employee, the Arbitrator notes that the Petitioner was 55 years of age at the time of his injury. The Arbitrator notes that the petitioner is relatively close to the end of the of the normal work life expectancy. Accordingly, the Arbitrator finds that this factor weighs in favor of decreased permanence.

With regard to Subsection (iv) of Section 8.1b(b), Petitioner's future earning capacity, the Arbitrator notes that the Petitioner is making substantially less money than he was at the time of his injury due to his permanent work restrictions and the respondent's ability to offer petitioner work within those restrictions. The Petitioner testified that he was making approximately $35.00 per hour when the accident occurred. The Petitioner's new job currently pays him $12.50 per hour. The Petitioner's ability to find a better paying job is also diminished due to his restrictions.

Furthermore, the Petitioner has very little education. He did not graduate high school. He has only worked in junk yards and as a mechanic in the past in addition to the heavy job of highway maintainer. The Petitioner is limited to the type of work he would be able to obtain.

The Petitioner testified that his retirement benefits have been greatly affected as a result of his job loss with the State. He was six months short of obtaining a full pension at 20 years. He also testified that as a result of this loss, he must now pay his own medical insurance.

Since the Petitioner's future earnings capacity has been greatly diminished as a result of this injury, the Arbitrator finds that this factor weighs in favor of increased permanence.

With respect to Subsection (v) of Section 8.1b(b), evidence of disability corroborated by treating medical records, the Arbitrator has considered that the Petitioner was diagnosed with an aggravation of his pre-existing back condition as well as a neck injury. The cervical MRI showed a right sided disc herniation at C5-C6 and a broad-based posterior disc herniation at C6-C7 (Px.#1, pg. 58-59). The Petitioner was treated with therapy and a cervical steroid injection.

The Petitioner's injury to his low back resulted in a series of injections, followed by surgery. Dr. Drake performed an anterior lumbar interbody fusion at L5-S1 with the insertion of cages and instrumentation (Px. #2, pg. 93-96).

As a result of these injuries, the Petitioner has permanent restrictions consisting of no lifting over 35 lbs. and no prolonged driving. He continues to have problems with his neck and back and still takes medication. The Arbitrator finds that this factor weighs in favor of increased permanence.

Based on the above factors and the records taken as a whole, the Arbitrator finds that Petitioner sustained a permanent partial disability to the extent of 50% pursuant to Section 8(d)2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC029870
Case Name	Raul Holguin v. B&C Garage Door Inc
Consolidated Cases	19WC033963;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0312
Number of Pages of Decision	18
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Jason Esmond
Respondent Attorney	Brad Antonacci

DATE FILED: 7/24/2023

/s/ Kathryn Doerries, Commissioner

Signature

23IWCC0312

STATE OF ILLINOIS)	☐ Affirm and adopt (no changes)
) SS.	☐ Affirm with changes
COUNTY OF)	☐ Reverse Choose reason
WINNEBAGO	☒ Modify down

☐ 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

RAUL HOLGUIN,

Petitioner,

vs. NO: 19 WC 029870

B & C GARAGE DOOR, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission affirms and adopts the Arbitrator's Statement of Facts except to strike the word "Medium" and substitute the word "Heavy" in the third sentence of the first paragraph on page four (the last page of the Statement of Facts) and modifies the fourth sentence so those sentences now read as follows: "The FCE was found to be valid with a limitation to the Heavy occupational Demand Level. The report noted that Petitioner's prior position was Medium based on the Dictionary of Occupational Titles (DOT)."

The Commission further views the evidence differently with respect to Sections K, temporary disability, and L, the nature and extent of the injury in the Findings of Fact and Conclusions of Law. Therefore, the Commission modifies the Arbitrator's Decision regarding those two sections and respective awards as follows:

Temporary Total Disability

The Commission strikes both the first paragraph and the last paragraph under Section "K. What temporary benefits are in dispute?" The Commission substitutes the following for the first paragraph: The Commission finds that Petitioner is entitled to temporary total disability (TTD) benefits from February 5, 2019, through April 15, 2019, and from April 30, 2019, through November 18, 2021. Petitioner was offered light duty by the Respondent after Physicians Immediate Care assigned work restrictions in February 2019, and Petitioner rejected that offer, however, the Respondent stipulated to TTD benefits from February 5, 2019, through April 15, 2019. (T. 36-37, 67-68; ArbX1)

The Commission further substitutes the following for the last paragraph under Section K: As such, the Commission finds that Petitioner is entitled to TTD benefits from February 5, 2019, through April 15, 2019, and from April 30, 2019, through November 18, 2021, at the rate of $486.40 per week. The Arbitrator notes that Respondent stipulated to and paid TTD benefits from February 5, 2019, through April 15, 2019; April 30, 2019, through July 29, 2019; August 15, 2019 through March 21, 2020; and from September 30, 2020 through March 25, 2021, for which it is owed a credit of $38,668.79.

Permanent Disability

The Commission strikes the entire Section "L. What is the nature and extent of the injury?" from the Arbitrator's Decision and substitutes the following:

According to Section 8.1b(b) of the Act, for injuries that occur after September 1, 2011, 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 AMA guidelines;
(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.

In considering the degree to which Petitioner is permanently partially disabled as a result of the work-related accident, the Commission weighs the five factors in Section 8.1b(b) of the Act as follows:

(i) No AMA impairment rating was submitted by either party, so this factor is given no weight.

(ii) Regarding the occupation of the Petitioner, he worked for Respondent for approximately 5-6 months as a garage door specialist, installing, repairing, and dismantling garage doors. Although Petitioner has not returned to work for Respondent as a garage door specialist, the job analysis (RX2) indicates that the Petitioner's job duties as a garage door specialist required a Medium Physical Demand Level. Bill Olmstead ("Olmstead"), the owner of Respondent, testified his job duties

as owner included installing garage doors and repairing garage doors (T. 56-57). He reviewed the Job Analysis (RX2) and confirmed the analysis accurately describes the physical requirements for Petitioner's position with Respondent (T. 59). He testified the weights involved could be heavier for commercial work, but commercial work was not completed alone. Other employees were present to help, or a scissor lift was utilized (T. 59-60) The November 18, 2021, functional capacity evaluation (FCE) also documented that that Petitioner's position as a garage door specialist fell within the Medium Physical Demand Level according to the Dictionary of Occupational Titles. (RX1) This is consistent with the job analysis and Olmstead's testimony. Significant weight is given to this factor.

(iii) Petitioner was 35 years old at the time of his injury. Petitioner will have to work with the effects of his injury for a substantial time, with approximately 30 years of work life remaining until retirement. Thus this factor is assigned great weight.

(iv) There is no evidence of reduced future earning capacity in the record. The FCE documented that that Petitioner's position as a garage door specialist fell within the Medium Physical Demand Level according to the Dictionary of Occupational Titles. (PX8; RX1) This is consistent with the job analysis and Olmstead's testimony. Further, according to the FCE, Petitioner demonstrated a Heavy Physical Demand Level, including, but not limited to, the ability to lift 107.8 pounds occasionally above the shoulder level and from desk to chair level. He demonstrated the ability to lift 72.8 pounds occasionally from chair to floor level. He demonstrated the ability to carry on the right and left side 79.6 pounds on an occasional basis. He demonstrated the ability to work eight hours with no limitations on sitting. He demonstrated the ability to stand for four hours in 50-minute durations and walk four to five hours for occasional, moderate distances. Petitioner's capabilities as noted in the FCE meets or exceeds the job duty required of his position as a garage door specialist. However, Petitioner never attempted to return to work as a garage door specialist, even when offered a job within his restrictions. Olmstead testified that he believed Petitioner could have returned to work for Respondent based on the results of the Functional Capacity Evaluation. (T. p. 61). He testified that there is no current position for Petitioner. (T. p. 68). Petitioner testified that he worked at Home Depot briefly after his FCE, and that he looked for additional work, but provided no documentation of a diligent job search, except that he applied for work at Walmart and did not get hired. Although Petitioner testified he previously worked as union carpenter, he failed to establish his earnings in that capacity or that the job requirements exceeded a Heavy occupational or Physical Demand Level. Based on the above factors, and the job analysis and Olmstead's testimony that Petitioner can return to work as a garage door specialist, and the FCE results, there is no evidence that the Petitioner's injury will affect his future earning capacity, thus significant weight is given to this factor.

(v) Regarding evidence of disability corroborated by the treating medical records, as a result of the work-related accident of February 4, 2019, Petitioner was diagnosed with a meniscal tear in his right knee. He underwent a partial medial meniscectomy and tri-compartmental synovectomy on June 7, 2019. (PX5) After physical therapy and light duty restrictions, Petitioner sought a second opinion for ongoing symptoms.

Thereafter, he underwent an arthroscopic partial medial meniscectomy and extensive synovectomy and debridement on September 30, 2020. (T. 20, PX6) On August 11, 2021, Petitioner consulted Dr. Corpus for a second opinion. Dr. Corpus found no effusion, full range of motion, no instability, negative meniscal provocative maneuvers. His knee was ligamentously stable in all planes. He documented a negative Homan's sign and no calf pain and found Petitioner's knee was "Neuro intact distally." Dr. Corpus took four view x-rays and the impression was normal. Dr. Corpus personally reviewed the most recent MRI from July 8, 2021, and opined it was "essentially normal." Dr. Corpus had little to offer Petitioner, but discussed the possibility of future viscosupplementation injections, therapy or anti-inflammatories for his subjective complaints. (PX10) Petitioner underwent an FCE on November 18, 2021. (PX8; RX1). According to the FCE, Petitioner demonstrated a Heavy Physical Demand Level, including, among others findings, the ability to lift 107.8 pounds occasionally above the shoulder level and from desk to chair level. He demonstrated the ability to lift 72.8 pounds occasionally from chair to floor level. He demonstrated the ability to carry on the right and left side 79.6 pounds on an occasional basis. He demonstrated the ability to work eight hours with no limitations on sitting. He demonstrated the ability to stand for four hours in 50-minute durations and walk four to five hours for occasional, moderate distances. Petitioner testified that he continues to experience pain in his right knee, that his pain starts with his first step of the day, that he also has popping and grinding in his knee that is constant and walking or climbing steps make the pain worse. (T. 27) Petitioner also testified that he has trouble standing more than two hours before his leg becomes weak. (T. 28) Based upon the treating medical records this factor is assigned significant weight.

Based upon the foregoing §8.1b(b) five factors, the Commission reduces the permanency award to 27-1/2% loss of use of a right leg.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on August 10, 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 $486.40 per week for a period of 143-3/7 weeks, commencing February 5, 2019, through April 15, 2019, and April 30, 2019, through November 18, 2021, that being the period of temporary total incapacity for work under §8(b) of the Act. The Respondent is due a credit of $38,668.79 in temporary total disability benefits paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $437.76 per week for a period of 59.125 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 27.5% loss of use of a right leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay $6,117.03 for necessary medical services, as provided in §8(a) and §8.2 of the Act and consistent with the medical fee schedule.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $63,200.00. 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.

July 24, 2023

KAD/bsd
O052323
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/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	19WC029870
Case Name	Raul Holguin v. B&C Garage Door Inc
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Paul Seal, Arbitrator

Petitioner Attorney	Jason Esmond
Respondent Attorney	Brad Antonacci

DATE FILED: 8/10/2022

/s/ Paul Seal, Arbitrator

Signature

INTEREST RATE WEEK OF AUGUST 9, 2022 3.04%

STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

☐ 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

Raul Holguin
Employee/Petitioner

v.

B & C Garage Door, Inc.
Employer/Respondent

Case # **19 WC 29870**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Seal**, Arbitrator of the Commission, in the city of **Rockford**, on **June 22, 2022.** After 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: Violation of two doctor rule

FINDINGS

On the date of accident, **February 4, 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 his accident.

In the year preceding Petitioner's injury, Petitioner's average weekly wage was **$729.60.**

On the date of accident, Petitioner was **35** years of age, ***single*** with **0** dependent children.

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

ORDER

- The Respondent shall pay $**6,117.03** for necessary medical services, as provided in Section 8(a) and 8.2 of the Act and consistent with the medical fee schedule.

- The Respondent shall pay the petitioner temporary total disability benefits of $ **486.40** /week for **145 & 2/7** weeks, from **February 5, 2019, through November 18, 2021,** as provided in Section 8(b) of the Act.

- The Respondent is due a credit of **$38,668.79** in temporary total disability benefits paid.

- The Respondent shall pay the Petitioner the sum of **$437.76** / week for a period of **125** weeks, as provided in Section 8(d)2 of the Act, because the injuries sustained caused **25%** **loss of use of a person 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.

Signature of Arbitrator

August 10, 2022

STATEMENT OF FACTS

The parties appeared for hearing on June 22, 2022 before Arbitrator Seal under the Illinois Workers' Compensation Act. The parties stipulated that Petitioner was an employee of Respondent on February 4, 2019, and that Petitioner sustained an accident that arose out of and in the course of his employment on that date. The parties stipulated that that timely notice of Petitioner's February 4, 2019, injury was provided and that Petitioner's average weekly wage relative to his injury was $729.60. The parties further stipulated that Petitioner was 35 years of age, single, with 0 dependent children at the time of his February 4, 2019, injury.

Petitioner testified that he worked for Respondent for approximately 5-6 months as a garage door specialist. (Tr. p. 11). He worked on a full-time basis. (Tr. p. 12). Petitioner testified that in performance of the job, he installed, repaired, and dismantled garage doors, springs, and operators. (Tr. pp. 12-13). Petitioner worked on residential as well as commercial garage doors. (Tr. p. 13). Petitioner described industrial settings, working on garage doors for factories or businesses such as Berner Foods, Snak King, Menards, and Jiffy Lube. (Tr. p. 13). Some doors would be those for semis to load and unload to. (Tr. p. 13). Prior to working for Respondent, Petitioner worked as a union carpenter. (Tr. p. 13).

Petitioner reviewed a job description for a garage door specialist (Rx. 2). He testified that it appeared to provide a minimal depiction of his job duties. (Px. 29). Petitioner testified that the description would be for a residential installation only. (Tr. p. 29). Petitioner testified that he did more residential work than commercial while working for Respondent, estimating approximately 60% of the time doing residential and 40% commercial. (Tr. pp 29-30). Petitioner noted that when performing repairs, as opposed to installations, he would be working alone. (Tr. p. 47). Petitioner testified that the job description's notation that lifting of 25-45 pounds would be done by two people is incorrect. (Tr. p. 30). He noted that one person would often lift in excess of 40 pounds and estimated he would lift up to 120 pounds. (Tr. pp. 30, 33). Petitioner disagreed that the lifting performed when installing garage doors would be limited to 35 pounds. (Tr. p. 31). Petitioner testified that the residential doors were typically lighter. However, at times he would be working on hold, wooden garage doors, which were very heavy. (Tr. p. 49). He estimated lifting 70 to 80 pound springs when working on commercial garage doors, which he would lift himself. (Tr. p. 31). Petitioner noted that there would generally be at least two people working on a commercial installation, but it would often be inconvenient to find the other person and make them stop what they were doing to assist on a heavy lift. As such, he would often do it himself. (Tr. p. 45). Petitioner testified that he lifted more than 35 pounds by himself multiple times throughout his workday. (Tr. p. 32). Petitioner also estimated that the kneeling and squatting would be performed frequently as opposed to occasionally. (Tr. p. 33).

Respondent called William Olmstead, owner of Respondent, to testify. Mr. Olmstead also reviewed the job description provided as Respondent's Exhibit 2. (Tr. p. 59). Mr. Olmstead testified that the job description was generally accurate, though there could be heavier products on commercial jobs. (Tr. p. 59). However, he testified there would be assistance for heavy lifts. (Tr. p. 59). Mr. Olmstead estimated that Respondent's business was approximately 90% residential during the time Petitioner worked for Respondent. (Tr. p. 60). Mr. Olmstead agreed that Petitioner would go on service and repair calls on his own. (Tr. p. 62). Mr. Olmstead testified that on repair calls, a specialist wouldn't know what he was going to find. However, if it

was something that a hand was needed for, the specialist could call for help. (Tr. p. 63). Mr. Olmstead testified that a specialist would not be reprimanded for lifting over 40 pounds on a job site but would not be required to do so. (Tr. pp. 73-74).

On February 4, 2019, Petitioner was working on a garage in Lanark, Illinois. (Tr. p. 12). He was called out to install trim around the door. (Tr. p. 14). He was working with materials on the ground, and it was snowy. (Tr. p. 14). While kneeling to work on the lower trim, he felt a pop in his right knee with excruciating pain. (Tr. pp. 14, 16). Petitioner testified that he took a moment to college himself, realigned his knee, and completed the job. (Tr. p. 14). Petitioner reported his injury the next day and was referred to Physician's Immediate Care by Respondent. (Tr. p. 15). Petitioner reported squatting and hammering when his right knee gave out. (Rx. 3). X-rays were performed and Petitioner was restricted from kneeling or squatting and was given a splint to wear. (Rx. 3). Petitioner was seen for follow up on February 13, 2019, and an MRI was ordered. (Rx. 3).

Petitioner started treatment at Mercy Health on February 20, 2019, with Dr. Muhammad. (Tr. p. 16). Dr. Muhammad recommended an MRI and ordered physical therapy. (Tr. p. 16). Following the February 22, 20219 MRI, Dr. Muhammad assessed a meniscal tear and referred Petitioner to an orthopedic. (Px. 1). Petitioner was seen by Dr. Krpan, an orthopedic, on April 30, 2019. (Rx. 4). Dr. Krpan assessed a meniscal tear and recommended surgery. (Tr. p. 17). On June 7, 2019, Petitioner underwent a partial medial meniscectomy and tri-compartmental synovectomy. (Tr. p. 17, Px. 5). Petitioner testified that the surgery did not help. (Tr. p. 17). Petitioner continued in physical therapy and remained off work. (Tr. p. 17, Px. 3). On September 3, 2019, Dr. Krpan indicated that he did not feel that Petitioner could return to his regular occupation installing garage doors. (Px. 4).

On September 6, 2019, Petitioner was seen by Dr. Verma at Respondent's request for an Independent Medical Examination. (Tr. p. 18). Dr. Verma's report indicates he was provided a job description indicating that Petitioner was required to stand and walk frequently and lift up to and over 100 pounds. (Rx. 4). Dr. Verma agreed that Petitioner's meniscal tar was causally related to his February 4, 2019, injury and recommended four weeks of PT and avoidance of squatting, kneeling, climbing, or lifting more than 25 pounds. (Rx. 4).

On October 8, 2019, Dr. Krpan kept Petitioner off work and recommended a repeat MRI due to ongoing symptoms. (Tr. p. 18, Px. 4). On December 5, 2019, Petitioner complained of right hip pain in addition to his ongoing knee pain. (Tr. p. 18). Petitioner testified that his hip pain started approximately 6 months after his February 4, 2019, injury. (Tr. p. 18). He described radiating pain from the knee to the hip. (Tr. p. 19). Dr. Krpan reviewed the November 4, 2019, MRI. He also noted Petitioner's right hip pain. Dr. Krpan recommended Petitioner remain off work pending evaluation of his hip. (Px. 4).

Petitioner was then seen by Dr. Blint on February 13, 2020, for a second opinion. (Tr. p. 19). Dr. Blint assessed a recurrent meniscal tear and recommended another surgery. (Tr. pp. 19-20, Px. 6). The March 2, 2020, note indicated that the surgery was denied by insurance. (Px. 6). A note from May 11, 2020, indicted that surgery was being approved. A phone call from May 29, 2020, indicated Petitioner asked if surgery could be moved up. (Px. 6). Petitioner was seen by Dr. Blint, and surgery was again suggested. (Px. 6). Petitioner underwent a preoperative appointment with Dr. Lim on September 1, 2020. (Px. 7). Petitioner underwent the

arthroscopic partial medial meniscectomy and extensive synovectomy and debridement on September 30, 2020. (Tr. p. 20, Px. 6). Petitioner testified that the delay in getting the surgery performed was due to Covid as well as approval from work comp. (Tr. p. 20). He also testified that his primary care physician had retired, and he had to get a new primary care doctor. (Tr. p. 20). Petitioner testified that the September 30, 2020, surgery did not help his knee symptoms either. (Tr. p. 21). On October 8, 2020, Petitioner was kept off work and recommended additional physical therapy. (Tr. p. 21, Px. 6). Petitioner continued to complain of pain most prominent with weightbearing and using stairs on October 15, 2020. (Px. 6). Petitioner began physical therapy on October 21, 2020, at ATI Physical Therapy. (Px. 8). Dr. Blint kept Petitioner off work and recommended additional physical therapy on November 16, 2020. (Px. 6). On December 7, 2020, Dr. Blint recommended another MRI of the right knee and kept Petitioner off work. (Tr. p. 21, Px. 6). Following a January 26, 2021, MRI, Dr. Blint recommended Petitioner be fit with TED high compression hose due to effusion (Px. 6). Petitioner testified he had continued to have painful popping, pain, stiffness, and tenderness in his knee that had not changed since his injury. (Tr. pp. 21-22).

Petitioner was again seen by Dr. Verma, at Respondent's request, on February 1, 2021. (Tr. p. 22). Dr. Verma assessed significant persistent pain with mild effusion, status post revision arthroscopy. (Rx. 6). He opined that Petitioner's treatment had been reasonable and necessary. He opined Petitioner could return to light duty work, lifting 10-15 pounds, with no repetitive lifting, squatting, kneeling, or climbing. He recommended a cortisone injection followed by a Functional Capacity Evaluation, noting Petitioner should reach MMI two weeks post FCE. (Rx. 6).

On March 11, 2021, Dr. Blint provided a steroid injection that was not helpful. (Tr. p. 22, Px. 6). Additional physical therapy was recommended as well as medication. (Tr. p. 22). Dr. Blint kept Petitioner off work on April 8, 2021. (Px. 6). Petitioner was seen by his primary care physician on May 12, 2021, with worsening right knee pain with numbness, welling, and weakness. (Px. 7). On May 20, 2021, Dr. Blint recommended a repeat MRI and a second opinion and kept Petitioner off work. (Px. 6). An additional MRI was performed on July 8, 2021. (Tr. p. 23). Petitioner was seen by Dr. Corpus for a second opinion on August 11, 2021. Dr. Corpus indicated that as the repeat MRI was essentially normal, he did not feel he could offer anything other than viscosupplemental injections. (Px. 10). Petitioner continued to report throbbing pain and pain climbing stairs to his primary care physician on August 16, 2021. (Px. 7). A Kenalog injection was provided with recommendation to continue physical therapy. (Px. 7).

On August 19, 2021, Dr. Blint noted Petitioner's chronic and continued right knee pain. At that point, Dr. Blint recommended a gel injection and follow up with pain management. (Tr. p. 23, Px. 6). The injection was not performed. (Tr. p. 24).

On September 22, 2021, Dr. Verma provided an addendum report. (Rx. 7). Dr. Verma noted Petitioner's diagnosis remained mild effusion with post-meniscectomy pain status post revision arthroscopy. He opined Petitioner had now maximized treatment with no further benefit ongoing. Dr. Verma recommended an FCE to determine the validity of Petitioner's ongoing complaints as well as his work capabilities. Prior to the FCE, Dr. Verma recommended a 25-pound lifting restriction with avoidance of repetitive squatting, kneeling, or climbing. (Rx. 7).

Petitioner underwent a functional capacity evaluation on November 18, 2021. (Tr. p. 24, Px. 8). Petitioner testified that his leg was swollen for over a week after undergoing the FCE. (Tr. p. 28). The FCE was found to be valid with a limitation to the Medium occupational demand level. The report noted that Petitioner's prior position had been heavy based on his description of the job. The report indicated Petitioner could occasionally lift 107.8 pounds above shoulder and from desk to chair height, occasionally lift 72.8 pounds from chair to floor, occasionally carry 79.6 pounds, stand 4 hours in 50-minute durations, and walk 4-5 hours, occasionally moderate distances. (Px. 8). Petitioner testified that he has only received conservative treatment since that time in the form of pain medication, anti-inflammatories, and physical therapy. (Tr. pp. 24-25).

Petitioner testified that he has not returned to work for Respondent after undergoing the FCE. (Tr. p. 25). Petitioner testified that he did work for Home Depot around February and March of 2022. (Tr. p. 26). He moved shelving and restocked the shelves, doing the job for approximately eight weeks. (Tr. p. 26). Petitioner worked part-time and the position ended because he had too much pain in his right leg to continue the work. (Tr. pp. 26-27). Petitioner testified he has looked for additional work. He applied for work at Walmart through Set and Services, though he did not get hired.

Mr. Olmstead testified that he believed Petitioner could have returned to work for Respondent based on the results of the Functional Capacity Evaluation. (Tr. p. 61). He testified that there is no current position for Petitioner though. (Tr. p. 68).

Petitioner testified that he continues to experience pain in his right knee. (Tr. p. 27). He testified that his pain starts with his first step of the day. (Tr. p. 27). He also has popping and grinding in his knee that is constant. (Tr. p. 27). The symptoms are improved with rest and ice. (Tr. p. 27). Walking or climbing steps make the pain worse. (Tr. p. 27). He has trouble standing more than two hours before his leg becomes weak. (Tr. p. 28). After that, he sits and elevates his leg. (Tr. p. 28).

Petitioner testified that he did not believe he would be capable of returning to work for Respondent. He noted that he would not be able to perform the ladder climbing, kneeling, or lifting that the job required. (Tr. pp. 34-35). He has difficulty bearing his own bodyweight at this time given the pain in his knee. (Tr. p. 35). Petitioner didn't believe wearing knee pads would help as he has difficulty kneeling at all. (Tr. p. 52).

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE DISPUTED ISSUES

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

The Arbitrator adopts the findings of fact stated above and incorporates them herein by this reference. The Arbitrator finds that Petitioner's current condition of ill-being is causally related to his work injury of February 4, 2019. The Arbitrator relies upon the opinions of Dr. Verma as well as the treating records and Petitioner's testimony.

Petitioner's treatment records and the IME opinion testimony support a causal relationship between his current condition of ill-being regarding his right knee and his February 4, 2019, injury. Petitioner was seen for treatment the day after his injury with complaints of right knee pain that began while squatting at work.

Shortly thereafter, he underwent an MRI that revealed a meniscal tear. Petitioner underwent two meniscectomy procedures to attempt to repair his meniscal tear and resolve his ongoing pain. Petitioner's records document his ongoing symptoms despite the surgeries and extensive physical therapy. Dr. Verma, Respondent's examining physician, consistently opined that Petitioner's right knee condition has been causally related to his work injury. At the time of Dr. Verma's last report, from September 22, 2021, he opined that Petitioner was at maximum medical improvement and recommended an FCE to determine the validity of Petitioner's ongoing complaints as well as his work capabilities. Petitioner underwent the FCE, which was determined to be valid. There was no suggestion in the records, or in Dr. Verma's opinions, that Petitioner's right knee condition was not causally related to his February 4, 2019, injury.

Petitioner testified to ongoing pain in his right knee, made worse with ongoing standing, walking, stairs, kneeling, and squatting. Petitioner has been consistently complaining of pain, aggravated by those type of activities, since his injury. His complaints have been consistently reported and documented since his February 4, 2019, injury with no indication that he has sustained an intervening accident. As such, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to his February 4, 2019, injury.

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? Did Petitioner violate two-doctor rule?

The Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary for the injury he sustained on February 4, 2019. The Arbitrator notes that the medical records, diagnoses, treatment carried out, and treatment recommendations are noted in the Statement of Facts. The Arbitrator finds that Petitioner's treatment described in the statement of facts, including the two surgical procedures, the extensive physical therapy, and the injections to the right knee, have been reasonable and necessary. The Arbitrator notes that Dr. Verma, Respondent's examining physician, noted on September 22, 2021, that Petitioner's treatment had been reasonable and necessary. For the reasons stated above and having found that Petitioner's current condition of ill-being to be related to his injury, Petitioner's treatment has been reasonable and necessary.

The only outstanding medical bills submitted at hearing were those from ATI Physical Therapy from April 1, 2021, through May 19, 2021. As such, the Arbitrator finds that Respondent is liable for the medical bills provided from ATI Physical Therapy, totaling $6,117.03, pursuant to the medical fee scheduled.

Respondent also raised the issue of the two-doctor rule. Petitioner was initially seen at Physician's Immediate Care at Respondent's direction. Thereafter, he sought treatment with his primary care physician, Dr. Muhammad, on February 20, 2019. Petitioner was referred to Dr. Krpan by Dr. Muhammad on March 8, 2019. When Petitioner's symptoms continued after his initial surgery with Dr. Krpan, he sought a second opinion with Dr. Blint on February 13, 2020. This would constitute his second choice of physicians. After his surgery with Dr. Blint on September 30, 2020, Petitioner was sent for additional physical therapy, for which he underwent the treatment at ATI Physical Therapy. As such, this treatment remained within his two choices of physicians.

As such, Respondent is liable for charges as noted above, totaling $6,117.03, pursuant to the medical fee schedule.

K. What temporary benefits are in dispute?

The Arbitrator finds that Petitioner is owed Temporary Total Disability benefits from February 5, 2019 through November 18, 2021.

The Supreme Court of Illinois has held that "the determinative inquiry for deciding entitlement to TTD benefits remains, as always, whether the claimant's condition has stabilized. If the injured employee is able to show that he continues to be temporarily totally disabled as a result of his work-related injury, the employee is entitled to TTD benefits." Interstate Scaffolding v. Illinois Workers' Compensation Commission, 236 Ill. 2d 132 (2010).

"To establish entitlement to TTD benefits, a claimant must demonstrate not only that he or she did not work, but also that the claimant was unable to work. (Internal citation omitted). It is irrelevant whether the claimant could have looked for work. (Internal citation omitted). The dispositive test is whether the claimant's condition has stabilized, that is, whether the claimant has reached maximum medical improvement."

Mech. Devices v. Indus. Comm'n (Johnson), 344 Ill. App. 3d 752, 759 (4th Dist. 2003).

"The factors to be considered in determining whether a claimant has reached maximum medical improvement include: (1) a release to return to work; (2) the medical testimony concerning the claimant's injury; (3) the extent of the injury; and (4) "most importantly," whether the injury has stabilized."

Id. at 760.

Petitioner initially went off work on February 5, 2019, due to the restrictions he was provided by Physician's Immediate Care and TTD benefits were paid from February 5, 2019, through April 15, 2019. On March 8, 2019, Petitioner was referred to an orthopedic after his MRI revealed a meniscal tear. He was seen by Dr. Krpan, the orthopedic, on April 30, 2019, and was taken off work pending surgery. Petitioner underwent surgery on June 7, 2019, and he continued in follow up with Dr. Krpan. On July 16, 2019, Dr. Krpan noted Petitioner was to start physical therapy and was continued off work. On September 9, 2019, Dr. Krpan continued Petitioner off work given the nature of his occupation. On September 6, 2019, Dr. Verma indicated Petitioner could work light duty, lifting 25 pounds, with avoidance of repetitive squatting, kneeling, or climbing. Dr. Krpan kept Petitioner off work on October 8, 2019, and December 5, 2019. On February 13, 2020, Dr. Blint recommended another right knee surgery. Petitioner was seen for pre-operative visit on March 2, 2020, with surgery scheduled for March 4, 2020. Dr. Blint's records indicate surgery was denied by insurance. TTD benefits were ceased on March 21, 2020.

On June 15, 2020, Dr. Verma agreed that the recommended revision arthroscopy was reasonable. He also restricted Petitioner to sedentary work. That report was provided to Petitioner's attorney on June 19, 2020, and it was noted surgery would be authorized. On July 17, 2020, Petitioner established a new primary care

physician. He was again recommended surgery by Dr. Blint on July 27, 2020. Petitioner was seen for preoperative visit on September 1, 2020, with Dr. Lim and with Dr. Blint on September 24, 2020. Surgery was performed on September 30, 2020. Thereafter, Petitioner began physical therapy and was kept off work. Dr. Blint kept Petitioner off work on December 17, 2020. Petitioner was recommended a new MRI which he underwent on January 26, 2021. He was kept off work by Dr. Blint on January 28, 2021.

On February 1, 2021, Dr. Verma recommended a cortisone injection followed by an FCE. He opined Petitioner could return to light duty work, with a 10-15 pound lifting restriction and no repetitive squatting, kneeling, or climbing. He opined that Petitioner should be at maximum medical improvement 2 weeks after the FCE.

Petitioner underwent the steroid injection with Dr. Blint on March 11, 2021. Dr. Blint kept Petitioner off work on April 8, 2021, and May 20, 2021. He also recommended a second opinion on May 20, 2021. Petitioner underwent a repeat MRI on July 8, 2021, and he was seen for a second opinion by Dr. Corpus on August 11, 2021. Dr. Corpus suggested viscosupplemental injections as cortisone had not worked. On August 16, 2021, Petitioner's primary care physician, Dr. Lim, recommended a Kenalog injection. On August 19, 2021, Dr. Blint recommended a gel injection. The injections recommended were not authorized.

On September 22, 2021, Dr. Verma opined that Petitioner had reached MMI and that an FCE would be helpful to determine the validity of Petitioner's ongoing complaints and work capabilities. Prior to the FCE, Dr. Verma recommended a 25-pound lifting restriction as well as avoidance of repetitive squatting, kneeling, or climbing. Dr. Verma also opined that Petitioner's treatment to date had been reasonable. Petitioner underwent the FCE on November 18, 2021. Thereafter, he treated only conservatively with anti-inflammatories and physical therapy.

Petitioner has continued in consistent treatment with ongoing symptoms in his right knee limiting his ambulation as well as kneeling and squatting. He tried two surgical procedures, extensive physical therapy, and injections. Petitioner's treating physicians kept him off work through August of 2021 and injections were recommended by three different physicians. On September 22, 2021, Dr. Verma opined Petitioner had reached MMI. Given the treatment Petitioner underwent, it can be said that his condition stabilized as of his November 18, 2021, FCE. At that time, his limitations were sufficiently established. Prior to that, Petitioner continued under treatment to attempt to alleviate his symptoms. The various physicians disagreed regarding whether Petitioner needed to be off work or could work with restrictions, however, his treatment was found to be reasonable by Respondent's physician through September 22, 2021, at which point an FCE was recommended to determine the validity of Petitioner's complaints, which was interpreted to be valid on November 18, 2021.

As such, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits from February 5, 2019, through November 18, 2021, at the rate of $486.40 per week. The Arbitrator notes that Respondent paid TTD benefits from February 5, 2019, through April 15, 2019; April 30, 2019, through July 29, 2019; August 15, 2019 through March 21, 2020; and from September 30, 2020 through March 25, 2021, for which it is owed a credit of $38,668.79.

L. What is the nature and extent of the injury?

The Arbitrator adopts the findings of fact stated above and incorporates them herein by this reference.

The Arbitrator adopts the findings of fact stated above and incorporates them herein by this reference. In assessing the nature and extent of Petitioner's injury, the Arbitrator must consider 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." No impairment rating was offered by either party.

2) The occupation of the injured employee. Petitioner worked for Respondent for approximately 5-6 months as a garage door specialist, installing, repairing, and dismantling garage doors. Petitioner has not returned to work for Respondent nor as a garage door specialist.

3) The age of the employee at the time of the injury. Petitioner was 35 years old at the time of his injury.

4) The employee's future earning capacity. Petitioner has not secured full-time employment since his injury of February 4, 2019, as a result of his injury.

5) Evidence of disability corroborated by the treating medical records. Petitioner testified to ongoing pain, stiffness, and swelling in his right knee despite two surgeries. Petitioner testified to difficulty being walking or performing squatting or kneeling. Petitioner's initial MRI documented a meniscal tear. He underwent two meniscectomy and synovectomy surgeries. He did not experience significant relief from the surgeries. Petitioner also underwent extensive physical therapy with ongoing symptoms in his knee. No opinion was provided that Petitioner's ongoing symptoms were unrelated to his injury. As such, Petitioner has remained on medication and modified his activities.

The Arbitrator finds that Petitioner sustained a significant and permanent loss of use of his right knee as a result of his injury. This is supported by his testimony, his treatment records, and the opinions of Dr. Verma. Testimony was provided regarding whether Petitioner is capable of returning to his past employment as a garage door specialist. Petitioner testified he would not be able to perform the lifting, the kneeling, or the squatting required to perform the position. Petitioner testified he previously worked as a union carpenter as well. Petitioner testified that the position required heavy lifting, up to 120 pounds, with significant kneeling and squatting. Respondent's owner testified that lifting was not required over 40 pounds. A job description was provided that Respondent claimed to be an accurate description of Petitioner's position. Petitioner testified that the job description was substantially consistent with the residential work done as a garage door specialist, but not with the commercial work. Further, Petitioner testified that lifting performed on residential jobs could greatly exceed lifting of 40 pounds. The Arbitrator does note that in Dr. Verma's initial report, of September 6, 2019, that a job description indicated Petitioner is required to lift up to and over 100 pounds for his position. (Rx. 4).

The Arbitrator notes that Petitioner's records consistently document his ongoing knee pain and limitations. Petitioner is only 35 years old. He has not been able to return to his work for Respondent as a garage door specialist nor as a carpenter, work he had performed previously. The Arbitrator finds Petitioner's testimony regarding his job duties to be credible. Petitioner described job duties that he would not be able to perform on a consistent basis given his ongoing limitations. The Arbitrator therefore finds that Petitioner could not return to his past work for Respondent nor for similar garage door specialist type of work. Petitioner's FCE found him limited to the Medium physical demand level. As such, he has lost the ability to perform the heavy work he performed for Respondent and similar heavy exertional work. As such, the Arbitrator finds that Petitioner has sustained a loss of occupation and is entitled to 25% loss of a person as a whole under Section 8(d)2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC033963
Case Name	Raul Holguin v. B&C Garage Door Inc
Consolidated Cases	19WC029870;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0313
Number of Pages of Decision	18
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Jason Esmond
Respondent Attorney	Brad Antonacci

DATE FILED: 7/24/2023

/s/ Kathryn Doerries, Commissioner

Signature

23IWCC0313

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)	☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
WINNEBAGO		☐ PTD/Fatal denied
	☒ Modify down	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RAUL HOLGUIN,

Petitioner,

vs. NO: 19 WC 033963

B & C GARAGE DOOR, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission affirms and adopts the Arbitrator's Statement of Facts except to strike the word "Medium" and substitute the word "Heavy" in the third sentence of the first paragraph on page four (the last page of the Statement of Facts) and modifies the fourth sentence so those sentences now read as follows: "The FCE was found to be valid with a limitation to the Heavy occupational Demand Level. The report noted that Petitioner's prior position was Medium based on the Dictionary of Occupational Titles (DOT)."

The Commission further views the evidence differently with respect to Sections K, temporary disability, and L, the nature and extent of the injury in the Findings of Fact and Conclusions of Law. Therefore, the Commission modifies the Arbitrator's Decision regarding those two sections and respective awards as follows:

Temporary Total Disability

The Commission strikes both the first paragraph and the last paragraph under Section "K. What temporary benefits are in dispute?" The Commission substitutes the following for the first paragraph: The Commission finds that Petitioner is entitled to temporary total disability (TTD) benefits from February 5, 2019, through April 15, 2019, and from April 30, 2019, through November 18, 2021. Petitioner was offered light duty by the Respondent after Physicians Immediate Care assigned work restrictions in February 2019, and Petitioner rejected that offer, however, the Respondent stipulated to TTD benefits from February 5, 2019, through April 15, 2019. (T. 36-37, 67-68; ArbX1)

The Commission further substitutes the following for the last paragraph under Section K: As such, the Commission finds that Petitioner is entitled to TTD benefits from February 5, 2019, through April 15, 2019, and from April 30, 2019, through November 18, 2021, at the rate of $486.40 per week. The Arbitrator notes that Respondent stipulated to and paid TTD benefits from February 5, 2019, through April 15, 2019; April 30, 2019, through July 29, 2019; August 15, 2019 through March 21, 2020; and from September 30, 2020 through March 25, 2021, for which it is owed a credit of $38,668.79.

Permanent Disability

The Commission strikes the entire Section "L. What is the nature and extent of the injury?" from the Arbitrator's Decision and substitutes the following:

According to Section 8.1b(b) of the Act, for injuries that occur after September 1, 2011, 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 AMA guidelines;
(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.

In considering the degree to which Petitioner is permanently partially disabled as a result of the work-related accident, the Commission weighs the five factors in Section 8.1b(b) of the Act as follows:

(i) No AMA impairment rating was submitted by either party, so this factor is given no weight.

(ii) Regarding the occupation of the Petitioner, he worked for Respondent for approximately 5-6 months as a garage door specialist, installing, repairing, and dismantling garage doors. Although Petitioner has not returned to work for Respondent as a garage door specialist, the job analysis (RX2) indicates that the Petitioner's job duties as a garage door specialist required a Medium Physical Demand Level. Bill Olmstead ("Olmstead"), the owner of Respondent, testified his job duties

as owner included installing garage doors and repairing garage doors (T. 56-57). He reviewed the Job Analysis (RX2) and confirmed the analysis accurately describes the physical requirements for Petitioner's position with Respondent (T. 59). He testified the weights involved could be heavier for commercial work, but commercial work was not completed alone. Other employees were present to help, or a scissor lift was utilized (T. 59-60) The November 18, 2021, functional capacity evaluation (FCE) also documented that that Petitioner's position as a garage door specialist fell within the Medium Physical Demand Level according to the Dictionary of Occupational Titles. (RX1) This is consistent with the job analysis and Olmstead's testimony. Significant weight is given to this factor.

(iii) Petitioner was 35 years old at the time of his injury. Petitioner will have to work with the effects of his injury for a substantial time, with approximately 30 years of work life remaining until retirement. Thus this factor is assigned great weight.

(iv) There is no evidence of reduced future earning capacity in the record. The FCE documented that that Petitioner's position as a garage door specialist fell within the Medium Physical Demand Level according to the Dictionary of Occupational Titles. (PX8; RX1) This is consistent with the job analysis and Olmstead's testimony. Further, according to the FCE, Petitioner demonstrated a Heavy Physical Demand Level, including, but not limited to, the ability to lift 107.8 pounds occasionally above the shoulder level and from desk to chair level. He demonstrated the ability to lift 72.8 pounds occasionally from chair to floor level. He demonstrated the ability to carry on the right and left side 79.6 pounds on an occasional basis. He demonstrated the ability to work eight hours with no limitations on sitting. He demonstrated the ability to stand for four hours in 50-minute durations and walk four to five hours for occasional, moderate distances. Petitioner's capabilities as noted in the FCE meets or exceeds the job duty required of his position as a garage door specialist. However, Petitioner never attempted to return to work as a garage door specialist, even when offered a job within his restrictions. Olmstead testified that he believed Petitioner could have returned to work for Respondent based on the results of the Functional Capacity Evaluation. (T. p. 61). He testified that there is no current position for Petitioner. (T. p. 68). Petitioner testified that he worked at Home Depot briefly after his FCE, and that he looked for additional work, but provided no documentation of a diligent job search, except that he applied for work at Walmart and did not get hired. Although Petitioner testified he previously worked as union carpenter, he failed to establish his earnings in that capacity or that the job requirements exceeded a Heavy occupational or Physical Demand Level. Based on the above factors, and the job analysis and Olmstead's testimony that Petitioner can return to work as a garage door specialist, and the FCE results, there is no evidence that the Petitioner's injury will affect his future earning capacity, thus significant weight is given to this factor.

(v) Regarding evidence of disability corroborated by the treating medical records, as a result of the work-related accident of February 4, 2019, Petitioner was diagnosed with a meniscal tear in his right knee. He underwent a partial medial meniscectomy and tri-compartmental synovectomy on June 7, 2019. (PX5) After physical therapy and light duty restrictions, Petitioner sought a second opinion for ongoing symptoms.

Thereafter, he underwent an arthroscopic partial medial meniscectomy and extensive synovectomy and debridement on September 30, 2020. (T. 20, PX6) On August 11, 2021, Petitioner consulted Dr. Corpus for a second opinion. Dr. Corpus found no effusion, full range of motion, no instability, negative meniscal provocative maneuvers. His knee was ligamentously stable in all planes. He documented a negative Homan's sign and no calf pain and found Petitioner's knee was "Neuro intact distally." Dr. Corpus took four view x-rays and the impression was normal. Dr. Corpus personally reviewed the most recent MRI from July 8, 2021, and opined it was "essentially normal." Dr. Corpus had little to offer Petitioner, but discussed the possibility of future viscosupplementation injections, therapy or anti-inflammatories for his subjective complaints. (PX10) Petitioner underwent an FCE on November 18, 2021. (PX8; RX1). According to the FCE, Petitioner demonstrated a Heavy Physical Demand Level, including, among others findings, the ability to lift 107.8 pounds occasionally above the shoulder level and from desk to chair level. He demonstrated the ability to lift 72.8 pounds occasionally from chair to floor level. He demonstrated the ability to carry on the right and left side 79.6 pounds on an occasional basis. He demonstrated the ability to work eight hours with no limitations on sitting. He demonstrated the ability to stand for four hours in 50-minute durations and walk four to five hours for occasional, moderate distances. Petitioner testified that he continues to experience pain in his right knee, that his pain starts with his first step of the day, that he also has popping and grinding in his knee that is constant and walking or climbing steps make the pain worse. (T. 27) Petitioner also testified that he has trouble standing more than two hours before his leg becomes weak. (T. 28) Based upon the treating medical records this factor is assigned significant weight.

Based upon the foregoing §8.1b(b) five factors, the Commission reduces the permanency award to 27-1/2% loss of use of a right leg.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on August 10, 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 $486.40 per week for a period of 143-3/7 weeks, commencing February 5, 2019, through April 15, 2019, and April 30, 2019, through November 18, 2021, that being the period of temporary total incapacity for work under §8(b) of the Act. The Respondent is due a credit of $38,668.79 in temporary total disability benefits paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $437.76 per week for a period of 59.125 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 27.5% loss of use of a right leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay $6,117.03 for necessary medical services, as provided in §8(a) and §8.2 of the Act and consistent with the medical fee schedule.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $63,200.00. 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.

July 24, 2023

KAD/bsd
O052323
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/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	19WC033963
Case Name	Raul Holguin v. B&C Garage Door Inc
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Paul Seal, Arbitrator

Petitioner Attorney	Jason Esmond
Respondent Attorney	Brad Antonacci

DATE FILED: 8/10/2022

/s/ Paul Seal, Arbitrator

Signature

INTEREST RATE WEEK OF AUGUST 9, 2022 3.04%

STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

☐ 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

Raul Holguin
Employee/Petitioner

v.

B & C Garage Door, Inc.
Employer/Respondent

Case # **19 WC 33963**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Seal**, Arbitrator of the Commission, in the city of **Rockford**, on **June 22, 2022.** After 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: Violation of two doctor rule

FINDINGS

On the date of accident, **February 4, 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 his accident.

In the year preceding Petitioner's injury, Petitioner's average weekly wage was **$729.60.**

On the date of accident, Petitioner was **35** years of age, ***single*** with **0** dependent children.

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

ORDER

- The Respondent shall pay $**6,117.03** for necessary medical services, as provided in Section 8(a) and 8.2 of the Act and consistent with the medical fee schedule.
- The Respondent shall pay the petitioner temporary total disability benefits of $ **486.40** /week for **145 & 2/7** weeks, from **February 5, 2019, through November 18, 2021,** as provided in Section 8(b) of the Act.
- The Respondent is due a credit of **$38,668.79** in temporary total disability benefits paid.
- The Respondent shall pay the Petitioner the sum of **$437.76** / week for a period of **125** weeks, as provided in Section 8(d)2 of the Act, because the injuries sustained caused **25%** **loss of use of a person 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.

Signature of Arbitrator

August 10, 2022

STATEMENT OF FACTS

The parties appeared for hearing on June 22, 2022 before Arbitrator Seal under the Illinois Workers' Compensation Act. The parties stipulated that Petitioner was an employee of Respondent on February 4, 2019, and that Petitioner sustained an accident that arose out of and in the course of his employment on that date. The parties stipulated that that timely notice of Petitioner's February 4, 2019, injury was provided and that Petitioner's average weekly wage relative to his injury was $729.60. The parties further stipulated that Petitioner was 35 years of age, single, with 0 dependent children at the time of his February 4, 2019, injury.

Petitioner testified that he worked for Respondent for approximately 5-6 months as a garage door specialist. (Tr. p. 11). He worked on a full-time basis. (Tr. p. 12). Petitioner testified that in performance of the job, he installed, repaired, and dismantled garage doors, springs, and operators. (Tr. pp. 12-13). Petitioner worked on residential as well as commercial garage doors. (Tr. p. 13). Petitioner described industrial settings, working on garage doors for factories or businesses such as Berner Foods, Snak King, Menards, and Jiffy Lube. (Tr. p. 13). Some doors would be those for semis to load and unload to. (Tr. p. 13). Prior to working for Respondent, Petitioner worked as a union carpenter. (Tr. p. 13).

Petitioner reviewed a job description for a garage door specialist (Rx. 2). He testified that it appeared to provide a minimal depiction of his job duties. (Px. 29). Petitioner testified that the description would be for a residential installation only. (Tr. p. 29). Petitioner testified that he did more residential work than commercial while working for Respondent, estimating approximately 60% of the time doing residential and 40% commercial. (Tr. pp 29-30). Petitioner noted that when performing repairs, as opposed to installations, he would be working alone. (Tr. p. 47). Petitioner testified that the job description's notation that lifting of 25-45 pounds would be done by two people is incorrect. (Tr. p. 30). He noted that one person would often lift in excess of 40 pounds and estimated he would lift up to 120 pounds. (Tr. pp. 30, 33). Petitioner disagreed that the lifting performed when installing garage doors would be limited to 35 pounds. (Tr. p. 31). Petitioner testified that the residential doors were typically lighter. However, at times he would be working on hold, wooden garage doors, which were very heavy. (Tr. p. 49). He estimated lifting 70 to 80 pound springs when working on commercial garage doors, which he would lift himself. (Tr. p. 31). Petitioner noted that there would generally be at least two people working on a commercial installation, but it would often be inconvenient to find the other person and make them stop what they were doing to assist on a heavy lift. As such, he would often do it himself. (Tr. p. 45). Petitioner testified that he lifted more than 35 pounds by himself multiple times throughout his workday. (Tr. p. 32). Petitioner also estimated that the kneeling and squatting would be performed frequently as opposed to occasionally. (Tr. p. 33).

Respondent called William Olmstead, owner of Respondent, to testify. Mr. Olmstead also reviewed the job description provided as Respondent's Exhibit 2. (Tr. p. 59). Mr. Olmstead testified that the job description was generally accurate, though there could be heavier products on commercial jobs. (Tr. p. 59). However, he testified there would be assistance for heavy lifts. (Tr. p. 59). Mr. Olmstead estimated that Respondent's business was approximately 90% residential during the time Petitioner worked for Respondent. (Tr. p. 60). Mr. Olmstead agreed that Petitioner would go on service and repair calls on his own. (Tr. p. 62). Mr. Olmstead testified that on repair calls, a specialist wouldn't know what he was going to find. However, if it

was something that a hand was needed for, the specialist could call for help. (Tr. p. 63). Mr. Olmstead testified that a specialist would not be reprimanded for lifting over 40 pounds on a job site but would not be required to do so. (Tr. pp. 73-74).

On February 4, 2019, Petitioner was working on a garage in Lanark, Illinois. (Tr. p. 12). He was called out to install trim around the door. (Tr. p. 14). He was working with materials on the ground, and it was snowy. (Tr. p. 14). While kneeling to work on the lower trim, he felt a pop in his right knee with excruciating pain. (Tr. pp. 14, 16). Petitioner testified that he took a moment to college himself, realigned his knee, and completed the job. (Tr. p. 14). Petitioner reported his injury the next day and was referred to Physician's Immediate Care by Respondent. (Tr. p. 15). Petitioner reported squatting and hammering when his right knee gave out. (Rx. 3). X-rays were performed and Petitioner was restricted from kneeling or squatting and was given a splint to wear. (Rx. 3). Petitioner was seen for follow up on February 13, 2019, and an MRI was ordered. (Rx. 3).

Petitioner started treatment at Mercy Health on February 20, 2019, with Dr. Muhammad. (Tr. p. 16). Dr. Muhammad recommended an MRI and ordered physical therapy. (Tr. p. 16). Following the February 22, 20219 MRI, Dr. Muhammad assessed a meniscal tear and referred Petitioner to an orthopedic. (Px. 1). Petitioner was seen by Dr. Krpan, an orthopedic, on April 30, 2019. (Rx. 4). Dr. Krpan assessed a meniscal tear and recommended surgery. (Tr. p. 17). On June 7, 2019, Petitioner underwent a partial medial meniscectomy and tri-compartmental synovectomy. (Tr. p. 17, Px. 5). Petitioner testified that the surgery did not help. (Tr. p. 17). Petitioner continued in physical therapy and remained off work. (Tr. p. 17, Px. 3). On September 3, 2019, Dr. Krpan indicated that he did not feel that Petitioner could return to his regular occupation installing garage doors. (Px. 4).

On September 6, 2019, Petitioner was seen by Dr. Verma at Respondent's request for an Independent Medical Examination. (Tr. p. 18). Dr. Verma's report indicates he was provided a job description indicating that Petitioner was required to stand and walk frequently and lift up to and over 100 pounds. (Rx. 4). Dr. Verma agreed that Petitioner's meniscal tar was causally related to his February 4, 2019, injury and recommended four weeks of PT and avoidance of squatting, kneeling, climbing, or lifting more than 25 pounds. (Rx. 4).

On October 8, 2019, Dr. Krpan kept Petitioner off work and recommended a repeat MRI due to ongoing symptoms. (Tr. p. 18, Px. 4). On December 5, 2019, Petitioner complained of right hip pain in addition to his ongoing knee pain. (Tr. p. 18). Petitioner testified that his hip pain started approximately 6 months after his February 4, 2019, injury. (Tr. p. 18). He described radiating pain from the knee to the hip. (Tr. p. 19). Dr. Krpan reviewed the November 4, 2019, MRI. He also noted Petitioner's right hip pain. Dr. Krpan recommended Petitioner remain off work pending evaluation of his hip. (Px. 4).

Petitioner was then seen by Dr. Blint on February 13, 2020, for a second opinion. (Tr. p. 19). Dr. Blint assessed a recurrent meniscal tear and recommended another surgery. (Tr. pp. 19-20, Px. 6). The March 2, 2020, note indicated that the surgery was denied by insurance. (Px. 6). A note from May 11, 2020, indicted that surgery was being approved. A phone call from May 29, 2020, indicated Petitioner asked if surgery could be moved up. (Px. 6). Petitioner was seen by Dr. Blint, and surgery was again suggested. (Px. 6). Petitioner underwent a preoperative appointment with Dr. Lim on September 1, 2020. (Px. 7). Petitioner underwent the

arthroscopic partial medial meniscectomy and extensive synovectomy and debridement on September 30, 2020. (Tr. p. 20, Px. 6). Petitioner testified that the delay in getting the surgery performed was due to Covid as well as approval from work comp. (Tr. p. 20). He also testified that his primary care physician had retired, and he had to get a new primary care doctor. (Tr. p. 20). Petitioner testified that the September 30, 2020, surgery did not help his knee symptoms either. (Tr. p. 21). On October 8, 2020, Petitioner was kept off work and recommended additional physical therapy. (Tr. p. 21, Px. 6). Petitioner continued to complain of pain most prominent with weightbearing and using stairs on October 15, 2020. (Px. 6). Petitioner began physical therapy on October 21, 2020, at ATI Physical Therapy. (Px. 8). Dr. Blint kept Petitioner off work and recommended additional physical therapy on November 16, 2020. (Px. 6). On December 7, 2020, Dr. Blint recommended another MRI of the right knee and kept Petitioner off work. (Tr. p. 21, Px. 6). Following a January 26, 2021, MRI, Dr. Blint recommended Petitioner be fit with TED high compression hose due to effusion (Px. 6). Petitioner testified he had continued to have painful popping, pain, stiffness, and tenderness in his knee that had not changed since his injury. (Tr. pp. 21-22).

Petitioner was again seen by Dr. Verma, at Respondent's request, on February 1, 2021. (Tr. p. 22). Dr. Verma assessed significant persistent pain with mild effusion, status post revision arthroscopy. (Rx. 6). He opined that Petitioner's treatment had been reasonable and necessary. He opined Petitioner could return to light duty work, lifting 10-15 pounds, with no repetitive lifting, squatting, kneeling, or climbing. He recommended a cortisone injection followed by a Functional Capacity Evaluation, noting Petitioner should reach MMI two weeks post FCE. (Rx. 6).

On March 11, 2021, Dr. Blint provided a steroid injection that was not helpful. (Tr. p. 22, Px. 6). Additional physical therapy was recommended as well as medication. (Tr. p. 22). Dr. Blint kept Petitioner off work on April 8, 2021. (Px. 6). Petitioner was seen by his primary care physician on May 12, 2021, with worsening right knee pain with numbness, welling, and weakness. (Px. 7). On May 20, 2021, Dr. Blint recommended a repeat MRI and a second opinion and kept Petitioner off work. (Px. 6). An additional MRI was performed on July 8, 2021. (Tr. p. 23). Petitioner was seen by Dr. Corpus for a second opinion on August 11, 2021. Dr. Corpus indicated that as the repeat MRI was essentially normal, he did not feel he could offer anything other than viscosupplemental injections. (Px. 10). Petitioner continued to report throbbing pain and pain climbing stairs to his primary care physician on August 16, 2021. (Px. 7). A Kenalog injection was provided with recommendation to continue physical therapy. (Px. 7).

On August 19, 2021, Dr. Blint noted Petitioner's chronic and continued right knee pain. At that point, Dr. Blint recommended a gel injection and follow up with pain management. (Tr. p. 23, Px. 6). The injection was not performed. (Tr. p. 24).

On September 22, 2021, Dr. Verma provided an addendum report. (Rx. 7). Dr. Verma noted Petitioner's diagnosis remained mild effusion with post-meniscectomy pain status post revision arthroscopy. He opined Petitioner had now maximized treatment with no further benefit ongoing. Dr. Verma recommended an FCE to determine the validity of Petitioner's ongoing complaints as well as his work capabilities. Prior to the FCE, Dr. Verma recommended a 25-pound lifting restriction with avoidance of repetitive squatting, kneeling, or climbing. (Rx. 7).

Petitioner underwent a functional capacity evaluation on November 18, 2021. (Tr. p. 24, Px. 8). Petitioner testified that his leg was swollen for over a week after undergoing the FCE. (Tr. p. 28). The FCE was found to be valid with a limitation to the Medium occupational demand level. The report noted that Petitioner's prior position had been heavy based on his description of the job. The report indicated Petitioner could occasionally lift 107.8 pounds above shoulder and from desk to chair height, occasionally lift 72.8 pounds from chair to floor, occasionally carry 79.6 pounds, stand 4 hours in 50-minute durations, and walk 4-5 hours, occasionally moderate distances. (Px. 8). Petitioner testified that he has only received conservative treatment since that time in the form of pain medication, anti-inflammatories, and physical therapy. (Tr. pp. 24-25).

Petitioner testified that he has not returned to work for Respondent after undergoing the FCE. (Tr. p. 25). Petitioner testified that he did work for Home Depot around February and March of 2022. (Tr. p. 26). He moved shelving and restocked the shelves, doing the job for approximately eight weeks. (Tr. p. 26). Petitioner worked part-time and the position ended because he had too much pain in his right leg to continue the work. (Tr. pp. 26-27). Petitioner testified he has looked for additional work. He applied for work at Walmart through Set and Services, though he did not get hired.

Mr. Olmstead testified that he believed Petitioner could have returned to work for Respondent based on the results of the Functional Capacity Evaluation. (Tr. p. 61). He testified that there is no current position for Petitioner though. (Tr. p. 68).

Petitioner testified that he continues to experience pain in his right knee. (Tr. p. 27). He testified that his pain starts with his first step of the day. (Tr. p. 27). He also has popping and grinding in his knee that is constant. (Tr. p. 27). The symptoms are improved with rest and ice. (Tr. p. 27). Walking or climbing steps make the pain worse. (Tr. p. 27). He has trouble standing more than two hours before his leg becomes weak. (Tr. p. 28). After that, he sits and elevates his leg. (Tr. p. 28).

Petitioner testified that he did not believe he would be capable of returning to work for Respondent. He noted that he would not be able to perform the ladder climbing, kneeling, or lifting that the job required. (Tr. pp. 34-35). He has difficulty bearing his own bodyweight at this time given the pain in his knee. (Tr. p. 35). Petitioner didn't believe wearing knee pads would help as he has difficulty kneeling at all. (Tr. p. 52).

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE DISPUTED ISSUES

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

The Arbitrator adopts the findings of fact stated above and incorporates them herein by this reference. The Arbitrator finds that Petitioner's current condition of ill-being is causally related to his work injury of February 4, 2019. The Arbitrator relies upon the opinions of Dr. Verma as well as the treating records and Petitioner's testimony.

Petitioner's treatment records and the IME opinion testimony support a causal relationship between his current condition of ill-being regarding his right knee and his February 4, 2019, injury. Petitioner was seen for treatment the day after his injury with complaints of right knee pain that began while squatting at work.

Shortly thereafter, he underwent an MRI that revealed a meniscal tear. Petitioner underwent two meniscectomy procedures to attempt to repair his meniscal tear and resolve his ongoing pain. Petitioner's records document his ongoing symptoms despite the surgeries and extensive physical therapy. Dr. Verma, Respondent's examining physician, consistently opined that Petitioner's right knee condition has been causally related to his work injury. At the time of Dr. Verma's last report, from September 22, 2021, he opined that Petitioner was at maximum medical improvement and recommended an FCE to determine the validity of Petitioner's ongoing complaints as well as his work capabilities. Petitioner underwent the FCE, which was determined to be valid. There was no suggestion in the records, or in Dr. Verma's opinions, that Petitioner's right knee condition was not causally related to his February 4, 2019, injury.

Petitioner testified to ongoing pain in his right knee, made worse with ongoing standing, walking, stairs, kneeling, and squatting. Petitioner has been consistently complaining of pain, aggravated by those type of activities, since his injury. His complaints have been consistently reported and documented since his February 4, 2019, injury with no indication that he has sustained an intervening accident. As such, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to his February 4, 2019, injury.

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? Did Petitioner violate two-doctor rule?

The Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary for the injury he sustained on February 4, 2019. The Arbitrator notes that the medical records, diagnoses, treatment carried out, and treatment recommendations are noted in the Statement of Facts. The Arbitrator finds that Petitioner's treatment described in the statement of facts, including the two surgical procedures, the extensive physical therapy, and the injections to the right knee, have been reasonable and necessary. The Arbitrator notes that Dr. Verma, Respondent's examining physician, noted on September 22, 2021, that Petitioner's treatment had been reasonable and necessary. For the reasons stated above and having found that Petitioner's current condition of ill-being to be related to his injury, Petitioner's treatment has been reasonable and necessary.

The only outstanding medical bills submitted at hearing were those from ATI Physical Therapy from April 1, 2021, through May 19, 2021. As such, the Arbitrator finds that Respondent is liable for the medical bills provided from ATI Physical Therapy, totaling $6,117.03, pursuant to the medical fee scheduled.

Respondent also raised the issue of the two-doctor rule. Petitioner was initially seen at Physician's Immediate Care at Respondent's direction. Thereafter, he sought treatment with his primary care physician, Dr. Muhammad, on February 20, 2019. Petitioner was referred to Dr. Krpan by Dr. Muhammad on March 8, 2019. When Petitioner's symptoms continued after his initial surgery with Dr. Krpan, he sought a second opinion with Dr. Blint on February 13, 2020. This would constitute his second choice of physicians. After his surgery with Dr. Blint on September 30, 2020, Petitioner was sent for additional physical therapy, for which he underwent the treatment at ATI Physical Therapy. As such, this treatment remained within his two choices of physicians.

As such, Respondent is liable for charges as noted above, totaling $6,117.03, pursuant to the medical fee schedule.

K. What temporary benefits are in dispute?

The Arbitrator finds that Petitioner is owed Temporary Total Disability benefits from February 5, 2019 through November 18, 2021.

The Supreme Court of Illinois has held that "the determinative inquiry for deciding entitlement to TTD benefits remains, as always, whether the claimant's condition has stabilized. If the injured employee is able to show that he continues to be temporarily totally disabled as a result of his work-related injury, the employee is entitled to TTD benefits." Interstate Scaffolding v. Illinois Workers' Compensation Commission, 236 Ill. 2d 132 (2010).

"To establish entitlement to TTD benefits, a claimant must demonstrate not only that he or she did not work, but also that the claimant was unable to work. (Internal citation omitted). It is irrelevant whether the claimant could have looked for work. (Internal citation omitted). The dispositive test is whether the claimant's condition has stabilized, that is, whether the claimant has reached maximum medical improvement."

Mech. Devices v. Indus. Comm'n (Johnson), 344 Ill. App. 3d 752, 759 (4th Dist. 2003).

"The factors to be considered in determining whether a claimant has reached maximum medical improvement include: (1) a release to return to work; (2) the medical testimony concerning the claimant's injury; (3) the extent of the injury; and (4) "most importantly," whether the injury has stabilized."

Id. at 760.

Petitioner initially went off work on February 5, 2019, due to the restrictions he was provided by Physician's Immediate Care and TTD benefits were paid from February 5, 2019, through April 15, 2019. On March 8, 2019, Petitioner was referred to an orthopedic after his MRI revealed a meniscal tear. He was seen by Dr. Krpan, the orthopedic, on April 30, 2019, and was taken off work pending surgery. Petitioner underwent surgery on June 7, 2019, and he continued in follow up with Dr. Krpan. On July 16, 2019, Dr. Krpan noted Petitioner was to start physical therapy and was continued off work. On September 9, 2019, Dr. Krpan continued Petitioner off work given the nature of his occupation. On September 6, 2019, Dr. Verma indicated Petitioner could work light duty, lifting 25 pounds, with avoidance of repetitive squatting, kneeling, or climbing. Dr. Krpan kept Petitioner off work on October 8, 2019, and December 5, 2019. On February 13, 2020, Dr. Blint recommended another right knee surgery. Petitioner was seen for pre-operative visit on March 2, 2020, with surgery scheduled for March 4, 2020. Dr. Blint's records indicate surgery was denied by insurance. TTD benefits were ceased on March 21, 2020.

On June 15, 2020, Dr. Verma agreed that the recommended revision arthroscopy was reasonable. He also restricted Petitioner to sedentary work. That report was provided to Petitioner's attorney on June 19, 2020, and it was noted surgery would be authorized. On July 17, 2020, Petitioner established a new primary care

physician. He was again recommended surgery by Dr. Blint on July 27, 2020. Petitioner was seen for preoperative visit on September 1, 2020, with Dr. Lim and with Dr. Blint on September 24, 2020. Surgery was performed on September 30, 2020. Thereafter, Petitioner began physical therapy and was kept off work. Dr. Blint kept Petitioner off work on December 17, 2020. Petitioner was recommended a new MRI which he underwent on January 26, 2021. He was kept off work by Dr. Blint on January 28, 2021.

On February 1, 2021, Dr. Verma recommended a cortisone injection followed by an FCE. He opined Petitioner could return to light duty work, with a 10-15 pound lifting restriction and no repetitive squatting, kneeling, or climbing. He opined that Petitioner should be at maximum medical improvement 2 weeks after the FCE.

Petitioner underwent the steroid injection with Dr. Blint on March 11, 2021. Dr. Blint kept Petitioner off work on April 8, 2021, and May 20, 2021. He also recommended a second opinion on May 20, 2021. Petitioner underwent a repeat MRI on July 8, 2021, and he was seen for a second opinion by Dr. Corpus on August 11, 2021. Dr. Corpus suggested viscosupplemental injections as cortisone had not worked. On August 16, 2021, Petitioner's primary care physician, Dr. Lim, recommended a Kenalog injection. On August 19, 2021, Dr. Blint recommended a gel injection. The injections recommended were not authorized.

On September 22, 2021, Dr. Verma opined that Petitioner had reached MMI and that an FCE would be helpful to determine the validity of Petitioner's ongoing complaints and work capabilities. Prior to the FCE, Dr. Verma recommended a 25-pound lifting restriction as well as avoidance of repetitive squatting, kneeling, or climbing. Dr. Verma also opined that Petitioner's treatment to date had been reasonable. Petitioner underwent the FCE on November 18, 2021. Thereafter, he treated only conservatively with anti-inflammatories and physical therapy.

Petitioner has continued in consistent treatment with ongoing symptoms in his right knee limiting his ambulation as well as kneeling and squatting. He tried two surgical procedures, extensive physical therapy, and injections. Petitioner's treating physicians kept him off work through August of 2021 and injections were recommended by three different physicians. On September 22, 2021, Dr. Verma opined Petitioner had reached MMI. Given the treatment Petitioner underwent, it can be said that his condition stabilized as of his November 18, 2021, FCE. At that time, his limitations were sufficiently established. Prior to that, Petitioner continued under treatment to attempt to alleviate his symptoms. The various physicians disagreed regarding whether Petitioner needed to be off work or could work with restrictions, however, his treatment was found to be reasonable by Respondent's physician through September 22, 2021, at which point an FCE was recommended to determine the validity of Petitioner's complaints, which was interpreted to be valid on November 18, 2021.

As such, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits from February 5, 2019, through November 18, 2021, at the rate of $486.40 per week. The Arbitrator notes that Respondent paid TTD benefits from February 5, 2019, through April 15, 2019; April 30, 2019, through July 29, 2019; August 15, 2019 through March 21, 2020; and from September 30, 2020 through March 25, 2021, for which it is owed a credit of $38,668.79.

L. What is the nature and extent of the injury?

The Arbitrator adopts the findings of fact stated above and incorporates them herein by this reference.

The Arbitrator adopts the findings of fact stated above and incorporates them herein by this reference. In assessing the nature and extent of Petitioner's injury, the Arbitrator must consider 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." No impairment rating was offered by either party.

2) The occupation of the injured employee. Petitioner worked for Respondent for approximately 5-6 months as a garage door specialist, installing, repairing, and dismantling garage doors. Petitioner has not returned to work for Respondent nor as a garage door specialist.

3) The age of the employee at the time of the injury. Petitioner was 35 years old at the time of his injury.

4) The employee's future earning capacity. Petitioner has not secured full-time employment since his injury of February 4, 2019, as a result of his injury.

5) Evidence of disability corroborated by the treating medical records. Petitioner testified to ongoing pain, stiffness, and swelling in his right knee despite two surgeries. Petitioner testified to difficulty being walking or performing squatting or kneeling. Petitioner's initial MRI documented a meniscal tear. He underwent two meniscectomy and synovectomy surgeries. He did not experience significant relief from the surgeries. Petitioner also underwent extensive physical therapy with ongoing symptoms in his knee. No opinion was provided that Petitioner's ongoing symptoms were unrelated to his injury. As such, Petitioner has remained on medication and modified his activities.

The Arbitrator finds that Petitioner sustained a significant and permanent loss of use of his right knee as a result of his injury. This is supported by his testimony, his treatment records, and the opinions of Dr. Verma. Testimony was provided regarding whether Petitioner is capable of returning to his past employment as a garage door specialist. Petitioner testified he would not be able to perform the lifting, the kneeling, or the squatting required to perform the position. Petitioner testified he previously worked as a union carpenter as well. Petitioner testified that the position required heavy lifting, up to 120 pounds, with significant kneeling and squatting. Respondent's owner testified that lifting was not required over 40 pounds. A job description was provided that Respondent claimed to be an accurate description of Petitioner's position. Petitioner testified that the job description was substantially consistent with the residential work done as a garage door specialist, but not with the commercial work. Further, Petitioner testified that lifting performed on residential jobs could greatly exceed lifting of 40 pounds. The Arbitrator does note that in Dr. Verma's initial report, of September 6, 2019, that a job description indicated Petitioner is required to lift up to and over 100 pounds for his position. (Rx. 4).

The Arbitrator notes that Petitioner's records consistently document his ongoing knee pain and limitations. Petitioner is only 35 years old. He has not been able to return to his work for Respondent as a garage door specialist nor as a carpenter, work he had performed previously. The Arbitrator finds Petitioner's testimony regarding his job duties to be credible. Petitioner described job duties that he would not be able to perform on a consistent basis given his ongoing limitations. The Arbitrator therefore finds that Petitioner could not return to his past work for Respondent nor for similar garage door specialist type of work. Petitioner's FCE found him limited to the Medium physical demand level. As such, he has lost the ability to perform the heavy work he performed for Respondent and similar heavy exertional work. As such, the Arbitrator finds that Petitioner has sustained a loss of occupation and is entitled to 25% loss of a person as a whole under Section 8(d)2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC016044
Case Name	Chris Johnson v. Pavlich, Inc.
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0314
Number of Pages of Decision	26
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Peter Blasi
Respondent Attorney	Peter Sink

DATE FILED: 7/24/2023

/s/ Deborah Baker, Commissioner

Signature

DISSENT: /s/ Deborah Baker, Commissioner

Signature

23IWCC0314

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 Average Weekly Wage, Temporary Disability	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHRIS JOHNSON,

Petitioner,

vs. NO: 19 WC 16044

PAVLICH, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of whether Petitioner's current conditions of ill-being are causally related to the November 13, 2018 work accident, entitlement to temporary disability benefits, whether Petitioner's wage calculations and benefit rates were correct, and entitlement to incurred medical expenses as well as prospective medical care, and being advised of the facts and law, modifies the Decision of the Arbitrator as set forth below, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327 (1980).

I. FINDINGS OF FACT

The Commission adopts the Findings of Fact in the Decision of the Arbitrator and incorporates such facts herein, but changes the ensuing analysis with respect to average weekly wage and temporary disability. However, the Commission strikes any reference in the Decision to the surveillance video in Respondent's Exhibit #7, as this exhibit was not admitted into evidence. Arb.'s Ex. 4.

II. CONCLUSIONS OF LAW

A. Average Weekly Wage

Here, Petitioner testified that in addition to his earnings as a Truck Driver, he received $63.00/day per diem from Respondent for every night he spent away from home. His total per diem received through the November 19, 2018 pay period equals $7,560.00, or $63.00/day for 120 days. Resp. Ex. 4. Petitioner testified he essentially spent $30.00 of his daily per diem on meals, but put the remaining $33.00/day towards household bills and responsibilities. In finding that the daily remainder of $33.00 should be included in the calculation of Petitioner's average weekly wage, the Arbitrator relied upon Petitioner's testimony regarding his daily spending while away from home. The Arbitrator found that payments designated as travel expenses should be included in an average weekly wage to the extent that such payments represent real economic gain rather than reimbursement for actual expenses incurred. See *Swearingen v. Industrial Commission*, 298 Ill. App. 3d 666, 670-71 (1998).

We have closely analyzed this issue and view the evidence differently than the Arbitrator. Generally, amounts paid as reimbursement for travel expenses are not part of a claimant's earnings for the purpose of calculating average weekly wage. *United Airlines v. Illinois Workers' Compensation Commission (Ritter)*, 382 Ill. App. 3d 437, 440 (1st Dist. 2008). While we acknowledge the exception set forth in *Swearingen*, we find the evidence presented in the instant case requires us to enforce the rule provided in *United Airlines*. In *United Airlines*, the claimant argued that, even though she failed to produce evidence of her actual expenses, only a portion of her per diem[1] was a reimbursement for her travel expenses, thus the remaining per diem should be included in her average weekly wage calculation. *Id*. at 442. The Appellate Court found that allowing such without supporting evidence would improperly shift the burden of proof to Respondent to prove that the per diem payments did not represent an economic gain. *Id*; see also *Cook v. Industrial Commission*, 231 Ill. App 3d 729, 731 (3rd Dist.1992), (In a workers' compensation case, the claimant has the burden of establishing average weekly wage). In the instant case, Petitioner testified that $33.00 of his $63.00 per diem was not a reimbursement for travel expenses, but rather an economic gain, as he used it on household bills. However, the record is void of any evidence corroborating Petitioner's claim, and Petitioner testified he did not keep receipts of the food he purchased with the per diem. Petitioner provided no evidence other than his own testimony which would allow us to infer that the per diem he received exceeded his actual expenses, and thus represented real economic gain. Accordingly, we decline to impermissibly shift the burden of proof to Respondent regarding average weekly wage, and we also find Petitioner has failed to meet his burden of proof to include a portion of his per diem in the calculation of his average weekly wage.

In accordance with the above, we modify Petitioner's average weekly wage. Section 9030.40 of the Rules Governing Practice before the Illinois Workers' Compensation Commission provides in pertinent part: "Before a case proceeds to trial on arbitration, the parties (or their counsel) shall complete and sign a form provided by the Workers' Compensation Commission called Request for Hearing….The completed Request for Hearing form, signed by the parties (or counsel), shall be filed with the Arbitrator as the stipulation of the parties and a settlement of the

[1] The claimant alleged that she only spent $50.00 of her $230.00 per diem.

questions in dispute in the case." See Ill. Adm. Code tit. 50, §7030.40 (2016). The language of section 7030.40 indicates that the request for hearing is binding on the parties as to the claims made therein. *Walker v. Industrial Commission*, 345 Ill. App. 3d 1084, 1088 (4th Dist. 2004).

Here, the relevant Request for Hearing form signed by the parties indicates Petitioner sought an average weekly wage of $952.29, while Respondent calculated $711.45. We find no evidence supporting Petitioner's calculation, but are bound by the minimum calculation provided by Respondent. Accordingly, we find Petitioner's average weekly wage to be $711.45.

B. Temporary Disability

Having modified Petitioners average weekly wage, the award for temporary disability benefits must also be modified to conform. Having found an average weekly wage of $711.45, the Commission modifies the award for temporary total disability benefits to $474.30/week for a period of 173 & 2/7ths weeks (November 14, 2018 through March 11, 2022).

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 29, 2022, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $474.30 per week for a period of 173 & 2/7ths weeks, representing November 14, 2018 through March 11, 2022, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall receive credit of $74,941.03 for temporary total disability benefits paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay for the treatment recommended by Dr. Solman, including the total right knee arthroplasty and follow-up care, and therapy and further evaluation and treatment for Petitioner's bilateral hips and left knee, as provided in §8(a) of the Act.

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

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

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 $52,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

July 24, 2023

/s/ *Stephen J. Mathis*

DJB/wde
O: 5/24/23

/s/ *Deborah L. Simpson*

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DISSENT

I disagree with the majority's decision to modify the Decision of the Arbitrator and exclude part of Petitioner's *per diem* in the amount of $33.00 from the calculation of his average weekly wage. In my opinion, the Arbitrator properly included $33.00 of Petitioner's $63.00 *per diem* in the average weekly wage calculation based on a correct interpretation of *United Airlines v. Illinois Workers' Compensation Comm'n*, 382 Ill. App. 3d 437 (1st Dist. 2008) and *Swearingen v. Industrial Comm'n,* 298 Ill. App. 3d 666 (1998).

Generally, amounts paid as reimbursement for travel expenses are not part of a claimant's earnings for the purpose of calculating her average weekly wage. *United Airlines v. Illinois Workers' Compensation Comm'n*, 382 Ill. App. 3d 437, 440 (1st Dist. 2008), citing *Swearingen v. Industrial Comm'n,* 298 Ill. App. 3d 666, 670-71 (1998). The rationale behind this rule is that such payments merely reimburse the claimant for employment-related expenses that he would not otherwise incur, and, therefore, the claimant will not suffer any economic loss if he fails to receive such reimbursements once the employment ceases. *Id.* However, payments designated as travel expenses should be included in a claimant's average weekly wage to the extent that such payments represent ***real economic gain*** rather than reimbursement for actual expenses incurred. *Id.* at 671. If the *per diem* payments an employee receives is greater than the expenses he actually incurred during his work trips, the difference would constitute ***real economic gain*** to the employee and should be included when computing his average weekly wage. *United Airlines,* 382 Ill. App. 3d at 440-41.

I disagree with the majority's interpretation of *United Airlines* and *Swearingen*. Of note, the Arbitrator relied on Petitioner's credible and believable testimony that he only spent $30.00 of his *per diem* when he spent a night away from home while working for Respondent. The Arbitrator did not include the entire *per diem* in the average weekly wage calculation (which the court found to be improper in *United Airlines*), and instead, only included the amount of the *per diem* that was

supported by the credible evidence. The Arbitrator correctly found that only $33.00 of the $63.00 per diem constituted ***real economic gain*** (the difference between the amount of the *per diem* and the expenses he actually incurred).

For the reasons set forth above, I respectfully dissent.

/s/ *Deborah J. Baker*
Commissioner Deborah J. Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC016044
Case Name	Christopher Johnson v. Pavlich, Inc.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	20
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Peter Blasi
Respondent Attorney	Peter Sink

DATE FILED: 7/29/2022

THE INTEREST RATE FOR THE WEEK OF JULY 26, 2022.92%

/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)

CHRISTOPHER JOHNSON
Employee/Petitioner

v.

PAVLICH, INC.
Employer/Respondent

Case # **19** WC **016044**

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 **March 11, 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, **11/13/18**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**N/A**; the average weekly wage was $**848.42**.

On the date of accident, Petitioner was **48** 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 $**74,941.03** for TTD, $**--** for TPD, $**--** for maintenance, and $**--** for other benefits, for a total credit of $**74,941.03**.

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

ORDER:

Respondent shall pay for the treatment recommended by Dr. Solman, including total right knee arthroplasty and follow-up care and therapy and further evaluation and treatment for his bilateral hips and left knee.

Respondent shall pay temporary total disability benefits of $**565.61**/week for **173 and 2/7ths weeks**, representing the period of November 14, 2018, through March 11, 2022, as provided in Section 8(b) of the Act. Respondent shall be given a credit for TTD as stated above.

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

JULY 29, 2022

PROCEDURAL HISTORY

This matter proceeded to trial on March 11, 2022, pursuant to Sections 19(b) and 8(a) of the Illinois Workers' Compensation Act (hereinafter "the Act"). The issues in dispute are: 1) whether the Petitioner sustained accidental injuries that arose out of and in the course of his employment; 2) the causal connection between the accident and the Petitioner's bilateral knee and hip conditions 3) average weekly wage; 4) entitlement to TTD after November 30, 2021; and 5) entitlement to prospective medical care to the Petitioner's bilateral knees and hips. The parties stipulated that the Respondent would pay TTD owed through November 30, 2021. Also at arbitration, the Petitioner's objection to Respondent's Exhibit 7 was sustained for lack of foundation. However, the Petitioner later withdrew his objection, and the exhibit is now admitted into evidence.

FINDINGS OF FACT

At the time of the accident, the Petitioner was 48 years old and had been employed by the Respondent as a truck driver. (T. 16) He testified that in addition to his regular wages, he was paid a per diem of $63 per day (T. 18) He said he spent $25 but no more than $30 per day of the per diem on food and the rest on household bills. (T. 21-22) He said he received per diem from previous employers, did not claim the income on his taxes and had not yet filed his tax returns for 2018. (T. 60)

On November 13, 2018, the Petitioner was delivering a load of scrap aluminum in Granite City and was getting out of the back of the trailer when he put one foot on a grappling hook and tried to slide down and touch his toe to the ground. (T. 23-24) He said he put his hand on the shoulder of a someone who was standing there with a rock bar in his hand, but that person moved, causing the Petitioner to hit his mouth on the rock bar and land directly on the concrete with his

right knee. (T. 24-25) The Petitioner testified that he reported the incident to his dispatcher, who told him to come back to the Respondent's business in Kansas City before he could see a doctor. (T. 26) The Petitioner picked up and delivered another load before returning to the office. (T. 27) He said he was hurting, and his knee "was as big as a house." (Id.)

On November 14, 2018, the Petitioner was treated at Concentra, where he was examined by osteopath Dr. Ternesgen Wakwaya, who diagnosed a right knee contusion, gave the Petitioner crutches and a knee wrap, prescribed medication and ordered physical therapy and X-rays. (PX1) The Petitioner was given work restrictions of 100 percent sitting. (Id.) At follow-up visits, the Petitioner complained of worsening symptoms. (Id.) On December 3, 2018, Dr. Wakwaya added a diagnosis of left hip pain and referred the Petitioner to an orthopedic specialist. (Id.) The Petitioner underwent physical therapy from November 20-29, 2018, for a total of six visits. (PX2) At the last visit, physical therapist Danielle Boxberger reported that the Petitioner had improved range of motion, strength, gait and tolerance to activity, but he continued to have pain and difficulty progressing with weight bearing secondary to joint pain, as well as pain under the patella. (Id.)

The Petitioner testified that at the direction of the Respondent or its insurer, he saw Dr. Robert Bruce, an orthopedic surgeon at Kansas City Bone & Joint Clinic. (T. 29) At his first visit on December 18, 2018, the Petitioner complained of right knee pain that was achy with intermittent sharp intense pain and popping and instability of the knee, as well as right hip pain that was intermittent. (PX3) Dr. Bruce examined the Petitioner and took X-rays of the right knee and hip. (Id.) The knee X-rays showed minimal patellofemoral degenerative joint disease, and the hip X-rays showed moderate degenerative joint disease. (Id.) Dr. Bruce read an MRI of the right knee taken on November 30, 2018, that he said showed: partial tear of the medial patellofemoral ligament with no patellar subluxation or dislocation; strain of the posterior cruciate ligament

(PCL); mild patellar tendinopathy; and mild medial compartment osteoarthritis. (Id.) Dr. Bruce diagnosed the Petitioner with right knee pain, morbid obesity and medial patellofemoral ligament tear. (Id.) He performed a steroid injection to the Petitioner's right knee, prescribed medication and gave work restrictions of no prolonged walking or standing. (Id.) He opined that the work accident was likely the prevailing cause of the Petitioner's symptoms. (Id.)

At a follow-up visit on December 28, 2018, the Petitioner reported no relief from the injection and worsening pain, and Dr. Bruce recommended surgery and continued work restrictions. (Id.) On February 8, 2019, Dr. Bruce performed an arthroscopic extensive synovectomy with chondroplasty of the patella and chondroplasty of the medial femoral condyle with lateral retinacular release. (PX3, PX5) The Petitioner testified that following the surgery, his right knee and hip still hurt, and his leg was retaining fluid and was swollen. (T. 31) Dr. Bruce found that the Petitioner suffered hemarthrosis and operated again on February 18, 2019, to drain, irrigate and debride a hematoma. (PX3, PX6) The Petitioner was ordered off work. (Id.)

At a follow-up visit on March 21, 2019, the Petitioner was still experiencing swelling in his knee, and Dr. Bruce drained fluid from the Petitioner's knee and performed a steroid injection. (Id.) He allowed the Petitioner to return to work with restrictions of no prolonged standing or walking and no climbing. (Id.) The Petitioner testified that the restrictions prevented him from returning to work with the Respondent because he could not climb into a semi-truck. (T. 34) He underwent another round of physical therapy from February 26, 2019, through May 10, 2019, for a total of 22 visits. (PX2) At his last physical therapy session, the Petitioner was still having much pain with weightbearing activity. (Id.)

The Petitioner returned to Dr. Bruce on May 10, 2019, and reported residual swelling, discomfort throughout the right knee, trouble stepping onto curbs with his right leg and inability

to put full weight on his right knee without pain. (PX3) An MRI performed on April 12, 2019, did not show any recurrent tears but did show high-grade cartilage thinning of the central and lateral aspects of the trochlea inferiorly and moderate-grade cartilage thinning of the inner weightbearing surfaces of the medial femorotibial compartment. (PX3, PX7) Dr. Bruce found the Petitioner to be at maximum medical improvement, continued work restrictions and recommended at FCE to determine permanent work restrictions. (PX3)

On June 21, 2019, the Petitioner saw Dr. Corey Solmon, an orthopedic surgeon at the Orthopedic & Spine Institute of St. Louis. (PX8) He described the accident and provided his treatment records, which Dr. Solmon outlined in his notes. (Id.) The Petitioner told Dr. Solmon he would do anything he could to get back to doing his job. (Id.) Dr. Solmon performed a physical examination of the right knee that showed: mild thickness of his soft tissues around the knee but no intra-articular effusion; mild atrophy of the quadriceps; crepitus with range of motion in the patellofemoral joint; some medial patellofemoral joint tenderness but no lateral tenderness; negative instability testing; and normal strength. (Id.) Dr. Solmon reviewed the MRIs and noted possible interstitial fiber damage to the medial patellofemoral ligament. (Id.) X-rays taken that day showed some mild patellofemoral changes only. (Id.)

Dr. Solmon opined that the work injury was the prevailing factor in the development of right knee pathology and that the prior treatment was appropriate and necessary. (Id.) But he found the treatment did not relieve the Petitioner of his symptoms and pathology and did not return him to his baseline condition. (Id.) He did not believe the Petitioner was at maximum medical improvement and recommended further treatment. (Id.) Although he stated that the Petitioner's condition would warrant a patellofemoral arthroplasty, he first recommended conservative treatment of electrical stimulation to improve quadriceps tone and patella tracking. (Id.) He noted

that the Petitioner had pre-existing arthritis in his patellofemoral joint that was asymptomatic prior to the work injury and concluded that the work injury was either the prevailing factor in the creation of the patellofemoral chondromalacia or aggravated his pre-existing condition. (Id.) In his treatment notes, Dr. Solmon recommended wearing a brace, no climbing ladders or stairs, no lifting more than 50 pounds, performing work on flat ground, no jumping from heights and no deep squatting or kneeling. (Id.) He also issued a work status report ordering the Petitioner off work until after surgery. (Id.) On July 23, 2019, Dr. Solman issued another report ordering the Petitioner off work. (Id.) On August 30, 2019, he allowed the Petitioner to return to work but stated that he could not climb into or drive a big truck but could drive his personal truck. (Id.) The Petitioner testified that he worked part-time for AMC Pilot Car from September 2019 through February 2020, escorting oversized loads, which he said caused pain and swelling. (T. 38-39, 68)

The Petitioner returned to Dr. Solman on October 18, 2019, and complained of right hip and right knee pain. (PX8) Examination of the knee was unchanged. (Id.) Examination of the right hip showed pain with log roll, impingement and Stinchfield testing. (Id.) Dr. Solman opined that the Petitioner may have had a labral tear in the right hip and that the hip pain was related to the work accident. (Id.) He recommended a patellofemoral arthroplasty for the right knee, ordered an MRI of the right hip and continued work restrictions. (Id.)

On February 13, 2020, the Petitioner was involved in a rear-end motor vehicle accident while driving a pilot car, injuring his back, upper shoulder and the back of his head. (T. 40-41) He denied any aggravation of his knee and hip conditions by the motor vehicle accident. (T. 41) Records from Heartland Primary Care/Sunflower Medical Group show that the Petitioner underwent treatment for his back and left shoulder as a result of the accident. (RX10) He did report that he thought his right leg was pinned initially, and he had pain to his right inner thigh.

(Id.) There was no mention of knee or hip injuries. (Id.) The Petitioner testified that the driver's side door was pushed in, and his whole body was pinned. (T. 54) He did not remember saying his right knee was pinned. (Id.)

At a visit to Dr. Solman on April 10, 2020, the Petitioner reported that he was beginning to have pain in his left knee from compensating for the right-sided pain. (PX8) Dr. Solman believed this would improve if the issues with the right leg were repaired. (Id.) He reiterated his prior recommendations and added restrictions of no climbing ladders or stairs. (Id.)

On November 23, 2020, Dr. Solman performed the patellofemoral arthroplasty. (Id.) On December 7, 2020, Dr. Solman gave work restrictions of: no lifting, pushing or pulling greater than two pounds; no repetitive bending, twisting or squatting; no repetitive motions with the right lower extremity and no overhead lifting. (Id.) Due to increased swelling and tightness in the right knee, Dr. Solman performed a right knee evacuation and drainage and an irrigation of a right knee prepatellar hematoma on December 8, 2020. (Id.) On December 9, 2020, he ordered the Petitioner off work. (Id.) The Petitioner underwent physical therapy at Marquette Physical Therapy from December 21, 2020, through February 11, 2021, for a total of 20 visits. (PX9) The Petitioner testified that while waiting for the surgery, his ability to get around and walk was terrible, causing him to lean to his left side and hobble along. (T. 45-46)

An MRI of the Petitioner's right hip was performed February 8, 2021. (RX1) On February 24, 2021, Dr. Solman reported that the study showed no evidence of significant osteoarthritis changes but there was some abnormality at the anterior lateral labrum that could have represented a small tear. (PX8) He recommended an injection. (Id.) On April 7, 2021, the Petitioner reported that the swelling in his right knee had gone down, and his strength and motion were getting better but his pain was not. (Id.) He said the injection gave him relief for a few days. (Id.) He reported

that, because of favoring the right leg, he was having pain in his left hip and knee. (Id.) An examination showed improvement in the right knee, positive impingement signs and pain with rotational stress in both hips and global tenderness around the peripatellar area and patella facets of the left knee. (Id.) Dr. Solman reported that the Petitioner's right knee pain was out of proportion to what he would expect and recommended blood tests to rule out infection. (Id.) He reiterated that the Petitioner likely had a labral tear. (Id.) Regarding the left hip and knee, he stated that limping on his right leg for two and a half years took its toll on the opposite extremity and caused compensatory pain. (Id.)

On May 12, 2021, the Petitioner reported the same complaints plus groin and low back pain. (Id.) An examination of the right knee appeared normal except for thickened synovitis and generalized tenderness around the patella facets and anterior patella bursa area. (Id.) Examination of the hips showed pain with Stinchfield testing, positive impingement sign and full range of motion. (Id.) The left knee had pain with hyperextension and tenderness in the patellofemoral joint over the medial and lateral patella facets and negative instability tests. (Id.) Dr. Solman opined that the Petitioner may have had scar tissue in his right knee due to the significant and severe amount swelling and the hematoma that might require debridement. (Id.) He recommended an injection for the right hip and MRIs of the left hip and knee. (Id.)

At a visit on June 18, 2021, Dr. Solman noted that blood tests revealed signs of a possible infection, and he performed an aspiration of the right knee. (Id.) On July 21, 2021, Dr. Solman reported that a second set of blood tests were normal and stated that he believed the Petitioner's continued right knee pain was the result of further degeneration of the patellofemoral joint and the remainder of the joint. (Id.) He recommended a total knee replacement for the right knee and reiterated his recommendation for hip injections and MRIs of the left hip and knee. (Id.)

On July 29, 2021, a records review was conducted by Dr. Matthew Collard, an orthopedic surgeon at Orthopedic Specialists. (RX1) He reviewed the Petitioner's medical reports from Concentra, X-ray and MRI reports, records from Dr. Bruce, the operative reports, physical therapy records from Blue Valley Physical Therapy & Sports Medicine (not produced at arbitration), Dr. Solman's records and records from the motor vehicle accident. (Id.) Dr. Collard stated in his report that the work accident was a reasonable mechanism of injury for a possible hip injury but felt the Petitioner's hip issues were more related to the his weight, chronic low back pain and long-standing conditions of pincer impingement and tronchanteric bursitis. (Id.) He said it was plausible that the Petitioner's ongoing pain pattern would have been related to the motor vehicle accident but noted there was no complaint of hip pain during the two emergency-room visits after the accident. (Id.) He stated that treatment to date had been reasonable and necessary to determine causation related to the work injury, but further treatment for the hips would not be appropriate. (Id.) Regarding the left knee, Dr. Collard said the Petitioner's complaints were completely unrelated to the work injury and were likely related to an underlying arthritic condition. (Id.)

The Petitioner underwent a Section 12 examination of his right knee on November 16, 2021, by Dr. Timothy Farley, an orthopedic surgeon at Motion Orthopaedics. (RX3) Dr. Farley took a history from the Petitioner, examined him and reviewed medical records and imaging study reports. (Id.) He reported a normal ligamentous examination with firm endpoints and advanced degenerative joint disease in the medial compartment. (Id.) He stated that the Petitioner's subjective complaints were out of proportion with what he would expect from his objective findings and felt the Petitioner's pain complaints were clear symptom magnification. (Id.) Dr. Farley did not feel that the work injury was a causative factor leading to the right patellofemoral arthroplasty. (Id.) He said the MRIs showed a chondromalacia without a specific chondral defect

that would have resulted from a direct blow upon the knee. (Id.) He said the chondromalacia was likely, in all likelihood, dramatically influenced by the Petitioner's morbid obesity. (Id.) He did not think the work injury caused or permanently aggravated a condition that led to the partial knee replacement because the replacement would have significantly reduced the overall level of symptoms if the Petitioner were suffering from symptomatic patellofemoral arthritic pain. (Id.)

Dr. Farley did not believe the right knee treatment was reasonable, necessary or causally related to the work accident because the treatment was related to the Petitioner's inherent condition of symptomatic degenerative arthritis that was exacerbated and accelerated by morbid obesity. (Id.) Because he was concerned about the veracity of the Petitioner's complaints and symptom magnification, Dr. Farley said he would be very cautious about recommending a total right knee replacement. (Id.) Dr. Farley also said the likelihood of complication would be higher because of the Petitioner being morbidly obese and having diabetes. (Id.) He thought the Petitioner should be able to work as a truck driver with no restrictions and found the Petitioner to be at maximum medical improvement for his right knee. (Id.)

The Petitioner's next visit to Dr. Solman was on December 15, 2021, at which time Dr. Solman had reviewed reports from Dr. Collard and Dr. Farley. (PX8) Examinations of the Petitioner's knees and hips were unchanged, and Dr. Solman continued to recommend a total right knee replacement, hip injections and MRIs of the left hip and knee. (Id.) Dr. Solman continued off-work orders that were in place since December 9, 2020. (Id.)

On January 4, 2022, the Petitioner underwent an examination by Dr. Daniel Stechschulte, an orthopedic surgeon at the Kansas City Orthopedic Institute who reviewed the Petitioner's medical records and imaging study reports and examined the Petitioner. (PX16) Dr. Stechschulte diagnosed the Petitioner with right knee pain and felt that the work injury was the primary and

prevailing factor for his current and ongoing right knee complaints. (Id.) Although he recommended further treatment with conservative measures (physical therapy, bracing, weight loss and viscosupplementation injections) being exhausted before surgical intervention, he acknowledged that this was unlikely to alleviate the Petitioner's complaints and stated that he may ultimately require a right patellofemoral arthroplasty. (Id.) Dr. Stechschulte recommended light duty work restrictions of no kneeling, squatting, climbing, crawling or prolonged standing. (Id.)

Dr. Solman testified consistently with his records at a deposition on January 25, 2022. (PX11) He said the Petitioner was continuing to have problems with his knee after the surgeries by Dr. Bruce because the hemarthrosis caused atrophy and weakness in his quadriceps and because of chondromalacia or arthritic changes within the patellofemoral joint. (Id.) He explained that patients potentially suffer pain when having any type of patellofemoral disease (cartilage damage or significant arthritis) and a weakened quadriceps tendon, which allows the patella to not appropriately track or glide along the grove of the thigh bone where it normally sits. (Id.) He said he felt that Dr. Bruce's finding of maximum medical improvement was premature, given that the Petitioner had issues with his knee. (Id.)

As to his recommendation for a total right knee replacement, Dr. Solman stated that the Petitioner appeared to have some advancement of his condition of the right knee, which would make the total knee replacement more appropriate. (Id.) He explained that when patients have patellofemoral arthroplasty procedures that have failed to eliminate pain, sometimes the only recourse is to convert the patellofemoral arthroplasty to a total knee arthroplasty. (Id.) He said the work accident was mechanism of injury that could also cause right hip pathology in that the fall on his left knee imparted force directly to the hip joint along with the knee joint. (Id.) Regarding the Petitioner's left-sided complaints, Dr. Solman explained that favoring one leg forces

a person to put more force, pressure and weight on the opposite leg, and that can lead to compensatory overuse and pain. (Id.) He said he continued off-work restrictions because he believed it would be unsafe for the Petitioner to climb in and out of a truck and said he was not sure the Petitioner could sustain a full workday of driving a car. (Id.)

Dr. Farley testified consistently with his report at a deposition on February 1, 2022. (RX2) He explained that the MRI report of November 30, 2018, did not comment on a cartilage defect, which would occur when cartilage breaks off that could happen with a fall on the knee. (Id.) He said the report commented on chondromalacia, which is a chronic thinning of the cartilage consistent with arthritis. (Id.) He said the operative reports also were consistent with a degenerative condition as opposed to an acute condition. (Id.)

The Petitioner testified that during the past three years, he had been favoring his left side. (T. 46) He said his left hip was hurting and his left knee was grinding and popping. (T. 46-47) He said he was better than before his first surgery, but has had trouble walking, sleeping and sitting and driving. (T. 64, 40) He identified the photos taken in November 2021 showing swelling to his right knee. (T. 48-49) He said he has good days and bad days, experiencing flare-ups walking around the house, walking the dog and going to the grocery store. (T. 49) The Petitioner wanted to undergo the treatment recommended by Dr. Solman so that he could go back to work. (T. 51) He testified that he has not tried to get another job within his restrictions since December 1, 2021, because he did not know of anything he could do within his restrictions. (T. 67-68)

The Respondent submitted video surveillance from May 2019 and February and March 2022 that included footage of the Petitioner getting and out of his Ford Expedition and going to the post office, physical therapy, restaurants and convenience stores. (RX7) There also was a video of the Petitioner pushing snow off his deck with a shovel for approximately three minutes

and cleaning snow and ice off his vehicle for approximately seven minutes. (Id.) In all of the videos, the Petitioner walked with a limp. (Id.) Prior to viewing the video, the Petitioner acknowledged that he shoveled snow in moderation – pushing or sweeping it off his deck so that he wouldn't fall when letting his dog out. (T. 75)

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 Petitioner fell on his right knee while exiting the back of his trailer after dropping off a load for the Respondent. The Petitioner complained of pain and underwent treatment at the direction of the Respondent. The initial diagnosis was a knee contusion. The dispute in this case is causation, rather than accident, and will be addressed below.

Thus, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that his injuries occurred in the course of and arose out of his employment.

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

An accident need not be the sole or primary cause as long as employment is a cause of a claimant's condition. *Sisbro, Inc. v. Indus. Comm'n,* 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278

Ill.Dec. 70 (2003). An employer takes its employees as it finds them. *St. Elizabeth's Hosp. v. Workers' Comp. Comm'n,* 371 Ill.App.3d 882, 888, 864 N.E.2d 266, 309 Ill.Dec. 400 (5th Dist. 2007). A claimant with a preexisting condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Comm.,* 92 Ill. 2d 30, 36, 440 N.E.2d 861, 65 Ill.Dec. 6 (1982). Employers are to take their employees as they find them. *A.C.& S. v. Industrial Comm'n*, 304 Ill.App.3d 875, 883, 710 N.E.2d 837, 238 Ill.Dec. 40 (1st Dist. 1999)

When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *St. Elizabeth's Hospital*, 371 Ill.App.3d at 888.

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).

The doctors agreed that the Petitioner had arthritic changes in his joints and was obese. Dr. Farley believed the Petitioner was exaggerating his right knee condition and that what condition he did have was caused by arthritis and obesity and not the accident. Dr. Farley relied on the MRI reports that pointed out chondromalacia but did not mention a chondral defect. However, from examining Dr. Farley's report and testimony, it did not appear that he viewed the actual films from

the MRIs. In addition, his examination occurred three years after the accident and after the Petitioner had already undergone four surgeries. For these reasons, the Arbitrator gives little weight, if any, to Dr. Farley's opinions.

Dr. Collard's records review was a mixed bag. Although he acknowledged that the accident could have been a mechanism of injury for the Petitioner's right hip complaints and found the treatment the Petitioner had received was reasonable and necessary, he believed the Petitioner's condition was more related to other factors. Dr. Collard did not find the Petitioner's left-sided complaints to be causally related to the accident but did not address the effects of the Petitioner compensating for his right-sided pain for an extended period. Dr. Collard did not physically examine the Petitioner, and it appears that he also only reviewed the MRI reports and not the films themselves. He did not weigh in on the Petitioner's right knee condition. For these reasons, the Arbitrator gives little weight to his opinions.

The surveillance videos were not compelling. Although one video showed the Petitioner clearing snow and ice from his deck and vehicle, these were not activities that would negate Dr. Solman's diagnosis. They did show the Petitioner consistently walking with a pronounced limp.

As the Petitioner's treating physician, Dr. Solman had more opportunities to be familiar with the Petitioner and the progression of his conditions over a period of two and a half years. He explained how the accident, along with the effects of the surgeries, was a contributing cause to his right knee and hip conditions. Dr. Stechschulte agreed with Dr. Solman regarding the Petitioner's right knee. Dr. Solman also explained how the Petitioner's favoring his right side for the past three or so years has caused him to develop issues in his left knee and hip. For these reasons, the Arbitrator gives greater weight to Dr. Solman's opinions.

The circumstantial evidence also supports Dr. Solman's opinions. The Petitioner had no knee or hip complaints prior to the accident. He was able to perform his duties as a semi-truck driver before the accident but was unable to afterwards.

Lastly, there was no evidence to show that the motor vehicle accident February 13, 2020, broke the chain of causation for the Petitioner's current condition. Other than the Petitioner's statement that his knee may have been pinned, there was no other indication that he injured his knees or hips in the accident.

The Arbitrator finds that the Petitioner injured his right knee and hip in the fall and that, despite treatment, these conditions have worsened over time. Regarding the Petitioner's left-sided conditions, there is competent evidence that this is due to the Petitioner having compensated for his right knee issues for a long period. Although arthritis and obesity have contributed to the Petitioner's conditions, the work accident was the mechanism that set in motion the issues that have led to the Petitioner's current conditions.

Therefore, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that his bilateral knee and hip conditions are causally related to the work accident.

Issue (G): **What were the Petitioner's earnings?**

The issue is whether the per diem amounts the Petitioner was paid should be included in his average weekly wage. Generally, amounts paid as reimbursement for travel expenses are not part of a claimant's earnings for the purpose of calculating average weekly wage. *United Airlines v. Ill. Workers' Comp. Comm'n,* 282 Ill.App.3d 437, 440, 887 N.E.2d 888, 320 Ill.Dec. 744. (1st Dist. 2008) The rationale behind this rule is that such payments merely reimburse the claimant for employment-related expenses that the claimant would not otherwise incur, and, therefore, the claimant would not suffer any economic loss if he or she fails to receive such reimbursements once

the employment ceases. *Id*., citing *Swearingen v. Industrial Comm'n,* 298 Ill. App. 3d 666, 670-671, 699 N.E.2d 237, 232 Ill. Dec. 790 (1998). However, payments designated as travel expenses should be included in an average weekly wage to the extent that such payments represent real economic gain rather than reimbursement for actual expenses incurred. *Id*. The Court concluded that the per diem payments that claimant received that exceeded her actual expenses should be included in her average weekly wage. *Id*. at 441-442.

In this case, the Petitioner testified that he spent no more than $30 of his $63 per diem on his actual expenses. The Arbitrator finds that the extra $33 per diem should be included in his average weekly wage. The Petitioner was paid $14,338.91 in wages for the period of June 23, 2018, through November 19, 2018, which was 150 days. He received total per diem for that time of $7,560.00, which equates to $63 for 120 days. At a rate of $33 per day, the Petitioner's total excess per diem during his 150 days of employment was $3,960.00. Adding together the wages and excess per diem equals total income of $18,188.91 for that period or $121.26 per day. Therefore, the Arbitrator finds the Petitioner's average weekly wage to be $848.42.

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).

As stated above, the Arbitrator gives greater weight to the opinions of Dr. Solman, who believes the Petitioner needs a total arthroplasty of his right knee, continuing treatment for his right hip and further diagnostics and treatment for his left knee and hip. Although the Petitioner has

undergone considerable treatment, he still has not returned to his condition prior to the accident. Dr. Solman believes further treatment can help the Petitioner to reach a condition that would allow him to return to work.

Therefore, the Arbitrator finds that the Petitioner is entitled to prospective medical care, specifically further evaluation and treatment, including surgical intervention, physical therapy and follow-up care for his bilateral knees and hips as recommended by Dr. Solman. The Respondent shall authorize and pay for such.

Issue (L): What temporary benefits are in dispute? (TTD)

According to the Request for Hearing (AX1), the parties dispute temporary total disability benefits after November 30, 2021. 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). From November 30, 2021, through the date of arbitration, the Petitioner was ordered off work by Dr. Solman. As stated above, the Arbitrator gives greater weight to his opinions than the other doctors.

Therefore, the Petitioner was entitled to TTD benefits from November 14, 2018, through March 11, 2022, representing 173 and 2/7 weeks. The Respondent is entitled to a credit of $43,526.07 in TTD benefits paid plus $31.414.96 that was to be paid within 30 days of arbitration.

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	18WC007194
Case Name	Adrian Cangas v. Pavement Systems, Inc
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0315
Number of Pages of Decision	23
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Kenneth Lubinski
Respondent Attorney	Gregory Rode

DATE FILED: 7/24/2023

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes) Arbitrator's Affirm with changes ☒ Reverse - finding cervical spine not CC to work accident. Reverse to deny med exp. & Prospective cervical treatment X Strike part of CC finding, mod CC. Modify TTD award, modify medical award ☒ Modify down	☐ 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

ADRIAN CANGAS,

Petitioner,

vs. NO: 18 WC 07194

PAVEMENT SYSTEMS, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b)/8(a) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, medical expenses, prospective medical, and evidentiary rulings, 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 Findings of Facts and affirms the finding of causation between Petitioner's left shoulder, left knee, and right wrist and the work accident. However, the Commission reverses the Arbitrator's decision regarding causation between the Petitioner's cervical spine condition and the work accident and finds Petitioner's cervical spine condition is not causally related to the accident. Based upon the Commission's finding that the Petitioner's cervical condition is not causally related to the work accident, the

Commission also reverses the award of prospective medical for cervical spine surgery, reverses the Arbitrator's award with respect to the cervical medical bills and further modifies or reverses the Arbitrator's award with respect to various other medical bills outlined below and modifies the TTD award as outlined below. These conclusions are based upon the Commission's modification of the Arbitrator's Conclusions of Law as follows:

Issue F, whether Petitioner's current condition of ill-being is causally related to the injury?

The Commission strikes paragraphs two through four under the Arbitrator's Conclusions of Law, Issue F and replaces it with the following causation analysis:

Petitioner testified on October 25, 2017, he slipped and fell to the concrete floor striking his left knee with his left leg bent underneath him and landing on the floor with a twisting motion of his left arm/shoulder and striking his right hand. (T. 36-41) Petitioner reported to the Palos Community Hospital emergency department on October 29, 2019, that he had a work accident and injury to his left knee, right hand/wrist, right index finger, and left shoulder/arm. (PX 2) Petitioner prepared a Form 45 on November 1, 2017, and indicated injury to his left knee, left shoulder, and right hand. (RX 3)

Respondent's office manager, Lisa Debellis, ("Debellis") testified on behalf of Respondent. Debellis testified she was present when Petitioner slipped and fell and recounted that he fell mostly to his hands and arms. She further testified that it was not a significant impact and she described Petitioner going down slowly. Debellis further testified that she did not see any type of whiplash or hyperextension motion of Petitioner's neck during the fall. (T.184-188)

Petitioner was seen by Dr. Regan at Southside Orthopedics on October 30, 2017. Petitioner advised the doctor of his slip and fall work injury with complaints of left knee and left shoulder pain. Petitioner treated there with ongoing left knee and left shoulder complaints and was kept off work until the January 15, 2018, visit. On January 15, 2018, Dr. Regan noted that Petitioner's most recent MRI of the shoulder is fairly unremarkable. Petitioner last saw Dr. Regan on February 5, 2018, noting no cervical or radicular complaints throughout that record. (PX 4)

Petitioner was seen by Dr. Ronak Patel at Hinsdale Orthopedics February 21, 2018, and provided a history of the work accident and complaints regarding his left knee and left shoulder. Petitioner reported he had dull pain about the posterior and lateral aspect of the left knee, and provided a history of two prior pre-accident left knee surgeries in 2003 and 2017. On physical exam there was no evidence of quad atrophy and tenderness only at the posterolateral joint line. He had negative anterior drawer and posterior drawer tests, stability was good, negative patellar compression with no palpable click or pain but Dr. Patel noted positive McMurray and Apley's Compression tests. Dr. Patel further documented that it could be possible the shoulder pain was from cervical etiology, however, his physical examination revealed normal cervical range of motion, normal muscle strength and a normal neurologic exam. Petitioner last saw Dr. Patel for

his left knee on April 17, 2018, when Dr. Patel confirmed that he could offer nothing further for Petitioner's left knee. He did not recommend surgery or further treatment for the knee at that time. (T. 104; RX7) Dr. Patel continued to see Petitioner through June 5, 2018, his last office visit. At that time, Dr. Patel administered another corticosteroid injection and released Petitioner PRN and to return to regular work/activity with no restrictions on June 5, 2018. He was, however, also provided a lifting restriction of no greater than 10-15 lbs. and no prolonged standing or prolonged walking. Dr. Patel recommended Petitioner follow up with Dr. Darwish going forward.

Petitioner first saw Dr. Ashraf Darwish at Hinsdale Orthopedics March 1, 2018, and, for the first time, five months post accident, Petitioner noted his chief complaint was cervical pain. A cervical x-ray taken at that time reported reversal of normal lordosis and severe degenerative changes from C2 through C7 levels and Dr. Darwish recommended a cervical MRI. The MRI performed on May 11, 2018, revealed C4-5 large posterior disc osteophyte causing severe left and moderate severe right foraminal narrowing, as well as multiple levels of bilateral foraminal narrowing, degenerative disc disease, and osteophytes. (PX 3)

Dr. Darwish opined that there was a causal relationship between the accident and Petitioner's cervical condition, recommended an anterior cervical discectomy and fusion from C3 through C6, and restricted Petitioner from work. (RX9, 54-56; T. 1148-1150). Dr. Darwish admitted at deposition that he did not have the benefit of reviewing Petitioner's prior treatment, was not aware of Petitioner having prior neck injuries and was unaware of Petitioner's motor vehicle accident in September 2017. Dr. Darwish further testified the diagnostic findings were long standing and consistent with Petitioner's age. Dr. Darwish admitted that a patient's pain can vary and change the range of motion between examinations, which can all be from degenerative conditions and their natural progression, and did not require a trauma for the condition to become symptomatic. (PX 7, T.57-50) Dr. Darwish further admitted that the pain diagram Petitioner completed did not designate any cervical symptoms. Dr. Darwish indicated his concern was with treating the patient, rather than causation of the symptoms. Dr. Darwish did not view the surveillance video showing Petitioner doing manual type work, lifting and moving his neck and twisting his body. (RX28) Dr. Darwish testified his 3-level surgery recommendation was based on physical exam findings, subjective complaints, and diagnostic findings. He further testified if a patient came in with no pain but diagnostic and exam findings, he would still recommend the surgery. (PX 7, 62-65)

Dr. Jay Levin examined Petitioner on December 13, 2018 at Respondent's request pursuant to Section 12 and authored a report dated December 13, 2018. (RX21, 15; DepX3) Dr. Levin reviewed Petitioner's treatment records and diagnostics, as well as the surveillance video. Dr. Levin testified that it was his opinion that the Petitioner did not sustain an injury to his cervical spine from the occurrence of October 25, 2017. Dr. Levin testified that Petitioner did not suffer any cervical injury caused, aggravated, or accelerated by the accident. (RX21, 41-42) He testified there was nothing in the medical records reporting a mechanism of injury to the cervical spine, nor were there any records reporting symptoms in the cervical spine. Dr. Levin noted that there was no description of a hyperextension or of Petitioner's neck snapping forward and backwards. Dr.

Levin testified there was nothing indicating a cervical pain component in the records. (RX21, 17-18, T. 41-42) Dr. Levin testified he had specifically asked Petitioner and Petitioner denied having any neck pain immediately after the fall. (RX22, T.65-66)

The opinions of Dr. Levin are supported by the preponderance of the evidence that Petitioner had no initial cervical or radicular complaints for months after the accident. Dr. Levin noted Dr. Patel indicated a possible cervical component of Petitioner's issues at the February 21, 2018, visit, however, that was inconsistent with Dr. Patel's physical findings of a normal cervical examination. (RX21, Dep X 4) The Commission finds that the opinions of Dr. Levin are more credible and persuasive than those of Dr. Patel or Dr. Darwish.

Dr. Levin testified that Petitioner sustained a left shoulder contusion/strain in the October 25, 2017, accident. (RX21, 30; T. 1396) Further, Dr. Levin testified that Petitioner did not require future treatment to the left shoulder with respect to any injury sustained on October 25, 2017, and finally that Petitioner had reached maximum medical improvement (MMI) for the left shoulder as a result of his injury to the left shoulder sustained on October 25, 2017 within four to six weeks post injury. (RX21, 33-34; T. 1399-1400).

On cross-examination, Dr. Levin further testified regarding Petitioner's shoulder pain, noting that he performed a Spurling test on the right at the time of the IME and Petitioner reported that he had pain on the left which was an unexpected finding; symptoms should have been on the same side. (RX22, 90-92) Dr. Levin also performed a Speeds test, which was negative on physical examination bilaterally when Petitioner was assessed on December 13, 2018. Dr. Levin opined the negative Speeds test was evidence of the fact that Petitioner did not have a labral tear of the left shoulder. Finally, Dr. Levin opined that in the video surveillance, by description of taking a large picture with a frame and being able to carry it to the side of the home in no apparent distress, would be inconsistent with a shoulder labral tear of clinical relevance. Moving a tire from the rear of a truck, lifting it up and placing it on the ground, that would also be inconsistent with a clinically relevant labral tear in the shoulder. (RX22, 97, 110-111)

Dr. Levin further opined that Petitioner sustained a left knee contusion in this accident. His diagnosis was prior history of a left knee arthroscopic meniscectomy in 2003 and March of 2017 consistent with the Petitioner's comments when he was seen for initial assessment December 13, 2018. He opined Petitioner was at MMI for his left knee within four to six weeks after the work accident. (RX22, 34, 35; T. 1401-1402) Dr. Levin had reviewed the MRIs of Petitioner's left knee completed both before and after the October 25, 2017, accident and found no difference between the two studies. *Id.*. Dr. Levin opined that there was a lack of recurrent lateral meniscal tear, the interior cruciate ligament appears to be intact, and the posterior cruciate ligament was intact. (RX22, 109)

Dr. Levin further testified that Petitioner suffered a right wrist sprain, based upon his clinical examination, X-ray findings and nature of the injury. Dr. Levin testified that Petitioner was at MMI for his right wrist four to six weeks post accident and would not require any additional

treatment to his right wrist as it relates to the accident of October 25, 2017. (RX21, 39-40) Dr. Levin further noted that at the October 25, 2017, visit with physician assistant Andrew Dwyar, no continued clinical complaints regarding his right wrist were noted in the follow-up medical records. Thus, with that additional information and totality of information related to his right wrist noted in his report and testimony, Dr. Levin opined Petitioner should have been able to return to work by zero days to four weeks post injury regarding his right wrist.

The Commission, in relying on Dr. Levin's opinions, supported by the preponderance of evidence, finds that Petitioner failed to meet his burden of proving his cervical condition was causally related to the accident. The Commission further relies upon Dr. Levin's opinions regarding MMI for the Petitioner's left shoulder and right hand and his ability to return to work on or about December 7, 2017. With respect to the left knee, the Commission finds that Petitioner reached MMI when he was released by Dr. Patel on June 5, 2018.

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 Commission strikes the Arbitrator's paragraphs under Issue J in the Conclusions of Law and substitutes the following:

As Petitioner failed to prove that the cervical condition is causally related to the accident, Petitioner failed to prove entitlement to medical expenses regarding his cervical condition. Thus the Commission reverses the Arbitrator's award for medical expenses with respect to the cervical treatment.

Further, the Commission reverses the award of the Palos Community Hospital medical bill in the amount $4,309.00, finding that the bill was paid in full by Respondent's carrier and has a zero balance.

The Commission further reverses, in part, the award of the Hinsdale Orthopedics medical bill in the amount of $4,275.00. The Commission affirms the award for medical treatment related to the left knee through June 5, 2018, in the amount of $1,237.00 (dates of service February 21, 2018, March 13, 2018, April 10, 2018, April 17, 2018, and June 5, 2018), and those bills shall be paid pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act. Based upon the Commission's finding the cervical condition is not related to the work accident, the Commission denies the charges for medical treatment rendered to the cervical spine.

The Commission further reverses the award of the Southside Orthopedics medical bills in the amount of $5,095.59. The Arbitrator's award appears to have been based solely on Petitioner's summary of medical bills in PX1, however, no supporting medical bills were introduced into evidence, thus, as such, those bills are denied in their entirety.

The Commission modifies the award of the Heights Physical Therapy medical bill and awards the balance due in the amount of $303.00 pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act.

Issue K, whether Petitioner is entitled to any prospective medical care?

The Commission strikes the three paragraphs under Issue K in the Arbitrator's Conclusions of Law and substitutes the following:

The Commission finds that Petitioner failed to prove a causal connection between his cervical spine and the work accident and thus prospective medical care for the cervical spine is denied.

Issue L, whether Petitioner is entitled to temporary total disability benefits?

The Commission strikes the four paragraphs under Issue L in the Arbitrator's Conclusions of Law and substitutes the following:

The Commission modifies the Arbitrator's award of TTD for the following reasons.

> Temporary total disability benefits are awarded for the period from when an employee is injured until he or she has recovered as much as the character of the injury will permit. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App 3d 752, 760, 800 N.E. 2d 819, 279 Ill. Dec. 531 (2003). A person is totally disabled when he or she cannot perform any services except those that are so limited in quantity, dependability, or quality that there is no reasonably stable market for them. *Dolce v. Industrial Comm'n*, 286 Ill. App. 3d 117, 122, 675 N.E. 2d 175, 221 Ill. Dec. 268 (1996). A claimant seeking TTD benefits must prove not only that he or she did not work, but also that he or she was unable to work. *Anders*, 332 Ill. App. 3d at 507. The dispositive test is whether the claimant's condition has stabilized, *i.e.*, reached MMI. *Mechanical Devices*, 344 Ill. App. 3d at 759. The factors to consider in deciding whether a claimant's condition has stabilized include (1) a release to return to work; (2) the medical testimony about the claimant's injury; and (3) the extent of the injury. *Buese v. Industrial Comm'n*, 299 Ill. App. 3d 180, 183, 701 N.E. 2d 96, 233 Ill. Dec.453 (1998).

In this case, the Commission relies not only upon Dr. Levin's opinions that Petitioner could return to work four to six weeks post accident for the left shoulder and right wrist, that the Petitioner's cervical condition is unrelated, but also upon the January 9, 2018, video surveillance which showed Petitioner was considerably more active than he claimed, thus tainting his credibility. The surveillance demonstrates Petitioner walking without a cane or limp, unloading and carrying large items from his truck, including what he described as "foam" of a car seat, a

plastic reinforcement that goes under a bumper, (T. 128), car parts, a large painting, a wire cable, a milk crate, a side panel, the top tray of a toolbox, a bucket seat and a tire. (RX28) He was also seen entering and exiting his truck, leaning under the hood of his truck and going from a prone position (laying) to a standing position. Petitioner further testified that he currently walks on a nice day but his knee will hurt if he overdoes it. (T. 84-85) Petitioner testified that he maintained his Class A CDL and had maintained it through the date of the arbitration hearing. (T. 95) His Class A CDL allows him to operate any vehicle weighing up to 80,000 pounds, and combination vehicle, a truck pulling a trailer, and a tanker. *Id.* Petitioner testified that he drives a pickup. (T. 100, 129) Petitioner testified that he was able to climb stairs. (T. 149150) The Commission finds Petitioner's testimony regarding his past training and certifications and active CDL coupled with the video surveillance is compelling evidence that the Petitioner is capable of working.

John Land, Respondent's Corporate Secretary, testified that Respondent could modify a job for Petitioner to return to light-duty work, including a 10-pound lifting restriction, and there was another mechanic who could provide assistance available for lifting. (T. 204-207) Further, Land confirmed that there were steps on all the equipment that Petitioner operated. (T. 211-212)

In *Land & Lakes Co*., the Court held that the Petitioner was entitled to TTD benefits following his voluntary retirement because there was competent evidence that Petitioner was unable to work due to his injuries and he retired because his benefits were terminated and he needed the income. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 595 (2nd Dist. 2005). However, the Commission finds that this case is more similar to the facts in *Sharwarko v. Industrial Commission*. *Sharwarko v. Ill. Workers' Comp. Comm'n*, 2015 IL App (1st) 131733WC, 28 N.E.3d 946, 2015 Ill. App. LEXIS 128, 390 Ill. Dec. 293. In *Sharwarko,* the Court affirmed the Commission's decision to deny TTD beyond the date the Petitioner voluntarily retired where there was evidence that the employer would have accommodated the Petitioner's restrictions had he not retired.

The *Sharwarko* Court held:

> When, as in this case, work within an injured employee's medical restrictions is available and the employee does not avail himself of the opportunity by voluntarily retiring, continued payment of TTD benefits does not further that purpose. In such a case, the employee's lost earnings are the result of his volitional act of removing himself from the work force, not his work-related injuries. As we have held before, to establish entitlement to TTD benefits, an injured employee must prove not only that he did not work, but also that he was unable to work. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 832, 769 N.E.2d 66, 263 Ill. Dec. 864 (2002). We believe, as did the Commission, that when work for an injured employee falling within his medical restrictions is available, the employee's voluntary retirement is the equivalent to a refusal to work within those restrictions, authorizing the termination of TTD benefits before the employee has reached MMI. See *City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090, 666 N.E.2d 827,

217 Ill. Dec. 158. (1996). *Sharwarko v. Ill. Workers' Comp. Comm'n*, 2015 IL App (1st) 131733WC, P49, 28 N.E.3d 946, 956.

Petitioner was 65 years old at the time of the subject accident and testified he has not worked since the accident except the one day of work at the City of Chicago, the Saturday following this Wednesday accident. There is no evidence in the record that Petitioner ever asked Respondent if they could or would accommodate his restrictions. (T. 120) Respondent's witness, Land, credibly testified that Respondent would have accommodated Petitioner's restrictions. Instead, Petitioner applied for and began receiving social security very shortly after the accident, in January 2018. (T. 121)

Although the Petitioner testified that he had not retired from the City of Chicago position, there is no evidence Petitioner contacted Respondent for light duty work or that he intended to return to work with Respondent. Thus, even though Dr. Patel authorized Petitioner off work for the left knee through June 5, 2018, at which time the Petitioner was placed on work restrictions of no lifting greater than 10 lbs. the Commission finds that Petitioner is not entitled to TTD from January 1, 2018 to June 5, 2018. The evidence and testimony establish that Petitioner had effectively removed himself from the job market when he opted to receive social security without attempting light-duty work for Respondent. The video surveillance documents that Petitioner was capable of working light-duty. The Commission finds Petitioner failed to sustain his burden of proving that he was unable to work for Respondent. In so doing, Petitioner failed to meet the burden of proof necessary in order to sustain entitlement of TTD benefits after he applied for and received his social security benefits. Therefore, the Commission finds Petitioner is entitled to TTD benefits commencing October 26, 2017, through January 1, 2018, and TTD benefits thereafter are denied.

Finally, the Commission affirms the Arbitrator's evidentiary rulings.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on August 12, 2022, is hereby modified for the reasons stated herein including reversal on the issue of causation between the cervical spine and the work accident, reversal on the award of cervical medical treatment and prospective cervical medical expenses, reversal on the award of certain medical bills as described herein, modification of the award of TTD, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $1,027.09 per week for a period of 9-5/7 weeks, commencing October 25, 2017 through January 1, 2018, (total TTD $9,977.45), that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act. Respondent shall be given credit of $22,432.00 for TTD paid. 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 pay the sum of $303.00 for medical expenses at Heights Physical Therapy and the sum of $1,237.00 for medical expenses regarding the left knee at Hinsdale Orthopedics through June 5, 2018, under §8(a) and §8.2 of the Act. Medical expenses and prospective medical treatment regarding the cervical spine are, hereby, denied.

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

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

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

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.

July 24, 2023

o-5/23/23
KAD/bsd

/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	18WC007194
Case Name	Adrian Cangas v. Pavement Systems, Inc
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Rachael Sinnen, Arbitrator

Petitioner Attorney	Kenneth Lubinski
Respondent Attorney	Gregory Rode

DATE FILED: 8/12/2022

/s/Rachael Sinnen,Arbitrator

Signature

INTEREST RATE WEEK OF AUGUST 9, 2022 3.04%

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)

Adrian Cangas
Employee/Petitioner

v.

Pavement Systems, Inc.
Employer/Respondent

Case # **18** WC **7194**

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 **6.3.22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **10.25.17**, 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 $**80,112.76**; the average weekly wage was $**1,540.63**.

On the date of accident, Petitioner was **65** 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 $**22,432.00** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**22,432.00**.

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

ORDER

Respondent to pay Petitioner directly for outstanding medical services outlined in Petitioner's Exhibit 1, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act, from Palos Community Hospital ($4,309.00), Hinsdale Orthopedics ($4,280.00), Southside Orthopedics ($5,095.59), and Heights Physical Therapy ($4,670.00).

Respondent shall approve and pay for an anterior cervical discectomy and fusion from C3-4, C4-5, and C5-6 including necessary post-operative care as prescribed by Dr. Darwish as provided in Section 8(a) and 8.2 of the Act.

Respondent to pay Petitioner directly for 240 2/7 weeks of TTD benefits (October 25, 2017 through June 3, 2022) at a weekly rate of $1,027.09.

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 12, 2022

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Adrian Cangas	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 18WC7194
Pavement Systems, Inc.	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on June 3, 2022 in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's Request for Hearing. Issues in dispute include causation, medical bills, temporary total disability "TTD" benefits, and prospective medical. Arbitrator's Exhibit "Ax" 1.

Petitioner's Job Duties

The Petitioner, a 65-year-old single male with no dependent children, began working for the Respondent as a heavy equipment mechanic and driver in its commercial pavement contractor business in approximately April 2016. (Arb. Ex. #1; Arb. Trans. pp. 10, 11, 13-14). Petitioner's job duties for the Respondent varied day to day. He worked on forty pieces of rolling equipment, and sixty to eighty pieces of small equipment. This included changing hoses, batteries, tires, oil, cylinders, plate compactors, radiators; fixing electrical problems; and repair and maintenance necessary to keep the machines running. He used hand tools and pneumatic tools. The job required him to climb, stoop, kneel, crouch, crawl, twist, pull, and lift. The weight of materials used in the job ranged from 2 ½ to 150 pounds. (Arb. Trans. pp. 14-21; Resp. Ex. #21 pp. 110-112). There were dollies, hoists, jacks, forklifts, and other employees available to assist with heavier items. (Arb. Trans. pp. 96-97).

Petitioner also worked for the City of Chicago Department of Aviation as a union motor pool truck driver at Midway Airport. This was a part-time job for the snow season. He operated tow vehicles, snow brooms, tanker trucks, loaders, pickup trucks, and snowplows. His job assignment at Midway depended on what was needed. In addition to operating this equipment, the Petitioner transported people and equipment in pickup trucks. The Petitioner's personal vehicle is a pickup truck. His personal vehicle is an automatic, as are the trucks Petitioner operated at Midway. (Arb. Trans. pp. 23-25, 99-100, 128-129).

Petitioner's Alleged Accident

On October 25, 2017, the Petitioner obtained the serial number from a plate compactor that was in the back of a pickup truck in Respondent's facility and needed for a warranty claim. He pulled the compactor to the edge of the pickup truck and turned it. He then walked toward a desk by the office door to obtain a piece of paper on which to write the serial number. (Arb. Trans. pp. 31-36). As he walked towards the desk, the Petitioner saw Respondent's office manager, Lisa, standing by the garbage can and said good morning to her. At that moment he slipped on glass beads that were on the floor. His right foot went straight out. His left foot stayed stationary on the concrete, and he twisted his body to the left. He fell to the floor, striking his left knee, body, and right hand on the floor as he fell. The Petitioner's Exhibit 13 was a vial of the glass beads. (T.45-47). Petitioner declined an ambulance but was brought a chair to assist him in standing up. (T.41-44). The Petitioner put his knee back in place because it had "popped out." (T.42).

Petitioner returned to work on a few small pieces, but was having pain in his left knee, his bicep on the left side, and his shoulder blade on the left and arm so he went home around two. (T.43). This was the last date that he worked at Pavement Systems. (T.49). The Petitioner did work one additional day at the City of Chicago on his next scheduled shift, which was on a Saturday night. (T.49).

Petitioner's Medical Treatment Post Accident

On October 29, 2017, the Petitioner was seen at Palos Hospital. (T.56). Petitioner stated that he slipped on glass beads 4 days ago, falling on his right wrist, right hip, left knee, and left shoulder. He had complaints of left arm, bicep, forearm, knee, and left shoulder pain. X-rays were taken. He was told to follow up with an orthopedic doctor.

On October 30, 2017, the Petitioner was seen by Dr. Regan. (T.57). Regan noted Petitioner fell on glass beads. He diagnosed left knee degenerative changes, rotator cuff strain.

On November 13, 2017, the Petitioner returned to Dr. Regan. (T.58). He had chief complaints of a left shoulder and left knee injury. Physical therapy for left knee and an MRI for shoulder were recommended.

On November 20, 2017, the Petitioner started physical therapy at Heights PT. (T.58). On that date, Petitioner presented for an initial evaluation for left shoulder injury. The diagnosis was left shoulder rotator cuff tear. The last date he was seen in physical therapy was January 15, 2018.

On November 28, 2017 the MRI of the left shoulder was performed. (T.58). The impression was no tears.

On December 4, 2017 Petitioner returned to Dr. Regan, at which time he was prescribed physical therapy for the shoulder.

On December 21, 2017, Petitioner saw Dr. Regan. On that date, Petitioner still has shoulder problems. An MRI of knee was recommended.

On January 15, 2018, Petitioner returned to Dr. Regan. His chief complaints were of knee and shoulder symptoms. A cortisone injection in the knee was given. Dr. Regan advised a repeat knee arthroscopy was possible.

On January 18, 2018, Petitioner saw Dr. Regan. A cortisone injection in the shoulder was given.

On February 5, 2018, Petitioner returned to Dr. Regan. The cortisone injection did not give much relief. Petitioner was advised to return to physical therapy. This was the last date that the Petitioner saw Dr. Regan. (T.59).

On February 21, 2018, the Petitioner was seen at Hinsdale Orthopedics by Dr. Patel for a second opinion. (T.59). His chief complaint was left knee pain. He was diagnosed with C spine pathology and a lateral meniscus tear. Dr. Patel gave the Petitioner a referral for a spine evaluation and Dr. Patel opined that the knee was exacerbated by the injury. Dr. Patel placed the Petitioner off work. (T.66).

On March 1, 2018, the Petitioner was seen by Dr. Darwish for a spine evaluation. (T.60). The diagnosis was cervical disc degeneration, cervical radiculopathy. An MRI was ordered. Dr. Darwish also had the Petitioner off work. (T.66).

On March 13, 2018, the Petitioner returned to Dr. Patel. Upon examination, Petitioner was found to have a posterior horn root tear of lateral meniscus. Dr. Patel stated that no further arthroscopy is needed. Petitioner was advised he will need a knee replacement in the future. An injection was recommended.

On April 10, 2018, Petitioner returned to Dr. Patel. Petitioner received an injection, which gave some relief. He had left shoulder pain consistent with C spine etiology. He was advised to do low impact activities only and consider visco supplementation injection and surgery. Dr. Patel kept the Petitioner off work. (T.66).

On April 17, 2018, the Petitioner saw Dr. Patel. The diagnosis was lateral meniscus tear. Dr. Patel did not feel surgery was not indicated and advised Petitioner that there was nothing else that he could offer him for the knee. A work letter was given keeping the Petitioner off work. (T.66).

On May 11, 2018, the Petitioner was seen at Elmhurst Hospital: An MRI of the C-spine was performed. On May 18, 2018, Petitioner saw Dr. Darwish. The MRI was reviewed. The MRI showed a C3-4-disc osteophyte, C4-5 protrusion. The diagnosis was stenosis. Dr. Darwish recommended a discectomy and fusion.

On June 5, 2018 Petitioner was seen by Dr. Patel. An injection was performed. Dr. Patel gave the Petitioner an off work note. (T.67).

The Petitioner returned to Dr. Darwish on August 3, 2018, September 21, 2018, October 26, 2018, December 7, 2018, January 18, 2019, February 15, 2019, March 22, 2019, May 10, 2019, June 21, 2019, August 2, 2019, and September 13, 2019. Dr. Darwish continued to recommend surgery and advised Petitioner to be off work on these visits.

On October 25, 2019, Petitioner returned to Darwish. Dr. Darwish told the Petitioner to follow up when surgery had been approved. (T.69). This was the Petitioner's last date of treatment with Dr. Darwish. (T.64). On that date, Dr. Darwish gave the Petitioner restrictions of no lifting greater than 10 lbs. (T.68).

Petitioner's Prior Medical History

The Petitioner had a prior left knee injury in 2000. (T.70). He had a torn meniscus and underwent and arthroscopy from a work accident. (T.71, 90). He settled this claim for 30% loss of use of the leg and 5% loss of use of the Man as a Whole. (T.93). He was able to return to work after this incident.

In 2003, the Petitioner fell through a hole in a ramp at the Dolton Yacht Club and tore his right rotator cuff. (T.139). He was able to return to work after this incident. (T.150).

In 2016, he was rear ended in a motor vehicle collision but suffered no injuries. (T.140).

He also underwent a left knee surgery in March of 2017. (T.71). This injury was due to someone running over his heel with a shopping cart in a grocery store. (T.131). The Petitioner returned to Pavement Systems in April of 2017, from this knee surgery and had been working his full duties up to the date of the accident. (T.72).

In September of 2017, the Petitioner was involved in a motor vehicle accident when he struck a pole in a parking lot. (T.138). He did not sustain an injury in this accident. (T.138). In 2017, the Petitioner also was involved in a motor vehicle accident in which he T-boned another vehicle. (T.141). The Petitioner had no injuries as a result of that accident.

On September 29, 2017, he was seen at Healthworks in order to undergo an exam for the City of Chicago. (PX. 6). This was required for the new work season that was starting. (T.79). Healthworks concluded that the Petitioner was cleared to work and that he was able to lift 35 lbs. (T.79)

Testimony of Dr. Darwish

Dr. Darwish is a board-certified orthopedic surgeon with Hinsdale Orthopedic. (Darwish, 5). His specialty is spine surgery. (Darwish, 7). Dr. Darwish first saw the Petitioner on March 1, 2018. (Darwish, 11). At the time of the deposition, the petitioner's last visit with Dr. Darwish was March 22, 2019. (Darwish, 25). Dr. Darwish testified that the injury that the petitioner sustained in October of 2017 caused an exacerbation of his pre-existing cervical stenosis and cervical degenerative changes. (Darwish, 27).

Dr. Darwish explained that patients with cervical stenosis and myelopathy do not always have neck pain, and often have nerve related pain that is referred in their upper extremities or lower extremities, in their arms or legs, and in their shoulders around the shoulder blades. (Darwish, 29). In fact, a majority of patients with cervical disc herniations or cervical stenosis will complain more of upper extremity issues. (Darwish, 29). Dr. Darwish further testified that the petitioner was at a greater risk for developing an injury to his spinal cord because of his underlying stenosis. (Darwish, 30). In this case, Dr. Darwish believes that the petitioner was complaining of what he thought was shoulder issues but was in fact referred pain from his cervical spine. (Darwish, 52).

Dr. Darwish testified that the need for the surgery is due to the work accident. (Darwish, 31). The petitioner should continue to be on work restrictions of no lifting greater than 10 lbs. (Darwish, 32). Dr. Darwish testified that those work restrictions remain in effect. (Darwish, 34)

Dr. Darwish admitted he did not have the benefit of a review of any prior treatment records or the surveillance. He testified the MRI findings could be degenerative or traumatic. He testified the osteophytes seen on the MRI developed over time. He could not say when the disc herniation shown on the MRI occurred. He acknowledged the Petitioner did not designate any symptoms going down his left arm and into his hand on the pain drawing completed when he was initially seen; and at the time he was initially seen the Petitioner reported he was without pain. Dr. Darwish admitted the Petitioner's symptoms, varying degrees of pain, which laxed and waned, and changes in range of motion from exam to exam, can all be from degenerative conditions and their natural progression; and did not require trauma. He acknowledged his initial opinion to keep the Petitioner off work and then place him on a 10-pound restriction, without knowing what assistance, if any, is available to the Petitioner to perform his job duties. (Pet. Ex. #7, pp. 1, 14, 19, 28-29, 38-40, 43, 52, 55-58, 61, 64-65, 68-69,75-76; Resp. Ex. #10, pp. 106-109).

Testimony of Dr. Levin

The Respondent arranged for Dr. Jay Levin, board certified orthopedic surgeon, to complete a Section 12 Independent Medical Evaluation on December 13, 2018. In conjunction with that evaluation, Dr. Levin reviewed medical records from prior and after the October 25, 2017 accident; a job analysis; and surveillance completed January 9, 2018, February 27, 2018, March 2, 2018, and July 5 and 6, 2018. He prepared three reports and the parties completed his evidence deposition. That deposition was completed in two parts and submitted as Respondent's Exhibits #21 and #22. Regarding the left knee, Dr. Levin opined to a reasonable degree of medical and surgical certainty that the Petitioner sustained a left knee contusion in this accident. He reviewed the left knee MRIs completed prior and after the accident and opined there was no change. He opined the Petitioner's gait change, if any, preexisted the accident. He opined Petitioner reached maximum medical improvement from any injury to the left knee sustained in the October 25, 2017 accident in four to six weeks, which would be December 7, 2017 at the latest. He opined that after six weeks from the accident date, considering the Petitioner's job duties, he could return to full duty work. (Resp. Ex. #1, pp. 45-48; Resp. Ex. #21, pp. 91-94; 11-12; 110-253; 34; 35-38; 58-59; Resp. Ex. #22, pp. 39-40, 37-38).

Dr. Levin opined Petitioner sustained a left shoulder contusion in the October 25, 2017 accident. He opined Petitioner reached maximum medical improvement in six weeks after the accident. He

agreed with Dr. Regan's statement that the findings on the shoulder MRI were not clinically significant. When cross examined during the course of his deposition about a potential labral tear on the MRI, Dr. Levin convincingly testified that this was of no clinical significance since there was a negative Speed test in the course of his exam; and given the Petitioner's ability to lift and carry the rather large picture as seen in the video surveillance. He opined Petitioner could return to full duty work within fourteen days of the accident. (Resp. Ex. #21, pp. 30, 32, 34; Resp. Ex. #22, p. 28, 42-43).

Dr. Levin opined the Petitioner sustained a right wrist sprain in this accident. He opined Petitioner reached maximum medical improvement from that injury in six weeks and could return to full duty work. (Resp. Ex. #21, pp. 38, 40-41).

Regarding the Petitioner's claim of cervical spine injury, Dr. Levin opined, to a reasonable degree of medical and surgical certainty, that the Petitioner did not sustain any cervical spine injury caused, aggravated, or accelerated by the October 25, 2017 accident. He opined that there was nothing in the records that reported a mechanism of injury to the cervical spine nor any symptoms in the cervical spine. He cited the surveillance which showed full rotation without any outward signs of pain. He noted the lack of any cervical component to the claim on the pain drawing and questionnaire completed by the Petitioner.

Regarding the MRI findings, he testified on cross examination that it was possible the accident changed the degree of the disc protrusion on the right at C5-C6, but this was not clinically significant since Petitioner symptoms involved the left shoulder, and the disc protrusion would result in right upper extremity symptoms. He testified the spondylolisthesis preexisted the accident and that the MRI finds were consistent with the Petitioner's age. This would include the stenosis and myelomalacia. He further noted Petitioner's non-anatomical complaint of left shoulder symptoms with right sided Spurling's test in support of his opinion. He also testified that the lordotic curve findings on the MRI can be a normal variation. (Resp. Ex. #21, pp. 41-45; 64-66; Resp. Ex. #22, pp. 12-17, 46-49, 19-21). He also noted in his January 8, 2019 report entered into evidence at his deposition that Dr. Patel's diagnosis on February 21, 2018 of a possible cervical spine component to the Petitioner's symptoms was inconsistent with the physical exam on that date which showed normal cervical range of motion and normal cervical muscle strength. (Resp. Ex. #21, p. 280).

Testimony of Lisa Debellis

Lisa Debellis is the office manager at Pavement Systems. (T.184). She was "standing right there" when the petitioner fell. (T.185). Ms. Debellis explained that the petitioner fell on his hands and arms. (T.185). She said that he went down slowly. (T.186). After the incident, the petitioner said something about his knee. (T.186). The petitioner continued to work that day but left early. (T.187).

Testimony of Eileen Skisak

Eileen Skisak is a nurse case manager with Custom Case Management. (T.155, 156). Ms. Skisak has been performing nurse case management services for 21 years. (T.169). She was retained by

EMC Insurance Companies to provide nurse case management services for the Petitioner beginning in November of 2017. (T.157). Her nurse case management services ended in February of 2018. (T.160). During that time, she attended appointments Petitioner scheduled with Dr. Regan, and the IME appointment with Dr. Aribindi. She performed no case management services when the Petitioner was treating with Dr. Darwish. (T.177).

Ms. Skisak testified that the Petitioner reported left shoulder pain but did not complain of or report an injury to his cervical spine. (T.161). She testified that in relation to his ability to work, the Petitioner told Ms. Skisak that he couldn't do anything. (T.163).

Ms. Skisak also testified that she observed a large trunk of a tree in the Petitioner's pickup truck. (T.164). Ms. Skisak testified that she documented this fact in her own handwritten notes, not in her case management reports. (171). However, Ms. Skisak no longer had her contemporaneously made notes at the time of the arbitration hearing as they were no longer in existence. (T.181). Instead, she had created a new set of handwritten notes from her memory, emails, and reports. (T.179). This set of notes was created a couple of weeks prior to the hearing. (T.180). It was in these notes that there was a notation "Old Ford pickup, bad bumper, large tree trunk in bed." (T.179).

Video Surveillance of Petitioner

Nicholas Marchesano is an investigator with Marshall Investigative Group. (T.224). Mr. Marshall conducted surveillance on January 9, 2018, February 27, 2018, March 2, 2018, and June 15, 2021. (T.235). Mr. Marchesano admitted that there are time jumps in the footage but explained that the investigators start and stop the camera, which is responsible for the time jumps on the footage, and that the surveillance is not continuously recorded. Mr. Marchesano testified that the footage was not edited. (T.238).

Marshall Investigative Group completed surveillance of the Petitioner. On January 9, 2018 surveillance showed Petitioner unloading and carrying into his backyard a number of items from his truck, including bumper liners, car parts, a large painting, a wire cable, a milk crate, a side panel, the top tray of a toolbox, a folded car seat, a bucket seat, and a tire. Petitioner walked without a cane although with the limp. (Resp. Exhs. #16 & #28; Arb. Trans. pp. 113-114).

Marshall Investigative Group completed additional surveillance on February 27, 2018 where Petitioner was working on two vehicles (placing fluids into the vehicles and cleaning the headlights of his pickup truck. Additional surveillance on March 2, 2018 showed the Petitioner able to lift and carry grocery bags, including with his left hand. (Resp. Ex. #17; Resp. Ex. #28).

Petitioner's Current Condition

Petitioner has not returned work for the Respondent since the date of accident. He is currently collecting Social Security Benefits and enrolled in Medicare. (Arb. Trans. pp. 42-43, 49 and 105).

The Petitioner is unable to have the surgery performed under his health insurance because he has an open workers' compensation claim. (T.83).

On the date of the arbitration, the Petitioner continued to feel pain in his bicep, shoulder blade, forearm, and had a loss of strength in his left arm. (T.74). It is a burning, stinging, and radiating pain. (T.74). In his left knee, he continues to have a little pain and doesn't walk like he did prior to the accident. (T.75). He can't walk as far as he did prior to the accident. (T.75). He used to be able to walk 4 or 5 miles. (T.75). He can't dance. (T.75). He can't cut his grass, shovel snow, or do laundry. (T.76). He can't climb a ladder. (T.76). He can't lift or climb with his left arm due to weakness. (T.77).

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

Issue F, whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. Even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. Thus, a claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." International Harvester v. Industrial Com., 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982).

Despite Petitioner's medical history, prior to the incident, the petitioner was fully performing his job duties. The medical records from Palos Hospital on October 29, 2017 demonstrate complaints of pain in his bicep, in his forearm, in his shoulder blade, and in his knee. He followed up with Dr. Regan on October 30, 2017 and was placed on work restrictions.

The Arbitrator relies on the opinions of Dr. Darwish regarding causation of the cervical spine. Dr. Darwish testified that the injury that the petitioner sustained in October of 2017, caused an exacerbation of his pre-existing cervical stenosis and cervical degenerative changes. The Arbitrator is not persuaded by arguments regarding when and if Petitioner had neck symptoms. Dr. Darwish explained that patients with cervical stenosis and myelopathy do not always have neck pain, and often have nerve related pain that is referred in their upper extremities. Petitioner was complaining of what he thought was shoulder issues but was in fact referred pain from his cervical spine.

Based on Petitioner's testimony, the medical records, and Dr. Darwish's opinion, the Arbitrator finds Petitioner's current condition of ill-being causally related to the injury.

Issue J, whether the medical services that were provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

Relying on the medical records and the opinions of Petitioner's treaters, the Arbitrator finds Petitioner's treatment to be reasonable and necessary and finds that Respondent has not paid for said treatment. Petitioner's Exhibit 1 contains the medical bills that the Petitioner incurred for treatment.

The Arbitrator orders Respondent to pay Petitioner directly for the following outstanding medical services, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act:

- **Palos Community Hospital: $4,309.00**
- **Hinsdale Orthopedics: $4,280.00**
- **Southside Orthopedics: $5,095.59**
- **Heights Physical Therapy: $4,670.00**

Issue K, whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows:

The medical records support a finding that the petitioner is entitled to prospective medical treatment. On June 22, 2018, the petitioner followed up with Dr. Darwish. Dr. Darwish noted that conservative treatment had failed and recommended surgery. The petitioner elected to proceed with the surgery. Dr. Darwish then continued to recommend an anterior cervical discectomy and fusion during the course of his treatment with the petitioner.

The petitioner testified that on October 25, 2019, he was last seen by Dr. Darwish. On that date, Dr. Darwish stated that there was no need to return until the surgery was scheduled, as there were no other treatment options. The Arbitrator relies on the opinions of Dr. Darwish regarding surgery.

Respondent shall approve and pay for an anterior cervical discectomy and fusion from C3-4, C4-5, and C5-6 including necessary post-operative care as prescribed by Dr. Darwish as provided in Section 8(a) and 8.2 of the Act.

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

The Arbitrator notes the surveillance footage suggests Petitioner was more active than he claimed to be. Even if Petitioner was not completely straightforward with his physical capabilities, the Arbitrator does not find that he was able to return to work full duty as Dr. Levin opined. Petitioner's work with Respondent was heavy and no light duty work was offered. Petitioner's work included changing hoses, batteries, tires, oil, cylinders, plate compactors, radiators; fixing electrical problems; and repair and maintenance necessary to keep the machines running. He used

hand tools and pneumatic tools. The job required him to climb, stoop, kneel, crouch, crawl, twist, pull, and lift. The weight of materials used in the job ranged from 2 ½ to 150 pounds. (Arb. Trans. pp. 14-21; Resp. Ex. #21 pp. 110-112).

While surveillance shows Petitioner unloading and carrying items from his truck, entering and exiting his truck, and going from a laying to standing position, Mr. Marchesano acknowledged that there were time jumps in the surveillance footage giving an inaccurate view of the speed and repetition of Petitioner's activities. Petitioner is seen walking with a limp and needed to roll over from his back onto his stomach in order to stand up. (Resp. Exhs. #16 & #28; Arb. Trans. pp. 113-114).

Following the accident of October 25, 2017, petitioner was taken off work by Dr. Regan on October 30, 2017. Dr. Regan kept the petitioner off of work until February 5, 2018. (PX.4). When the petitioner first saw Dr. Patel, on February 21, 2018, Dr. Patel continued to keep the petitioner off of work. The off-work restrictions were continued by Dr. Darwish until the petitioner was last seen on October 25, 2018, at which time the petitioner was placed on work restrictions of no lifting greater than 10 lbs. (PX. 3). As noted, these restrictions remain in effect until the surgery is performed.

Based on Petitioner's testimony, the medical records and the opinions of Petitioner's treaters, the Arbitrator finds Respondent liable for 240 2/7 weeks of TTD benefits (October 25, 2017 through June 3, 2022) at a weekly rate of $1,027.09. Respondent has paid TTD benefits in the amount of $22,432.00.

It is so ordered:

Arbitrator Rachael Sinnen

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC020354
Case Name	Ali Muhammad v. State of Illinois - IYC St. Charles
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0316
Number of Pages of Decision	12
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Thomas Stiberth
Respondent Attorney	James Gale

DATE FILED: 7/25/2023

/s/ Amylee Simonovich, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

☒ Affirm and adopt (no changes)	☐ 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

ALI MUHAMMAD,

Petitioner,

vs. NO: 17 WC 20354

STATE OF ILLINOIS – IYC ST. CHARLES,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of nature and extent, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 23, 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.

July 25, 2023:

o071123
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	17WC020354
Case Name	Ali Muhammad v. State of Illinois - IYC St. Charles
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Frank Soto, Arbitrator

Petitioner Attorney	Thomas Stiberth
Respondent Attorney	James Gale

DATE FILED: 12/23/2022

/s/Frank Soto, Arbitrator

Signature

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

December 23, 2022

/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

Ali Muhammad
Employee/Petitioner

v.

IYC-St.Charles
Employer/Respondent

Case # 17 WC 20354

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 Frank Soto, Arbitrator of the Commission, in the city of Wheaton, on November 28, 2022. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On May 4, 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 $60,798.00; the average weekly wage was $1,169.19.

On the date of accident, Petitioner was 34 years of age, Single with 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 $ for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

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

ORDER

Respondent shall pay 8(d)(1) benefits at $671.86 per week from April 13, 2022 through June 30, 2022. Thereafter, Respondent shall pay 8(d)(1) benefits at $715.17 per week commencing July 1, 2022 and continuing and until Petitioner reaches the age of 67 or 5 years from the date the award becomes final, as provided in Section 8(d)1 of the Act, as set forth in the Conclusions of Law attached hereto;

The Petition for penalties is denied, as set forth in the Conclusions of Law attached hereto;

Respondent shall pay Petitioner compensation that has accrued from May 5, 2016 through November 28, 2022 and shall pay the remainder of the award, if any, in weekly payments.

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

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

By: /o/ Frank J. Soto
Arbitrator

December 23, 2022

PROCEDURAL HISTORY

This matter was previously tried on July 19, 2019, pursuant to Sections 19(b) and 8(a) of the Act. (PX1) At that time, the Arbitrator found for Petitioner. (PX1, pp.13-17). This second trial occurred on September 27, 2022 and November 28, 2022 and involved the nature and extent of Petitioner's injuries and penalties. Petitioner seeks a wage differential pursuant to Section 8(d)(1) of the Act. (Arb. Ex. #1). The parties stipulated to Petitioner's current condition of ill-being causally related to his May 4, 2016 work accident and had Petitioner continued to be employed for Respondent his average weekly wage would have been $1,647.79 as of July 21, 2021 and $1,712.75 as of July 1, 2022. (T. 7, 8).

FINDINGS OF FACT

Ali Muhammad (hereinafter referred to as "Petitioner") was the only witness to testify in this matter. In addition to his testimony, Petitioner introduced his medical records along with records relating to his vocational rehabilitation, his job search efforts, and his new employment. Respondent introduced a payment ledger pertaining to the benefits paid Petitioner, two IME reports and several vocational reports from the vocational rehabilitation counselor Respondent retained to assist Petitioner in his job search, and a wage statement.

Petitioner testified he continued to treat for his injuries after his 19(b) hearing and underwent a cervical facet injection followed by a radio frequency ablation procedure. (T.11, PX3 pp.33-37). Petitioner experienced improvement of his pain following the ablation procedure but he continued to experience pain in the right side of his neck and in the occipital region of his head. (T.13-14; PX3 pp.33-35). Petitioner also experienced a gradual return of his low back pain. (T.16; PX3 pp.35-37; Px2 p.60). Petitioner continued to treat conservatively with restrictions and medications and eventually Petitioner underwent an occipital nerve block which did not completely resolve his pain. (T.16; PX3 pp.49-53).

On June 4, 2021, Petitioner's treating physician, Dr. Sokolowski, issued permanent restrictions placing Petitioner at a medium physical demand level. (T.17; PX2 pp.42-44). Petitioner reported his permanent restrictions to Respondent who could not accommodate

the restrictions. (T.17). Respondent directed Petitioner to complete and submit a Reasonable Request for Accommodation (RRA) form, which he did. (T.17; PX13). Thereafter, Petitioner applied for job search assistance through the State's Alternative Employment Program (AEP) and started his own self-directed job search. (T.19). At that time, Petitioner demanded vocational assistance. (PX 12).

On February 2, 2022, at Respondent's request, Petitioner met with Ms. Diamond Warren, a certified vocational rehabilitation specialist, for the purpose of a vocational rehabilitation evaluation. (T.20; PX7 4, Vocational Initial Report). Petitioner provided Ms. Warren with information concerning his education, work experience, and physical limitations. Ms. Warren opined Petitioner was a good candidate for employment and formulated a vocational rehabilitation plan to help him find work within his restrictions. (Px7, Vocational Initial Report and Individual Written Rehab Plan). She also prepared a labor market survey and opined that, based upon Petitioner's education, work experience and restrictions, he could return to work. (PX7, December 10, 2021, Transferable Skills Analysis/Labor Market Survey). Ms. Warren identified a list of suitable positions in a 30-mile radius of Petitioner's hometown, which paid between $14.00 to $27.51 per hour. (PX7, December 10, 2021, TSA/LMS).

Following his initial meeting with Ms. Warren, Petitioner began looking for work pursuant to the vocational rehabilitation plan. (T.21-23; PX7). Petitioner met with Ms. Warren on three separate occasions and made eighty contacts and attended three interviews. (PX7). On March 21, 2022, Petitioner received a job offer to work as an unarmed security officer at Advanced Security Solutions. (RX 4, Closing Report). The position was in a nursing home and paid $16.00 per hour. (PX4, Closing Report).

Petitioner contacted Ms. Warren and asked whether he should accept this offer. Ms. Warren directed him to do so. (T.23). Petitioner accepted this position and was scheduled to start working on April 1, 2022. However, Petitioner needed to renew his permanent employee registration card (PERC) as a condition to his employment. Petitioner secured his PERC card on April 12, 2022. (RX4, Closing Report). Since Petitioner was unable to start working on April 1, 2022, the unarmed security position was filled by another candidate. (RX4, Closing Report). However, Advanced Security Solutions offered Petitioner an alternative unarmed security position working in a parking garage. The

position was full-time, 40 hours per week, and paid $14.00 per hour. (T.23; PX9; RX4 Closing Report). Petitioner asked Ms. Warren if he should accept this position or continue his job search efforts. (T.23). Ms. Warren directed Petitioner to accept this position. (T.23) Petitioner accepted this job offer and he began working on April 12, 2022. On April 29, 2022, Respondent directed Ms. Warren to stop further job search services and to close the file since Petitioner secured full-time employment. (RX4, Closing Report).

On August 11, 2022, Respondent requested Ms. Warren to complete an Updated Labor Market Survey. (RX4 Updated LMS). Ms. Warren secured updated records from Petitioner's treating doctor, which showed he continued to remain under the same permanent restrictions as before. (RX4 Updated LMS). The Updated Labor Market Survey showed "potentially appropriate employment opportunities" between $16.00 to $28.84 per hour. (RX4 Updated LMS). Ms. Warren acknowledged these positions paid more than the $14.00 per hour security guard position Petitioner accepted but she noted that Petitioner may require reasonable accommodations for some of the job. (PX4 Updated LMS).

The Arbitrator found Petitioner's testimony credible.

CONCLUSIONS OF LAW

The Arbitrator adopts the finding of fact in support of the Conclusions of Law as Set forth below. The burden is upon the party seeking an award to prove by a preponderance of the credible evidence the elements of her claim. *Peoria County Nursing Home v. Industrial Comm 'n*, 115 lll.2d 524, 505 N.E.2d 1026 (1987).

Regarding issue "L" the nature and extent of Petitioner's injury, the Arbitrator finds as follows:

The sole issue before the Arbitrator is whether Petitioner has established entitlement to a wage differential. It is well-established, to qualify for a wage differential award under section 8(d)(1), a claimant must prove: (1) a partial incapacity which prevents him from pursuing his "usual and customary line of employment," and (2) an impairment of his earnings. 820 ILCS 305/8(d)(1) (West 2002); *Yellow Freight Systems v. Industrial Comm'n, 351 Ill.App.3d 789, 794, 286 Ill.Dec. 684, 814 N.E.2d 910 (2004); Greaney v. Industrial Comm'n, 832 N.E.2d 331, 358 Ill. App. 3d 1002 (Ill. 2005).*

In the present case, the Arbitrator finds Petitioner has proven by the preponderance of the evidence entitlement to a wage differential award. The Arbitrator finds Petitioner's

injury prevented him from returning to his employment as a Juvenile Justice Specialist. Petitioner's treating physician, Dr. Sokolowski, placed Petitioner on permanent restrictions which Respondent was unable to accommodate. Thereafter, Petitioner accepted employment earning less money than he was earning prior to his injury.

The Arbitrator finds Petitioner suffered a diminished earning capacity because of his work injury. The Arbitrator notes that after completing a professionally guided job search Ms. Warren, Respondent's vocational case manager, Petitioner found fulltime employment earning $14.00 per hour. However, the Arbitrator notes that Petitioner originally received a job offer earning $16.00 per hour which Petitioner was unable secure since his PERC card expired. Ms. Warren directed Petitioner to accept that position. (T.23). Had Petitioner's PERC card not expired, he would have been earning $16.00 per hour. For purpose of determining Petitioner's diminished earnings, the Arbitrator finds the hourly rate of $16.00 per hour is the appropriate rate since Petitioner would have been earning that rate had his PERC card not expired, which was within his control. The Arbitrator further notes that Ms. Warren advised Petitioner to accept the position earning $16.00 and that hourly rate of pay was within the range Ms. Warren deemed reasonable in both labor market surveys.

The parties stipulated that pursuant to the collective bargaining agreement Petitioner, as a juvenile justice specialist, would have earned $1,647.79 per week through July 1, 2022 and $1,712.75 per week as of July 1, 2022 due to a union negotiated pay increase. The parties further stipulated that Petitioner was paid maintenance benefits through April 12, 2022. (Arb. Ex. #1). Based on the above, the Arbitrator finds from April 13, 2022, the date Petitioner started working, he sustained a recoverable wage loss of $671.86 per week through June 30, 2022, which represents two-thirds of the difference between $1,647.79, the amount he would have earned per week as a juvenile justice specialist, and $640.00 (*i.e.*, $16.00 per hour multiplied by 40 hours per week), the amount he would have earned per week. As of July 1, 2022, Petitioner sustained a recoverable wage loss of $715.17 per week, which represents two-thirds of the difference between $1,712.75, the amount he would have earned per week as a juvenile justice specialist as of July 1, 2022, and $640.00. As such, Respondent shall pay 8(d)(1) benefits at $671.86 per week from April 13, 2022 through June 30, 2022 and 8(d)(1) benefits at $715.17 per week

commencing July 1, 2022 and continuing until Petitioner reaches the age of 67 or 5 years from the date the award becomes final, as provided in Section 8(d)1 of the Act.

Respondent claims Petitioner is capable of earning $22.00 per hour which is the average between $16.00 per hour and $28.00 per hour identified in the Updated Labor Market Survey Respondent secured on August 11, 2022. The Arbitrator is not persuaded by Respondent's argument. A labor market survey is not vocational assistance. Respondent did not provide nor offer to provide Petitioner additional vocational assistance after Petitioner accepted the job earning $14.00 per hour.

After Petitioner accepted the job earning $14.00 per hour, Respondent instructed Ms. Warren to close Petitioner's file and to discontinue further job placement services. This is not a situation where after advising Petitioner to accept a lower paying position Respondent continued to provide job placement services to Petitioner so he could secure a higher paying job. Under the Act, providing vocational services is Respondent's responsibility and that responsibility should not terminate when Respondent believes Petitioner is underemployed. No evidence was presented indicating Petitioner was not cooperating or would not cooperate had the vocational services continued. The Arbitrator finds performing an updated labor market survey, on the eve of trial, without providing additional vocational services to assist Petitioner secure a higher paying job is insufficient on its own to prove that Petitioner is capable of earning a higher rate of pay. As such, the Arbitrator finds Respondent failed to sustain its burden of proof.

The Arbitrator finds Petitioner cooperated with vocational services. After Respondent could not accommodate Petitioner's restrictions, he began a self-directed job search, enrolled into Respondent's Alternative Employment Program and demanded vocational job placement assistance. The Arbitrator notes Respondent referred Petitioner's case to Ms. Warren, a vocational case manager with Creative Case Management, Inc., to evaluate Petitioner, complete a Labor Market Survey, and assist Petitioner with his job search efforts. Ms. Warren interviewed Petitioner, reviewed his medical records and restrictions, and opined that Petitioner possessed transferrable skills that would allow him to return to gainful employment within his medical restrictions. The Arbitrator notes Ms. Warren originally opined jobs were available to Petitioner within his restrictions paying between $14.00 to $27.51 per hour.

The Arbitrator finds that, in addition to his self-directed job search, Petitioner contacted over 80 employers, attended three interviews, and completed all the tasks expected of him before receiving an offer of employment as an unarmed security specialist with Advanced Security Solutions, Inc. The Arbitrator notes the hourly rate of pay of $16.00 is within the range of wages, albeit the low range, considered suitable in both labor market surveys.

Regarding issue "M", should penalties or fees be imposed, the Arbitrator finds as follows:

Petitioner seeks Penalties for Respondent's failure to pay wage loss benefits after he found work within his restrictions as an unarmed security specialist. The Arbitrator finds Petitioner failed to prove by the preponderance of the evidence entitlement to penalties. Respondent received a demand for vocational assistance and promptly provided vocational assistance. As a result of the vocational assistance, Petitioner obtained employment. The parties stipulated Respondent paid all TTD and maintenance benefits. (Arb. Ex. #1). Disputing whether Petitioner was underemployed doesn't rise to conduct sufficient to award penalties. As such the Petition for penalties is hereby denied.

By: /o/ Frank J. Soto
Arbitrator

December 23, 2022
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC013481
Case Name	Vera Moses v. Chicago Transit Authority
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0317
Number of Pages of Decision	11
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Adam Scholl
Respondent Attorney	Elizabeth Meyer

DATE FILED: 7/25/2023

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

VERA MOSES,
Petitioner,

vs. NO: 18 WC 13481

CHICAGO TRANSIT 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 medical expenses, permanent partial disability, and award of medical bills, 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 28, 2022 is hereby affirmed and adopted.

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

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

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 Circuit Court.

July 25, 2023

O: 07/20/23
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	18WC013481
Case Name	MOSES,VERA v. CHICAGO TRANSIT AUTHORITY
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Rachael Sinnen, Arbitrator

Petitioner Attorney	Adam Scholl
Respondent Attorney	Elizabeth Meyer

DATE FILED: 12/28/2022

THE INTEREST RATE FOR THE WEEK OF DECEMBER 28, 2022 4.60%

/s/ Rachael Sinnen, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Vera Moses
Employee/Petitioner

v.

Chicago Transit Authority
Employer/Respondent

Case # **18** WC **13481**

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 **October 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. ☐ 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 **April 12, 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 $***68,268.20***; the average weekly wage was $***1,312.85***.

On the date of accident, Petitioner was ***56*** 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 $***164,292.89*** for TTD, $***0*** for TPD, $***0*** for maintenance, and $***as shown in Rx 1*** for other benefits, for a total credit of $***164,292.89 & medical paid as shown in Rx 1***.

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

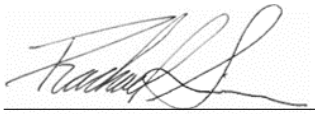
ORDER

Respondent shall pay Petitioner directly for the following outstanding medical services, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act: Illinois Orthopedic Network ($42,082.91); Metro Anesthesia Consultants ($7,342.94); Midwest Specialty Pharmacy ($600.75); QMed Assist ($39,879.70).

The Arbitrator makes an award of 25% loss of use of the person as a whole under Section 8(d)(2) which corresponds to 125 weeks of permanent partial disability benefits at a weekly rate of $787.7. 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.



Signature of Arbitrator

December 28, 2022

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Vera Moses,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 18WC13481
Chicago Transit Authority,	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on October 25, 2022 in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's Request for Hearing. Issues in dispute include unpaid medical bills and the nature and extent of the injury. Arbitrator's Exhibit "Ax" 1.

Procedural Posture

This matter proceeded to hearing on February 19, 2019 before Arbitrator Tiffany Kay pursuant to Petitioner's Petition under Sections 8(a) and 19(b) of the Act. Petitioner's Exhibit "Px" 5. Arbitrator Kay found Petitioner's left shoulder and psychological condition to be causally related to the work accident of April 12, 2018. Px 5, pp. 8, 10. Unpaid medical bills and temporary total disability "TTD" benefits were awarded as well as prospective medical in the form of a "left shoulder rotator cuff repair and subacromial decompression inguinal surgery." Px 5, pp. 10-11. The Commission affirmed and adopted the Arbitration Decision on July 31, 2019. Px 5, p. 1.

Summary of Medical Records Submitted Since February 19, 2019

After the 19b hearing, conducted on February 19, 2019, Petitioner continued to treat with the ION medical clinic through the period of time she awaited a final decision by the Commission. (PX2) On August 12, 2020, Petitioner was operated upon by Dr. Giannoulias. The surgery consisted of a left shoulder arthroscopic rotator cuff repair, subacromial decompression, and an extensive glenohumeral debridement. (Px2, p.55)

Petitioner followed up with Dr. Giannoulias on August 20, 2020. On that visit, Dr. Giannoulias advised her to begin physical therapy 2-3 times per week. (Id. at 63) Petitioner participated in physical therapy and followed up with Dr. Giannoulias monthly. (Id. 67-86) At Petitioner's follow-up visit on March 11, 2021, Dr. Giannoulias noted stiffness with her left shoulder and

diagnosed her with adhesive capsulitis. (Id. at 90) An intraarticular injection was administered. (Id.)

On March 22, 2021, Petitioner was examined by Respondent's Section 12 examiner, Pietro Tonino, M.D. (Id. at 94) After examining Petitioner and conducting a medical record review, Dr. Tonino diagnosed Petitioner with adhesive capsulitis. (Id. at 95) He recommended an examination under anesthesia and a possible arthroscopic capsular release followed by a course of physical therapy. (Id.)

Dr. Giannoulias agreed with the procedure recommended by Dr. Tonino at Petitioner's follow-up visit on March 25, 2021. (Id. at 96) On April 28, 2021, Dr. Giannoulias performed a left shoulder arthroscopic capsular with manipulation, an extensive glenohumeral debridement, and a revision subacromial decompression. (Id. at 99)

Petitioner participated in a supervised physical therapy program and followed up with Dr. Giannoulias monthly. (Id. at 106-122) At her September 30, 2021 visit, she reported doing significantly better and had almost full range of motion and strength. (Id. at 125) Three additional weeks of physical therapy were recommended. Petitioner returned to Dr. Giannoulias on October 28, 2021. He indicated that she had progressed nicely and could return to her activities and work as tolerated. (Id. at 133)

Petitioner also testified that she received psychological treatment beyond the first hearing and discontinued care sometime in 2021.

Summary of Utilization Reviews

Respondent entered into evidence as its Exhibit 4, utilization reviews ("UR") pertaining to medical services that were non-certified. The UR denials are as follows:

- Non-certification of the medicines Meloxicam and Esomeprazole issued on May 21, 2018 by Midwest Specialty Pharmacy. Basis of denial, there was no follow-up assessment after April 23, 2018 prior to dispensing medication Meloxicam on May 21, 2018. Concerning Esomeprazole, the basis of denial was no support for medical necessity of the medication; a proton pump inhibitor for prevention of NSAID associated ulceration. (RX4, p.1-9)
- Non-certification of medicine Ondansetron issued on August 12, 2020 by Midwest Specialty Pharmacy. Basis of denial, Ondansetron is not recommended as a first-line treatment without documentation of nausea post-operatively or failed first line treatments. (Id., p.10-18)
- Non-certification of Lidocaine ointment and Omeprazole issued on August 26, 2020 by Midwest Specialty Pharmacy. Omeprazole is prescribed for patients with risk for gastrointestinal events, without documented risk factors for gastrointestinal complications secondary to NSAID use, medical necessity not established. As to Lidocaine ointment no evidence that medication is sufficient to manage symptoms. (Id., p. 19-36)
- Non-certification of medicines Omeprazole, Lidocaine ointment, and Cyclobenzaprine issued on August 26, 2020 by Midwest Specialty Pharmacy. Bases of denial, see aforementioned concerning Omeprazole and Lidocaine ointment. Cyclobenzaprine denied because there was no subjective complaints by patient of muscle spasm or palpable trigger points. (Id., p.37-52)

- Non-certification of medicines Lidocaine ointment and Lidocaine patch issued on March 21, 2021 by Midwest Specialty Pharmacy. Basis of denial, no evidence of functional benefits with Lidocaine patch. (Id., p. 53-60)
- Non-certification of Lidocaine ointment issued on April 19, 2021 by Midwest Specialty Pharmacy. Basis of denial, no evidence that medication is sufficient to manage symptoms. (Id., p.61-71)
- Non-certification of durable medical equipment of pneumatic appliance and thermal pneumatic compression unit provided by QMed Assist on April 28, 2021. Basis of denial, ODG states cold compression is recommended for shoulder and not supported as more efficacious than ice packs following shoulder surgery. (Id., p.72-77)
- Non-certification of VascuTherm pneumatic compression unit for 6-13 weeks provided by QMed Assist on April 28, 2021. Peer report omitted. (Id., p.78-80)

Petitioner's Testimony Regarding Her Current Condition

Petitioner testified that she continues to have difficulty with the shoulder. In operating the bus, she is required to make turns hand over hand. When she does that, she has radiating pain from elbow up to the neck. She described the pain as a shocking and burning pain. Petitioner stated additionally that she has difficulty dressing or performing any activity that requires her to reach overhead or behind her back. She incurs pain with vacuuming and lifting. Lifting is difficult from floor to waist and waist to shoulder level, and far worse above shoulder level.

Mentally, Petitioner stated that she used to enjoy the activity of going to the gun range, but now has anxiety with the sound of gunfire or anything similar. She has become hypervigilant since the incident and is very suspicious of individuals, group of teenagers, or large crowds. She does not like to be out at night and deliberately has picked bus routes that run during the daytime.

CONCLUSIONS OF LAW

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

Issue J, whether the medical services that were provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

Petitioner has presented five medical bills for which she claims have outstanding balance. In defense of some of the charges contained within, Respondent introduced eight utilization reviews challenging the reasonableness and necessity. The Arbitrator has addressed each medical bill separately below:

Illinois Orthopedic Network ($42,082.91)

The bill of Illinois Orthopedic Network ("ION") reflects charges paid and unpaid. The unpaid charges include two non-emergency transportation charges in the amount of $200.00 each that correspond to the dates of each of the two surgeries. The Arbitrator would not expect the Petitioner to drive herself to and from her surgeries. Consequently, such charges would be considered reasonable and medically necessary.

Additionally, the bill reflects two unpaid charges in the amount of $719.52 for the shoulder manipulation performed on April 28, 2021. Both the IME and the treater agreed as to the medical necessity of the procedure. The Arbitrator deems both charges to be reasonable and necessary.

The bill also includes an unpaid charge for a follow-up visit on May 6, 2021 in the amount of $43.67. The Arbitrator deems this charge to be reasonable and necessary.

Lastly, the ION bill has two $750 charges for Covid testing for dates May 6, 2021 and October 21, 2021. Given our current state of times, the Arbitrator finds such testing to be reasonable and necessary. The Arbitrator further notes that such testing was paid previously by Respondent

The bill also included unpaid facility fees. The unpaid charges are associated with the two surgical procedures performed on August 12, 2020 and April 28, 2021, respectively. The Arbitrator has reviewed the charges and finds the bills correspond to medical treatment determined by both the IME and the treating physician to be reasonable and necessary.

Considering the foregoing, the Arbitrator orders Respondent to pay Petitioner directly for the outstanding medical services of ION in the amount of $42,082.91, pursuant to Section 8(a) and subject to the medical fee schedule and Section 8.2 of the Act

Metro Anesthesia Consultants ($7,342.94)

The charge from Metro Anesthesia Consultants corresponds to the surgical procedure that Petitioner underwent on August 12, 2020. This would be the first surgery to the shoulder that was awarded at the 19b hearing. The Arbitrator has reviewed the outstanding charges and finds them to be reasonable, necessary, and related to Petitioner's claim. As such, the Arbitrator orders Respondent to pay Petitioner directly for the outstanding medical services of Metro Anesthesia in the amount of $7,342.94, pursuant to Section 8(a) and subject to the medical fee schedule and Section 8.2 of the Act

Midwest Specialty Pharmacy ($754.40)

The only outstanding charges claimed by Midwest Specialty Pharmacy pertain to Esomeprazole issued on May 21, 2018 and Lidocaine ointment on April 19, 2021. (PX1, p.60-64)

With regard to the outstanding charge of Esomeprazole issued on May 21, 2018, that bill should have been included in the previous 19b award as the date of the charge precedes the 19b hearing

date of February 19, 2019. As such, the Arbitrator finds that the Petitioner is not entitled to the unpaid charge in the amount of $153.65.

With regard to the Lidocaine ointment, it appears Respondent paid the charges for the ointment several times, but not the April 19, 2021 charge. The Arbitrator has considered the medical records, Petitioner's shoulder condition, and the UR review. It is the Arbitrator's finding that the prescription for Lidocaine ointment was reasonable and necessary and directs Respondent to pay Petitioner directly for the outstanding medical services of Midwest Specialty Pharmacy the amount of $600.75 pursuant to Section 8(a) and subject to the medical fee schedule and Section 8.2 of the Act.

QMed Assist ($39,879.70)

Petitioner was furnished with durable medical equipment for periods of time following both of her surgical procedures. Respondent introduced a UR non-certifying the use of the device following the second surgery. No UR was entered into evidence concerning the August 12, 2020 charges. Per Respondent's UR, the equipment is described as a Vascutherm pneumatic compression therapy device. (RX4, p.75) The UR certification is based on the reviewer's reliance on ODG guidelines.

The Arbitrator has reviewed the outstanding charges in conjunction with the medical records and finds the charges related to the set-up, education, and use of the pneumatic compression therapy device to be reasonable, necessary, and related to Petitioner's claim. Wherefore, the Arbitrator direct Respondent to pay to Petitioner the charges of QMed Assist in the amount of $39.879.70 pursuant to Section 8(a) and subject to the medical fee schedule and Section 8.2 of the Act.

Victory Enterprises, Inc. ($2,495.00)

The bill of Victory Enterprises was introduced by Petitioner within PX1. In examining the bill, it appears that it was paid by Respondent and has no balance. Respondent's ledger confirms that payment was issued. RX1. Consequently, no award is due Petitioner.

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 employed as a bus operator at the time of the accident. After two surgeries and extensive rehabilitation, she was able to return to that same occupation. However, Petitioner testified that she continues to have some difficulty in operating the bus as she is required to make turns hand over hand causing radiating pain from the elbow up to the neck. The Arbitrator acknowledges that driving a bus is more labor intensive than driving a car. The Arbitrator therefore gives moderate weight to this factor to the benefit 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 56 years old at the time of the accident and was 60 years of age at the time of hearing. Considering Petitioner's age and the injury sustained, she will likely live with the effects of her injury as she nears the end of her working career. As a result, the Arbitrator gives moderate weight to this factor to the benefit of Petitioner

Under Section 8.1b(b)(iv), the employee's future earning capacity, the Arbitrator notes that Petitioner was able to return to her normal occupation and did not incur any diminution of wages. The Arbitrator gives moderate weight to this factor to the benefit of Respondent

Under Section 8.1b(b)(v), evidence of disability corroborated by the treating medical records, the Arbitrator gives great weight to this factor to the benefit of Petitioner. Petitioner sustained a full thickness tear of the rotator cuff. She thereafter underwent extensive therapy but could not overcome the presence of a frozen shoulder which required a second surgery consisting of a manipulation under anesthesia, a capsular release, and a revision subacromial decompression. Petitioner was able to rehabilitate and get herself back to work. Petitioner credibly testified that she has significant deficits with regard to lifting and reaching which affect both her work life and personal life. Additionally, Petitioner incurred a psychological trauma which was diagnosed by Dr. Nicholas Jasinski as PTSD. (See PX5, p. 11) Petitioner underwent psychotherapy and per her testimony discontinued such treatment in 2021.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 25% disability to the person as whole pursuant to §8(d)(2) of the Act which corresponds to 125 weeks of permanent partial disability benefits at a weekly rate of $787.71 for both her physical and mental injuries.

It is so ordered:

Arbitrator Rachael Sinnen

December 28, 2022

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC029206
Case Name	Anthony Melton v. Double A Roofing & IWBF
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0318
Number of Pages of Decision	18
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Jason Esmond
Respondent Attorney	Dan Kallio

DATE FILED: 7/25/2023

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF WINNEBAGO)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Anthony Melton,

Petitioner,

vs. No. 13 WC 29206

Double A Roofing, and
Illinois State Treasurer as Ex-Officio Custodian of
The Injured Workers' Benefit Fund,

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Injured Workers' Benefit Fund and notice given to all parties, the Commission, after considering the issues of jurisdiction, notice, causal connection, medical expenses, temporary disability and permanent disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission has carefully considered the issue of notice of the arbitration hearing to Respondent-employer. The Commission finds that Respondent-employer was given proper notice.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 28, 2022, is hereby affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondents 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.

July 25, 2023

SJM/sk
o-6/14/2023
44

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

/s/ *Deborah J. Baker*
Deborah J. Baker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC029206
Case Name	MELTON, ANTHONY v. DOUBLE A ROOFING/ ILLINOIS STATE TREASURER AS EX OFFICIO OF THE INJURED WORKERS' BENEFIT FUND
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision (Corrected)
Commission Decision Number	
Number of Pages of Decision	15
Decision Issued By	Gerald Napleton, Arbitrator

Petitioner Attorney	Jason Esmond
Respondent Attorney	Dan Kallio

DATE FILED: 6/28/2022

THE INTEREST RATE FOR THE WEEK OF JUNE 28, 2022 2.50%

/s/Gerald Napleton, Arbitrator

Signature

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

☒ 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 (CORRECTED)

Anthony Melton
Employee/Petitioner

v.

Double A Roofing / Illinois State Treasurer as ex-officio of the Injured Workers' Benefit Fund
Employer/Respondent

Case # **13 WC 29206**

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 **Rockford**, on **May 18, 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, **November 4, 2012**, 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 these accidents ***was*** given to Respondent.

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

In the year preceding the injury, Petitioner's average weekly wage was **$**$503.91..

On the date of accident, Petitioner was **52** years of age, ***single*** with **0** dependent children.

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

ORDER

- The Respondent shall pay the petitioner temporary total disability benefits of $ 335.93 /week for 39 & 1/7 weeks, from November 4, 2012 through May 7, 2013, November 25, 2014 through January 5, 2015, March 25, 2016 through April 29, 2016, and June 2, 2017 through June 16, 2017, as provided in Section 8(b) of the Act**,** totaling 39 & 1/7 weeks.
- The respondent is liable for the medical bills totaling $347,241.15 before adjustments and partial payments. Respondent is liable for the listed medical bills and shall pay any unpaid balances pursuant to section 8(a), the Medical Fee Schedule and the balance billing provisions in Section 8.2(e).
- The Respondent shall pay the Petitioner the sum of $302.35 / week for a period of 225 weeks, as provided in Section 8(d)(2) of the Act, because the injuries sustained caused 45% loss of a person as a whole.

THE ILLINOIS STATE TREASURER AS *EX-OFFICIO* CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND WAS NAMED AS A CO-RESPONDENT IN THIS MATTER. THE TREASURER WAS REPRESENTED BY THE ILLINOIS ATTORNEY GENERAL'S OFFICE. THIS AWARD IS HEREBY ENTERED AGAINST THE FUND TO THE EXTENT PERMITTED AND ALLOWED UNDER §4(D) OF THE ACT. IN THE EVENT THE RESPONDENT/EMPLOYER/OWNER/OFFICER FAILS TO PAY THE BENEFITS, THE INJURED WORKERS' BENEFIT FUND HAS THE RIGHT TO RECOVER FROM RESPONDENT THE BENEFITS PAID DUE AND OWING THE PETITIONER PURSUANT TO SECTION 5(B) AND 4(D) OF THIS 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.

/s/ Gerald W. Napleton **JUNE 28, 2022**

Signature of Arbitrator

STATEMENT OF FACTS (CORRECTED)

The parties appeared for hearing on May 18, 2022 before Arbitrator. Petitioner was represented by counsel. Petitioner attempted to provide notice of the hearing date to Respondent, Double A Roofing, by certified mail. (PX4). As Respondent did not have workers' compensation insurance coverage, the Illinois Attorney General's Office appeared on behalf of the Illinois State Treasurer, as ex-officio custodian of the Injured Workers' Benefit Fund. (PX3). Respondent did not appear and was not represented by counsel.

Petitioner testified that on November 4, 2012, he was employed by Respondent, Double A Roofing. He had worked for Respondent for six months. Petitioner worked as a laborer whose job duties involved tearing shingles down and cleaning up. To perform the job, he used hammers, screwdrivers, boxcutters, and pliers owned by Respondent. He climbed ladders to get onto roofs to do the work. Petitioner testified that he would work 20-40 hours a week, making approximately $12.00 an hour. As of October 2012 his rate increased to $14.00 an hour. He was paid weekly, and taxes were removed from his paychecks. He was hired by Anthony Adams, the owner of Respondent, and a friend of Petitioner's. Petitioner testified that he would be told where to go for a job and would show up. Sometimes, he and other employees would meet at Mr. Adams' home and drive to the worksite in Mr. Adams' company truck. Petitioner testified that wore a Double A Roofing t-shirt as a uniform while working. He testified that he was only working for Respondent during the period in question. Petitioner testified that he received minimal training. They showed him how to remove shingles from a roof. Aside from that, he was mostly throwing material into dumpsters.

On November 4, 2012, Petitioner was using a ladder to reach an area to remove shingles when the ladder he was on began to slide in sand and fall. Petitioner jumped down from a height of approximately 7-10 feet and landed on his feet. He was unable to stand up and was taken to the Emergency Room at Swedish American Hospital by his co-workers. Petitioner testified that Anthony Adams was notified and came to the hospital.

Petitioner was hospitalized from November 4, 2012 through November 8, 2012 at Swedish American Hospital. (Px. 7). His initial medical record noted that he had fallen from a ladder and complained of bilateral leg pain. He described a popping pain located on the back of his feet, with more severe pain in the right foot than the left. X-rays revealed bilateral calcaneal fractures. Petitioner underwent open reduction and internal fixation of both calcaneal fractures on November 5, 2012 with Dr. Corcoran. (Px. 7). Petitioner was discharged on November 8, 2012 with instructions to be non-weightbearing for at least 8-10 weeks. (Px. 7). Discharge notes that Petitioner tested positive for cocaine and opiates, but Dr. Muhammad's notes opined that Petitioner may have tested positive because of medication received in the hospital. The records are not clear

as to the level or concentration of cocaine or opiates detected. The records are silent as to any evidence of intoxication during his examinations.

Petitioner followed up with Dr. Corcoran who changed Petitioner's foot cast on November 19, 2012 and kept Petitioner's restrictions of non-weightbearing in place. On November 27, 2012, his right foot was noted to have some dehiscence. He continued to describe pain. On December 17, 2012, he was kept off his right foot. On January 17, 2013, Petitioner was able to transition to crutches and was given a CAM walker for his right foot and a surgical shoe for his left foot. His left foot pain began to subside, but his right foot pain continued. Petitioner was further excused from activity on January 31, 2013. On February 18, 2013, Petitioner continued to complain of right foot pain and Dr. Corcoran recommended he begin physical therapy. (Px. 8).

Petitioner underwent physical therapy from February 26, 2013 through May 7, 2013. (Px. 9). The initial evaluation noted his injury, falling from a ladder while working on a roof. (Px. 9). On May 7, 2013, Petitioner followed up with Dr. Corcoran, noting ongoing pain in his right foot. The possibility of performing subtalar arthrodesis on the right in the future was discussed. However, it was noted that Petitioner did not have insurance. Therefore, the focus at the time was pain control. Dr. Corcoran noted that Petitioner would not be able to perform any job that required standing or lifting and that he would be limited to desk work. (Px. 8). A June 21, 2013 note shows that Petitioner must limit his activities and should elevate both feet.

On August 14, 2013, Petitioner was advised to walk with a cane, and was experiencing stiffness in both feet, especially the right. He was unable to take narcotics due to a recent incarceration. He was advised to follow up as needed. On February 18, 2014, Petitioner reported a lot of pain and advised Dr. Corcoran that he now had insurance and wanted to try Celebrex until he could undergo surgery. (Px. 8). Petitioner underwent unrelated treatment for a stroke and a head injury in early 2014. (Px. 7).

On October 21, 2014, Petitioner returned complaining of bilateral foot pain, right worse than left, and wished to schedule surgery. Surgery was performed on November 25, 2014. Petitioner underwent arthrodesis of the right subtalar joint, removal of retained hardware, and excision of a ganglion cyst in the right foot. He was diagnosed with posttraumatic arthritis, subtalar joint, painful retained hardware, and right foot ganglion cyst. Petitioner was casted on December 3, 2014. A CAM walker was provided on December 10, 2014. A cast below the knee was provided on December 17, 2014 and removed on January 5, 2015. At that time, Petitioner was advised to start weightbearing as tolerated. (Px. 8). On February 16, 2015, Dr. Corcoran prescribed a CAM boot to improve Petitioner's ongoing right foot pain. On May 27, 2015, Petitioner reported chronic pain in his right heel, trouble getting out of bed in the morning, and swelling as the day goes on. He was prescribed Norco and Cymbalta and advised to wear his CAM boot for pain. (Px. 8).

Petitioner testified that he moved to Detroit in 2015. Around that time, he was awarded social security disability benefits and has been receiving them through the date of hearing. On December 2, 2015, he was seen at DMC Harper University Hospital, reporting severe foot pain since the weather turned cold. Osteoarthritis or an exacerbation of chronic pain was suspected, and Petitioner was referred to orthopedic. (Px. 10).

On December 18, 2015, Petitioner began treatment with Dr. Kissel at DMC Orthopedic. He reported right foot pain and that his feet were doing well until the weather changed, reporting severe pain in the right foot, localized to the back of the right heel. Dr. Kissel assessed right foot and ankle arthritis and pain and recommended a CT scan and a Swede-O ankle brace. (Px. 11). Petitioner underwent the CT scan on December 29, 2015. (Px. 10). Dr. Kissel noted that the scan showed complete osseous union of the subtalar joint with intact hardware. He noted a poorly defined mass along the course of the peroneal tendons, which could suggest tenosynovitis and/or tendinopathy of the peroneals. An injection was provided, and surgery was discussed as an option. (Px. 11).

On February 19, 2016, Petitioner reported that the steroid injection provided limited and temporary improvement and that he wished to undergo surgery. (Px. 11). On March 25, 2016, Dr. Kissel performed a right ankle arthroscopy with partial synovectomy, peroneus brevis tendon repair, and exostectomy of the right calcaneus. (Px. 10). At follow up on April 1, 2016, Dr. Kissel assessed posttraumatic arthritis, right ankle peroneal tendonitis with tear, and exostosis, status post surgeries. He advised Petitioner to remain non-weightbearing. (Px. 11). On April 15, 2016, Petitioner's cast was removed, and a CAM walker was provided. Petitioner was to remain non-weightbearing. (Px. 11). On April 29, 2016, Petitioner reported doing well and transitioning into a regular shoe. He was prescribed a lace-up ankle brace to be worn when standing or walking for extended periods of time. (Px. 11).

Petitioner returned to Dr. Kissel on December 30, 2016. He reported that over the past several weeks, the pain in his right ankle had become increasingly worse, especially as the temperature had gotten colder. Dr. Kissel advised to continue to wear the lace-up ankle brace and prescribed Neurontin and Tramadol. (Px. 11). On February 10, 2017, Petitioner reported his pain had been worse in the cold weather. He reported that his ankle pain had been quite bothersome and was limiting his daily life. Injections to both ankles were recommended. Petitioner underwent the bilateral cortisone injections on February 17, 2017. On March 10, 2017, he reported 50% improvement in his pain, with the right foot begin worse than the left. On April 14, 2017, Petitioner reported that the improvement from the injections had been slowly decreasing, with the right ankle pain becoming more severe. Surgery was recommended. (Px. 11).

On June 2, 2017, Dr. Kissel performed a right ankle arthroscopy, synovectomy, and debridement. Postoperative diagnosis was posttraumatic ankle arthritis. On June 16, 2017, Petitioner reported 50% improvement in his right foot pain with his left foot and was doing well. Dr. Kissel indicated he could bear weight in regular shoes, with an ankle brace for support, and recommended physical therapy. (Px. 11).

Petitioner was next seen by Dr. Kissel on February 8, 2019. He reported he was doing better and had transitioned into regular shoes. He noted his ankle was feeling better though he did still have some pain. He was ambulating with the help of a cane. He was given a handicap parking prescription and a new Swede-O brace. (Px. 11).

Petitioner last seen by Dr. Kissel in February of 2021 complaining of bilateral foot pain. He noted that his pain was exacerbated by the weather, stating his feet get extremely cold. He reported ambulating with his Swede-O brace. Dr. Kissel diagnosed posttraumatic arthritis of the right ankle status post ankle arthroscopy and ankle synovectomy and right ankle debridement, history of calcaneal fractures and possible PAD bilaterally. He prescribed Tramadol and continued use of his brace. Vascular studies of his feet were recommended. (Px. 11).

Petitioner testified that since his injury, he has increased pain in his feet during the winter. His feet are better in the summer, but once it gets cold, his feet get more stiff and painful. Petitioner testified that he still has difficulty getting up from a sitting position. His left foot is better than his right. He testified that it hurts occasionally, but his right foot is the ongoing problem. Petitioner uses a cane at all times to get around. When it rains, he has pain throughout the foot and into his right ankle. He can't be on his feet for more than 30 minutes before he needs to sit down for at least 15-20 minutes. He does his own activities of daily living but takes breaks to sit when needed. Petitioner testified that he hasn't held a job since his injury. He cuts grass here and there, but has been surviving on his social security disability benefits. Petitioner testified he has not treated since February of 2021. His feet, predominantly his right foot, still hurts, but he is not interested in having another surgery.

Notice of the trial date was attempted on the Respondent at Respondent's last known address. (PX4). Petitioner submitted printouts from the website of the Illinois Office of the Secretary of State and paystubs from Double A Roofing, confirming the address in which service was attempted. (PX5, PX13). A certificate of noncompliance from the NCCI confirming that Respondent failed to have insurance was entered into evidence. (PX3). Finally, Petitioner offered exhibits 1 and 2 which were the original Application for Adjustment of Claims and the amended Application for Adjustment of Claims, adding the Injured Workers Benefit Fund is a party to the case. (PX1, PX2). All issues were in dispute at the time of trial. The Arbitrator

verified the Certified Mail Receipt with a tracking number of 70183090000197739242 (via PX4) via usps.com which noted that the certified letter's status was "Delivered, Left with Individual."

CONCLUSIONS OF LAW (CORRECTED)

A. Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

The Arbitrator finds that the Petitioner and Respondent were operating under and subject to the Illinois Workers' Compensation Act on November 4, 2012. Petitioner testified that he was hired by Anthony Adams, owner of Double A Roofing, to perform tear down and cleanup work for Double A Roofing. Double A Roofing maintained a place of business in Rockford, Illinois. Jurisdiction is proper here in Illinois. Petitioner testified that his job was to perform roof tear down and cleanup. This position involved the remodeling, altering, or demolishing of structures, the use of sharp edged cutting tools, such as a box-cutter, and involved handling of junk and salvage. Therefore, the work is subject to the Illinois Workers' Compensation Act consistent with 820 ILCS 305/3 (1, 2, 8).

The provisions of the Act apply automatically to any business or enterprise engaging in the erection, maintaining, removing, remodeling, altering, or demolishing of structures, construction, or any enterprise in which sharp edged cutting tools are used. The Arbitrator finds Petitioner's testimony credible and finds that Respondent was operating under and subject to the Act under Section 3 of the Illinois Workers Compensation Act on November 4, 2012.

B. Did an employee-employer relationship exist between Petitioner and Respondent?

The Arbitrator finds that there was an employee-employer relationship between Petitioner and Double A Roofing on November 4, 2012. Petitioner testified that he was hired by Anthony Adams, owner of Respondent, Double A Roofing, to perform tear down and clean up on roofing jobs. Petitioner testified that his schedule was set by Mr. Adams. He was shown how to perform the work by co-workers. His work was dictated and controlled by Double A Roofing. Petitioner was paid weekly based on the hours he worked. He was paid an hourly rate as evidenced by paystubs from Double A Roofing. (Px. 13). Taxes were withheld from Petitioner's paychecks. (Px. 13). Double A Roofing provided t-shirts to employees to wear while working. All of this information went uncontradicted at trial. Further, the Arbitrator finds Petitioner credibly

testified to his employment relationship with Respondent. The evidence was unrebutted at trial. Accordingly, based on the evidence in the record, the Arbitrator finds that there was an employee-employer relationship between Petitioner and Double A Roofing on November 4, 2012.

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

The Arbitrator finds that an accident did occur that arose out of and in the course of Petitioner's employment with Double A Roofing on November 4, 2012. Petitioner testified that on that day, while ascending a ladder to tear down shingles on a small roof over a side door, the ladder slipped and he fell 7-10 feet to the ground, landing on his feet. Petitioner's emergency room record on the day of injury indicated that he had fallen from a ladder, though there is some discrepancy whether his feet became entangled in the ladder based on the written note. The history of a fall from a ladder was consistently noted in the treatment records. The records document bilateral calcaneal fractures for which he underwent his first surgery the next day, on November 5, 2012. The mechanism of injury of falling from a certain height due to a ladder falling is clear. Petitioner's testimony regarding the accident was uncontradicted at trial and is clearly supported by the treatment records.

The Arbitrator does not find that there was evidence of intoxication that was the proximate cause or that there was evidence of intoxication to the level that it removed Petitioner from the scope of his employment. The records note that Petitioner admitted to drug use and tested positive for cocaine and opiates. The records negate the finding of opiates as likely related to the narcotics he received post-accident. The records are not clear as to the concentration of cocaine found in Petitioner's system. There is also no further evidence in the record of intoxication through Petitioner's actions. The fact that an employee has ingested an illegal substance at the time of an injury will not, in and of itself, defeat a claim for benefits. See *Lakeside Architectural Metals v. Industrial Comm'n,* 267 Ill.App.3d 1058 (1st Dist., 1994). The record in the present case is clear that Petitioner's injury happened when the ladder he was using began to slide causing him to jump or fall from an advanced height resulting in injury. The record is bereft of evidence that his injury was caused by intoxication or would not have happened otherwise. There is no evidence of impairment in the record aside from the positive drug test at the hospital. Accordingly, the Arbitrator finds that Petitioner suffered an injury that arose out of and in the course of his employment with Respondent on November 4, 2012.

D. What was the date of the accident?

The Arbitrator finds that the date of the accident was November 4, 2012. Petitioner testified to his injury on November 4, 2012 and was seen in the Emergency Room at Swedish American Hospital on the same day. He testified he was transported to the hospital by co-workers after falling. His initial ER records, on November 4, 2012, noted that he had sustained a fall from a ladder approximately hand an hour ago. The Arbitrator finds that Petitioner's accident occurred on November 4, 2012.

E. Was timely notice of the accident given to Respondent?

The Arbitrator finds that Petitioner provided timely notice of the accident to Respondent. Petitioner testified that he was transported to the Emergency Room by his co-workers. He testified that the owner of Double A Roofing, Anthony Adams, went and saw him in the emergency room. No evidence was provided to contradict Petitioner's testimony. Therefore, the Arbitrator finds that timely notice was given by Petitioner to Double A Roofing.

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

The Arbitrator finds that Petitioner's present condition of ill-being is causally related to the injury that occurred on November 4, 2012. On the date of injury, Petitioner was immediately transported to the emergency room where he was diagnosed with bilateral calcaneal fractures. He underwent his first surgery, bilateral open reduction and internal fixation, on November 5, 2012. Thereafter, the medical records document a clear chain of evens which connect his ongoing symptoms to his bilateral calcaneal fracture injury. There was no evidence in the medical records suggesting Petitioner had any pre-existing problem with his feet or ankles, nor is there evidence of any intervening accident that would cause his need for increased or ongoing treatment. He had a clear injury, and ongoing treatment through February of 2021 for his feet and ankles.

Based on the records from Swedish American Hospital, Dr. Corcoran, and Dr. Kissel, the surgeries Petitioner has undergone to his feet and ankles were causally related to his November 4, 2012 injury. Petitioner's records document a continuation of symptoms in his feet and ankles, mainly his right foot/ankle, since the November 4, 2012 injury. His records consistently note increased symptoms with cold weather.

The records document that his symptoms have improved with the surgeries he has undergone, though his symptoms have gradually worsened at times and through the date of hearing. Dr. Corcoran and Dr. Kissel both diagnosed posttraumatic arthritis which has required ongoing treatment through February of 2021. Despite the multiple surgical procedures, Petitioner continues to have pain and stiffness in his feet and ankles, the right worse than the left, with difficulty with prolonged standing or walking. Those symptoms are consistent with the injury he sustained, the surgeries performed and the posttraumatic arthritis that has set into his feet/ankles. His ongoing symptoms are consistent with the injuries suffered and no contradictory medical evidence was admitted at trial. Accordingly, the Arbitrator finds that Petitioner's present condition of ill-being is causally related to his November 4, 2012 injury.

G. What were Petitioner's earnings/AWW?

Based on the record, specifically Petitioner's Exhibit 13, and the Petitioner's unrebutted testimony, the Arbitrator finds that Petitioner earned $503.91 per week prior to his date of accident. Petitioner testified that he worked 20 to 40 hours a week for Double A Roofing, making approximately $12.00 per hour. Petitioner was able to provide seven paystubs from Double A Roofing between April 14, 2012 and October 19, 2012. The paystubs indicate that he was initially paid $12.00 per hour as of April 14, 2012, then $12.50 per hour as of June 9, 2012, then $14.00 per hour as of October 13, 2012. Petitioner's paystubs show that he worked anywhere from 12 hours to 51 hours in a week. He testified that he worked for Double A Roofing for 6-12 months. The April 14, 2012 – April 20, 2012 paystub indicates it was Petitioner's first paycheck. As he did not work for an entire 52-week period, Petitioner's earnings are calculated by dividing the number of weeks and parts therefore during which he earned wages. See *Sylvester v. Industrial Comm'n,* 197 Ill. 2d 225, 231-32 (2001). Petitioner earned $2,318.00 once non-mandatory overtime was removed from the gross amount (as there was no evidence in the record that overtime was mandatory and regularly worked). Dividing those gross earnings by the 4.6 weeks worked documented in the pay stubs, Petitioner's average weekly wages equals $503.91. Accordingly, the Arbitrator finds that Petitioner's average weekly wage was $503.91.

H. What was Petitioner's age at the time of the accident?

Petitioner testified that he was born on August 4, 1960. No evidence was presented that would refute Petitioner's testimony. His medical records confirm his date of birth. The Arbitrator finds that Petitioner was 52 years of age at the time of his November 4, 2012 injury.

I. What was Petitioner's marital status at the time of the accident?

Petitioner testified that he was single, with no dependent children under the age of 18 at the time of his November 4, 2012 injury. No evidence was offered to refute Petitioner's testimony. The Arbitrator finds that Petitioner was single and with 0 dependent children at the time of his November 4, 2012 injury.

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 that the medical services provided to Petitioner were reasonable and necessary for the injuries he sustained on November 4, 2012. The Arbitrator notes that the medical records, diagnoses, treatment carried out, and treatment recommendations are noted in the Statement of Facts. The Arbitrator finds that the Respondent failed to offer any evidence to refute the reasonableness and necessity of the medical treatment received by Petitioner for his injuries. Therefore, the Arbitrator finds that the treatment Petitioner received at Swedish American Hospital, Swedish American Medical Group (Dr. Corcoran), Detroit Receiving Hospital, DMC Orthopaedic & Sports Medicine (Dr. Kissel), were reasonable and necessary for his injury. The Arbitrator notes that certain bills contained in Petitioner's Exhibit 12 were unrelated to Petitioner's treatment for his bilateral feet / ankles. Other bills were paid or reduced by Medicare, for which reimbursement may be sought. Based on the Arbitrator's findings that the Petitioner suffered an injury that arose out of and in the course and scope of his employment for Respondent, Double A Roofing, and that the treatment Petitioner received was reasonable and necessary, the Arbitrator finds that the Respondent is liable for the following dates of service and corresponding charges:

Swedish American Hospital:	11/4/12 – 11/8/12 - Hospitalization and 11/5/22 surgery	$139,641.10
	2/26/13 – 4/25/13 - Physical Therapy	$7,067.65
	11/25/14 - Surgery	$71,119.02
SAMG (Dr. Corcoran):	11/5/12 – 5/27/15 – office visits	$18,925.00
Georgia Inpatient Med (ER):	11/4/12 - ER physician	$1,131.00
Infinity Healthcare Physicians:	11/4/12 - ER physician	$728.00
Rockford Anesthesiologists Associated:	11/5/12 - surgery anesthesia	$4,050.00
	11/25/14 - surgery anesthesia	$2,800.00
Rockford Associated Clinical Pathology:	11/4/12 – 2/26/13 lab work	$372.00
	11/18/14 - labs	$32.00
Detroit Receiving (Dr. Kissel):	12/2/15 – ER	$1,792.19
	12/29/15 – CT right foot	$1,317.00
	1/22/16 - office visit	$720.00

2/19/16 - office visit	$140.00
3/25/16 - surgery	$50,163.19
4/1/16 – office visit	$384.00
4/15/16 – office visit	$494.00
4/29/16 – office visit	$494.00
12/30/16 – office visit	$550.00
2/10/17 – office visit	$925.00
2/17/17 – Injections	$12,979.33
3/10/17 – office visit	$175.00
4/14/17 – office visit	$175.00
6/2/17 – surgery	$29,434.67
6/16/17 – office visit	$566.00
2/8/19 – office visit	$817.00
2/19/21 – office visit	$249.00

The Arbitrator notes that the gross total of bills is $347,241.15 before partial payments and write-offs. The Arbitrator notes that some of these bills show a zero balance after payment by group health carriers, Medicare, and community write-offs. Specifically, the $139,641 bill from Swedish American Hospital bill shows it has been written off as a "community write off" with a $0 balance and the Rockford Anesthesiology bill shows a $0 balance as well. Accordingly, the Respondent is liable under Section 8(a) and 8.2. and the medical fee schedule for the listed medical bills and shall pay any unpaid balances pursuant to section 8(a), the Medical Fee Schedule and the balance billing provisions in Section 8.2(e).

K. What temporary benefits are in dispute?

The Arbitrator finds that Petitioner is owed Temporary Total Disability benefits from November 4, 2012 through May 7, 2013, November 25, 2014 through January 5, 2015, March 25, 2016 through April 29, 2016, and June 2, 2017 through June 16, 2017 for a total of 39 & 1/7 weeks.

The Supreme Court of Illinois has held that "the determinative inquiry for deciding entitlement to TTD benefits remains, as always, whether the claimant's condition has stabilized. If the injured employee is able to show that he continues to be temporarily totally disabled as a result of his work-related injury, the employee is entitled to TTD benefits." Interstate Scaffolding v. Illinois Workers' Compensation Commission, 236 Ill. 2d 132 (2010). "To establish entitlement to TTD benefits, a claimant must demonstrate not only that he or she did not work, but also that the claimant was unable to work. It is irrelevant whether the claimant could have looked for work. The dispositive test is whether the claimant's condition has stabilized, that is, whether the claimant has reached maximum medical improvement." Mech. Devices v. Indus. Comm'n (Johnson), 344 Ill. App. 3d 752, 759 (4th Dist. 2003). "The factors to be considered in determining whether a claimant has reached

maximum medical improvement include: (1) a release to return to work; (2) the medical testimony concerning the claimant's injury; (3) the extent of the injury; and (4) "most importantly," whether the injury has stabilized." Id. at 760.

Petitioner was restricted from work following his injury and initial surgery for his bilateral calcaneal fractures as he was told by Dr. Corcoran to be non-weight-bearing through May 7, 2013. At that time, he was allowed to work though it was recommended her perform a sit-down job. Petitioner did not provide evidence that he looked for sedentary employment. He was again taken off work for a right foot surgery on November 25, 2014 and was non-weightbearing through January 5, 2015. Petitioner began receiving Social Security Disability payments in 2015. Petitioner underwent another surgery, to his right ankle, on March 25, 2016 for which he remained non-weightbearing until April 29, 2016. Petitioner had his final surgery on June 2, 2017 and was not allowed to bear weight until June 16, 2017. During these periods of time, Petitioner was not allowed to bear weight and would not have been capable of working. As such, the Arbitrator finds that Petitioner was temporarily and totally disabled from November 4, 2012 through May 7, 2013, November 25, 2014 through January 5, 2015, March 25, 2016 through April 29, 2016, and June 2, 2017 through June 16, 2017.

L. What is the nature and extent of the injury?

The Arbitrator adopts the findings of fact stated above and incorporates them herein by this reference. In assessing the nature and extent of Petitioner's injury, the Arbitrator must consider the following five factors under Section 8.1:

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.": No impairment rating was offered by either party. This factor is given no weight.
2) The occupation of the injured employee: Petitioner worked for Respondent for approximately 7 months as a laborer whose job was to remove shingles from roof and clean up the mess from the tear down. Petitioner did not return to work for Double A Roofing. Petitioner's treating physicians noted his difficulty ambulating which likely prevent him from returning to this line of work. This factor is given great weight.
3) The age of the employee at the time of the injury: Petitioner was 52 years old at the time of his November 4, 2012 injury. He was in the mid-to-late stages of his working life. This factor is given some weight.

4) The employee's future earning capacity: Petitioner testified that he did not secure employment after his injury. He has since been awarded social security disability benefits. Petitioner's treating physicians noted his difficulty ambulating which would prevent him from performing similar work to that he was performing for Double A Roofing. The record does not show he held jobs of any different nature than that of a laborer. This factor is given great weight.
5) Evidence of disability corroborated by the treating medical records: Petitioner testified to ongoing pain in his feet and ankles, his right worse than his left, and worse with standing and walking or with cold weather. He testified to difficulty getting up from a seated position. He uses a cane at all times and cannot be on his feet for more than 30 minutes at a time before needing to sit down. Petitioner's ongoing symptoms are well documented throughout the medical records and are consistent with the four surgeries he has undergone to his right foot/ankle and one surgery to his left foot. This factor is given great weight.

Having found that Petitioner has met his burden under the Act for the aforesaid issues in dispute, the Arbitrator finds that Petitioner has sustained a loss of use of the person as a while commensurate with a loss of occupation. Petitioner is awarded 45% loss of the person, consistent with a loss of occupation under Section 8(d)2.

The Illinois State Treasurer as ex officio custodian of the Injured Workers' Benefit Fund was named as a co- respondent in this matter. The Treasurer was represented by the Illinois Attorney General at hearing. Section 4 of the Workers' Compensation Act provides that the Injured Workers' Benefit Fund is liable to pay benefits to an injured worker where the Respondent has failed to obtain insurance, and where Respondent has failed to pay benefits due. Petitioner submitted sufficient credible evidence by means of a certification from the National Council on Compensation Insurance Certificate demonstrating that Respondent-Employer was not insured at the time of the injury. Further, Petitioner provided sufficient credible evidence that notice of the proceedings were provided to the Respondent-Employer. Accordingly, pursuant to Section 4 of the Act, the Arbitrator enters this award against the Injured Workers' Benefit Fund through the State Treasurer as *ex officio* custodian of the Injured Workers' Benefit Fund. The Employer-Respondent's obligation to reimburse the IWBF, as set forth above, is in no way limited or modified and is entirely independent and separate from Employer-Respondent's potential liability for fines and penalties set forth in the Act for its failure to be properly insured. Respondent-Employer shall reimburse, and The Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC015105
Case Name	Richard Dach v. Crown Machine
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0319
Number of Pages of Decision	13
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Jason Esmond
Respondent Attorney	Nadine Neue

DATE FILED: 7/26/2023

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF WINNEBAGO)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICHARD DACH,

Petitioner,

vs. NO: 18 WC 15105

CROWN MACHINE,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses and the nature and extent of Petitioner's injuries, 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 strikes the Arbitrator's PPD award of 25% loss of use of the left leg and instead finds that Petitioner is entitled to wage differential benefits under Section 8(d)1 of the Act commencing August 20, 2019. To qualify for a wage differential under Section 8(d)1, a claimant must prove he was (1) partially incapacitated from pursuing his usual and customary line of employment and (2) he sustained an impairment of earnings. *820 ILCS 305/8(d)1; Gallianetti v. Ill. Indus. Comm'n*, 315 Ill. App. 3d 721, 730 (2000).

The evidence demonstrated that Petitioner's treating physician, Dr. Fischer, gave Petitioner sedentary work restrictions of sit-down work which Respondent was able to accommodate. As of August 20, 2019, Petitioner deburred parts for Respondent and no longer performed his full duties as a machinist. Petitioner's primary job duties as a machinist involved programming, setting-up tools, running and changing parts, and performing inspections on a CNC machine. He also used a boom hoist to lift items that weighed in excess of 200 pounds. The Commission finds that as a result of Petitioner's work-related injuries, he is partially incapacitated from pursuing his usual and customary line of employment as a machinist and is now performing light duty deburring work for Respondent.

The Commission further finds that Petitioner proved an impairment of earnings. The parties stipulated that Petitioner's average weekly wage (AWW) in the year preceding the injury was

$1,296.55. Following his treatment and release to work with restrictions, Petitioner began earning $10.00 per hour on August 20, 2019 working in the deburring department. His pay increased to $11.00 per hour on January 1, 2021 and he continued to earn this wage through the date of arbitration. Petitioner's Exhibit 5 is the wage statement commencing August 9, 2019 and reflects that Petitioner earned $10.00 and $11.00 per hour as indicated.

The Commission finds that Petitioner's AWW was reduced from $1,296.55 per week to $400.00 per week, and then later $440.00 per week, based on a 40-hour work week. Wage differential benefits equal 66-2/3% of the difference between the average amount which Petitioner would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident. *820 ILCS 305/8(d)1*. As such, Petitioner is entitled to wage differential benefits of $597.70 per week from August 20, 2019 through December 31, 2020 and $571.03 per week from January 1, 2021 through the date Petitioner reaches the age of 67 or five years from the date the award becomes final whichever is later.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 11, 2022 is hereby modified as stated and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of 25% loss of use of the left leg pursuant to Section 8(e) of the Act is stricken.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $597.70 per week from August 20, 2019 through December 31, 2020, as provided in Section 8(d)1 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $571.03 per week from January 1, 2021 through the date Petitioner reaches the age of 67 or five years from the date the award becomes final, whichever is later, as provided in Section 8(d)1 of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all other 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 the Circuit Court.

July 26, 2023

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

CAH/pm

O: 7/20/23
052

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC015105
Case Name	Richard Dach v. Crown Machine
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Paul Seal, Arbitrator

Petitioner Attorney	Jason Esmond
Respondent Attorney	Nadine Neue

DATE FILED: 7/11/2022

THE INTEREST RATE FOR THE WEEK OF JULY 6, 2022 2.50%

/s/ Paul Seal, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

☐ 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

Richard Dach
Employee/Petitioner

v.

Crown Machine
Employer/Respondent

Case # **18 WC 15105**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Seal**, Arbitrator of the Commission, in the city of **Rockford**, on **March 18, 2022.** After 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, **May 11, 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 accidents ***was*** given to Respondent.

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

In the year preceding Petitioner's injury, Petitioner's average weekly wage was **$1,296.55.**

On the date of accident, Petitioner was **60** years of age, ***married*** with **0** dependent children.

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

ORDER

- The Respondent shall pay $**849.20** for necessary medical services, as provided in Section 8(a) and 8.2 of the Act and consistent with the medical fee schedule.

- The Respondent shall pay $777.93 per week for 53.75 weeks – the petitioner proved by the preponderance of the evidence that he sustained permanent partial disability to the extent of 25% loss of use of his left leg pursuant to 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.

JULY 11, 2022

Signature of Arbitrator

STATEMENT OF FACTS

The parties appeared for hearing on March 18, 2021 before Arbitrator Seal under the Illinois Workers' Compensation Act. The parties stipulated that Petitioner was an employee of Respondent on May 11, 2018. The parties stipulated that that timely notice of Petitioner's May 11, 2018 injury was provided and that Petitioner's average weekly wage relative to his injury was $1,296.55. The parties further stipulated that Petitioner was 60 years of age, married, with 0 dependent children at the time of his May 11, 2018 injury.

Petitioner testified that he started working for Respondent, Crown Machine on August 18, 1997. (Tr. p. 12). He testified that he worked as a machinist since hired in 1997. (Tr. p. 13). He testified that he programs, sets up, and runs parts on a CNC machine. (Tr. p. 13). He worked full time, typically 40 hours a week. (Tr. p. 14). He testified that his duties can vary depending on the orders. (Tr. p. 13). There can be 2-piece orders, in which he would mainly program, find tools, set up, and inspect. (Tr. p. 13). There are also orders of 500 – 1,000 pieces. With large orders, he would change parts and inspect all day. (Tr. pp. 13-14). He testified that while setting up or loading the machine, he would be standing. (Tr. p. 14). If on a job with a 2-hour cycle time, there would be time to sit, but that depended on the job. (Tr. p. 14). He testified that there is a hoist to assist with heavy lifting. However, the hoist is a boom hoist, requiring he push and pull the piece it is holding to get it into place, noting that the pieces are sometimes 200 or 300 lbs. (Tr. p. 15). If the parts were smaller, weighing 30 pounds or so, it would be just as easy to lift the part than use the hoist. (Tr. p. 16).

Petitioner testified that prior to May 11, 2018, Respondent had taken a job from Parker Hannifin. (Tr. p. 16). He described it as ends to pistons, 12 by 12 plates. His particular job was to mill 4 ends on them. (Tr. p. 16). To do so, he would load the part, hit the button, unload the part, and hit the button again. (Tr. p. 17). He testified that the machine had a dysfunctioning pallet changer at the time so instead of just pushing the button once and changing the parts, he had to go back to the control, unlocking the pallet, come back around, and step up. (Tr. p. 17). He had a wooden pole that he would have to use to push the pallet in, go back around, and manually lock the pallet down. (Tr. p. 17). He noted with many parts being run, it was a lot of back and forth. (Tr. p. 17). He noted that a few months prior to May 11, 2018, Respondent had gotten SPX pump bodies and he was asked to run a second machine. (Tr. p. 17). As of approximately March of 2018, Petitioner was running two machines instead of one, and was working overtime due to the increased work. (Tr. p. 18). Petitioner testified that one of the machines was terrible because it was lifting, loading, climbing up the step, putting it down on a barrel, grabbing a part out of a box. (Tr. pp. 18-19). He noted he would step up a single 8-inch step, carrying 40 pounds and then manually clamp the bolts which required grabbing a wrench and twisting. (Tr. p. 19). During the period from March of 2018 through May 11, 2018, Petitioner would hurry between the two machines he was running, noting they were 10-15 feet apart. (Tr. pp. 20-21). Petitioner wage statement indicated overtime of 9 hours, 15 hours, 15 hours, 15 hours, and 8 hours during the weeks ending April 7, 2018 through May 5, 2018. (Px. 4).

With the increased workload from approximately March of 2018 through May 11, 2018, Petitioner began experiencing pain in his left knee. (Tr. p. 21). He indicated he would come home from work and would ice his knee and elevate his leg. (Tr. p. 21). Petitioner testified that he did have a left knee injury in 2008 for which he underwent a surgery to repair a torn meniscus. (Tr. p. 16). He believed he had missed about 2 weeks of work after that procedure and returned without a problem. (Tr. p. 16). Leading up to March of

2018, he testified that he was not receiving any treatment for his knee and didn't have any problems doing his job. (Tr. p. 22). Petitioner testified that he had received an injection into his left knee in November of 2012. However, he had not received any treatment between December of 2012 and March of 2018. (Tr. pp. 22-23).

Petitioner testified that he had complained about pain in his knee with the increased work and, for a period of time, was not required to do the task of deburring. (Tr. p. 23). After complaints from another employee, he was advised he would have to perform the deburring. (Tr. p. 23). Petitioner testified that he voices he could not further increase his workload due to his increased knee pain. (Tr. pp. 23-24). He indicated that Kevin Michaeles, his foreman, had asked him if he had a note regarding his knee and had sent him home for the day. (Tr. p. 25). Petitioner testified he then went to OSF Rock Cut Crossing to see his doctor. (Tr. p. 25). Petitioner was seen by Dr. Mohiuddin on May 11, 2018. He reported 4-5 weeks of left knee pain and that he performed a lot of bending, moving, and lifting at work. (Rx. 1). He had x-rays performed of his knee and was referred to see an orthopedic. (Tr. pp. 25-26).

Respondent called Kevin Michaeles to testify. Mr. Michaeles is the vice president of manufacturing for Respondent. (Tr. p. 38). In 2018, he was a manufacturing manager. (Tr. p. 39). Mr. Michaeles testified that Petitioner worked on a Mazak H500 machine in 2018. (Tr. p. 40). He indicated that in 2017, the cycle being run was 15 minutes, including part changes which he estimated at 3-4 minutes each time. (Tr. p. 44). Mr. Michaeles testified that Petitioner was required to run two machines for approximately 9 days in March and April of 2018. (Tr. p. 47). He testified the first machine was running 15-minute cycles, 4 parts per hour. (Tr. p. 47). Mr. Michaeles testified that some force was required to move parts into place into the machine, even with the hoist. (Tr. p. 58). Mr. Michaeles testified that on May 11, 2018, he was questioned by another employee as to why Petitioner was not deburring his parts. (Tr. p. 49). Mr. Michaeles indicated that a verbal altercation took place between the other employee and Petitioner regarding the deburring. (Tr. p. 52). Mr. Michaeles confirmed that Petitioner advised him that his knee was bothering him with standing up all day. (Tr. p. 52).

Petitioner mostly agreed with Mr. Michaeles testimony regarding the cycle times from March to May of 2018, but noted that he was operating 2 pallets, so there would be 8 parts being run per hour.

Petitioner was seen by Dr. Fisher, an orthopedic, on May 15, 2018. (Px. 1). Dr. Fischer's record noted that Petitioner had a fairly long history of discomfort in his left knee that was steadily worsening at his job as a machinist in which he does a fair amount of lifting and going up and down steps. He reported having to work two machines at this time, where previously he was only working one machine. An aspiration and injection were performed, and Petitioner was restricted to limited steps and lifting as tolerated. (Px. 1). Petitioner testified he took the note into Respondent and was accommodated. (Tr. p. 26).

Petitioner followed up with Dr. Fischer on August 7, 2018. He reported pain at 8/10 at work due to bending, lifting, etc. He noted he was willing to try a sedentary position at work. Another aspiration and injection were provided on August 14, 2018, with Dr. Fisher limiting Petitioner to standing 50% of his workday. (Px. 1). Dr. Fisher's records note a phone call on August 24, 2018 from Petitioner noting that sitting work wasn't available. (Px. 1).

Petitioner testified that between August of 2018 and July of 2019, they were running longer-cycle parts, allowing him to sit for much of the day. (Tr. pp. 27-28). Around July of 2019, he was moved to some different machines that required leaning and tooling, which was too difficult on his knee. (Tr. pp. 28-29). Petitioner was seen on July 24, 2019 for another aspiration and injection to his left knee. On August 1, 2019, Dr. Fischer limited him to sit-down work. (Px. 1). Petitioner provided the note to Kevin and was put on deburring for a day. Thereafter, he was told to go home as Respondent did not have sit-down work. (Tr. p. 29). Petitioner testified that he inquired about disability benefits. (Tr. p. 30).

Given the restrictions to sit-down work, Petitioner was moved to a different, sedentary position, on August 20, 2019. (Tr. p. 30). He indicated he was told that he could quit or deburr parts for $10 an hour. (Tr. p. 30). Thereafter, Petitioner began working the sit-down, deburring position, at $10 an hour. (Tr. p. 30). He indicated a few other employees did the deburring position and believes they made approximately $16 an hour. (Tr. p. 31). Petitioner remains at the deburring position at this time, though his pay was increased to $11 an hour around January 1, 2021 when minimum wage increased. (Tr. p. 31, Px. 5).

Respondent also called Daniel Glavin, Respondent's owner, to testify. (Tr. p. 61). Mr. Glavin agreed that when cycle times were shorter during March to May of 2018, the time he would have spent on his feet would have increased. (Tr. p. 70). He also confirmed that Petitioner was advised he could accept the $10 an hour deburring position as of August 20, 2019, or he could leave. (Tr. p. 68).

Petitioner was seen by Dr. Coe for an Independent Medical Examination on December 4, 2019. (Px. 2). Dr. Coe noted that Petitioner had worked for Respondent for 22 years as a machinist. Petitioner advised Dr. Coe that in early 2018, his employer was performing several larger jobs, requiring machining of large metal pieces weighing 45-50 pounds each. He described the work as fast-paced and heavy, requiring manual lifting of parts in machine loading. He noted he would step up an 8-inch step repeatedly and clear and load the machines. He reported operating a second machine for several months as well, with the increased work requiring mandatory overtime. (Px. 2). Petitioner reported pain, swelling, and stiffness in his knee with the increased workload. Dr. Coe opined that Petitioner's increased workload had been a causative factor in the aggravation of his pre-existing arthritic condition of his left knee. Dr. Coe noted that the walking between machines, moving parts in machines, twisting and turning, and loading and unloading of the machines were a factor that aggravated his left knee osteoarthritis. Dr. Coe recommended sit down work and follow up with the orthopedic for injections, pain management, and potentially a knee replacement. (Px. 2).

Petitioner was sent to Dr. Forsythe for an Independent Medical Examination on July 2, 2020. Dr. Forsythe noted that Petitioner had reported 4-5 weeks of left knee pain to Dr. Mohiuddin when seen on May 11, 2018. He had indicated that he was performing a lot of bending, moving, and lifting at work. (Rx. 2). Dr. Forsythe opined that Petitioner's left knee condition was merely a manifestation of his pre-existing osteoarthritis and was not causally related to his work activities. (Rx. 2). Dr. Forsythe agreed that the treatment Petitioner had undergone had been reasonable and necessary. He agreed that Petitioner is a candidate for a total knee replacement, though he should lose weight before undergoing the procedure. (Rx. 2). Dr. Forsythe testified that if someone has moderate to severe arthritis, then you could certainly exacerbate symptomatology of arthritis with heavy work activities. He also testified that surgery, such as a total knee replacement, would not be recommended or performed in the absence of pain. He believed that Petitioner would already have

been symptomatic relative to his arthritic condition, prior to 2018, though he did not review medical documentation noting symptoms prior. Petitioner reported to Dr. Forsythe that he had 90% left knee function prior to February of 2018, but Dr. Forsythe indicated it was difficult for him to believe that. (Rx. 2). Dr. Forsythe agreed that sit-down work restrictions were appropriate for Petitioner, and that he did not review anything indicated Petitioner had been so restricted prior to May of 2018. (Rx. 2).

Petitioner testified that his knee remains sore, and he has worse pain with trouble walking long distances or being on his feet longer than 10 minutes. (Tr. pp. 32-33). However, given that he has been working a predominantly sit-down position, his knee has not been too problematic. (Tr. p. 32).

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE DISPUTED ISSUES

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

The Arbitrator adopts the statement of facts detailed above and finds that Petitioner sustained repetitive trauma injury to his left knee that arose out of and in the course of his employment through May 11, 2018. The Arbitrator relies upon the records of the treating physicians, the opinions of Dr. Coe, as well as Petitioner's credible testimony.

The treating medical records support a finding that Petitioner sustained repetitive trauma injuries through May 11, 2018. When initially seen on May 11, 2018, he reported left knee pain for 4-5 weeks and that he was performing a lot of bending, moving, and lifting at work. (Rx. 1). When seen by Dr. Fischer on May 15, 2018, he reported steadily worsening pain and difficulty with his job as a machinist requiring a fair amount of lifting and going up and down steps. He indicated that he'd been having to work 2 machines at this time frame, where he'd previously been working one. (Px. 1). Petitioner credibly testified to the increased workload from March 2011 through May 2011. He testified to increased activity on his own, regular machine, as well as having to operate a second machine. He testified to running smaller parts, requiring him to load and unload more frequently, walking up the step to his machine more frequently. The increased work activities were not contradicted by Respondent's witnesses. Petitioner's wages also support increased overtime from early April through May 11, 2018, consistent with Petitioner' testimony regarding the increased workload and house from March 2018 through May 11, 2018. Petitioner's description of the increased workload was also consistently reported to Dr. Coe and Dr. Forsythe. (Px. 2, Rx. 3).

As such, the Arbitrator finds that Petitioner sustained repetitive trauma injuries through May 11, 2018 that arose out of and in the course of his employment with Respondent.

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

The Arbitrator adopts the findings of fact stated above and incorporates them herein by this reference. The Arbitrator finds that Petitioner's current condition of ill-being is causally related to his work injuries through May 11, 2018. The Arbitrator relied upon the opinions of Dr. Jeffrey Coe, as well Petitioner's treating records and his credible testimony.

The Arbitrator relies upon the well-established rules set forth by the Illinois Supreme Court that "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 treatment records and IME opinion testimony support a causal relationship between his current condition of ill-being regarding his left knee and his repetitive work activities through May 11, 2018. Petitioner's treatment records note increased symptoms in his knee with increased work duties for several months leading up to May 11, 2018 when he sought treatment. Petitioner's examining physician, Dr. Coe's opinion regarding an aggravation of pre-existing osteoarthritis with the increased workload is supported by the treatment notes. Dr. Forsythe, Respondent's examining physician, opined that Petitioner's work activities did not aggravate his pre-existing condition, based in part, on his assumption that Petitioner's osteoarthritis was symptomatic prior to the increased work activities from March 2018 through May 11, 2018. Petitioner credibly testified to doing well prior to the increased workload and to the onset of ongoing pain in his knee with the increased workload from March 2018 through May 11, 2018. Petitioner was working his regular job duties, unrestricted, with no need for treatment for over 5 years, from December 2012 through May 11, 2018. Dr. Forsythe agreed restrictions to sit down work were appropriate for Petitioner. There is no indication he required such restrictions, or was symptomatic, prior to May 11, 2018. Dr. Forsythe agreed he did not see treatment notes indicating symptoms or restrictions prior to May 11, 2018.

Petitioner testified to ongoing pain and swelling in his knee with being on his feet for longer than 10 minutes. Since August 20, 2019, he has worked a sedentary position with Respondent, deburring parts. This position no longer required him to load or unload machines, nor be on his feet for any significant amount of time. With the sit-down work, he has not required additional treatment for his knee since seeing Dr. Fischer on August 1, 2019. Dr. Coe and Dr. Forsythe agreed that a total knee replacement would be reasonable, though Dr. Forsythe opined he would need to lose a significant amount of weight prior to undergoing the procedure. Both physicians agreed that a limitation to sedentary work is reasonable given the condition of his knee and that Petitioner was working, unrestricted, prior to May 11, 2018.

The Arbitrator finds Dr. Coe's opinion that Petitioner's work activities from March 2018 through May 11, 2018 were a causative factor in the aggravation of his left knee osteoarthritis more convincing. This opinion is supported by the history of the onset of Petitioner's symptoms as well as the continuation of his symptoms and need for limitations since he began treatment. As such, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to his May 11, 2018 repetitive trauma injuries.

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 that the medical services provided to Petitioner were reasonable and necessary for the injury he sustained as a result of his May 11, 2018 injuries. The Arbitrator notes that the medical records, diagnoses, treatment carried out, and treatment recommendations are noted in the Statement of Facts. The

Arbitrator finds that Petitioner's treatment described in the statement of facts, including injections has been reasonable and necessary. The Arbitrator notes that both examining physicians, Dr. Coe and Dr. Forsythe, opined that Petitioner's left knee treatment had been reasonable and necessary. For the reasons stated above and having found that Petitioner's current condition of ill-being to be related to his injury, Petitioner's treatment has been reasonable and necessary.

As such, the Arbitrator finds that the Respondent is liable for the treatment provided, as set forth in Petitioner's Exhibit 3, pursuant to the medial fee schedule, as follows:

Respondent is responsible for the outstanding charges at OSF Medical Group. Petitioner underwent aspiration and an injection on July 24, 2019 with Dr. Fischer. Having found that treatment causally related, Respondent is responsible for those outstanding charges, totaling $353.00.

Respondent is responsible for the outstanding charges at OSF Medical Center. Petitioner was seen for an evaluation and x-ray on May 11, 2018. Having found that treatment causally related, Respondent is responsible for those outstanding charges, totaling $481.00. Further, Respondent is responsible for the radiologist charge from the May 11, 2018 x-ray, with Rockford Radiologists, totaling $15.20.

As such, Respondent is liable for charges as noted above, totaling $849.20, pursuant to the medical fee schedule.

K. What temporary benefits are in dispute?

The Arbitrator finds that Petitioner is not owed further temporary benefits.

L. What is the nature and extent of the injury?

Considering the evidence in its entirety: the petitioner's testimony, the documentary medical evidence, the respondent's testimonial evidence – the Arbitrator finds the petitioner failed to prove by the preponderance of said evidence that he sustained a work-related wage diminution under section 8(d)1 of the act.
The Arbitrator, therefore, finds that the petitioner sustained permanent partial disability to the extent of 25% loss of use of his left leg pursuant to section 8 (e) of the act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	12WC029602
Case Name	Christopher R. Negrete v. Dawn Food Products, Inc
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0320
Number of Pages of Decision	14
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Catherine Krenz Doan
Respondent Attorney	Daniel Wellner

DATE FILED: 7/26/2023

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF KANKAKEE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHRISTOPHER R. NEGRETE,

Petitioner,

vs. NO: 12 WC 29602

DAWN FOOD PRODUCTS, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical benefits, temporary benefits and the nature and extent of Petitioner's injuries, 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 22, 2022 is hereby affirmed and adopted.

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

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

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

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

July 26, 2023

CAH/pm
O: 7/20/23
052

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

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	12WC029602
Case Name	CHRISTOPHER R. NEGRETE v. DAWN FOOD PRODUCTS, INC.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Jessica Hegarty, Arbitrator

Petitioner Attorney	Catherine Krenz Doan
Respondent Attorney	Daniel Wellner

DATE FILED: 7/22/2022

THE INTEREST RATE FOR THE WEEK OF JULY 19, 2022 2.91%

/s/ Jessica Hegarty, 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

CHRISTOPHER R. NEGRETE
Employee/Petitioner

v. Case # **12 WC 029602**

DAWN FOOD PRODUCTS, INC.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Kankakee**, on **December 16, 2021**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's present 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 **5/16/2012** , 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 $**40,501.76**; the average weekly wage was **$778.88**.

On the date of accident, Petitioner was **45** 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 $**85,008.49** for TTD, and $**53,032.43** for maintenance, for a total credit of $**138,040.92**.

Respondent is entitled to a credit of $**984.95** under Section 8(j) of the Act.

ORDER

- The Respondent shall pay the Petitioner TTD benefits of $519.25/week for 163-5/7 weeks, from May 17, 2012, through November 28, 2012; April 10, 2013, through April 16, 2013; and April 18, 2013, through November 17, 2015;

- The Respondent shall pay the Petitioner maintenance benefits of $519.25/week for 317-2/7 weeks, from November 18, 2015, through December 15, 2021;

- The Respondent shall pay $91,533.27 for medical services as provided in Section 8(a) of the Act and pursuant to the medical fee schedule. The payment shall be sent directly to Petitioner's attorney in accordance with Section 7080.20 of the Rules Before the Illinois Workers' Compensation Commission;

- The Respondent shall receive an 8(j) credit of $984.95. The Respondent shall hold Petitioner harmless from any claim for payment made by BCBS of Michigan;

- The Respondent shall pay the Petitioner the sum of $**519.25**/week for life, effective **12/16/2021**, because the injuries sustained resulted in a permanent total disability pursuant to Section 8(f) of the Act. The Petitioner is entitled to annual adjustments beginning July 15 of the second year after the date of entry of this award and on July 15 annually thereafter. The adjustments shall be made directly to Petitioner pursuant to Section 8(g);

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.

Jessica A. Myers

JULY 22, 2022

Signature of Arbitrator

ADDENDUM TO THE DECISION OF THE ARBITRATOR

This matter proceeded to a hearing on December 16, 2021, in Kankakee, Illinois. (Arbitrators Exhibit "Arb. Ex." 1). The disputed issues are causal connection, TTD/maintenance benefits, the nature and extent of the Petitioner's injuries, and medical bills. (Id.).

The Petitioner began working for Respondent, Dawn Food Products, Inc., as an Environmental Control Laborer in December 2009. (Petitioner's Exhibit "PX" 22). His job duties encompassed general cleaning and maintenance of Respondent's factory. (Transcript "T". 9). He worked at least 8 hours per day, the majority of which, he spent on his feet. (Id., p. 9).

On May 16, 2012, the Petitioner was cleaning out a pan washer when the door popped off of the machine releasing scalding hot liquid onto Petitioner's feet and ankles. (Id., 14).

The Petitioner sought treatment that day at Provena St. Mary's Hospital Occupational Clinic where significant burns to his ankles were noted. (PX 1). He was transferred to the hospital and treated by Dr. Terril Applewhite, a wound care specialist, who kept the Petitioner overnight. (Id.).

The Petitioner testified he had no problems with his feet before May 16, 2012. (T. p. 12).

Following his release from the hospital, the Petitioner regularly followed up with Dr. Applewhite and on July 19, 2012, the doctor noted the left ankle burn had decreased from its original size of 27cm x 10cm x 0.1cm to its present size of 1 cm x 0.7cm x 0.1cm. On July 26, 2012, and August 2, 2012, Dr. Applewhite noted that Petitioner reported his pain was a 1 out of 10. The doctor released the Petitioner to moderate/light-duty work on August 2, 2012. (PX 1).

On August 1, 2012, the Petitioner's primary doctor, Dr. Anjum Hameeduddin, noted the Petitioner's complaints of swelling and pain in his left foot. On exam, the doctor noted decreased sensation in the left foot and ankle. Dr. Hameeduddin instituted light-duty work restrictions and recommended physical therapy. (Id.).

On August 7, 2012, Accelerated Rehabilitation noted the Petitioner's complaints of muscle weakness, instability, and swelling in his ankles. The Petitioner reportedly had been immobilized for a few weeks following his accident and had returned to light-duty work recently but was unable to continue due to swelling in his ankles. (Id.).

On August 23, 2012, Dr. Applewhite noted the Petitioner's burns/wounds had been resistant to healing despite numerous interventions over the past three months. The doctor noted the Petitioner had been complaint with the treatment plan. Dressings were changed on the Petitioner's wounds and the use of compression stocking was ordered to gain control of edema in his lower extremities.

At this same visit, the Petitioner was released to full duty work by Dr. Applewhite who noted that Petitioner reported "0/10" pain in his bilateral feet. This is the last visit with this physician contained in the record.

The Petitioner testified that he did not recall telling Dr. Applewhite that he had 0/10 pain. (Id.).

On September 14, 2012, Dr. Hameeduddin noted the Petitioner's complaints of sharp left ankle pain at a 7/10, bilateral foot swelling, and difficulty walking. (PX2). The doctor continued light-duty work restrictions, prescribed Vicoprofen for pain, and referred Petitioner to Dr. Richard Gamelli at Loyola University. (Id.).

On October 22, 2012, the Petitioner was examined by Dr. Richard Gamelli, Director of the Burn & Shock Trauma Institute at Loyola Medicine in Maywood. (PX 5). The Petitioner reported an accident history consistent with his testimony at the hearing. The Petitioner reportedly was immobilized at home for one month following the accident. The Petitioner reported instability when walking, more so with the right ankle. He also reported joint pain, more so with the left ankle, that shoots up his back and causes headaches. The Petitioner was currently taking Norco and Naproxen for pain. Dr. Gamelli reviewed the Petitioner's physical therapy records which noted bilateral lower extremity distal muscle weakness when compared to the proximal muscles. Dr. Gamelli, suspecting an underlying neurological deficit, referred the Petitioner to a specialist. (PX 5).

On October 30, 2012, Dr. Athena Kostidis, a neurologist at Loyola Medicine, examined the Petitioner pursuant to Dr. Gamelli's referral. (PX6). The Petitioner described his lower extremity pain as pulsating and worse with activity. The doctor's assessment noted sensory changes, pain, and lower extremity weakness. Dr. Kostidis thought the lower limb weakness was largely related to pain, although she noted "there does seem to be at least local sensory nerve injuries on both sides. The doctor ordered a lower extremity EMG/NCV study. (Id.).

On January 7, 2013, Dr. Kostidis noted the Petitioner's complaints of left foot/ankle weakness, soreness, and pain. Occasional right ankle pain was noted. (Id.). The doctor noted the EMG/NCV was a normal study with no electrophysiologic evidence of a large fiber neuropathy, active radiculopathy, or myopathy of the lower limbs. The doctor noted, "clinically, it is probable" that Petitioner had some "small fiber nerve involvement in the feet." The Petitioner's Neurontin was increased and he was ordered to follow up in 2-3 months. (Id.).

The Petitioner returned to light duty work for Respondent from November 2012 through April 2013. Per his testimony, the Petitioner could not stand for long periods of time and experienced pain in his feet. He further testified that he was not offered light duty work by Respondent after April 2013.

On May 13, 2013, Dr. Kostidis noted that Petitioner had started using a cane one month ago due to balance problems. (Id.). The doctor also noted that Petitioner's physical therapist, as of May 9, 2013, had seen minimal progress. The Petitioner reportedly continued to have daily foot/ankle pain at an 8/10 if he stood for more than 10 minutes. On exam, giveaway weakness throughout the lower extremities along with reduced strength, decreased sensation, and abnormal gait was noted. (Id.). Dr. Kostidis prescribed a functional capacity evaluation ("FCE") to assess his ability to return to work and kept Petitioner off of work until his next visit. (PX6.).

The Petitioner underwent an FCE at Accelerated on May 23, 2013, which was invalid. (PX 8).

On June 19, 2013, Dr. Kostidis noted the Petitioner's report of left foot swelling that prevented Petitioner from putting a shoe on. (Id.). The swelling improved with elevation and was exacerbated with standing and walking. On exam, the findings were similar to the last visit. The Petitioner was kept off work for 6 weeks until his next visit.

On July 5, 2013, a second, valid, FCE concluded that Petitioner could work a light-medium job with standing/walking limited to 20 minutes and no squatting, climbing or walking on uneven surfaces. (PX 9).

On August 21, 2013, Dr. Kostidis noted Petitioner's report that he fell trying to climb over a 3-foot fence in his yard. The doctor increased his Gabapentin dosage and recommended biofeedback therapy for his lower limb pain. (PX 6).

On February 19, 2014, the Petitioner described a fall in his garage to Dr. Murray Flaster, a neurologist covering for Dr. Kostidis. (T. 21). The Petitioner lost his balance, fell, and hurt his left shoulder. (PX11) The Petitioner complained of right foot pain that radiated to his knee and left foot pain that radiated to the hip. The doctor

increased the Gabapentin dosage and also prescribed Cymbalta. The Petitioner was referred to Dr. Garbis for his shoulder pain. (Id.).

On February 25, 2014, Dr. Nickolas Garbis, an orthopedic physician at Loyola Medicine, noted that Petitioner presented with complaints of left shoulder pain following a fall approximately one week earlier. (PX 12). A subsequent MRI revealed a full-thickness supraspinatus tear. The Petitioner underwent arthroscopic repair of his left shoulder, performed by Dr. Garbis, on September 22, 2014. (Id.).

On October 7, 2014, Dr. Kostidis noted the Petitioner's complaints of left foot pain radiating to the knee along with complaints of bilateral swelling in his feet when on his feet for long periods. (PX6). The Petitioner reported that his right foot pain had improved with physical therapy although he noted persistent heel pain on the right lateral ankle. On exam, mild weakness was noted in the bilateral lower extremities. Petitioner's station and gait were antalgic with a "mildly wide base". Petitioner could not heel or toe walk due to pain mostly in the left foot. Dr. Kostidis diagnosed a possible small fiber nerve injury related to Petitioner's burns, left greater than right. (Id.).

On September 2, 2015, Petitioner underwent another FCE pursuant to the recommendation of Dr. Garbis. (PX 17). The FCE was deemed valid by the examiner who concluded that the Petitioner should not return to work due to unsafe mobility and increased fall risk. (Id.). The therapist noted he may be able to return to a sedentary position that does not require much physical activity, including overhead work or walking and standing. (Id.).

On September 10, 2015, Dr. Garbis noted the FCE showed mostly medium-duty restrictions with light-duty overhead restrictions. Dr. Garbis released Petitioner at MMI for his shoulder within the restrictions of the FCE. (PX 12).

On October 28, 2015, Dr. Kostidis noted that Petitioner could not return to his prior job duties but could work an office job with no prolonged walking or lifting over 20 pounds. (PX 6). Petitioner followed up with the doctor regularly and on December 20, 2017, Dr. Kostidis recommended that Petitioner elevate his feet periodically, and limit his standing, walking, and driving to 15 minutes. (PX 5).

Dr. Athena Kostidis Deposition

Pursuant to her evidence deposition on January 19, 2021, Dr. Athena Kostidis testified that she initially examined Petitioner on October 29, 2012, at which time her impression noted burn injuries with sensory changes, weakness in the lower limbs, and local sensory nerve injuries in the bilateral lower limbs. (PX 21., p. 11). The Petitioner underwent a lower limb EMG/NCV that was "normal", however, Dr. Kostidis noted a probable diagnosis of a small nerve injury based on the Petitioner's history and clinical presentation. Dr. Kostidis testified that small-fiber nerve injuries cannot be detected via EMG testing. (Id., at 25).

Dr. Kostidis opined that Petitioner's condition was causally connected to his work-related accident, that medical treatment thus far had been reasonable and necessary, and that Petitioner would need ongoing medical treatment, including medication, related to his work accident. (Id., at 28). Dr. Kostidis testified that Petitioner's dysfunctional sensation in his feet could cause instability and that Petitioner's work restrictions prohibited heavy lifting or prolonged walking or standing. Petitioner's driving was limited to 15 minutes and if his ankles were swollen, driving was prohibited. Lastly, Petitioner was required to elevate his legs for 10 to 15 minutes, twice daily. (Id., at 30).

Dr. Preston Wolin IME

Dr. Preston Wolin, an orthopedic surgeon, conducted a records review pursuant to the Respondent's Section 12 request. (PX 20). On January 14, 2015, the doctor opined that Petitioner's small fiber nerve involvement in his bilateral feet could produce "impairment with proprioception" consistent with the history of falls documented in the medical records and that Petitioner's rotator cuff tear was consistent with the trauma described in the records. The doctor found the Petitioner's left shoulder treatment reasonable and necessary. (Id.). On March 11, 2015, the Petitioner presented to Dr. Wolin for a section 12 exam at which time the doctor noted his complaints of swelling and pain radiating from his feet proximally toward his bilateral knees**.** On exam, Dr. Wolin noted diffuse swelling in the bilateral lower extremities with decreased muscle strength. The doctor did not change his causation opinions documented on his January 14, 2015, report. Regarding restrictions for the left shoulder, the doctor recommended no repetitive or over-the-shoulder activity and no lifting over 7 pounds. (Id.).

Dr. Karen Levin IME

Pursuant to Respondent's Section 12 request, Dr. Karen Levin, a neurologist, examined the Petitioner on four occasions. (RX 4). On March 6, 2013, Dr. Levin opined that Petitioner possibly had a small fiber neuropathy that could explain his abnormal leg sensations although a small fiber neuropathy would not explain his lower extremity weakness. Dr. Levin recommended neuropathic pain medication and follow-up care with a neurologist. Work should be restricted to ground-level activity with no excessive time spent on his feet.

On October 28, 2013, pursuant to her examination, Dr. Levin noted the Petitioner's performance in the July 2013 FCE was worse than his invalid May 2013 FCE. evaluation. (RX 5). The doctor found this disparity inconsistent with the nature of a neuropathic injury. Dr. Levin suspected Petitioner's functional abilities were consistent with the May 2013 FCE.

On June 9, 2014, Dr. Levin examined the Petitioner again at which time the doctor found no neurologic reason for the Petitioner's worsening symptoms. Dr. Levin suspected the Petitioner was embellishing his history and clinical presentation**.** The doctor thought he could return to work consistent with the May 2013 FCE, although he would need medications.

On March 2, 2015, Dr. Levin examined the Petitioner noting inconsistency with dorsiflexion and plantar flexion of his feet. (RX 7). The doctor noted the Petitioner should not have lower extremity weakness. She was doubtful that Petitioner's increasing symptoms were related to small fiber neuropathy. (Id.). Again, the doctor suspected the Petitioner was embellishing his symptoms and reiterated her opinion that Petitioner could return to work per the May 2013 FCE. (Id.). In her July 5, 2015, addendum, the doctor found no reason why Petitioner's symptoms persisted and further opined that Petitioner needed no further treatment or medication. (RX 8).

IME Dr. Gene Neri

On February 5, 2021, Dr. Gene Neri, a neurologist, testified regarding his review of Petitioner's medical records and Section 12 examination on September 6, 2018. (RX 1 at 7). Dr. Neri testified that Petitioner had neuropathic pain syndrome and should be examined by a psychologist with an MMPI test to rule out a psychiatric component. (Id., at 18). In Dr. Neri's opinion, second-degree burns would not produce nerve damage. (Id., at 28-29). The doctor further opined that Petitioner's pain and neuritis from his burns should heal. (Id., at 30). Regarding Petitioner's ability to work, the doctor believed the Petitioner could perform a desk job. (Id., at 33). Dr. Neri did not think the work accident was causally related to the fall that injured the Petitioner's shoulder. (Id., at 39). On examination, Dr. Neri noted weakness with Petitioner's extensors and flexors. (Id., at 53).

Vocational Rehabilitation

The Petitioner was provided vocational rehabilitation services through Vocamotive. He was required to provide progress reports telephonically. According to his testimony, on several occasions, the Petitioner was unable to report his progress due to Vocamotive's unannounced office closures. Further, the Petitioner testified that Vocamotive does not have an answering machine, answering service, or any means that a client can leave a message when the office is closed. The Petitioner testified to an instance when he thought that Ms. Stafseth had hung up on him during a phone conversation.

The Petitioner filed a complaint with the EEOC alleging communication issues, a failure to honor work restrictions, and threats regarding Petitioner's wages. Prior to filing the complaint, the Petitioner asked to speak with Ms. Stafseth who failed to contact him. The EEOC eventually dismissed the claim. Vocamotive never addressed the EEOC claim with the Petitioner. After filing the complaint, the Petitioner continued his job search. Vocamotive terminated the Petitioner's vocational program. Vocamotive did not refer Petitioner to another vocational counselor. After the program was terminated, Petitioner's benefits ceased on October 31, 2017. The Petitioner conducted a self-directed job search from November 18, 2015, through December 16, 2021, during which he contacted approximately 1,135 potential employers. (RX 24). This did not include the job searches that he conducted while working with Vocamotive.

Pursuant to her evidence deposition on June 14, 2019, Ms. Stafseth, testified that Petitioner's restrictions prevented him from returning to his former job for Respondent. In her opinion, he could return to a sedentary job within his restrictions. (Id., p. 27-29). While working with the Petitioner, Ms. Stafseth targeted the following positions: customer service representative, office clerk, data entry clerk, call center representative, and receptionist. (Id., at 32). Ms. Stafseth further opined that the Petitioner could earn between $9 and $11 per hour in such positions. (Id., at 33).

Thomas Grzesik, a certified rehabilitation counselor, was retained by the Petitioner's attorney and met with Petitioner on one occasion. (PX 23, p 63). Based on his review, Mr. Grzesik opined that Petitioner could not return to work in his pre-injury employment due to his physical restrictions. (Id., p. 34). He further opined that the Petitioner had no transferable skills, was not a candidate for a vocational rehabilitation program, and had lost access to a reasonably stable job market. (Id., p 37).

CONCLUSIONS OF LAW

Causal Connection

The Arbitrator concludes that the current condition of ill-being in the Petitioner's bilateral feet and left upper extremity are causally connected to the work-related accident of May 16, 2012. In support, the Arbitrator relies on the treating medical records, and the opinions of Dr. Kostidis, Dr. Garbis, Dr. Wolin, and to a certain extent, Dr. Levin.

Following this accident, multiple burns were noted on the Petitioner's bilateral feet/ankles including a left ankle, second-degree, partial thickness burn measuring 22cm x 13 cm. Approximately three months following the accident, Dr. Applewhite noted that Petitioner's lower extremities were "resistant to healing despite numerous interventions" and Petitioner's compliance with the treatment protocol. The Petitioner's complaints of swelling and pain radiating from his bilateral feet to his knees is well-documented in the records. The Petitioner's treating neurologist, Dr. Kostidis, diagnosed Petitioner with a small nerve fiber injury and opined that Petitioner's current condition is causally connected to the work accident. Dr. Kostidis further opined that the small fiber neuropathy

caused imbalance and sensory dysfunction in the Petitioner's feet which, in turn, caused Petitioner to fall injuring his left shoulder.

Respondent's IME, Dr. Wolin, opined that Petitioner's small fiber nerve involvement in his feet was causally connected to Petitioner's left shoulder injury.

Dr. Levin and Dr. Neri, Respondent's IMEs, agreed with the diagnosis of a small nerve fiber neuropathy. Although Dr. Levin later recanted her opinion, she continued to recommend neuropathy medication for Petitioner until her final report was issued. Dr. Levin noted Petitioner's worsening symptoms were possibly related to *another* cause but failed to identify any such cause. Regarding Dr. Neri, the Arbitrator found the doctor's opinions equivocal and difficult to understand. The Arbitrator does find it significant that Dr. Neri endorsed the recommendation for ongoing medication noting the accident may be a cause of the imbalance leading to the Petitioner's left shoulder injury.

Regarding Dr. Applewhite, the Arbitrator finds his note (documenting Petitioner's report of "0/10" pain) inconsistent with Petitioner's primary doctor's August 1, 2012, note and with the August 7, 2012, physical therapy chart.

The Arbitrator finds that Petitioner has established by a preponderance of the credible evidence contained in the record, that the current condition in his bilateral feet and left shoulder is causally related to his accident on May 16, 2012.

Medical Bills

The Arbitrator finds that the preponderance of credible evidence contained in the record supports a finding that the medical services provided to Petitioner related to his bilateral feet and left shoulder constituted reasonable and necessary medical care.

The Arbitrator finds that Respondent is liable for payment of medical bills in the amount of $91,533.27:

Blue Cross Blue Shield of Illinois	$80,297.75
Out of pocket payments:	$2,052.59
Loyola Medical Center:	$2,818.90 (outstanding balance and Medicare payments)
Loyola University Physician Services	$1,080.83 (outstanding balance and Medicare payments)
Ingalls Memorial Hospital	$391.22
Southwest Laboratory Physicians	$18
Primary Healthcare Associates	$25;
Accelerated Rehabilitation	$4,523.98
Blue Cross Blue Shield of Michigan	$984.95
Illinois Healthcare and Family Services	$420.88.

The Respondent shall make payment to the Petitioner's attorney pursuant to Section 7080.20 of the Rules Governing the Practice Before the Illinois Worker's Compensation Commission.

TTD & Maintenance

Based on a preponderance of the credible evidence contained in the record, that the Petitioner is entitled to the following benefits:

TTD benefits: May 17, 2012, through November 28, 2012; April 10, 2013, through April 16, 2013; and April 18, 2013, through November 17, 2015.

Maintenance benefits: November 18, 2015, through December 15, 2021.

The award is supported by the Section 12 opinions of Dr. Wolin and Respondent's IME, Dr. Neri who agreed that some work restrictions were reasonable. Dr. Levin noted that the Petitioner was unable to return to work without restrictions in all of her Section 12 reports. Regarding Dr. Levin's opinion that the Petitioner reached maximum medical improvement on June 9, 2014, the doctor did not consider the condition of the Petitioner's left shoulder.

For the period of May 17, 2012, through November 28, 2012: Immediately following the accident, the Petitioner was hospitalized overnight at St. Mary's Hospital. Thereafter, Dr. Applewhite restricted Petitioner from working and on August 1 and September 14, 2012, instituted light-duty work restrictions which Respondent accommodated from November 29, 2012, through April 9, 2013.

Dr. Kostidis and later Dr. Garbis instituted work restrictions from April 10, 2013, through April 16, 2013, and April 18, 2013, through November 17, 2015. Dr. Garbis released Petitioner for his left shoulder condition on September 8, 2015. The Petitioner continued receiving medical treatment from Dr. Kostidis and remained under her care on October 28, 2015. Dr. Kostidis did not document that Petitioner was at maximum medical improvement however, Petitioner began a self-directed job search on November 18, 2015.

The Arbitrator finds an award of TTD benefits through November 17, 2015, is supported by the preponderance of the credible evidence contained in the record.

The Arbitrator awards maintenance benefits for the period of November 18, 2015, through December 15, 2021.

The medical evidence shows that Petitioner was unable to return to his pre-injury employment. It is undisputed that the Petitioner began a self-directed job search on November 18, 2015. He was provided vocational rehabilitation services by Vocamotive beginning on November 15, 2016. He participated in vocational rehabilitation services until October 2017, when the services were terminated by Vocamotive. The Petitioner's maintenance benefits were terminated on October 31, 2017.

After Vocamotive terminated vocational rehabilitation services, the Petitioner continued to participate in a self-direct job search. Mr. Grzesik testified that Petitioner's job search was diligent. Ms. Stafseth confirmed that the Petitioner was applying for appropriate jobs while conducting his job search.

The Arbitrator finds that the Petitioner is entitled to payment of maintenance benefits after October 21, 2017, regardless of the complaint he filed against Vocamotive with the EEOC. The Petitioner remained complaint in his vocational program. Vocamotive, and not Petitioner, terminated the vocational rehabilitation program and did not refer Petitioner to another program or counselor.

Based on the preponderance of the credible evidence contained in the record, the Arbitrator finds that Petitioner is entitled to maintenance benefits from November 18, 2015, through December 15, 2021.

Nature and Extent of the Injuries

The Petitioner established that he is permanently and totally disabled pursuant to the odd-lot category. The Arbitrator finds that Petitioner is entitled to receive payment of total disability benefits in the amount of $519.25 per week effective December 16, 2021, for life.

Mr. Grzesik opined, based on the restrictions set forth by Dr. Kostidis and Dr. Garbis, that the Petitioner was unable to return to work in his pre-injury job and is not a candidate for a vocational rehab program. Mr. Grzesik further opined that Petitioner was permanently and totally disabled pursuant to the odd-lot category. The Petitioner participated in a self-directed job search from November 18, 2015, through the date of the hearing. He contacted approximately 1,135 employers without any offers of employment.

The Petitioner participated in a job search with Vocamotive from November 15, 2016, through October 31, 2017. Mr. Grzesik confirmed that Petitioner diligently searched for employment during this period while Ms. Stafseth confirmed that the Petitioner was applying for appropriate positions.

The Arbitrator finds that the Respondent failed to meet its burden of production that suitable employment was regularly and continuously available for Petitioner. The Arbitrator relies on the work restrictions set forth by Dr. Kostidis, over those of Dr. Levin. Dr. Kostidis set forth restrictions of no prolonged walking more than 5 to 10 minutes without an hour break, no repetitive bending, no lifting over 20 pounds, no driving more than 15 minutes and that Petitioner had to elevate his feet. Dr. Kostidis based these work restrictions on the valid July 2013 FCE and the Petitioner's course of treatment.

Dr. Levin released Petitioner to return to work per the restrictions of the May 23, 2013, FCE which was invalid.

The Arbitrator notes that the third FCE, conducted following the Petitioner's left shoulder surgery, was consistent with the July 2013 FCE.

Dr. Levin did not consider the persistent swelling of the Petitioner's feet, which she acknowledged was present, nor did she consider the Petitioner's lower extremity weakness. Based on the Petitioner's lengthy job search, even utilizing Dr. Levin's work restrictions, the Petitioner has established that a job is not available to him through a diligent and unsuccessful job search.

The surveillance video does not impact the Arbitrator's decision. The Arbitrator notes the surveillance period was over a short period of time and did not establish that the Petitioner violated any of his work restrictions or could perform more physically demanding tasks than the medical records document.

The Arbitrator finds that Vocamotive failed to establish that the Petitioner was employable. Vocamotive did not consider the additional restrictions of driving and elevating the feet provided by Dr. Kostidis. The Petitioner did not find a job despite working with Vocamotive for almost a year. Further, Vocamotive did not target appropriate jobs for Petitioner and did not disclose how the Petitioner's driving restrictions and elevating of his feet would be accommodated. Ms. Stafseth acknowledged that employers would have to provide a special accommodation to allow for the Petitioner to elevate his feet at work.

Having determined that Respondent has failed to meet its burden of production, the Arbitrator concludes that the Petitioner is permanently and totally disabled from employment as an odd-lot permanent total effective December 16, 2021.

The Petitioner is entitled to permanent and total disability benefits in the amount of $519.25 per week. pursuant to Section 9(f) of the Act, effective December 16, 2021, for life.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC021236
Case Name	Bernie O'Hallaren v. Navarro's Concrete, Inc & IWBF
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0321
Number of Pages of Decision	20
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Phillip Johnson
Respondent Attorney	Drew Dierkes, Adeena Weiss Ortiz

DATE FILED: 7/26/2023

/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

Bernie O'Hallaren,

Petitioner,

vs. No. 16 WC 21236

Navarro's Concrete, Inc., and
Illinois State Treasurer as Ex-Officio Custodian of
The Injured Workers' Benefit Fund,

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Injured Workers' Benefit Fund (IWBF) and notice given to all parties, the Commission, after considering the issues of wage calculations and benefit rates, and being advised of the facts and law, corrects the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms the Arbitrator's determination of Petitioner's average weekly wage. However, IWBF is correct that, based on Petitioner's testimony, "[a]t most, Petitioner would have worked for Navarro for 12 weeks." Accordingly, the Commission strikes the Arbitrator's finding that Petitioner's earnings during the year preceding the injury were $62,400.00. Rather, multiplying the average weekly wage of $1,200.00 by 12 weeks yields the earnings of $14,400.00 during the year preceding the injury.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 18, 2022, is hereby corrected, affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondents 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 $36,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

July 26, 2023

SJM/sk
o-6/14/2023
44

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

/s/ *Deborah J. Baker*
Deborah J. Baker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC021236
Case Name	Bernie O'Hallaren v. Navarro's Concrete, Inc & IWBF
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	17
Decision Issued By	Nina Mariano, Arbitrator

Petitioner Attorney	Phillip Johnson
Respondent Attorney	Drew Dierkes

DATE FILED: 8/18/2022

/s/Nina Mariano, Arbitrator

Signature

INTEREST RATE WEEK OF AUGUST 16, 2022 3.02%

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

BERNIE O'HALLAREN
Employee/Petitioner

v.

Case # **16** WC **021236**

Consolidated cases: _____

NAVARRO'S CONCRETE, INC. AND STATE TREASURER AND EX-OFFICIO OF THE INJURED WORKERS BENEFIT FUND
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nina Mariano**, Arbitrator of the Commission, in the city of **Chicago**, on **February 23, 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 **The liability of the Injured Workers Benefit Fund**

FINDINGS

On **June 8, 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 $**62,400.00**; the average weekly wage was $**1,200.00**.

On the date of accident, Petitioner was **54** years of age, ***married*** with **1** dependent children.

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

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

Respondent shall be given a credit of $**0.00** 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-Employer shall pay reasonable and necessary medical services of $11,178.28, as provided in Section 8(a) of the Act.

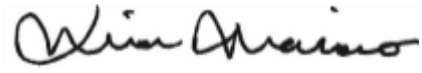
Respondent-Employer shall pay Petitioner total temporary total disability benefits $800.00/week for 2 and 5/7 weeks as provided by Section (b) of the Act.

Respondent-Employer shall pay Petitioner permanent partial disability benefits of $720.00 per week for 32.5 weeks, because the injuries sustained on June 8, 2016, caused 6.5% loss of use of man as a whole as provided in Section 8(d)2 of the Act.

The Illinois State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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 18, 2022

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

Bernie O'Hallaren	)	
	)	
Employee/Petitioner,	)	Case No. 16 WC 021236
v.	)	
	)	
Navarro's Concrete, Inc. and	)	
State Treasurer and *ex officio*-custodian	)	**Chicago, IL**
of the Injured Workers Benefit Fund	)	
	)	
Employer/Respondents.	)	

Findings of Fact

This action was pursued under the Illinois Workers' Compensation Act (the "Act") by the Petitioner-Employee, Bernie O'Hallaren ("Petitioner"), and sought relief from the Respondent-Employer, Navarro's Concrete, Inc. ("Navarro's Concrete"), and the Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund ("IWBF").

On February 23, 2022, a hearing was held and proofs were closed before Arbitrator Nina Mariano in Chicago, Illinois. Attorney Phillip Johnson represented the Petitioner. The Illinois Attorney General's Office represented the IWBF. No one appeared on behalf of Respondent-Employer.

Arbitrator's Findings as to Insurance Coverage

Without objection, Petitioner's counsel offered into evidence Petitioner's Exhibit 5, which was a record from the National Council on Compensation Insurance, Inc. ("NCCI") showing no record of workers' compensation insurance for Navarro's Concrete. (PX 5). Based

on Petitioner's Exhibit 5, Arbitrator finds that Respondent-Employer lacked workers' compensation insurance coverage.

Arbitrator's Findings as to Adequacy of Notice

Petitioner's counsel offered into evidence, Petitioner's Exhibit 9, a letter mailed to Navarro's Concrete informing it of the trial date on February 23, 2022. Based on Petitioner's Exhibit 9, Arbitrator finds that Respondent-Employer received proper notice of the hearing date.

I. Summary of Testimony and Other Evidence

A. Testimony of Bernie O'Hallaren

Petitioner was working for Navarro's Concrete on June 8, 2016 as a laborer and personal driver for the owner, Francisco Navarro. Petitioner began work with Navarro's Concrete in late March or early April of 2016. There was no written work contract; Petitioner made a verbal agreement with Navarro regarding employment. No training was required for the job. Prior to being hired by Navarro's Concrete, Petitioner was friends with Navarro. Petitioner's duties included demolition of concrete structures, construction of replacement concrete structures, and driving Navarro to and from various jobsites. Tools used by Petitioner included electric, gasoline, and power-driven equipment. Additionally, Petitioner was given a work truck to pick up and drop off Navarro every work-day. Petitioner wore a Navarro's Concrete shirt when working. Everything used by Petitioner in his duties for Navarro's Concrete was provided by Navarro's Concrete, including the work truck.

Petitioner was paid $100.00 a day for his role as Navarro's personal driver, plus $100.00 a day for his role as a laborer. In total, Petitioner made approximately $1,200.00 per week. Petitioner was paid weekly and in cash by Navarro. Petitioner was never issued a W-2 for his work. Depending on the job, Petitioner worked with five to seven other employees. Petitioner was given

his schedule daily and he did not have to clock in or out. Petitioner worked from 6:00 a.m. until around 6:00 or 7:00 p.m. After picking Navarro up in the morning, Petitioner would drive them to that day's jobsite. After work, Petitioner would drive Navarro to his other jobsites.

On June 8, 2016, Petitioner picked up Navarro in the work truck and drove to the jobsite. At this particular jobsite, Petitioner was assisting in the demolition of a driveway, stairs, and a patio. At the jobsite that day, Petitioner was laying concrete with others on the rear side of the house. Normally, Petitioner did not use a wheelbarrow in his employment duties, but that day, his help was needed to transport concrete from the cement mixer at the front of the house. Petitioner loaded concrete into the wheelbarrow, walked up the driveway toward the rear of the house, and dumped it. After four or five trips, Petitioner was getting fatigued and tired. At some point, Petitioner was walking a full wheelbarrow up the driveway to bring it to the dumping area. As Petitioner was lifting the wheelbarrow up, his right toe got caught on some wire mesh that was laying on the ground and tripped him. Petitioner turned his head as he fell and he hit the right side of his neck on the wheelbarrow. Petitioner felt like he could not breathe after hitting his neck. Navarro was behind Petitioner at that time and Petitioner heard him laughing. Navarro did not offer Petitioner any help or take him to the hospital. Two other employees, George and Jose, ran over to Petitioner and helped him up.

Immediately following the trauma, Petitioner drove himself to Gottlieb Hospital in Melrose Park, Illinois. Petitioner felt dizzy and weak. Additionally, Petitioner could not walk in a straight line, had labored breathing, and could not swallow. After a CT scan was done in the Emergency Department, Petitioner was knocked out, intubated, and transferred to Loyola Hospital. Petitioner woke up four days later on June 12, 2016. At some point after Petitioner was extubated at Loyola Hospital, Navarro visited him in the ICU. Petitioner and Navarro had a brief conversation at this time. Petitioner remembered Navarro telling him that he "does not have to

pretend he cannot talk." During this conversation, there was no discussion of the payment of Petitioner's medical bills.

During his stay at Loyola Hospital, Petitioner was attended to by a throat doctor, Dr. Michael Anstadt, Dr. Anstadt was concerned with the swelling of Petitioner's trachea and Petitioner's inability to talk. Petitioner received substantial imaging and diagnostics while under Dr. Anstadt's care. This substantial imaging and diagnostics included CT scans of Petitioner's head, neck, thorax, lumbar, and spine as well as a fiber optic evaluation and larynx procedure. Petitioner was discharged from the hospital on June 14, 2016.

After being released from Loyola Hospital, Petitioner was on light work duty restrictions, but Navarro would not talk to him so Petitioner did not return to work. Petitioner began having neck and spine pain shortly after his release from the hospital. Prior to the trauma experienced on June 8, 2016, Petitioner did not have any injuries to his neck, larynx, or spine.

After his discharge from Loyola Hospital, Petitioner sought out an evaluation from Dr. Sims at the University of Illinois, Chicago. Petitioner was having a hard time talking and swallowing. Dr. Sims did imaging on Petitioner's neck, which showed swelling as well as a rupture. Dr. Sims prescribed Petitioner synthetic opioids for pain and anti-inflammatory medication. Petitioner's doctors mentioned the possibility of Petitioner experiencing vertigo from his symptoms, but no medication was prescribed for that. Additionally, Dr. Sims recommended Petitioner receive therapy. Petitioner met with a therapist once every other week. Petitioner's therapy included speaking through a straw and humming. Petitioner was recommended surgery on his cervical spine, but he did not want to go through with the procedure. July 18, 2016 was the last time Petitioner received care for his injuries. At that time, Petitioner was released to return to work. Petitioner has not worked since July 18, 2016. Three to

four months after his injury, driving, getting up quickly, and flying in a plane became a problem for Petitioner because of dizziness he experienced.

Currently, Petitioner feels that he is not the same person he used to be. Petitioner cannot do the same things he used to do, like sing or play contact hockey. Petitioner's breathing is restrained and his throat constricts with exercise. Petitioner's voice is weaker and breathing cold air tightens his throat. Petitioner stopped taking his prescription medication years ago because he faced addiction issues, particularly with regard to the opiates. Petitioner has not taken opiate pain-medication for at least three years.

At some point after July 18, 2016, Petitioner applied for Social Security disability benefits. On August 29, 2019, Petitioner's application was granted. Petitioner is still receiving Social Security disability benefits; however, the benefits that Petitioner receives are not related to Petitioner's throat and neck issues. Petitioner is not yet eligible for Medicare.

On June 3, 2016, Petitioner was given a letter showing proof of work from Navarro. Petitioner and Navarro agreed that Navarro would set aside $300 from Petitioner's weekly wages for the purposes of dealing with Petitioner's eviction. As far as Petitioner knows, Navarro never set aside money from Petitioner's weekly wages.

Petitioner's medical bills totaled $105,896.90. Petitioner paid less than $2,000.00 because some of his medication was needed quickly. Petitioner paid these bills by form of group insurance. Medical providers have reached out to Petitioner regarding his medical bills. To this day, Navarro has never paid nor offered to pay Petitioner's medical bills. According to Petitioner, Navarro told Petitioner that the medical bills were not his problem.

Prior to his injury, Petitioner told Navarro that he was at risk of being evicted. The only compensation that Petitioner received from Navarro following the accident was a one-time $200.00 payment. Petitioner has only met with Navarro once since the injury. Petitioner went to

Navarro's bar and told him that he had retained counsel and was planning on suing. Navarro then threatened to hurt Petitioner with a pool cue.

B. Petitioner's Medical Treatment

On June 8, 2016, Petitioner presented to Dr. Kristen Donaldson of the Gottlieb Memorial Hospital. (PX 1). Petitioner complained of throat pain and swelling after tripping and hitting his neck on the rim of a wheelbarrow. *Id*. Additionally, Petitioner's voice was hoarse and he had difficulty breathing while lying down. *Id*. A CT scan of Petitioner's neck showed a moderate hematoma on the right side of the neck located at approximately the level of the right aryepiglottic fold ("AE fold") and deep to the thyroid cartilage resulting in effacement of the right piriform sinus and complete effacement of the supraglottic airway. *Id*. Dr. Donaldson diagnosed Petitioner with a compromised airway with neck trauma. *Id*. However, Dr. Donaldson could not rule out laryngeal or tracheal injury, despite no obvious evidence of such presented on the CT scan. *Id*.

On June 8, 2016, Petitioner was fiberoptically intubated and transferred to Loyola for further laryngeal evaluation and airway management. (PX 2). On June 9, 2016, Petitioner remained intubated and sedated in a cervical spine collar. *Id*. On June 10, 2016, Dr. Bridgett Driscoll performed an extubation on Petitioner as well as a flexible nasopharyngoscopy. *Id*. It was determined that Petitioner should remain in the ICU for close monitoring. *Id*. Dr. Driscoll recommended that Petitioner remain on voice rest until June 13, 2016. *Id*. After Petitioner's extubation, a scope in the operating room revealed hematoma of the right AE fold and arytenoid, and ecchymosis of the bilateral tricuspid valves. *Id*.

On June 11, 2016, Petitioner was breathing well and felt his breathing had improved, so he was not re-intubated. *Id*. Petitioner was having trouble swallowing and was coughing with extreme pain while swallowing. *Id*. Dr. Driscoll recommended that Petitioner be monitored in the ICU for an additional 24 hours. *Id*.

On June 12, 2016, Dr. Shi Yang attended to Petitioner. *Id*. Petitioner reported that he had no issues breathing overnight and that his swallowing improved. *Id*. Although Petitioner had not yet had a swallow evaluation that day, Dr. Yang determined Petitioner was okay to transfer out of ICU. *Id*.

On June 13, 2016, Dr. Michael Loochtan attended to Petitioner. *Id*. Petitioner's airway was stable and his status improved. *Id*. Petitioner was released to light duty at work for two weeks. *Id*. Petitioner underwent speech and language therapy, and was transferred to the general nursing ward. *Id*. On June 14, 2016, Petitioner was discharged from Loyola Hospital. *Id*. Petitioner was to follow up with Dr. Bier-Laning in two weeks. *Id*.

On July 18, 2016, Petitioner presented to Dr. Steven Sims of the University of Illinois, Chicago Hospital. (PX 3). Petitioner reported that he had sustained blunt force trauma to his anterior neck from an incident with a wheelbarrow. *Id*. Petitioner reported being seen by an Otolaryngologist at Loyola Hospital, and was told that he did not require further follow-up. *Id*. Petitioner stated that his voice had not returned and that concerned him. *Id*. Dr. Sims did an examination of Petitioner, noting hoarseness and that Petitioner's voice was breathy. *Id*. Dr. Sims additionally performed a rigid laryngoscopy, which revealed slight weakness of the right side of Petitioner's larynx. *Id*. Dr. Sims diagnosed Petitioner with a change in voice and an injury of the laryngeal nerve. *Id*. Petitioner was prescribed ibuprofen. *Id*. Petitioner underwent a clinical voice evaluation that same day. *Id.* Voice therapy was recommended, however no exhibits were entered into evidence showing therapy was done. *Id.*

Conclusions of Law

The Arbitrator adopts and incorporates the above findings in support of the following conclusions of law.

ISSUE (A) Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

Arbitrator finds that Respondent-Employer was operating under the Act on June 8, 2016 based on Petitioner's testimony that Navarro's Concrete was engaged in the erection, maintaining, removing, remodeling, altering or demolishing of any structure; he used sharp edged tools, and he used electric, gasoline, or other power driven equipment for Respondent-Employer's business. Sections 3(1), (2), (8), and (15) of the Act states that the Act shall automatically apply to such businesses.

ISSUE (B) Was there an employee-employer relationship?

Arbitrator finds that on June 8, 2016, an employee/employer relationship existed between Petitioner and Respondent-Employer. Petitioner's testimony concerning the circumstances of his hiring and job duties was detailed, believable, and unrebutted.

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

Arbitrator finds that an accident arising out of and in the course of Petitioner's employment occurred on June 8, 2016, based on the credible testimony of Petitioner and on the corroborating medical records. The Petitioner has proven by a preponderance of the evidence that he was injured at the work site, while performing an act or duty directly related to the work assigned as a concrete laborer.

ISSUE (D) What was the date of the accident?

The Arbitrator finds that an accident occurred on June 8, 2016 based on the credible testimony of Petitioner and on the medical records that corroborated that Petitioner was injured on June 8, 2016.

ISSUE (E) Was timely notice of the accident given to the Respondent?

The Arbitrator finds that timely notice of the accident was given to Respondent-Employer based on Petitioner's credible testimony that Navarro was present on the day of the accident and that Petitioner spoke with Navarro while he was in the hospital.

ISSUE (F) Is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that Petitioner's current condition of ill-being as it relates to his throat and neck injuries is causally related to the injuries he sustained on June 8, 2016 as a result of the work accident. The Arbitrator's findings on this are fully set forth below in Issue L.

ISSUE (G) What were Petitioner's earnings?

Petitioner testified he was paid $100.00 per day cash to work as a concrete laborer. He was also paid $100.00 per day to drive Mr. Navarro each day from his home to work and to various job sites to complete estimates for future work. Additionally, Petitioner would drive Mr. Navarro from his office to job site which was scheduled for each day's work.

Petitioner testified he was paid cash and did not receive a W-2 to reflect his wages. He testified that he averaged about $1,200.00 per week during the time he worked for the Respondent-Employer. The testimony of the Petitioner as to his average weekly wage stands unrebutted.

The absence of any written wage agreement nor W-2 or similar documentation does not prohibit a finding as to the Petitioner's weekly wage. Arbitrator finds this situation is limited to the case decided by the Illinois Workers Compensation Commission, *20 IWCC 000104 Kimmel v. ASM Transport Service Inc. et al.,* which supports that Petitioner's testimony standing alone without W-2 or writing confirmation is sufficient to make a finding that Petitioner has sustained his burden of proving his average weekly wage by unrebutted testimony.

Arbitrator finds that Petitioner's earnings during the year preceding the injury were $62,400 and the average weekly wage to be $1,200.

ISSUE (H) What was Petitioner's age at the time of the accident?

Arbitrator finds that Petitioner was 54 years old at the time of the accident based on Petitioner's credible and unrebutted testimony at trial corroborated by the medical records.

ISSUE (I) What was Petitioner's marital status at the time of accident?

Arbitrator finds that Petitioner was married with one dependent child at the time of the accident per Petitioner's credible and unrebutted testimony.

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 concludes that Petitioner has proven by a preponderance of the evidence that the medical treatment for the injuries he sustained was reasonable and necessary. The Arbitrator further finds that based on the medical records contained in Petitioner's exhibits 1 through 3 that the charges for services contained in Petitioner's Exhibit 7 were reasonable and necessary. The Arbitrator notes no remaining balances for Petitioner's treatment. The Arbitrator notes that Petitioner's Exhibit 4 is a letter from Equian detailing payments of $11,178.28 made by Health Care Service Corporation – IL on behalf of Petitioner, which was for a Medicaid plan. Respondent-Employer shall pay $11,178.28, as provided in Sections 8(a) and 8.2 of the Act.

While Petitioner is seeking payment of an alleged unpaid bill for medical treatment provided at University of Illinois by Dr. Sims, payments were made on that bill and present in the itemized ledger provided by Equian (PX 4), so the charges sought for that bill are not awarded.

Issue (K) What temporary benefits are in dispute?

Arbitrator concludes that Petitioner is owed 2 weeks and 5 days of TTD from June 9, 2016 through June 27, 2016, as Petitioner was under medical care and ordered off work or on light duty without available work from Respondent. Arbitrator also notes that there were no other off work notes or light duty restrictions after Dr. Loochtan's visit on June 13, 2016, which took Petitioner off work for two weeks, or through June 27, 2016.

ISSUE (L) What is the nature and extent of the injury?

Arbitrator notes that pursuant to Section 8.1(b) of the Act, 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 includes: (i) the reported level of impairment pursuant to AMA; (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.

Looking to the five criteria established by 8.1(b) and concerning the first factor: neither party sought an AMA rating. Accordingly, the Arbitrator gives no weight to this factor.

With respect to factor two, Petitioner worked as a concrete laborer and driver for Respondent-Employer. Petitioner was released to return to work without restrictions. Petitioner is now on disability for conditions unrelated to the work accident. This factor is given lesser weight.

With respect to factor three, Petitioner was fifty-four years old at the time of the accident and at the time of trial was on disability for conditions unrelated to the work accident. Arbitrator gives this factor lesser weight.

With respect to factor four, Petitioner did not present evidence regarding diminished earning capacity. Therefore, Arbitrator gives no weight to this factor.

With respect to factor five, Petitioner sustained trauma to his neck area. He was intubated on an emergency basis. He was hospitalized for one week. It was determined after fiberoptic evaluation that Petitioner sustained damage to the vocal cord. Petitioner testified to a permanent change in his ability to speak. He also indicated discomfort with certain attempts at physical activities. Petitioner's testimony was credible and unrebutted. There are no permanent restrictions documented in the medical records. In total, the Arbitrator gives this factor moderate weight.

Considering each of the five above-mentioned factors, the Arbitrator concludes Petitioner's injury has caused a permanent disability to the extent of 6.5% loss use of man-as-a-whole.

Issue (M) Should penalties or fees be imposed upon Respondent?

No Petition for Penalties or supporting evidence was submitted into the record. No penalties are awarded.

Issue (N) Is Respondent is due any credit?

The Arbitrator finds that Respondent-Employer is not entitled to a credit as no evidence of any entitlement to a credit was entered into evidence.

ISSUE (O) Other: Insurance Coverage and Liability of the Injured Workers' Benefit Fund

The Illinois State Treasurer as ex officio custodian of the Injured Workers' Benefit Fund was named as a party respondent in this matter. Section 4 of the Workers' Compensation Act provides that the Fund is liable to pay benefits to an injured worker where the Respondent has failed to obtain insurance, and where Respondent has failed to pay benefits due. Petitioner submitted sufficient credible evidence by means of a certification from the National Council on Compensation Insurance Certificate demonstrating that Respondent-Employer was not insured at

the time of the injury. Further, Petitioner provided sufficient credible evidence that notice of the proceedings were provided to the Respondent-Employer.

Accordingly, the Arbitrator enters this award against the State Treasurer as *ex officio* custodian of the Injured Workers' Benefit Fund. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation paid to the Petitioner from the Injured Workers' Benefit Fund. The Employer-Respondent's obligation to reimburse the IWBF, as set forth above, is in no way limited or modified and is entirely independent and separate from Employer-Respondent's potential liability for fines and penalties set forth in the Act for its failure to be properly insured.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC017081
Case Name	Robert Sommerfeld v. Wolf Motors
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0322
Number of Pages of Decision	9
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Russell Haugen
Respondent Attorney	Kevin Luther

DATE FILED: 7/26/2023

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Sommerfeld,
Petitioner,

vs. NO: 21 WC 17081

Wolf Motors,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 20, 2022, is hereby affirmed and adopted.

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

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

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

July 26, 2023
o7/12/23
DLS/rm
046

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

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

/s/*Deborah J. Baker*
Deborah J. Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC017081
Case Name	Robert Sommerfeld v. Wolf Motors
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Gerald Granada, Arbitrator

Petitioner Attorney	Russell Haugen
Respondent Attorney	Kevin Luther

DATE FILED: 10/20/2022

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

/s/Gerald Granada, 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

ROBERT SOMMERFELD
Employee/Petitioner

v.

WOLF MOTORS
Employer/Respondent

Case # **21** WC **17081**

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 **Gerald Granada**, Arbitrator of the Commission, in the city of **Wheaton, IL**, on **August 23, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **12/09/2019**, 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 in his left shoulder/arm ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**75,460.32**; the average weekly wage was $**1,451.16**.

On the date of accident, Petitioner was **68** 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 $**42,152.33** for TTD, $**0** for TPD, $**0** for maintenance, and $**5,020.14** for a PPD advance, for a total credit of $**47,172.47**.

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

ORDER

- Respondent shall pay to Petitioner any reasonable and necessary medical expenses relating to Petitioner's left shoulder condition as set forth in Petitioner's Exhibit 4, as provided in Sections 8(a) and 8.2 of the Act and subject to the medical fee schedule. The Respondent shall receive a credit for all medical services already paid.

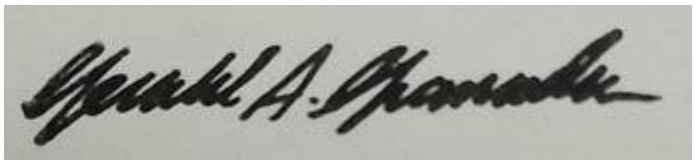
- Respondent shall pay Petitioner temporary total disability benefits of $967.44/week for 84 6/7 weeks, commencing June 10, 2020 through January 24, 2022, as provided in Section 8(b) of the Act.

- Respondent shall pay Petitioner permanent partial disability benefits of $836.69/week for 175 weeks, because the injuries sustained caused the 35% 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.

OCTOBER 20, 2022



Signature of **Arbitrator Gerald Granada**

FINDINGS OF FACT

This case involves Petitioner Robert Sommerfeld, who alleges sustaining injuries while working for Respondent Wolf Motors on December 9, 2019. Respondent disputes Petitioner's claim, with the issues being: 1) causation, 2) medical expenses, 3) TTD, and 4) nature and extent.

Petitioner was employed as an automotive repair technician for Respondent. As an auto repair technician, Petitioner was involved in every aspect of the repair or maintenance of automobiles. As of December 2019, Petitioner had been employed with Respondent for approximately 24 years. Petitioner's job duties required him to work at or above his shoulder level approximately 50% of the time. While working at or above his shoulder level, he often had to hold, push, or pull items that weighed more than ten pounds. Those items included wheels, tires, exhaust systems, auto body parts, and additional car components. Prior to December 9, 2019, Petitioner did not have any problems completing his job duties as an automotive technician. Prior to December 9, 2019, Petitioner never sought treatment for any issues with his left shoulder or left arm.

On December 9, 2019, Petitioner sustained an undisputed work accident. At that time, he reached behind him with his left arm to grab a tire that was rolling away. As he did this, he had an immediate onset of pain in his left shoulder that travelled down his arm to his left elbow. Petitioner had never experienced those types of symptoms prior to this accident. Petitioner reported this accident to his supervisor.

On December 23, 2019, Petitioner was evaluated at First Choice Occupational Health. At that time, Petitioner reported a left arm injury that occurred at work on December 9, 2019. Petitioner further reported that since this event, his left arm had been sore, weak, and had developed a lump. On examination, it was noted that he had a soft mass on his left upper arm. The diagnosis was spontaneous rupture of other tendons in the upper arm. Petitioner was instructed to seek care with Dr. Lombardi at DMG. (PX1).

Petitioner was evaluated by Dr. Aakash Chauhan at DuPage Medical Group on December 31, 2019. Petitioner reported left shoulder and arm pain since December 9, 2019 when he irritated it at work. He denied prior treatment. Dr. Chauhan's diagnosis was left shoulder pain, likely proximal biceps rupture and rotator cuff injury. Petitioner was recommended to undergo an MRI of the left shoulder. (PX 2).

Petitioner underwent an MRI of the left shoulder at DuPage Medical Group on January 13, 2020. The impression was chronic retracted full-thickness rotator cuff tear and chronic retracted full-thickness tear of the long head of the biceps' tendon. (PX 2).

On January 21, 2020, Petitioner returned to Dr. Chauhan. Petitioner reported continued pain with certain overhead activities. Upon review of the MRI, Dr. Chauhan diagnosed left shoulder full thickness retracted supraspinatus and subscapularis tears and a ruptured biceps tendon. Dr. Chauhan discussed the options of non-operative treatment versus operative treatment. Petitioner decided to proceed with operative treatment which included an arthroscopy and possible attempt at a repair. (PX 2).

On June 10, 2020, Petitioner underwent surgical intervention with Dr. Chauhan. The preoperative diagnosis was left shoulder massive rotator cuff tear. Dr. Chauhan performed a left shoulder arthroscopic rotator cuff repair, debridement, and subacromial decompression. The subscapularis tendon was not repairable. (PX 2).

Petitioner underwent physical therapy, at the recommendation of Dr. Chauhan, from July 1, 2020 through November 14, 2020. During this period of time, Petitioner completed 40 sessions of skilled therapy. At the time of his discharge, Petitioner continued to have left shoulder pain and was unable to tolerate work postures and do heavy activities of daily living. Petitioner was recommended to undergo additional physical therapy so

that he could progress with his strengthening to enable him to return to work. (PX 2).

On December 14, 2020, Petitioner returned to Dr. Chauhan. Petitioner reported that he had completed physical therapy and was doing a home exercise program. Petitioner further reported that his strength was slowly getting better. Dr. Chauhan instructed Petitioner to continue with his home exercise program and to remain off work for another three months. (PX 2).

On March 22, 2021, Petitioner was reevaluated by Dr. Chauhan. At that time, Dr. Chauhan opined that Petitioner may not be able to return to his previous duties due to the high demand needed for his shoulder. Petitioner was kept off work. He was also recommended to undergo an EMG/NCS to his left arm and hand. On April 20, 2021, Petitioner was seen again by Dr. Chauhan. At that time, Petitioner was recommended to undergo a work conditioning program in an attempt to return back to work. Petitioner was kept off work. (PX 2).

On April 8, 2021, Petitioner underwent a Section 12 IME with Dr. Brian Cole of Midwest Orthopaedics at Rush. Dr. Brian Cole subsequently testified via evidence deposition on November 16, 2021. (RX 1) He testified that Petitioner had nearly full range of motion with nearly normal strength. He further testified that it was his opinion that Petitioner could return to work full duty with no restrictions but felt that Petitioner would have some discomfort with some level of impairment. Dr. Cole further testified that Petitioner's December 9, 2019, work accident was a contributing cause to his left shoulder condition of ill-being which required surgical intervention. Dr. Cole agreed that work conditioning is a viable treatment option in some instances. Dr. Cole testified that a Functional Capacity Evaluation, and additional therapy or work conditioning, may be needed if Petitioner was adamant that he could not return to his prior job. (RX 1).

On November 22, 2021, Petitioner underwent an initial evaluation at ATI Physical Therapy. Petitioner reported left shoulder weakness with easy fatigue when lifting overhead. Petitioner was recommended to undergo skilled therapy five times a week for four weeks. Petitioner completed 16 sessions of work hardening. At the time of his discharge, on December 23, 2021, Petitioner had failed to reach all of the job demands of a mechanic. (PX 3).

Petitioner was evaluated by Dr. Justin Kyhos at DuPage Medical Group on January 4, 2022. Petitioner testified that Dr. Chauhan was no longer working at DuPage Medical Group so he was referred to Dr. Kyhos. At that time, Petitioner reported that he continued to have slight weakness with overhead forward elevation but notes that this is significantly improved as compared to prior to the surgery. He further reported that he made progress with work conditioning but is unlikely able to return to work as an auto mechanic given the high demand placed on the upper extremity with respect to lifting. Dr. Kyhos indicated that he was concerned that Petitioner would not be able to return to his job as an auto mechanic. Petitioner was recommended to undergo a functional capacity evaluation and follow up thereafter. Petitioner was kept off work. (PX 2).

On January 13, 2022, Petitioner completed a Functional Capacity Assessment at ATI Physical Therapy. The assessment was a valid determination of Petitioner's full capabilities. Petitioner's demonstrated physical demand level was modified medium. Petitioner did not meet the full capabilities of an auto mechanic based on DOT standards. (PX 3).

Petitioner returned to Dr. Kyhos on January 24, 2022. Dr. Kyhos reviewed the FCE and noted that it was valid by objective measurements during testing. Dr. Kyhos further noted that Petitioner demonstrated persistent overhead weakness that limits his ability to lift with his postoperative affected arm above shoulder level. Dr. Kyhos determined that Petitioner had reached maximal medical improvement and instructed Petitioner to return for further evaluation as needed. Petitioner was given permanent restrictions of no lifting greater than ten

pounds over the shoulder level and no lifting greater than 30 pounds desk to chair. (PX 2).

At the time of hearing, Petitioner testified that he signed a Notice of Separation agreement (RX 3) after being called back into work by Carrie, the HR representative for Respondent. Petitioner testified that he was given two choices by Respondent: return to work full duty or resign. Petitioner chose to resign since he was not able to return to work full duty.

Petitioner further testified that he continues to have pain and weakness in his left shoulder. These ongoing symptoms make it difficult for him to do many activities. It is difficult for him to ride a bike, golf, move things around the house, vacuum, and clean his garage. He has difficulty reaching away from his body and reaching overhead with his left arm. He further testified that he takes Aleve once a day to help relieve his ongoing symptoms in his left shoulder and left arm. Petitioner testified that he is no longer looking for work and considers himself retired.

CONCLUSIONS OF LAW

1. With regard to the issue of causation, the Arbitrator finds that Petitioner has met his burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's credible, unrebutted testimony and the preponderance of the medical evidence that show Petitioner sustained an injury to his shoulder on December 9, 2010 resulting in a left shoulder full thickness retracted supraspinatus and subscapularis tears and a ruptured biceps tendon that required surgery. There was essentially no evidence offered to rebut Petitioner on this issue. Respondent's IME Dr. Cole opined that the work accident was a contributing cause to Petitioner's left shoulder condition of ill-being and need for surgical intervention. Based on these facts, the Arbitrator concludes that Petitioner's current condition of ill-being in his left shoulder and left arm is causally related to his December 9, 2019 work accident.

2. Consistent with the Arbitrator's conclusions above, the Arbitrator further finds that the Petitioner's medical expenses related to his left shoulder condition have been reasonable and necessary in addressing his work-related shoulder condition. As such, the Arbitrator awards the Petitioner the medical expenses relating to his left shoulder condition as set forth in Petitioner's Exhibit 4, subject to the Fee Schedule. Respondent shall receive a credit for any expenses it has already paid.

3. Based on the Arbitrator's conclusions above, the Arbitrator further finds that Petitioner was temporarily totally disabled from June 10, 2020 through January 24, 2022. This finding is supported by Petitioner's unrebutted testimony and the medical evidence. Although Petitioner signed a Notice of Separation, he had no intention to resign from his employment. In the document, Petitioner explained that he was leaving the company because of his "shoulder injury not able to return and do the same job." The Arbitrator further notes that Petitioner's treating physician, Dr. Chauhan, continued to keep Petitioner off work indefinitely as of April 20, 2021. Petitioner was unable to initially undergo work conditioning due to Respondent's failure to authorize the treatment. Following Petitioner's completion of work conditioning and the Functional Capacity Evaluation, Petitioner was determined to have reached MMI as of January 24, 2022, by Dr. Kyhos. Therefore, the Arbitrator awards Petitioner TTD benefits for this period.

4. Regarding the issue of the nature and extent of the Petitioner's injuries, the Arbitrator applies the factors set forth in Section 8.1b of the Act and notes the following: (i) no impairment rating was entered into evidence and the Arbitrator gives no weight to this factor; (ii) Petitioner worked as a mechanic/automotive repair technician and was unable to return to his same occupation due to his permanent restrictions - the Arbitrator gives significant weight to this factor; (iii) Petitioner was 68 years old at the time of the injury and the Arbitrator

gives some weight to this factor; (iv) there was evidence that Petitioner's future earnings were affected by this injury as Petitioner was unable to return to his former position and has since retired - the Arbitrator gives significant weight to this factor; (v) there was evidence of disability corroborated by the medical records that showed Petitioner sustained a massive left rotator cuff tear and a ruptured bicep requiring surgical intervention, resulting in not being able to return to the full requirements of his job as a mechanic, and ongoing difficulties with his left arm when reaching away from his body or above his head - the Arbitrator gives great weight to this factor. Based on the factors above, the Arbitrator concludes the injuries sustained by Petitioner caused a 35% loss of use of the person as a result of the December 9, 2019 work accident.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC024941
Case Name	Thomas Perry, v. R+L Carriers,
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0323
Number of Pages of Decision	12
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	David Jerome
Respondent Attorney	Matthew Ignoffo

DATE FILED: 7/27/2023

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Thomas Perry,

Petitioner,

vs. NO: 20 WC 024941

R+L Carriers,

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 sole 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 thereof.

Regarding the issue of permanent partial disability, the Arbitrator concluded Petitioner sustained a loss of 18.2% hearing in the left ear and a loss of 6% hearing in the right ear. The Arbitrator awarded Petitioner an additional 10% loss of use of the person-as-a-whole for his work-related tinnitus. On review, the Commission finds that the Arbitrator correctly weighed the five factors required by §8.1b(b) of the Act but finds that the award for tinnitus should be reduced from 10% loss of use of the person-as-a-whole to 7.5% loss of use of the person-as-a-whole. This award under §8(d)2 is in addition to the loss of hearing awards under §8(e)16 of the Act.

In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated January 23, 2023, is modified as stated herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner permanent partial disability benefits of $836.69/week (maximum rate) for 37.5 weeks, representing 7.5% loss of use of the person-as-a-whole for Petitioner's tinnitus injury under Section 8(d)(2) of the Act.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $42,000.00. 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.

July 27, 2023

mp/dak
r-7/20/23
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	20WC024941
Case Name	Thomas Perry, v. R+L Carriers,
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	David Jerome
Respondent Attorney	Matthew Ignoffo

DATE FILED: 1/23/2023

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

/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

THOMAS PERRY,
Employee/Petitioner

Case # **20-WC-024941**

v.

Consolidated cases:

R+L CARRIERS,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of Mt. Vernon, on **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

FINDINGS

On **11/12/19**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**85,609.74**; the average weekly wage was $**1,646.34**.

On the date of accident, Petitioner was **51** years of age, **married** with **2** dependent children.

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

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**2,276.20**, for medical expenses, for a total credit of $**2,276.20**.

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

ORDER

Respondent shall pay Petitioner the sum of $**836.69 (Max rate)**/week for a period of **9.83** weeks because the injury sustained caused permanent partial disability to the extent of **18.2%** loss of hearing in the left ear (120/3=40 average–30 threshold=10 x 1.82% x 100), and **3.24** weeks because the injury sustained caused permanent partial disability to the extent of **6%** loss of hearing in the right ear (100/3=33.3 average-30 threshold=3.3 x 1.82% x 100), pursuant to Section 8(e)16 of the Act. Respondent shall further pay Petitioner the sum of **$836.69 (Max rate)**/week for a period of **50 weeks** because the injury sustained caused permanent partial disability to the extent of **10%** loss of use of his body as a whole related to significant tinnitus in his bilateral ears, pursuant to Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from **2/3/20** through **10/26/22**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Arbitrator Linda J. Cantrell

JANUARY 23, 2023

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
Nature and Extent Only

THOMAS PERRY,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No: 20-WC-024941**
	)	
R+L CARRIERS,	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on October 26, 2022. The parties stipulate that Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent on November 12, 2019, and that Petitioner's current condition of ill-being is causally connected to the injury. The parties stipulate that all medical bills have been paid and no temporary disability benefits are claimed. The parties stipulate that Respondent is entitled to a credit of $2,276.20 for medical bills paid. The sole issue in dispute is the nature and extent of Petitioner's injuries.

TESTIMONY

Petitioner was 51 years old, married, with two dependent children at the time of accident. Petitioner was hired by Respondent in 2006 and was an over-the-road truck driver at the time of accident. Petitioner drives 600 to 700 miles per day and hooks and unhooks trailers. He does not load or unload the trailers. Petitioner testified that on 11/12/19 he was on the road in Texas. He was sleeping in the sleeper bunk of the truck when his co-driver, Tom, woke him and told him the truck was on fire. They inspected the vehicle on the side of the road and found the brake drum was glowing red in between the dolly that connects the two trailers. While Petitioner was examining the brake drum, the tire blew up in his face knocking him three feet back against the trailer. Petitioner was facing the cab when the explosion threw him backwards.

Petitioner was dazed and stunned but was able to get up. He immediately noticed he could not hear anything in either ear, and had ringing in both ears. Respondent sent him to Concentra Medical Center where he reported the accident. Petitioner was referred to Dr. Fierstein and was fitted for hearing aids in both ears. Petitioner continues to wear hearing aids and follows up with Dr. Fierstein annually. He was told the hearing aids need to be replaced

every 4 to 5 years. The charge on the hearing aids lasts a workday and it takes four hours to fully recharge them. Petitioner did not miss time from work as a result of the accident.

Petitioner was examined by Dr. David Fletcher for an audiological test. He told Dr. Fletcher about the ringing in his ears. Petitioner denied any issues with his hearing prior to the accident. He testified he has had hearing tests as part of his DOT physical examinations every two years and was never advised of any problems with his hearing.

Petitioner testified that when he does not wear his hearing aids, he can hear sounds but has trouble with certain tones. He can hear low tones very well but has difficulty hearing mid to high pitch tones. Petitioner described that when his daughter screeches, it is painful to him like nails on a chalkboard. He can hear conversation if there is no surrounding ambient noise such as several people talking at the same time. If he is in a crowed area and not wearing his hearing aids, he would not be able to hear what was being said. Petitioner testified that at night he watches television without his hearing aids, and he has to turn the volume up really loud which annoys his wife.

Petitioner testified that for vanity reasons he does not like having to wear hearing aids. His inner ear frequently itches because the hearing aids cause a sensation deep inside his ear. He stated that even when he wears the hearing aids everything sounds different with a “cellophane” sound similar to crumpling a Doritos bag.

Petitioner continues to work for Respondent as an over-the-road truck driver. He has to remove his hearing aids while driving because they amplify every sound within the truck, including air valves, turn signals, horns, rattling, and engine noises. Petitioner described it as an overload of sounds. As a result, Petitioner must be constantly vigilant of his surroundings and watch his mirrors for traffic or emergency vehicles.

Petitioner testified it is excruciating when he chews while wearing his hearing aids because the sound is amplified. This is especially significant because Petitioner has TMJ and has constant jaw popping that he now hears inside his head. Petitioner also described problems with balance and dizziness for a few minutes after removing his hearing aids.

Petitioner testified he continues to have constant ringing in both ears. The hearing aids help reduce the ringing by adding white noise which removes his ability to hear anything at that sound level. He has constant ringing in his ears at night when he removes his hearing aids and when sitting in a quiet room with no one talking.

Petitioner testified regarding the DOT physical performed on 6/5/20. The paperwork references Petitioner having used an illegal substance within the past two years and failed a drug test. Petitioner denied ever using an illegal substance or failing a drug test and noted that if he had done either, he would not have passed the DOT examination. Petitioner testified that Respondent performs random drug screening every month and he would have lost his job if he tested positive for an illegal substance.

Petitioner testified he underwent a "whisper test" during the 6/5/20 DOT physical, which is completed by an individual standing directly behind him in a quiet room whispering numbers. Petitioner testified he passed the test without wearing his hearing aids but would have had difficulty if the individual's pitch was higher.

MEDICAL HISTORY

On 11/12/19, Petitioner presented to Concentra Medical Center and gave a consistent history of injury. He reported he was hit with some pieces of rubber over the right forearm and scalp when the tire blew up in his face. His chief complaint was ringing in his ears. He was assessed with tinnitus, released to full duty work, and ordered to follow up on 11/19/19. (PX3)

On 11/18/19, Petitioner returned to Concentra Medical Center with ongoing ringing in both ears and a "hollow sound" in his left ear. Petitioner was referred to an ENT.

On 11/23/19, Petitioner was examined by Dr. Jeffrey Fierstein for difficulty hearing and ringing in both ears and a "hollow sound" in his left ear. (PX4) Dr. Fierstein referred Petitioner for an audiologic evaluation that was performed at Anderson Hospital on 12/16/19. It was determined Petitioner was a candidate for hearing aids which were fitted on 2/3/20. (PX2)

On 6/5/20, Petitioner underwent a DOT Commercial Driver Medical Certification exam. It was noted Petitioner wore hearing aids for high frequency and was able to pass a whisper test without hearing aids. (RX2)

On 7/19/21, Petitioner was examined by Dr. David Fletcher pursuant to Section 12 of the Act. (PX1). Dr. Fletcher testified by way of deposition on 8/3/22. (PX1) Dr. Fletcher is board-certified in occupational medicine and has 40 years of experience with hearing loss cases, which was part of his residency in occupational environmental medicine. He also had extensive training when he was conducting noise hazard surveys with the Army Medical Center. Dr. Fletcher testified he is familiar with the Illinois Workers' Compensation regulations on hearing loss and has used them extensively.

Dr. Fletcher's testimony was consistent with his reported dated 8/2/21. He testified that due to the work accident, Petitioner developed hearing loss and severe tinnitus that impacts his activities of daily living and quality of life. Dr. Fletcher performed an audiogram that revealed mild impairment in speaking ranges. He tested the frequencies of 1,000, 2000, and 3,000 cycles per second and opined Petitioner lost 30, 30, and 60 decibels in the left ear respectively, and 15, 30, and 55 decibels in the right ear. He opined Petitioner had a hearing loss of 18% in the left ear and 5.46% in the right ear under the Act, as well as 5% binaural impairment which he noted under the AMA Guidelines to be 2% impairment of the entire body. He testified that the 2% rating under the AMA guidelines is for impairment and not disability. He testified that impairment is objective based on physical examination, medical history, and records review. He agreed that tinnitus is a subjective complaint that cannot be measured and Petitioner's chief complaint upon exam was tinnitus. Dr. Fletcher testified that Petitioner will require hearing aids for the rest of his life and will need to follow up with an audiologist for new hearing aids.

CONCLUSIONS OF LAW

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. Fletcher rated severe tinnitus at 5% binaural impairment which he noted under the AMA Guidelines to be 2% impairment of the entire body. Dr. Fletcher testified that the 2% impairment rating is in addition to Petitioner's hearing loss of 18% of the left ear and 5.46% of the right ear. Dr. Fletcher opined that Petitioner's severe tennitus would impact his activities of daily living and quality of life. The Arbitrator places greater weight on this factor.

(ii) **Occupation**: Petitioner continues to work for Respondent as an over-the-road truck driver. Petitioner testified that his hearing loss and tinnitus interfere with his job duties. He is unable to wear his hearing aids while driving as they amplify every sound within the truck causing an overload of sounds. He is constantly vigilant of his surroundings due to the inability to wear his hearing aids. Petitioner did not miss any time from work due to his work injuries. The Arbitrator places some weight on this factor.

(iii) **Age**: Petitioner was 51 years of age at the time of accident. He must live and 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 he is currently working for Respondent in his pre-accident position. The Arbitrator places some weight on this factor.

(v) **Disability**: Petitioner's ongoing tinnitus and hearing loss significantly interferes with his daily activities and quality of life. Petitioner testified that when he does not wear his hearing aids, he has difficulty hearing mid to high pitch tones. He has difficulty hearing in crowded rooms with multiple people speaking simultaneously. Petitioner has issues with itching deep within his ears due to the sensation caused by the hearing aids. He testified that even with the hearing aids everything sounds different with a "cellophane" sound. His ongoing symptoms interfere with his job duties as set forth above. Petitioner's jaw popping from a TMJ condition is amplified and causes excruciating symptoms when he chews while wearing his hearing aids. He has issues with balance and dizziness for a few minutes after removing his hearing aids. He has constant ringing in both ears, particularly at night and when sitting in a quiet room with no background noise. 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 18.2% loss of hearing in the left ear (120/3=40 average–30 threshold=10 x 1.82% x 100), and 6% loss of hearing in the right ear (100/3=33.3 average-30 threshold=3.3 x 1.82% x 100), pursuant to Section 8(e)16 of the Act. The Arbitrator further finds that Petitioner sustained permanent partial disability to the extent of 10% loss of use of his body as a whole related to significant tinnitus in his bilateral ears, pursuant to Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from 2/3/20 through 10/26/22, and shall pay the remainder of the award, if any, in weekly payments.

Arbitrator Linda J. Cantrell DATED:

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC026688
Case Name	Mario Salamanca v. AC Ready Mix
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0324
Number of Pages of Decision	22
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Lindsey Strom
Respondent Attorney	Ilir Imeri

DATE FILED: 7/27/2023

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mario Salamanca,

Petitioner,

vs. NO: 20 WC 26688

AC Ready Mix,

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 temporary total disability, causal connection, medical expenses and prospective medical care, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Arbitrator ordered Respondent to "pay for the recommended surgeries as ordered by Dr. Park and Dr. Salehi, as well as any reasonable post-operative care, post-operative therapy, medication, radiographic imaging, and other associated treatments, pursuant to Sections 8.2 and 8(a) of the Act." The Commission modifies the Arbitrator's order addressing Respondent's §8(a) liability as follows: Pursuant to §8(a) and §8.2 of the Act, Respondent shall pay for left shoulder surgery to include repair of Petitioner's rotator cuff tear, AC joint resection, and subacromial decompression, as recommended by Dr. Park. Respondent shall further pay for left hip surgery to repair Petitioner's labral tear, also recommended by Dr. Park. Additionally, Respondent shall pay for the C7 cervical discectomy and fusion recommended by Dr. Salehi. Respondent shall also pay for all reasonable and necessary attendant care following each surgery.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 21, 2022, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that pursuant to §8(a) and §8.2 of the Act, Respondent shall pay for left shoulder surgery to include repair of Petitioner's rotator cuff tear, AC joint resection, and subacromial decompression, as recommended by Dr. Park. Respondent shall further pay for left hip surgery to repair Petitioner's labral tear, also recommended by Dr. Park. Additionally, Respondent shall pay for the C7 cervical discectomy and fusion recommended by Dr. Salehi. Respondent shall also pay for all reasonable and necessary attendant care following each surgery.

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 $38,000.00. 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.

July 27, 2023

MP:yl
o 7/20/23
068

/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC026688
Case Name	Mario Salamanca v. AC Ready Mix
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	19
Decision Issued By	Frank Soto, Arbitrator

Petitioner Attorney	Lindsey Strom
Respondent Attorney	Ilir Imeri

DATE FILED: 9/21/2022

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 20, 2022 3.78%

/s/Frank Soto, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Mario Salamanca
Employee/Petitioner

v.

AC Ready Mix
Employer/Respondent

Case # **20** WC **26688**

Consolidated cases: **n/a**

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

DISPUTED ISSUES

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

FINDINGS

On **10/26/2020**, 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 $**77,688.00**; the average weekly wage was $**1,449.20**.

On the date of accident, Petitioner was **50** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

Respondent shall pay the medical expenses identified in Petitioner's Exhibits 1 through 12, pursuant to Sections 8.2 and 8(a) of the Act, subject to the fee schedule. Respondent shall be given credit for all medical bills that have been paid, and Respondent shall hold Petitioner harmless from any bills which Respondent claims a credit pursuant to Section 8(j) of the Act.

Respondent shall pay Petitioner TTD benefits commencing September 27, 2021 through June 24, 2022, as provided in Section 8(b) of the Act.

Respondent shall pay for the recommended surgeries as ordered by Dr. Park and Dr. Salehi, as well as any reasonable post-operative care, post-operative therapy, medication, radiographic imaging, and other associated treatments, pursuant to Sections 8.2 and 8 (a) of the Act.

The Petition for Penalties is hereby denied.

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

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

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

SEPTEMBER 21, 2022

By: /o/ *Frank J. Soto*
Arbitrator

Procedural History

This claim was tried pursuant to Section 19(b) of the Act. The issues in dispute involved whether Petitioner's current condition of ill-being (*i.e.* neck, left shoulder and left hip) were causally related to his work accident, whether Respondent is liable for outstanding medical expenses, whether Petitioner is entitled to prospective medical treatment (*i.e*. recommended surgeries for the left shoulder, left hip, and cervical spine) and whether Respondent is liable for TTD benefits. A petition for penalties was filed by Petitioner. (Arb. Ex. #1).

Findings of Fact

Petitioner's Testimony

Mario Salamanca (hereafter referred to as "Petitioner") was a cement truck driver for AC Ready Mix (hereafter referred to as "Respondent") since 2016. (T. 17-18). Petitioner testified at the end of each day he was required to clean or washout the cement truck he operated by positioning the truck in a washing bay under a water pipe. (T. 18-20).

Petitioner testified on October 26, 2020, he parked the cement truck he was operating in the washing bay when the overhead water pipe fell striking him on the side of the head. (T. 20-21). Petitioner testified the pipe weighed approximately 100 pounds and fell about 15 feet when it struck him. Petitioner testified the pipe struck him on the left side of his head, left upper shoulder, elbow region and he impacted his left hip when he was thrown to the ground twisting his body in the process. (T. 22-23). Petitioner testified he was wearing a hard hat at the time of the accident, but that the hard hat flew off after he was struck. (T. 47).

Petitioner testified after being struck by the pipe, he came to on the ground and felt dazed and disoriented. At that time, Petitioner noticed pain in his left shoulder, left elbow and bicep with numbness and tingling in both arms and back as well as a painful sensation of his hip and the feeling that his left hip was stuck in place. (T. 24-26). Petitioner stated he got up and tried walking off the pain. (T. 25-26). Thereafter, Petitioner parked his work truck and, after noticing he suffered an episode of bowel incontinence during this ordeal, he changed his clothes before calling dispatch to report the accident. (T. 27-28). Petitioner testified after reporting the accident, he drove himself home. (T. 29; 51). Petitioner testified when he arrived home, he continued to feel pain and dazed but he hoped the pain would go away. (T. 52).

Petitioner testified the following day he went to the emergency room at Palos Community Hospital. (T. 56-57). Petitioner testified he underwent a battery of tests at Palos Community

Hospital before being released and told to follow up with his primary care physician.[1] (T. 57-58). Petitioner testified he did not have a primary care physician so he followed up at Midwest Anesthesia and Pain Specialists (MAPS) at the recommendation of his attorney. (T. 29-30). Petitioner testified MAPS prescribed physical therapy, medications, injections to the cervical and lumbar spine and took him off work. (T. 31-32). Petitioner testified physical therapy and medications provided only temporary pain relief. (T. 32).

Petitioner testified he was referred by MAPS to Dr. Park for the left shoulder and hip. Petitioner testified Dr. Park recommended MRIs for both the left shoulder and left hip, physical therapy, and injections. (T. 33-34). Petitioner testified Dr. Park eventually recommended surgery for the left shoulder and left hip. (T. 34).

Petitioner testified MAPS also referred him to Dr. Kozlov who recommended additional physical therapy. (T. 35). Petitioner testified he wanted a second opinion so he saw Dr. Kramer who referred him to Dr. Pieroth, a neuropsychologist, at Midwest Orthopedics at Rush. (T. 36-37). Petitioner testified MAPS than referred him to Dr. Salehi for his back. Dr. Salehi, a spine surgeon, ordered a new MRI of the neck and an EMG. (T. 37-38). Petitioner testified Dr. Salehi recommended cervical spine surgery. (T. 38).

Petitioner testified he experiences pain daily which he takes medication. (T. 40-41). Petitioner testified he did not have left shoulder, left hip, left arm or neck and low back symptoms prior to his work accident. Petitioner also testified he never sought medical treatment for those areas prior to his work accident. (T. 41-42). Petitioner testified he would like to undergo the surgeries for his left hip, left shoulder, and neck since he continues to feel pain. (T. 34; 38-40; 71-72). Petitioner testified he has no health insurance because Respondent went out of business. (T. 43).

The Arbitrator found the testimony of Petitioner to be credible.

Medical History

Petitioner was seen at the emergency room at Palos Hospital on October 27, 2020. (P.X. 5). At that time, Petitioner reported being struck by a large pipe in the head, upper left arm, and left side of his pelvic area. Petitioner also reported that since the accident he had pain on the left side of his neck, upper left arm and left pelvic area near the anterior aspect of the pelvic bone

[1] A review of the medical records indicates the referral also included seeing an orthopedic surgeon.

close to the abdominal wall. Weakness was noted in Petitioner's forearm, wrist, and hand. (Px. 5).

The exam noted tenderness on the left lower quadrant near the anterior pelvic crest, tenderness around the paraspinal regions of the lower cervical spine mostly on the left, and a defect was also noted along the biceps tendon with the biceps muscle having contracted down into the left upper arm. (Px. 5). A CT of the head found no acute intracranial hemorrhage. A CT of the cervical spine noted nonspecific straightening of the normal cervical lordosis possibly due to positioning or spasms. Petitioner was diagnosed with an injury to the head, cervicalgia, injury to the muscle fascia and tendon of other parts of the left biceps and left arm. Petitioner was advised to follow up with an orthopedic surgeon and prescribed Tramadol. (Px. 5).

Petitioner was seen at Midwest Anesthesia & Pain (MAPS) on October 29, 2020. (Px 12). The MAPS records note Petitioner complained of pain in his head, neck, mid/low back, left shoulder/arm, and left hip. At that time, Petitioner rated his pain at 9-10/10 in intensity and that he was experiencing daily headaches with associated dizziness, nausea with occasional blurred vision. (Px 12). Thoracic, lumbar, and neck tenderness were noted on the physical exam. Petitioner was assessed with pain in the cervical, thoracic, and lumbar regions with cervical and lumbar radiculopathy and cervicalgia. (Px 12). Unspecified injuries to the left biceps muscle, left hip, and left upper arm/shoulder were also noted. (Px 12). Physical therapy was prescribed. (Px 12). MAPS also provided Petitioner a referral to see an orthopedic surgeon for the left shoulder. (Px 12). (Px. 12; pg. 32).

Petitioner continued treating with MAPS through the remainder of 2020, reporting soreness and tenderness in the head and left shoulder/arm, and sharp pain in the mid/low back and left hip. (Px 12). Petitioner attended therapy at ATI. (Px 7). On November 5, 2020, Petitioner underwent an MRI of the left shoulder, which showed (1) chronic high-grade partial-thickness tearing of the supraspinatus and early infraspinatus to posterior greater tuberosity attachments with partial-thickness tear of the tendon, (2) dual long head biceps signal proximal to the bicipital pulley with the possibility of a SLAP lesion associated with biceps tendon split tear and notable truncation of the posterosuperior labrum, and (3) bulky acromioclavicular arthropathy with mild lateral downscoping of the acromion contributing to impingement of the supraspinatus medial to the point of partial thickness tearing and tendon attenuation, as well as associated mild subacromial sub deltoid bursitis. (Px. 10; page 55-57). An x-ray of Petitioner's left hip was

performed on November 12, 2020 which showed mild left femoral acetabular joint space narrowing with superior roof spurring. (Px 12; page 231).

Following the MRI, Petitioner started treating for his hip and left shoulder with Dr. Park, of Specialty Orthopedics, who noted Petitioner continued to experience shoulder symptoms and he had a 'Popeye-like' appearance of his left biceps muscle. Dr. Park assessed a left partial rotator cuff tear and left proximal biceps rupture, left distal biceps strain, and left hip flexor strain with aggravation. (Px 10).

Petitioner continued to treat at MAPS, ATI and Dr. Park for the left shoulder and hip. (Px. 12; Px. 7; Px 10). On December 2, 2020, Petitioner underwent an MRI of his cervical spine which showed (1) straightening of the cervical lordosis, (2) C4-C5 left paracentral disc herniation with ventral CORD contact and mild canal stenosis, (3) C5-C6 broad-based central disc herniation with mild thecae sac effacement, (4) C6-C7 posterior disc bulge continuous with globular disc herniation in the left neuroforamen, underlying posterior endplate osteophyte, and right uncovertebral hypertrophy, (5) thecae sac effacement with mild canal stenosis, and (6) severe left and moderate right neuroforaminal stenosis. (Px. 10).

Petitioner also underwent an MRI for the left hip which showed (1) extensive fraying/intra-substance tearing/truncation with subjacent chondral labral junction tearing of the anterior to posterior superior labrum of the left hip with focal high-grade chondral malacia/full-thickness chondral erosion and continuous more medial chondral delimitation, (2) insertional tendinosis and interstitial tearing of the distal gluteus minimus insertion, (3) tendinosis and mild tenderness tearing of the gluteus medius, and (4) mild hamstring insertional tendinosis. (Px. 10). An MRI of the lumbar spine showed (1) bulky multilevel posterior element spondylosis contributing to impingement, (2) bilateral neuroforaminal bulging disc with mild bilateral neuroforaminal stenosis at L3-L4, (3) bulging disc accentuated in the bilateral neuroforamen with superimposed ring t neuroforaminal annular fissure and mild bilateral neuroforaminal stenosis, and (4) L5-S1 minimal grade 1 retrolisthesis and a central disc herniation with annular fissure impinging on the central thecae sac, as well as peripheral bulging disc with right greater than left S1 nerve root borderline impingement and mild bilateral neuroforaminal stenosis. (Px. 12).

In December 2020, Petitioner underwent cortisone injections for his left shoulder and cervical spine. (Px. 10; Px. 12). Petitioner continued to treat at MAPS, ATI, and Dr. Park with

only some short-term relief from the cortisone injections (Px. 10). Dr. Park assessed a traumatic incomplete tear of the left rotator cuff, left proximal biceps rupture, left hip femoracetabular impingement and flexor strain, and cervical and lumbar strains with radiculopathy. (Px. 10; Px. 12).

On April 6, 2021, Petitioner underwent an MRI of the left elbow which showed (1) suspect low-grade partial thickness proximal insertional tear of the radial collateral ligament with or without involvement of the common extensor tendon insertion, (2) mild to moderate common flexor tendinosis at the insertion, and (3) fluid signal about the soft tissues of the distal triceps insertion as well as deep to the triceps insertion, with possible mild triceps insertional tendinosis versus trace olecranon bursitis. (Px. 10).

Dr. Park assessed a traumatic incomplete tear of the left rotator cuff with subacromial bursitis of the left shoe elder joint, femoracetabular impingement of the left hip with strain and primary osteoarthritis, strain of the neck muscle, strain of the lumbar region and with lumbar spondylosis, and rupture of the left proximal biceps tendon with associated left elbow sprain. (Px. 10; pages 39-40). Petitioner was kept off work due to his left hip, shoulder, and elbow issues since the date of his injury. (Px. 10; page 35).

On May 10, 2021, Petitioner saw a spinal specialist, Dr. Sean Salehi who assessed lumbosacral spondylosis and unspecified cervical disc displacement, with possibly a disc herniation at C6-C7. (Px. 8). Petitioner was advised to obtain a new MRI and undergo an EMG. Petitioner underwent the cervical spine MRI on May 14, 2021 which showed (1) straightening of the cervical lordosis, (2) C6-C7 endplate/disc spondylosis as well as uncovertebral spondylosis impinging the thecae sac and neuroforamen with mild canal stenosis worst and severe to the left and mild to moderate right neuroforaminal stenosis, and (3) a slight left paracentral disc protrusion at C4-C5. (Px. 8). On May 25, 2021, Petitioner underwent electrodiagnostic review at MAPS, which showed cervical radiculopathy, paresthesias, and pain in both arms. The study was found to be abnormal with electrodiagnostic evidence of a bilateral C6-C7 radiculopathy. (Px. 12; pages 134-136).

On June 8, 2021, Petitioner saw Dr. Salehi who assessed lumbosacral and cervical spondylosis, neck pain and bilateral arm paresthesias, which he opined was due to permanent aggravation of a previously asymptomatic foraminal stenosis at C6-C7. (Px. 8; page 23). At this

time, due to the failure of conservative treatment, Dr. Salehi recommended surgery consisting of a C6-7 anterior cervical discectomy and fusion.

Through the remainder of 2021, Petitioner continued to treat with MAPS, Dr. Park for his left shoulder/arm and left hip, and with Dr. Salehi for his neck and spine issues. On September 30, 2021, Dr. Park recommended left hip surgery consisting of an arthroscopic hip femoral and acetabular osteoblast. (Px. 10, page 28). In March of 2022, Dr. Park also recommended left shoulder surgery. (Px, 12; page 201).

Dr. Domb, Petitioner's Section 12 Examiner

On October 21, 2021, Petitioner elected to see Dr. Dome on October 26, 2021 pursuant to Section 12 of the Act. Dr. Domb is board certified orthopedic surgeon who focuses upon sports medicine and arthroscopic surgery of the shoulder, hip, and knee. (Px. 8, p. 7).

At that time, Petitioner reported while washing out a cement truck a large pipe broke free and struck him on the left or back side of his head, left shoulder and elbow which caused him to fall to the ground. (Px. 8). Dr. Domb examined Petitioner's left shoulder noting a positive Hawkins Test, Positive O'Brien's Test, Positive Jobe Test, Positive Liftoff and Belly Press Tests. Dr. Domb also noted weakness in the supraspinatus and subscapularis. Dr. Domb testified the MRI of the left shoulder showed a partial rotator cuff tear, SLAP tear, AC joint arthritis and a proximal biceps tear. (Px. 8, p. 15).

Dr. Domb examined Petitioner's hip noting an abnormal gait, pain with range of motion testing, pain with flexion and internal rotation, external rotation, and abduction. Dr. Domb also noted a positive log roll test, positive anterior impingement test, Positive FABER sign, internal snapping, anterior apprehension and resisted internal rotation test with weakness in the abductor. (Px. 8, p. 12). Dr. Domb testified the left hip MRI showed a labral tear in the setting of cam impingement. (Px. 8, p. 15). Dr. Domb diagnosed a tear of the labrum in the hip joint. (Px. 8, p. 14).

Dr. Domb opined Petitioner's subjective complaints were supported by the objective findings and his examinations. (Px. 8, p. 15). Dr. Domb also opined the mechanism of injury supported Petitioner's complaints and objective findings. (Px. 8, p. 15). Dr. Domb testified the temporary pain relief Petitioner experienced from the injections to the left shoulder and hip confirmed that his pain was coming from the torn labrum in the hip joint and the left shoulder. (Px. 8, p. 16).

Regarding the left shoulder, Dr. Domb recommended arthroscopic surgery including subacromial decompression, AC joint resection, possible labral repair, possible biceps tenodesis and repair of the rotator cuff. (Px. 8, p. 16). Regarding the left hip, Dr. Domb recommended arthroscopy surgery consisted of an arthroscopic repair of the labral previously recommended by Dr. Park. (Px. 8, p. 17).

Dr. Domb testified he disagreed with Dr. Lieber's diagnosis of degenerative joint disease. Dr. Domb testified Petitioner's pain was caused by the labral tear produced by Petitioner's work accident. (Px. 8, p. 18). Dr. Domb testified he also disagreed with Dr. Lieber's opinion that Petitioner was at MMI because Petitioner has active injuries to the hip and shoulder which has not resolved because Petitioner needs surgery. (Px. 8, p. 19).

Dr. Domb opined there was a causal relationship between Petitioner's current condition of illbeing (i.e. left shoulder and left hip) and his work accident. (Px. 8, p. 19-20). Dr. Domb also opined that all of the medical treatment Petitioner received was reasonable, necessary and causally related to his work accident. (Px. 8, p. 20-21).

On cross examination Dr. Domb testified Petitioner had some preexisting conditions but not preexisting issues. (Px. 8, p. 23). Dr. Domb testified based upon the totality of the records, physical exam, and history the labral tear was caused by the accident. (Px. 8, p. 47). Dr. Domb testified the pain Petitioner was experiencing in the hip is from a very painful labral tear which began with a discrete acute trauma. Dr. Domb also testified Petitioner experienced the pain after the accident and did not have the pain prior to his work accident. (Px. 8, p. 29). Dr. Domb testified Petitioner's labral tear is very painful and was caused by the accident due to the temporal relationship between the onset of pain and the accident. (Px. 8, p. 30). Dr. Domb further testified the degree of trauma Petitioner experienced was a competent mechanism to cause a labral tear. (Px. 8, p. 29).

Dr. Domb also diagnosed a left shoulder partial rotator duff tear, SLAP tear, AC joint osteoarthritis and a proximal biceps tear. (Px. 8, p. 35). Dr. Dome opined that it is more likely than not the tears were caused by Petitioner's accident. (Px. 8, p. 37). Dr. Domb testified he had the benefit of reviewing the records from the entirety of Petitioner's treatment as well as the MRIs and x-rays which he correlated to Petitioner's subjective complaints with the objective findings from the physical exams. Dr. Domb noted the absence of any medical record related to any shoulder troubles prior to Petitioner's work accident. (Px. 8, p. 37).

Dr. Lieber, Respondent's Section 12 Examiner

Dr. Lieber examined Petitioner on April 22, 2021. Dr. Lieber testified Petitioner reported an alleged work event on October 26, 2022 when a pipe fell and struck Petitioner in the head. Dr. Lieber noted Petitioner provided no prior history of any left shoulder or left hip complaints. (Rx. 2, p. 9-11). Dr. Lieber's exam noted pain with abduction and internal rotation and with hip rotation. Dr. Lieber also noted a defect about the biceps muscle of the left arm and evidence of positive impingement and apprehension. Dr. Lieber further noted tendinitis about the shoulder with a biceps muscle tear. Regarding the hip, Dr. Lieber identified pain with extremes of rotation. (Rx. 2, p. 11-12).

Dr. Lieber testified Petitioner may have minor arthritis within the hip which is consistent with his symptoms. (Rx. 2, p. 13). Dr. Lieber also testified Petitioner had biceps muscle irregular with some arthritis about the shoulder and degeneration of the rotator duff which was consistent with his shoulder discomfort. (Rx. 2, p. 13). Dr. Lieber testified the left shoulder MRI dated November 5, 2020 showed possible partial thickness tearing of the supraspinatus, slight abnormalities of the bicep tendon with potential evidence of a minor SLAP tear and some arthritis. (Rx. 2, p. 14).

Dr. Lieber opined Petitioner had tendinitis of the left elbow, degenerative joint disease of the left hip, and rotator cuff syndrome of the left shoulder with a biceps muscle tear. (Rx. 2, p. 16). Dr. Lieber opined Petitioner's biceps muscle tendon tear was related to his work accident. (Px. 2, p. 18). However, Dr. Lieber testified Petitioner biceps tendon tear stabilized so no further treatment was necessary.

Regarding the remaining conditions, Dr. Lieber opined there was no relationship between those conditions and Petitioner's alleged work event of October 2020. Dr. Lieber further opined those conditions were degenerative in nature and showed no evidence of any acute abnormality that could be related to the alleged work event of October 2020. (Rx. 2, p. 16).

Dr. Lieber also opined after his April 22, 2021 examination no further medical treatment was necessary because Petitioner was at MMI. (Rx. 2, p. 18). Dr. Lieber testified all other Petitioner's diagnostic abnormalities were degenerative in nature and had no relationship to

Petitioner's alleged work event. Dr. Lieber opined Petitioner needed no work restrictions related to his work accident. (Rx. 2, pg. 19-20).

Dr. Salehi, Petitioner's treating neurosurgeon

Dr. Salehi, a neurosurgeon, testified he first examined Petitioner on May 10, 2021 and, at that time, Petitioner reported neck pain with numbness and tingling going down both arms into the first three digits of the hands. Petitioner also reported low back pain with tingling going down the posterior left leg to the foot. Petitioner said he underwent epidural steroid injections in the neck an low back resulting in temporary pain relief. Dr. Salehi noted Petitioner denied any prior neck or low back pain. (Px. 10, p. 7-8).

Dr. Salehi examined Petitioner and noted tenderness in the lower cervical and bilateral trapezius regions, reduced cervical range of motion, limited lumbar range of motion, negative straight leg test, diminished reflexes and decrease sensation. Dr. Salehi reviewed the cervical MRI dated December 2, 2020 which showed mild to moderate left paracentral herniated disc at C6-7. However, Dr. Salehi noted the MRI was of poor quality. Dr. Salehi testified the MRI results explained Petitioner's symptoms and neck complaints. (Px. 10, p. 11).

Dr. Salehi also reviewed the lumbar MRI dated October 10, 2020 which showed a minimal centrally herniated disc at L5-S1 with no neural compression and mild bilateral facet arthropathies at L4-5 and L5-S1. (Px. 10, p. 12). Dr. Salehi diagnosed lumbosacral spondylosis and cervical disc displacement. Dr. Salehi testified based upon the MRIs, Petitioner's symptoms and examination, there could be an underlying disc pathology and herniation causing Petitioner's symptoms. (Px. 10, p. 12). At that time, Dr. Salehi recommend another cervical MRI and an EMG of the bilateral upper extremities to confirm whether or not Petitioner's symptoms were due to nerve root compression. (Px. 10, p. 13).

Dr. Salehi testified he reviewed the cervical MRI dated May 24, 2021 which showed significant left C6-7 foraminal stenosis and moderate right C6-7 foraminal stenosis. Dr. Salehi testified he also reviewed the EMG dated May 25, 2021 which showed evidence of bilateral C6-7 radiculopathy. (Px.10, p. 14). Dr. Salehi testified the MRI and EMG showed Petitioner's symptoms were the result of a C6-7-disc degeneration and foraminal stenosis with compression of the nerve roots. (Px. 10, p. 14). Dr. Salehi diagnosed cervical spondylosis and lumbar spondylosis. Dr. Salehi testified he recommended a single level anterior cervical discectomy and fusion at C7. (Px. 10, p. 16).

Dr. Salehi opined Petitioner reached MMI for his lumbar condition but not for his cervical spine condition. Dr. Salehi further opined all the medical treatment provided was reasonable and necessary including the MRIs and injections. (Px. 10, p. 30-33).

Dr. Salehi testified the May 14, 2021 MRI showed foraminal stenosis and the narrowing was likely degenerative but one could have an acute herniation which resolved over time causing foraminal stenosis secondary to the earlier herniation. (Px. 10, p. 45-46). Dr. Salehi noted the first cervical MRI raised the possibility of a herniation while the second MRI showed foraminal stenosis without the disc herniation. (Px. 10, p. 58). Dr. Salehi further testified the majority of the time degeneration occurs over time but usually there's a trigger which renders the asymptomatic disc degeneration to become symptomatic. Dr. Salehi opined the degeneration started to become symptomatic as a result of Petitioner's work accident. (Px. 10, p. 47). Dr. Salehi noted that Petitioner denied similar symptoms in the past. Dr. Salehi testified the mechanism of injury Petitioner reported was consistent with the history Petitioner reported at the emergency room. (Px. 10, p. 48-53).

Dr. Salehi testified Petitioner had a small disc herniation at L5-S1 which did not require surgery and as of June 8, 2021 Petitioner reached MMI for his lumbar spine. (Px. 10, p. 63-64). For the cervical spine, Dr. Salehi testified Petitioner could work light duty. (Rx. 10, p. 64).

Dr. Salehi testified he disagreed with Dr. Mather who believed the imaging and exam were benign and nonspecific and the MRI was essentially normal. Dr. Salehi testified the MRI was not normal because the MRI showed significant foraminal stenosis on the left and moderate foraminal stenosis on the right. (Px. 10, p. 20). Dr. Salehi testified he also disagreed with Dr. Mather's opinion that the EMG was not valid. Dr. Salehi testified Dr. Mather's opinion the EMG was not valid was completely arbitrary since the EMG identified radiculopathy. Dr. Salehi noted that Dr. Mather diagnosis psychogenic pain functional overlay yet his exam was negative Waddell's signs. Regarding Dr. Mather's diagnosis Dr. Salehi said "*He literally pulls it out of the bag with no supporting argument why he's saying that*". (Px. 10, p. 21-22). Dr. Salehi further said "…*essentially he creates a report which would fit his narrative and absolutely has no bias on any objective documentation that we have, on the physical exam, on the correlation of the exam to the patient's symptoms, the MRI findings, or the EMG. This is the most biased IME I have seen in a long while".* (Px. 10, p. 22).

Dr. Mather, Respondent's Section 12 Examiner

Dr. Mather is a board-certified orthopedic surgeon who specializes in the spine. (Rx 3, p. 5). Dr. Mather examined Petitioner on October 26, 2020. Dr. Mather testified Petitioner reporting being struck in the head and left shoulder by a 12-15-foot-long pipe weighing between 75 and 100 pounds. At that time, Petitioner reported no previous problems, but, since the accident Petitioner reported numbness down the right thigh and left later calf and numbness down the index and ling fingers of both hands with the main complaints involving the neck. (Rx. 3, p. 9-10). During the examination, Dr. Mather noted normal rotation, no cervical spine tenderness, negative Spurling sign, normal flexion, and extension of the cervical spine. Dr. Mather testified the exam showed no objective findings. (Rx. 3, p. 14).

Dr. Mather opined Petitioner may have sustained a cervical contusion but his ongoing symptoms involves psychogenic pain and functional overlay. Dr. Mather testified he could not find any organic source of Petitioner's complaints. (Rx. 3, p. 20). Dr. Mather testified the EMG was normal and showed no cervical radiculopathy. (Rx. 3, p. 23).

Dr. Mather opined Petitioner suffered a cervical contusion but Petitioner doesn't require an anterior cervical discectomy and fusion at C6-7. (Rx. 3, p. 27). Dr. Mather also opined Petitioner reached MMI for both the neck and back 6 weeks after the accident or by December 5, 2020 and that Petitioner could work full duty without restrictions. (Rx. 3, p. 26).

Conclusions of Law

The Arbitrator adopts the finding of fact in support of the Conclusions of Law as Set forth below. The burden is upon the party seeking an award to prove by a preponderance of the credible evidence the elements of her claim. *Peoria County Nursing Home v. Industrial Comm 'n*, 115 lll.2d 524, 505 N.E.2d 1026 (1987).

Regarding issue (F), whether Petitioner's current condition of ill-being is causally related to his employment injury, the Arbitrator finds as follows:

In pre-existing condition cases, recovery will depend on the employee's ability to show that a work-related accidental injury aggravated or accelerated the pre-existing 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 a pre-existing condition. *Caterpillar Tractor Co. v. Industrial Comm'n,* 92 Ill.2d 30, 36-37. When a worker's physical structures, diseased or not, give way under the stress of their usual tasks, the law views

it as an accident arising out of and in the course of employment. *General Electric Co. v. Industrial Comm'n,* 89 Ill.2d 432, 60 Ill.Dec. 629, 433 N.E.2d 671 (1982). Even though an employee has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. *Caterpillar Tractor Co. v. Industrial Comm'n,* 129 Ill.2d 52, 133 Ill. Dec. 454, 541 N.E.2d 665 (1989). 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) "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. *International Harvester v. Industrial Comm'n*, 93 Ill.2d 59, 63-64 (1982).

The Arbitrator carefully reviewed and considered all medical evidence along with all the testimony. The Arbitrator finds Petitioner proved by the preponderance of the credible evidence that his current condition involving the left hip, left shoulder and cervical spine are causally related to his October 26, 2020 work accident. The Arbitrator also found Petitioner sustained an injury to his lumbar spine which resolved prior to the trial.

As stated above, the Arbitrator found the testimony of Petitioner credible and he testified that prior to his October 26, 2020 work accident he was not experiencing any symptoms involving his left hip, left shoulder, and neck. Prior to his October 26, 2020 work accident, Petitioner was working full duty and had not undergoing any prior medical treatment for his left hip, left shoulder, and cervical spine. Petitioner testified after being struck by the pipe he developed the symptoms which continue to persist and, since his work accident, Petitioner has been unable to return to work full duty.

The Arbitrator finds the opinions of Drs. Domb, Salehi and Park more persuasive than the opinions of Drs. Lieber and Mather. The opinions of Drs. Domb, Salehi and Park are consistent with the findings identified in the MRIs, x-rays, exams, symptoms, and the results of the EMG. Dr. Domb testified Petitioner's subjective complaints were supported by the objective findings and his examination. (Px. 8, p. 15). Dr. Domb also testified the mechanism of injury supported

Petitioner's complaints and objective findings. (Px. 8, p. 15). Dr. Domb testified the temporary pain relief Petitioner experienced from the injections to the left shoulder and hip confirms that Petitioner's pain is coming from the torn labrum in the hip joint and the shoulder. (Px. 8, p. 16). Dr. Salehi testified the majority of the time degeneration occurs over time but usually there's a trigger which renders the asymptomatic disc degeneration to become symptomatic. Dr. Salehi opined Petitioner's degeneration condition became symptomatic because of his work accident. (Px. 10, p. 47). Dr. Salehi also testified a pipe falling about 8 feet striking Petitioner and knocking him to the ground was also consistent with the history reported at the emergency room. (Px. 10, p. 48-53). The Arbitrator finds that Drs. Lieber and Mather failed to sufficiently address whether Petitioner's work accident aggravated his preexisting degenerative conditions and/or the temporal relationship between the onset of Petitioner's symptoms and his work accident.

Additionally, the Arbitrator finds Petitioner also sustained his burden of proof that his current condition of ill-being is causally related to his work accident based upon the chain-of-events theory. Petitioner testified he had no pain or ongoing issues with his injured body parts prior to this work accident. No evidence was presented showing Petitioner suffered from any prior spine, left shoulder, or left hip problems. The record demonstrates a previous condition of good health and ability to work without issue until October 26, 2020.

With respect to issue "J," whether the medical services that were provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges, the Arbitrator finds as follows:

Under section 8(a) of the Workers' Compensation Act, an employer's liability to pay for medical services is limited to (1) first aid and emergency treatment, *plus* (2) two additional doctors chosen by the employee *and* (3) any additional providers and services recommended by the two physicians selected by the employee. (820 ILCS 305/8(a) (West 2010). Respondent argues Petitioner's visit to Palos Community Hospital was not a "bona fide" emergency and, therefore, Petitioner violated the 2-doctor rule. Respondent states because Petitioner did not go to the emergency room on the date of the accident it no longer constitutes a "bona fide" emergency. Respondent reliance upon *Wolfe v. Industrial Comm'n*, 138 Ill. App. 3d 680 (Ill. App. Ct. 1985), is misplaced. In *Wolfe*, the claimant sustained an injury on March 2, 1981 but had visited multiple doctors before going to the emergency room on April 17, 1981. *Id.* at 682, 685. The claimant in *Wolfe* testified he went to the emergency room because his treating physician was unavailable. The

claimant argued the unavailability of his treating physician created an emergency situation so the medical expenses should be paid under section 8(a)(1) and was not the claimant's second choice. *Id.* at 689. In that case, the claimant's argued his doctor was unavailable but the Arbitrator noted the claimant's position was undermined by the record which showed the claimant was able to see his treating physician within 10 minutes after leaving the emergency room. In that case, the Arbitrator did not believe the claimant made any effort to contact his treating physician before going to the emergency room so the emergency room visit was claimant's second choice.

In this case, Petitioner was seen at the emergency room the day after his accident without seeing any other physicians. The Arbitrator finds Petitioner's visit to the emergency room the day after his accident was a bona find emergency under the Act. The Arbitrator declines to expand the holding in *Wolfe* to all initial emergency room visits because such an interpretation exceeds the authority of the judiciary and lies within the sound discretion of the legislature. Pursuant to the plain meaning of Section 8(a), an emergency room visit does not count as a "choice" under the Act in this situation. To find to the otherwise would create an unreasonable hardship upon injured workers who are experiencing serious medical conditions by restricting their future ability to seek additional medical care under the Act or by forcing injured employees to endure pain and symptoms while waiting for an appointment with a primary care physician just to obtain a referral. Such a position would conflict with the intended purpose of the Act and is against public policy.

Respondent also claims the Act prohibits "*general*" referrals as being invalid. Respondent cites no authority supporting the proposition the Act prohibits "general" referrals. Additionally, Respondent failed to cite to any authority identifying the criteria for determining whether or not a referral is valid. Such a requirement would create significant delays obtaining needed medical care and would also create unnecessary burdens upon doctors, the Illinois Workers' Compensation Commission and courts who would now need to also resolve disputes involving the intent of the doctors who issue referrals or the content of the referrals. The Arbitrator declines to prohibit "general" referrals or to create a criteria to determining what constitutes a "valid" referral. Such an interpretation lies only within the sound discretion of the legislature. The Arbitrator also notes that case law does not support Respondent's argument. In *Gerresheimer Glass, Inc. v. Ill. Workers' Comp. Comm'n*, 2016 Ill. App. 143280 (2016) the Appellate Court affirmed the arbitrator and commission decision finding a "generic" note in the medical records constituted a referral under the law. See *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n*, 409 Ill. App.

3d 463, 468 (2011) which found "the genesis of the referral has no bearing on the issue so long as the claimant's treating doctor ultimately made the referral." *Absolute Cleaning/SVMBL*, 409 Ill. App. 3d at 469; see also *Elmhurst-Chicago Stone Co. v. Industrial Comm'n*, 269 Ill. App. 3d 902, 906 (1995).

Under Section 8(a) of the Act, claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising our or and in the scope of employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury. *Absolute Cleaning/SVMBC v. Illinois Workers' Compensation Comm'n,* 409 Ill.App.3d 463, 470 (4th Dist. 2011).

Respondent disputed the medical bills based upon Petitioner's conditions not being causally related to his work accident not that the treatment received was unreasonable or not necessary to diagnose, relieve or cure Petitioner from the effects of his injury. Having found that Petitioner's conditions were causally related to his work accident, the finds Petitioner also proved by the preponderance of the evidence that the medical treatment received was related and necessary to diagnose, relieve or cure the Petitioner from the effects of his injury. As such, Respondent shall pay the medical expenses identified in Petitioner's Exhibits 1 through 12, pursuant to Sections 8.2 and 8(a) of the Act, subject to the fee schedule. Respondent shall be given credit for all medical bills that have been paid, and Respondent shall hold Petitioner harmless from any bills which Respondent claims a credit pursuant to Section 8(j) of the Act.

With respect to issue "K," whether Petitioner is entitled to prospective medical, the Arbitrator finds as follows:

The Arbitrator finds Petitioner proved by the of the preponderance evidence he is entitled to prospective medical treatment. Respondent denied the recommended treatment based upon causation. As stated above, the Arbitrator found Petitioner's condition was causally related to his work accident. Petitioner testified he would like to proceed with the recommended surgeries. As such, Respondent shall pay for the recommended surgeries as ordered by Dr. Park and Dr. Salehi, as well as any reasonable post-operative care, post-operative therapy, medication, radiographic imaging, and other associated treatments, pursuant to Sections 8.2 and 8 (a) of the Act.

With respect to issue "L," what temporary total benefits are due to Petitioner, the Arbitrator finds as follows:

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, "*i.e.,* until the condition has stabilized." *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 886 (2nd Dist. 1990). The dispositive test is whether the claimant's condition has stabilized, *i.e.,* reached MM.I. *Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC at 28 (June 26, 2014, Opinion Filed); *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). To show entitlement to temporary total disability benefits, a claimant must prove not only that he did not work, but also that he was unable to work. *Gallentine*, 201 Ill. App. 3d at 887; *see also City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (5th Dist. 1996).

The Arbitrator finds Petitioner proved by the of the preponderance evidence that he is entitled to TTD benefits from September 27, 2021 through June 24, 2022. Respondent denied owing TTD benefits based upon causation. As stated above, the Arbitrator found Petitioner's condition was caused by his work accident. As such, Respondent shall pay Petitioner TTD benefits from September 27, 2021 through June 24, 2022.

With respect to Issue "M", Penalties the Arbitrator finds as follows:

Petitioner seeks penalties pursuant to Sections 19(k), 19(l) and 16 of the Act. Respondent denied the claim based upon the opinions of their Section 12 examiners. The Arbitrator finds Petitioner failed to prove by the preponderance of the evidence entitlement to penalties and, as such, the Petition for Penalties is hereby denied.

By: /o/ *Frank J. Soto* September 20, 2022
Arbitrator Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

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

Petitioner Attorney	Arnold Rubin
Respondent Attorney	Craig Scarpelli

DATE FILED: 7/27/2023

/s/Maria Portela, Commissioner

Signature

23IWCC0325

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

KENNETH BERGLIND,

Petitioner,

vs. NO: 09 WC 44138

CITY OF CHICAGO,

Respondent.

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

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

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

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

Section 8(d)1 states:

> (d) 1. If, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in cases compensated under the specific schedule set forth in paragraph (e) of this Section, receive compensation for the duration of his disability, subject to the limitations as to maximum amounts fixed in paragraph (b) of this Section, equal to 66-2/3% of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident. For accidental injuries that occur on or after September 1, 2011, an award for wage differential under this subsection shall be effective only until the employee reaches the age of 67 or 5 years from the date the award becomes final, whichever is later.

As Petitioner's accident occurred prior to 2011, the limitation of "the age of 67 or 5 years from the date the award becomes final", is not applicable, but rather the award of a wage differential shall be for the "the duration of the disability."

Based on the foregoing, the Commission enters an award finding that Petitioner is entitled to receive a wage differential award in the amount of $932.25 per week, for the duration of the disability.

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

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

July 27, 2023

/s/ *Maria E. Portela*

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

MEP/dmm
O: 061323
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ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC033010
Case Name	Rafal Malinowski v. Top Quality Hardwood
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0326
Number of Pages of Decision	35
Decision Issued By	Kathryn Doerries, Commissioner, Amylee Simonovich, Commissioner

Petitioner Attorney	Michael Rom
Respondent Attorney	Craig Bucy

DATE FILED: 7/27/2023

/s/Kathryn Doerries, Commissioner
Signature

DISSENT: /s/Amylee Simonovich, Commissioner
Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RAFAL MALINOWSKI,

Petitioner,

vs. NO: 17 WC 33010

TOP QUALITY HARDWOOD,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission corrects a scrivener's error in the Arbitrator's decision, page 3, second paragraph, first sentence, and strikes "0217", and replaces it with "2017".

The Commission corrects a scrivener's error in the Arbitrator's decision, page 26, under Conclusions of Law, Issue (F), second paragraph, and strikes "Frank Phillips", and replaces it with "Benjamin Domb".

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $425.34 per week for a period of 48 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 $382.80 per week for a period of 53.75 weeks, as provided in §8(e)(12) of the Act, for the reason that the injuries sustained caused the 25% loss of use of Petitioner's right leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay reasonable and necessary medical services in the amount of $162.00 to Hinsdale Orthopedics, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 3, 2022, is otherwise, hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $16,600.00. 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.

July 27, 2023

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

6/13/23
KAD/jsf
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/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 lumbar spine condition was causally connected to his injury on October 25, 2017.

At his first visit with Dr. Sokolowski on November 1, 2017, Petitioner was asked to mark his symptoms on a diagram of his body. Petitioner marked pins/needles and stabbing pain on his right low back, underlined "back" when rating his pain, and marked numbness down the back of the right leg. PX3, p. 6. Dr. Sokolowski found right buttock and sciatic notch tenderness to palpation. Dr. Sokolowski stated, "He does have some lumbar tenderness to palpation." PX3, p. 2. His straight leg raise test reproduced groin and buttock pain. *Id.*

When Petitioner returned to Dr. Sokolowski on November 7, 2017, the pain diagram again illustrated right low back pain above the buttock, as well as numbness down the back of the right

leg. He also underlined "back" when rating his pain. PX3, p. 13. Dr. Sokolowski noted his pain radiated proximally to his back from his buttock and groin, and distally with numbness and tingling in his right leg. PX3, p. 21. He had right sciatic notch tenderness to palpation, positive right-sided straight leg raise for L5 and S1 radicular symptoms, paresthesias in his right L5 and S1 dermatomes, and lumbar tenderness to palpation. *Id*.

Petitioner was evaluated for physical therapy the next day with a chief complaint of right hip pain, lumbar pain and radiculopathy. PX3, p. 157. The therapist documented low back pain of 2-6 out of 10, which was intermittent, and right hip pain that was constant at 2-6 out of 10. *Id.* Straight leg raise test was positive. PX3, p. 158.

Despite these notations in the first three records of Dr. Sokolowski, Section 12 Examiner Dr. Phillips testified Petitioner did not suffer any lumbar injury because "his medical records clearly document the months following the injury and there being hip pain, he has no lumbar symptoms with no radicular symptoms…" RX5, Dep. p. 20. He later states, "The first time he actually notes pain radiating to the right leg with numbness, tingling is March of '18, so that is where I arrived at that conclusion." RX5, Dep. p. 51. He even claims that in November 2017 Dr. Sokolowski "noted a negative SLR, which would be sort of the hallmark test for radiculopathy." RX5, Dep. p. 60.

Dr. Phillips' opinions are directly contradicted by the records he purported to review. The lumbar MRI on March 27, 2018 confirmed pathology consistent with his symptoms: broad-based posterior and left foraminal herniation of L5-S1 disc, causing mild narrowing of the central canal and neural foramina, bilaterally (left greater than right), measuring 6mm in size. PX3, p. 43.

By January 17, 2019, Petitioner's straight leg raise test was negative. This was followed by a valid FCE on February 11, 2019. Unfortunately, it is impossible to delineate whether Petitioner's physical limitations demonstrated in the FCE derive from his right hip and/or lumbar spine, or unrelated conditions. Petitioner reported on April 1, 2019 that he returned to work for a different employer. PX3, p. 106. At the time of hearing, Petitioner claimed he continues to suffer low back pain, but this was very diffuse. T. 38. For these reasons, I find that Petitioner reached maximum medical improvement for his lumbar spine on March 31, 2019.

By contrast, I would not find causal connection for the neck. Unlike the lumbar spine, there are no neck complaints documented in the initial treatment records. I would assume that if Petitioner was so manipulated by the chiropractor as he claims, we would see evidence of this in the records. The initial pain diagram on November 1, 2017 showed notations at the bottom of the right scapula. Further, Petitioner made no notations where it says "neck" for the pain scale rating. PX3, p. 6. This remained true on November 7, 2017. PX3, p. 13.

When Petitioner was evaluated for physical therapy on November 8, 2017, the cervical symptom section was not completed. His parascapular strength was 5 on the right and 3+ on the left in all areas. PX3, p. 158. (Petitioner had prior left shoulder dislocation). By contrast, when he was evaluated for physical therapy for cervical facet joint pain on March 30, 2018, his parascapular strength was then 3+ on the right. PX3, p. 203. It had remained at 5 the last 3 re-evaluations. PX3, p. 177, 185, 198. At the evaluation on March 30, 2018, the therapist also noted

spasm and severe tenderness at the left cervical paraspinals, upper traps, rhomboids, and parascapular region.

When Petitioner completed a pain diagram on November 29, 2017, he did not record any parascapular or neck symptoms. PX3, p. 27. This was true again on January 12 and February 21, 2018. PX3, p. 32, 37. Notations in the cervical spine region were first made on March 23, 2018, nearly four months after the initial evaluation. PX3, p. 41.

Dr. Sokolowski's visit notes first mention neck pain with extension and bilateral cervical facet joint tenderness on January 12, 2018. PX3, p. 29. It is also the first reference to neck pain after a "particularly vigorous chiropractic session." *Id*. However, the physical therapy evaluation immediately prior to this visit on January 8, 2018, makes no reference to neck pain and the parascaplar strength was still 5 on the right and 3+ on the left, as prior. PX3, p. 184-185. There is no mention of neck pain in the physical therapy daily notes.

Given the delayed report of neck pain and the lack of objective documentation in the medical records, the Petitioner did not sustain a cervical injury as a result of this accident. This is clearly in contrast to the regular reporting and objective documentation of a lumbar spine condition shortly following the accident.

For the foregoing reasons, I would reverse the Decision of the Arbitrator and find Petitioner sustained a lumber spine injury which reached maximum medical improvement March 31, 2019.

o: 06/13/2023
AHS
51

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC033010
Case Name	Rafal Malinowski v. Top Quality Hardwood
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	30
Decision Issued By	Jeffrey Huebsch, Arbitrator

Petitioner Attorney	Michael Rom
Respondent Attorney	Craig Bucy

DATE FILED: 10/3/2022

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 27, 2022 3.85%

/s/ Jeffrey Huebsch, Arbitrator

Signature

R. Malinowski v. Top Quality Hardwood, 17 WC 033010

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

Rafal Malinowski Case # **17** WC **033010**
Employee/Petitioner

v.

Top Quality Hardwood
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 **3/17/22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

R. Malinowski v. Top Quality Hardwood, 17 WC 033010

FINDINGS

On **10/25/17** 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, in part,*** causally related to the accident.

The Parties agreed that the average weekly wage was $**638.00**.

On the date of accident, Petitioner was **34** 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 $**24,669.72** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**24,669.72**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $425.34/week for 48 weeks, commencing November 1, 2017 through October 2, 2018, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical expenses of $162.00, as provided in Sections 8(a) and 8.2 of the Act, and as is set forth below.

Respondent shall pay Petitioner permanent partial disability benefits of $382.80/week for 53.75 weeks, because the injuries sustained caused the 25% loss of the right leg, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner the compensation benefits that have accrued from 10/25/2017 through 3/17/2022 in a lump sum, and shall pay the remainder of the award, if any, in weekly payments.

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

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

OCTOBER 3, 2022

Signature of Arbitrator

STATEMENT OF FACTS

Testimony of Petitioner

Petitioner testified that he grew up in Poland and later moved to the United States. He testified that he completed a diploma in Poland and had completed certifications in "Business English". He denied having a college degree. Petitioner testified that he is fluent in both Polish and English.

Petitioner testified that on October 25, 0217 he worked for Top Quality Flooring Company (Respondent) as a store associate. His date of hire was October 23, 2017. Before working for Respondent, Petitioner worked for Dish Network for 7 years, as an installer and technician. Petitioner testified that he contacted an individual at Respondent named Damian based on an advertisement for a job in a Polish language newspaper. Petitioner testified he was then hired by Damian. Petitioner testified that his job duties for Respondent were those of a clerk and that he was expected to sell paint at the front of the store. Petitioner was required to mix paints, help customers, and perform related tasks.

The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of his employment by Respondent on October 25, 2017. Petitioner testified that Damian was with a customer and asked Petitioner to bring a paint bucket to the back of the store and to bring another to the front for the customer. Petitioner testified that when he lifted the bucket, he felt a "crack" in his hip. Petitioner testified to an immediate onset of pain in the back and side of his right hip.

Petitioner testified that he finished his shift around 5:30 pm that day. He was able to complete a full shift of work the following day. He testified that he had significant difficulty in walking and pain in his right hip. Petitioner testified that he was in pain, but worked the next day, October 27, 2017.

Petitioner testified that at noon on October 27, he went to see a chiropractor named Zbigniew Soya to be "checked out". Petitioner testified Mr. Soya was a chiropractor who practiced out of his house. Petitioner testified that Damain and the owner of Respondent sent him to see Soya. Petitioner testified that Soya told him to go see a doctor and did not provide any treatment.

Petitioner testified that he then sought treatment at Maximus Health Chiropractic on October 30, 2017. Petitioner testified he was given the name of this provider by Damian. Petitioner testified he was seen by this provider on two separate occasions. Petitioner testified that the chiropractor performed "aggressive manipulations" on his entire body at these visits. "He was twisting my head, push(ed) on the knees, pull(ed) my limbs, both of the legs and he really pulled sharp my right arm." He had pain in his back and shoulders (his left arm wasn't touched because of a prior dislocation). When his head was twisted, Petitioner noticed a crack in

his neck. When his left leg was pulled, Petitioner felt like something de-attached in the middle of his back. He testified that he received a weird massage on his second visit. Petitioner testified that after the treatments, he was barely able to walk down the stairs.

Petitioner testified that he no neck pain after the accident, until he underwent the chiropractic care. Petitioner testified that he had no back pain after the accident until being seen by the chiropractor. When asked to describe the location his pain complaints at the time of the injury, the Arbitrator noted that Petitioner was pointing to just above the buttocks on the right side. The Arbitrator noted Petitioner pointed to the midback, about the L1 level or so, when asked to describe the location of his back pain. Petitioner testified that his right hip pain did not change as a result of the manipulation. He had no prior neck injuries and no prior medical treatment for his neck. After the manipulation, he had pain in hid midback, between the shoulder blades. Later, he noticed a disc in his neck had bulged out, when he turned his head, there was a disc "that is like going in and out."

Petitioner testified that he had received prior treatment to his back, approximately 8 years prior to the accident. He testified to undergoing regular chiropractic therapy for 2-3 months. He had never injured his right hip before the accident of October 25, 2017.

Petitioner testified he then sought treatment with Dr. Sokolowski beginning on November 1, 2017. He testified that Dr. Sokolowski treats him for his hip, shoulders, back and neck. Petitioner confirmed that he underwent MRIs of the right hip on November 3, 2017 and of the cervical spine on January 15, 2018, based upon referrals from Dr. Sokolowski. Petitioner confirmed that Dr. Sokolowski referred him to Dr. Benjamin Domb for his right hip condition.

Petitioner first saw Dr. Domb on February 1, 2018. He then underwent an injection with Dr. Domb on February 3, 2018. Petitioner confirmed he eventually underwent right hip surgery by Dr. Domb on June 27, 2018. Petitioner testified he continued to follow up with Dr. Domb until he was released in October of 2018.

Petitioner testified that he thereafter continued treating with Dr. Sokolowski for multiple body parts. Petitioner testified he underwent more physical therapy. Petitioner was recommended an injection in the lower back by Dr. Kurzydlowski in November of 2018, but never underwent the same.

Petitioner testified that he eventually underwent an MRI of the right shoulder on January 22, 2019, almost 14 months after the accident date. Petitioner testified his shoulder had been hurting for approximately two and a half to three years. This would place the onset of Petitioner's right shoulder complaints to more than a year before his October 25, 2017 work accident. Petitioner testified that he had problems with his right shoulder for a long time. At present, he has less right shoulder problems than he used to.

Petitioner testified he was referred to Dr. Kalina for pain management with respect to his neck at the end of January 2019. He never underwent any injections to the cervical spine.

Petitioner testified that he then underwent an MRI of his chest and rib cage on March 5, 2019, due to ongoing chest pain. Petitioner testified the pain began shortly after the chiropractic manipulation. Petitioner testified he continued to experience ongoing chest pain at the time of trial.

Petitioner testified Dr. Sokolowski eventually referred him for a Functional Capacity Evaluation in February 2019 due to ongoing shoulder, chest, neck, and back pain. Petitioner testified he was eventually allowed to return to work with restrictions by Dr. Sokolowski.

Petitioner went back to work on April 4, 2019 for a new employer. He began working as a driver for a transportation company. His job duties included driving a cargo van and moving freight from state to state. Petitioner testified the job was super hard and he felt tired after driving. He testified that he experienced "unbearable" pain in his back, neck and chest.

Petitioner testified he worked in the cargo van job for two months before he quit and began working as a dispatcher for a new employer. Petitioner testified that he has largely been working as a dispatcher since that time, albeit for multiple subsequent employers. Dispatcher work is not physical. Dr. Sokolowski thought that a sedentary job would be best for Petitioner.

Petitioner testified that Dr. Sokolowski has continually recommended a work hardening program for his neck, back, chest and shoulder issues. Dr. Sokolowski sent Petitioner for a chest CT in March of 2020.

Petitioner confirmed he received TTD benefits while off work regarding his right hip condition. He testified that the Workers' Compensation insurance carrier had likewise paid many of the related medical bills for the right hip as well.

At the time of the trial, Petitioner testified that his right leg was "not the same." He testified that his knee would sometimes lock up. His right groin pain lasted for a long time, but it has gone away. He testified that his right ankle would sometimes "roll" and that he would experience sharp pain in the right leg as well as occasional cramping of the right leg. Petitioner testified again that he still gets "unbearable" pain in the right leg.

Petitioner testified he experienced pain "pretty much all over my back." When asked to point to the area of pain, the Arbitrator notes that Petitioner pointed to the middle of the back, right in the area of the lower thoracic and upper lumbar spine. Petitioner then pointed to anterior aspect of the right hip and top of the right buttock as well. He felt hip pain recently when he bent over to pick up his daughter.

Petitioner testified that his "worst pain is between his shoulder blades." Petitioner testified he feels that pain (a very strong pain) every day and it radiates outwards to his shoulders, mostly the left shoulder and neck.

Petitioner testified that he could feel part of his cervical spine "sticking out." The Arbitrator noted that Petitioner indicated that the cervical pain was at the lower cervical spine, about where the thoracic spine begins. Petitioner testified he felt a cracking sensation in his neck and further complained of severe headaches. Petitioner testified that his pain was affecting his left eye. He testified that his left eye was "swollen, bigger, and hurting." The Arbitrator noted that Petitioner indicated that his head pain is primarily in the back of his head and then along the left side of the head.

Petitioner continues to treat with Dr. Sokolowski for his low back, neck, shoulders, and chest, although the treatments were frozen (not authorized by WC ?).

On cross-examination, Petitioner testified that the bucket of paint he lifted was a little more than five gallons. Petitioner testified that he felt an immediate pain in his right hip only as a result of lifting the bucket.

Petitioner testified that he had reviewed his medical records from Maximus Health prior to the trial. Petitioner testified that the Maximus medical records were not accurate. Petitioner testified that the chiropractor lied about his medical issues (that Petitioner complained about right shoulder pain before the manipulation session). Petitioner testified the chiropractor put false information in the medical records. Petitioner testified that the information in these medical records with respect to his right hip was correct. Petitioner testified that he was only experiencing right hip pain as a result of the work accident. Petitioner testified that after he underwent chiropractic manipulation, he began to experience pain in the middle of the back and between the shoulder blades.

Petitioner testified that he found Dr. Sokolowski through the internet. He testified he first saw Dr. Sokolowski about one week after the accident. Petitioner testified that Dr. Sokolowski prescribed a CT and MR Arthrogram of the right hip at the first visit. Petitioner testified he was not referred for any diagnostic imaging of any portion of the spine at that visit. If the diagnosis at that time was right groin and buttock pain, Petitioner would not dispute that.

Petitioner testified that he underwent the MRI on November 3, 2017, which showed a small tear in the right hip labrum. He testified that he underwent physical therapy and had continued follow-ups with Dr. Sokolowski thereafter.

Petitioner testified that he disagreed with the medical records of Dr. Sokolowski. When Petitioner was questioned regarding the first reporting neck pain on January 12, 2018, Petitioner testified that was not accurate.

Petitioner testified he was first seen by Dr. Domb on February 1, 2018. He testified that he told Dr. Domb about his pain as a result of a work accident in October of 2017. Petitioner testified that he disagreed with the medical records of Dr. Domb. Petitioner testified that he told Dr. Domb about neck and lumbar pain at this visit, despite no such complaints being documents in the corresponding medical records.

Petitioner testified that he underwent an injection and surgery with Dr. Domb for his right hip condition. He testified he was released from care by Dr. Domb on October 2, 2018. Petitioner testified that he never underwent any further medical care with Dr. Domb after October 2, 2018.

Petitioner testified that after his release from Dr. Domb, he only treated with Dr. Sokolowski and the two pain management providers.

Medical Records

Petitioner first presented to Maximus Health for chiropractic care on October 30, 2017. (PX 1, RX 1) Petitioner complained of pain in the right hip, groin and right shoulder. Petitioner stated these symptoms started when he lifted something heavy during his work duties. Petitioner did not allege any lumbar or cervical spine pain. Petitioner rated his right shoulder pain as a 6/10 and right hip pain as a 4-5/10. Upon examination, Petitioner demonstrated an elevated right shoulder, right sided head tilt, limited assisted range of motion in the right shoulder with flexion and external rotation and reduced hip range of motion and pain. Petitioner underwent a soft tissue massage of the right shoulder, specifically the rotator cuff and trapezius. Petitioner also underwent a soft tissue massage of the lumbar paraspinal muscles and gluteus muscles for the right hip. Petitioner was advised to see an orthopedic doctor for the hip pain and to avoid heavy lifting. Petitioner was also provided an ice pack for the right shoulder. (PX 1, RX 1)

Petitioner returned to Maximus Health the following day, on October 31, 2017. Petitioner stated he was able to reach overhead and that his hip pain had decreased, but was still present in the groin area. Petitioner rated his right shoulder pain as 3/10 and his right hip/groin pain as 3/10. Petitioner did not describe any kind of cervical or lumbar spine pain. The physical examination revealed unchanged objective findings. Petitioner underwent soft tissue massages to the right levitator scapular, trapezius and right tensor fascia lata in the leg. Petitioner reported decreased pain after the massage. Petitioner was again advised to see an orthopedic doctor for his hip/groin pain. (PX 1, RX1)

Petitioner was first seen by Dr. Mark Sokolowski on November 1, 2017. (PX 3, RX 8) Petitioner's chief complaint was right buttock and groin pain, subsequent to an injury at work. Petitioner reported working on October 25, 2017. He reported he bent to pick up a five-gallon bucket of paint when he felt a sharp pain and pop in his hip. Petitioner reported that his symptoms worsened to include groin pain. Petitioner reported that he underwent some massage therapy and chiropractic care, with limited benefit. Petitioner rated his pain at 4/10. It was noted Petitioner was performing restricted duty at work. Dr. Sokolowski did not document that Petitioner described any cervical or lumbar spine pain at this visit. (PX 3, RX 8)

The physical examination of Petitioner showed his gait pattern was antalgic on the right. Manipulation of the right hip reproduced groin and buttock pain. Sciatic notch tenderness was appreciated to palpation. Straight leg raise testing reproduced groin and buttock pain. There was some lumbar tenderness to palpation. Dr. Sokolowski diagnosed Petitioner with right groin and right buttock pain. He ordered an MRI arthrogram of Petitioner's right hip to definitively evaluate for labral tear. Petitioner was taken off of work and advised to discontinue physical therapy pending a definitive diagnosis. (PX 3, RX 8)

Petitioner underwent a CT scan of the right hip on November 3, 2017. This study showed a small labral tear at the anterior acetabulum. Petitioner also underwent an MR Arthrogram of the right hip, which showed a small anterior labral tear. (PX 3, RX 8)

Petitioner returned to Dr. Sokolowski on November 7, 2017. Petitioner's chief complaints included right buttock and groin pain, as well as leg pain. Petitioner reported that his pain persisted and now radiated proximally to his back from his buttock and groin and radiated distally with numbness and tingling in his right leg. The physical examination was largely unchanged. Dr. Sokolowski reviewed Petitioner's MR arthrogram and the CT of the right hip. He noted a labral tear was present anteriorly. Dr. Sokolowski diagnosed Petitioner with right groin pain, right buttock pain, labral tear, and lumbar radiculopathy. Petitioner was prescribed Medrol Dosepak. Petitioner was referred for physical therapy and kept off work. (PX 3, RX 8)

Petitioner retuned to see Dr. Sokolowski on November 29, 2017. Petitioner reported he had been participating in physical therapy and reported his function was slowly improving. He rated his back pain as 2/10 and his groin pain as 3/10. Physical examination showed Petitioner's gait pattern was mildly antalgic on the right. Manipulation of the right hip reproduced groin pain, especially with extremes of internal rotation. There was only mild right sciatic notch tenderness to palpation. Right-sided straight leg raise was mildly positive. Petitioner's diagnoses were unchanged. Petitioner was kept off of work. Dr. Sokolowski prescribed and dispensed a home TENS unit. (PX 3, RX 8)

Petitioner returned to Dr. Sokolowski on January 12, 2018. He complained of right buttock and groin pain. Petitioner reported progress with physical therapy. Petitioner complained of neck pain that he claimed began after a vigorous massage and chiropractic treatment administered after his work injury. The Arbitrator notes that this is the first appearance of this allegation within the medical records. Dr. Sokolowski referred Petitioner to a hip specialist, Dr. Benjamin Domb, for additional workup and surgical evaluation. Dr. Sokolowski also ordered an MRI of the cervical spine for Petitioner's new neck complaints. (PX 3, RX 6)

Petitioner underwent a cervical spine MRI at Edgebrook Open MRI on January 15, 2018. This study was interpreted to show a 1-2mm posterior disc bulge at C3-C4. The rest of the study was unremarkable. (PX 3, RX 6)

Petitioner first saw Dr. Benjamin Domb of Hinsdale Orthopedics on February 1, 2018. Petitioner reported right hip pain after a work incident on October 25, 2017. Petitioner denied any prior hip injuries and indicated the right hip pain started after the accident. Petitioner reported a popping sensation at the time of injury followed by immediate pain. Upon examination, Dr. Domb noted a positive anterior impingement test of the right hip. The straight leg raising test was negative. The right hip MRI performed on November 3, 2017, showed a labral tear. Dr. Domb diagnosed Petitioner with a work related right hip labral tear and prescribed a right hip arthroscopy. Dr. Domb kept Petitioner off work and instructed him to follow up in six weeks. Dr. Domb prescribed a right hip diagnostic intraarticular injection. (PX 5, RX 6)

Petitioner returned to Hinsdale Orthopedics on February 2, 2018 for diagnostic/therapeutic intraarticular injection into the right hip. The injection confirmed an intraarticular component for Petitioner's pain with significant relief following the injection. (PX 5, RX 6)

Petitioner returned to Dr. Sokolowski on February 21, 2018. Petitioner complained of right buttock and groin pain. Petitioner stated that physical therapy had improved his lumbar pain and cervical symptoms. Petitioner rated his back pain as 3/10 and his groin, buttock and thigh pain as 3/10. Upon physical examination, Dr. Sokolowski recorded lumbar and right sciatic notch tenderness with right trochanteric bursal tenderness to palpation with a mildly positive straight leg raise on the right. Dr. Sokolowski noted mild neck pain with extension and a negative Spurling's bilaterally. Dr. Sokolowski diagnosed Petitioner with right groin pain, right buttock pain, a labral tear of the right hip and lumbar radiculopathy. Dr. Sokolowski prescribed continued therapy, a follow up in four to six weeks and kept Petitioner off of work. (PX 3, RX8)

Dr. Mark Levin IME, 2/27/2018 (RX 4)

Dr. Levin diagnosed a right hip labral tear and recommended surgery. He endorsed causation based on Petitioner's history and no prior symptomology. Petitioner's cervical spine complaints were not related to the work accident, as chiropractic treatment to the neck would not be related to a hip injury. (RX 4)

Petitioner returned to Dr. Domb on March 14, 2018. Petitioner reported temporary pain relief from the intraarticular injection, with the pain starting to return. Petitioner reported he was taking Advil for pain relief. Dr. Domb continued to prescribe surgery, in addition to physical therapy and meloxicam. (PX 5, RX 6)

Petitioner returned to Dr. Sokolowski on March 23, 2018 with unchanged complaints of lumbar, right buttock, groin, right leg, cervical and periscapular pain. Petitioner rated his back and neck pain as 8/10 and leg pain as 1/10 at rest. Dr. Sokolowski's examination was essentially unchanged, as were his diagnoses. Dr. Sokolowski prescribed an MRI to evaluate Petitioner for a lumbar radiculopathy as well as left sided cervical facet injections. (PX 3, RX 8)

Petitioner underwent a lumbar spine MRI at Edgebrook Radiology on March 27, 2018. The radiologist interpreted the study to show a L4-L5 2mm mild diffuse bulge, which indented the thecal sac without any significant central canal or neuroforaminal narrowing. The MRI also revealed a six mm broad based posterior and left foraminal disc herniation at the L5-S1 level, which indented the thecal sac, both L5 and S1 nerve roots and caused mild narrowing of the central canal and neuroforamina, bilaterally. (PX 3, RX 8)

Petitioner returned to Dr. Domb on April 13, 2018, with continued severe pain in the right hip. Petitioner reported radiating pain down the leg and that he was no longer doing therapy. Dr. Domb continued to prescribe surgical intervention. Dr. Domb continued Petitioner off work. (PX 5, RX 6)

Dr. Mark Levin IME Addendum, 5/22/2018 (RX 4)

Dr. Levin opined that the proposed surgery offered by Dr. Domb was causally related to the 10/25/2017 work accident, at least by aggravation. (RX 4)

Petitioner returned to Dr. Domb on June 19, 2018. Petitioner continued to report significant pain in the right hip, worse with activity. Petitioner rated his pain 4/10 at worst. Dr. Domb continued to diagnose Petitioner with a right hip labral tear and prescribed surgery along with Naprosyn, Prilosec, ASA, Colace and Norco for post op use. (PX 5, RX 6)

On June 27, 2018, Dr. Domb performed an arthroscopic labral repair, acetabuloplasty, iliopsoas bursectomy, femoroplasty (of the peripheral compartment) and capsular plication. The post-operative diagnoses was right hip labral tear, pincer, ilipsoas bursitis, Cam with alpha angle greater than 60 degrees and instability. (PX 5, RX 6)

Petitioner returned to Dr. Domb on July 11, 2018 for a two week follow up. Petitioner reported some continued discomfort, especially in the hip flexor, as well as clicking in the joint. Upon examination, Dr. Domb noted no obvious infection to the incision and removed the sutures. X-rays taken at the visit showed satisfactory acetabuloplasty and femoroplasty. Dr. Domb recommended Petitioner wean off crutches, as tolerated, and discontinue use of the brace. Dr. Domb also continued physical therapy and recommended Petitioner follow up in six weeks. (PX 5, RX 6)

Petitioner was next seen at Hinsdale Orthopedics on August 22, 2018 by Amanda Frakes, a PA. Petitioner reported his hip was slowly improving, but continued to report pain that increased with activity. Petitioner also reported discomfort to the right knee since surgery. Physical examination of the right lower extremity revealed normal range of motion in the right knee, restricted range of motion in the right hip with pain and a mildly antalgic gait without assistance. Petitioner was prescribed continued physical therapy with a possible cortisone injection for the hip and an x-ray for continued knee discomfort. (PX 5, RX 6)

Petitioner was next seen by Dr. Sokolowski on August 24, 2018. Petitioner reported lumbar, right buttock and groin, right leg, cervical and periscapular pain. Petitioner reported back pain 6-7/10, neck pain 6-7/10 and right hip and periscapular pain 5/10. Upon examination, Dr. Sokolowski recorded a mildly antalgic gait, which was improved from prior visits. Dr. Sokolowski noted a mildly positive straight leg raise on the right with paresthesias in the right L5 distribution. Dr. Sokolowski also found neck pain with extension over the left C3-5 facet joints with a mildly positive Spurling's test on the left. Dr. Sokolowski diagnosed Petitioner with right groin and buttock pain, a right hip labral tear, lumbar radiculopathy and persistent cervical/periscapular pain. Dr. Sokolowski prescribed continued therapy and a future right sided L5-S1 transforaminal ESI if Petitioner's lumbar symptoms do not improve. Dr. Sokolowski also prescribed left sided cervical facet injections. (PX 3, RX 8)

Petitioner returned to see Dr. Domb on October 2, 2018. Dr. Domb released Petitioner to return to regular duty without restrictions, with respect the right hip. (PX 5, RX 6)

Petitioner returned to Dr. Sokolowski on November 12, 2018. Petitioner's complaints were unchanged. Petitioner complained of 7/10 back pain, 4-5/10 leg/buttock pain, and 4/10 periscapular pain. Petitioner continued to state that aggressive manipulation of his neck at the chiropractor shortly after the work accident resulted in the cervical and periscapular pain. Upon examination, Dr. Sokolowski noted Petitioner had a nearly reciprocal gait and noted reproducible right groin pain with extreme internal rotation. Dr. Sokolowski noted lumbar and right sciatic notch tenderness. Dr. Sokolowski noted intact strength throughout both legs, with paresthesia in the right L5 and S1 dermatomes. Dr. Sokolowski recorded that a left sided straight leg raise reproduced buttock pain. Dr. Sokolowski noted neck pain with extension over the left C3-C5 facet joints. Dr. Sokolowski noted a positive Spurlings test with bilateral parascapular and trapezial tenderness. Dr. Sokolowski also recorded costochondral tenderness. Dr. Sokolowski's diagnoses remained unchanged. Dr. Sokolowski prescribed continued physical therapy for the lumbar spine and referred Petitioner for a lumbar epidural injection. Dr. Sokolowski recommended cervical facet injections as well. (PX 3, RX 8)

Dr. Mark Levin 11/20/18 IME (RX 4)

Dr. Levin noted that a Polish interpreter was present, however Petitioner was able to speak and understand English. Prior to the examination, Petitioner filled out a pain disability questionnaire scoring a 77/150.

Petitioner reported that he underwent a right hip arthroscopy with Dr. Domb on June 27, 2018. Petitioner reported he did physical therapy through Dr. Mark Sokolowski's office and has continued to do therapy twice a week. Petitioner reported he was released by Dr. Domb and returned to work with respect to the right hip.

Petitioner complained of pain in the low back and SI joint at a 3-4/10 with additional pain in the right leg down to the right heel. Petitioner reported additional mid back pain over the scapula between a 5-8/10. Petitioner stated he was doing a chair massage at the Kings Spa three to four months prior. During the chair massage session, he started feeling pain over the mid-scapula area.

With respect to the right hip, Petitioner reported no pain complaints, on a daily basis, and occasional pain up to 3-4/10. Petitioner reported he could sit for 5-10 minutes and could stand for less than 20 minutes ,while walking with a slight limp. Petitioner indicated his only current medication was Tramadol, which he took as needed and had not taken in the past week.

Dr. Levin performed a physical examination of the cervical spine. Dr. Levin noted Petitioner demonstrated good flexion and right and left lateral deviation. Dr. Levin noted Petitioner initially complained of pain over the upper thoracic area. Upon palpation, however, Petitioner did not complain of any pain over the thoracic paraspinal muscles or demonstrate muscle spasms. Dr. Levin also noted that Petitioner complained of some pain between the shoulder blades, but the reported pain varied with multiple testing. During the examination, Petitioner complained of tenderness over the thoracic-lumbar spine on the left side, but Dr. Levin found no pain to palpation and no buttock pain with good range of motion.

With respect to the lower extremities, Dr. Levin noted Petitioner was able to fully extend his hips with no pain and had a negative straight leg raise, bilaterally. Dr. Levin noted full range of motion and strength in the lower extremities bilaterally with no positive orthopedic findings.

Dr. Levin diagnosed Petitioner as status post right hip labral repair and related that diagnosis to the October 25, 2017 work accident. Dr. Levin opined Petitioner had reached maximum medical improvement from the work injury. Dr. Levin opined that with respect to the right hip, Petitioner was able to return back to work full duty without restrictions.

Dr. Levin performed an AMA impairment rating and found Petitioner to have a 2% lower extremity impairment, which translates to a 1% whole person impairment. (RX 4)

Petitioner was next seen by Dr. Jared A. Kalina, DO, a pain management physician, on January 22, 2019. He complained of neck, low back and right hip pain following a work-related injury. Petitioner reported that he was lifting a bucket of paint when he felt a sudden pain in his right hip/buttock region. He reported that he continued to work that day but the third day thereafter his pain had progressed. Petitioner reported that he was then seen by another provider, who began manual treatment, which resulted in the onset of neck, shoulder and worsening low back pain. (PX 4)

At the time of this evaluation, Petitioner complained of a stabbing neck pain on both sides that radiated up to the back of his head, bilateral shoulders and left chest. He denied any pain in the arms. He reported that

he had experienced some tingling into the bilateral hands, but this was a non-issue at the time of the evaluation. He further described left sided intermittent sharp low back pain which radiated into the buttocks. He denied any leg pain at this evaluation. The physical examination of the cervical spine documented focal tenderness in the paraspinal musculature with positive facet loading, bilaterally. An axial compression test was positive. A physical examination of the lumbar spine again documented positive facet loading and tenderness. The straight leg raise test was positive on the left and negative on the right. Dr. Kalina recommended a C3-C4 epidural steroid injection as well as trigger point injections for the same area. (PX 4)

Petitioner returned to Dr. Sokolowski on January 17, 2019, with continued complaints of lumbar, right hip, cervical and periscapular pain in addition to right shoulder pain. Petitioner described 1/10 right hip and buttock pain, 7/10 back pain, 8/10 neck pain, with radiation to the right shoulder and 3/10 right arm pain. (PX 3, RX 8)

Upon examination, Dr. Sokolowski noted a reciprocal gait pattern, with mild right trochanteric bursal tenderness to palpation. Dr. Sokolowski recorded lumbar and right sciatic notch tenderness and a negative bilateral straight leg raise test. Dr. Sokolowski also recorded full strength throughout the bilateral lower extremities, without any sensory deficits. Dr. Sokolowski noted neck pain with extension over the C5-C7 facet joints bilaterally and a positive Spurlings test. Dr. Sokolowski additionally noted full bilateral shoulder range of motion, with positive impingement signs on the right. Dr. Sokolowski maintained his diagnoses and recommended holding off on the lumbar epidural steroid injection due to the negative straight leg raise test. Dr. Sokolowski prescribed an FCE and a right shoulder MRI. Dr. Sokolowski kept Petitioner off work until completion of the FCE. (PX 3, RX 8)

Petitioner underwent a right shoulder MRI at Edgebrook Radiology on January 22, 2019. The MRI revealed an intact rotator cuff with mild rotator cuff tendonitis/bursitis involving the distal supraspinatus tendon. The MRI also revealed an AC inferior hypertrophic spurring measuring two to three millimeters indenting the supraspinatus tendon, with some narrowing of the subacromial space with probable mild impingement. (PX 3, RX 8)

Dr. Sokolowski authored a narrative report on February 14, 2019. Dr. Sokolowski stated in his narrative summary that the employer referred Petitioner to a chiropractor for manipulation after his October 25, 2017 work accident. Dr. Sokolowski stated that Petitioner underwent physical therapy for the lumbar spine and right hip. Dr. Sokolowski stated that as the demands of physical therapy increased, so did Petitioner's neck and periscapular pain from the chiropractic therapy undertaken at the behest of his employer after the work injury. Dr. Sokolowski stated that Petitioner's hip and buttock pain improved at recent visits, however his back pain persisted at 7/10 and he continued to complain of neck and periscapular pain. Dr. Sokolowski also opined that a

lumbar MRI showed an L5-S1 disk herniation and a cervical MRI showed disk pathology at C3-C4. Dr. Sokolowski stated that Petitioner was diagnosed with a lumbar radiculopathy which was the result of the work accident and that Petitioner's cervical pain began after the chiropractic manipulation. Dr. Sokolowski opined that Petitioner's diagnoses were related to the work accident based upon a correlation between the work accident, onset of symptoms, his physical examination findings and review of the MRIs. (PX 3, RX8)

Petitioner underwent an FCE at Function First Physical Therapy in Chicago on February 11, 2019. Petitioner demonstrated the ability to bilaterally lift 31.5 pounds occasionally and 18.5 pounds frequently. Petitioner demonstrated the ability to carry 31.5 pounds bilaterally and was able to push and pull 50 pounds. Petitioner was unable to successfully meet job requirements related to squat lifting, power lifting, bilateral and unilateral carrying, bending, squatting, walking and balance. (PX 6)

Petitioner returned to see Dr. Kalina on February 19, 2019. Petitioner's complaints were essentially unchanged. The physical examination was unchanged with the record failing to document a positive straight leg raise on either side. Dr. Kalina maintained his prior recommendation of epidural steroid injections and facet joint injections. (PX 4)

Petitioner was next seen by Dr. Sokolowski on February 28, 2019. Petitioner continued to complain of lumbar, right hip, cervical and periscapular pain. Petitioner reported ongoing back and neck pain, which he rated as 7/10, right shoulder arm pain at a 5/10 and right hip pain at 2/10. Upon physical examination, Dr. Sokolowski noted lumbar and right sciatic notch tenderness to palpation and a negative straight leg raise test. Dr. Sokolowski noted intact strength throughout the bilateral lower extremities with paresthesia, but no frank sensory deficits. Dr. Sokolowski noted right trochanteric bursal tenderness and increased cervical facet pain with neck extension. Dr. Sokolowski reviewed Petitioner's January 26, 2019 right shoulder MRI and opined that findings were consistent with supraspinatus tendonitis and impingement. (PX 3, RX 8)

Dr. Sokolowski maintained his diagnoses and continued to recommend work conditioning. Dr. Sokolowski recommended that Petitioner consider an L5-S1 fusion if his lumbar pain persisted. Dr. Sokolowski kept Petitioner off work and ordered rib x-rays to evaluate Petitioner's costochondral pain. (PX 3, RX 8)

Petitioner was last seen by Dr. Kalina on March 18, 2019, with continued complaints of sharp neck pain that radiates into his shoulders and left chest. He alleged pain at a 7/10 level with repetitive movement in these body parts. He further complained of sharp left sided back pain at a 1-4/10 level and indicated that his right hip pain was "bearable" at a 4/10 level, despite undergoing surgery. The physical examination was unchanged from the prior evaluations, as were the diagnoses and treatment recommendations. There is no indication that Petitioner ever returned for any further care with Dr. Kalina. (PX 4)

Petitioner returned to see Dr. Sokolowski on April 1, 2019. He complained of pain in his lumbar spine, right hip, cervical spine, periscapular area and right shoulder. Petitioner stated he continued to experience back, neck, hip and shoulder pain at a 7/10 level. The physical examination showed lumbar and right sciatic notch tenderness. The straight leg raise was negative. Petitioner had intact strength throughout the bilateral lower extremities, with right trochanteric bursal tenderness. Spurling's test reproduced periscapular pain. Petitioner had full shoulder range of motion, but demonstrated positive impingement signs on the right. Petitioner complained of pain with resisted right supraspinatus strength testing and internal rotation. Dr. Sokolowski diagnosed right groin pain, right buttock pain, a labral tear, lumbar radiculopathy and cervical and periscapular pain. He prescribed work conditioning and released Petitioner to return to work in a sedentary duty capacity. Petitioner was instructed to continue to follow up with Dr. Sokolowski in eight weeks. (PX 3, RX 8)

Petitioner was next seen by Dr. Sokolowski on June 7, 2019. Petitioner continued to complain of back, neck, hip and shoulder pain. He rated his back pain at a 7/10, his neck pain at a 4/10 and his hip, leg and shoulder pain at a 3-4/10. Upon examination, Dr. Sokolowski documented that Petitioner's lumbar pain increased with extension testing and radiated to his right buttock and thigh. The straight leg raise was negative. Manipulation of Petitioner's hips reproduced mild buttock pain bilaterally. Spurling's test reproduced periscapular pain bilaterally. Petitioner continued to have positive impingement signs on the right and pain with resisted right supraspinatus strength testing. Dr. Sokolowski's diagnoses remained unchanged and he continued to recommend work conditioning. (PX 3, RX 8)

6/25/19 IME with Dr. Frank Phillips (RX 5)

Dr. Phillips obtained a history of the accident from Petitioner. Petitioner stated that on October 25, 2017 he was lifting a five-gallon bucket when he felt a "snap" in his right buttock. He immediately noted right buttock and groin pain and was ultimately diagnosed with hip problems. Petitioner stated he underwent hip surgery in June of 2018, followed by physical therapy. Petitioner stated that prior to surgery, he experienced persistent buttock and groin pain, but was able to ambulate. Petitioner stated that he "did not do terribly well with surgery" and described his gait as worse subsequent to the hip surgery. Petitioner complained of worsening pain after the hip surgery, involving almost his entire spine. He complained of low back pain, as well as pain in the thoracic and scapular area. He complained of neck pain towards the right shoulder and overall diffuse spinal pain. He also complained of ongoing severe hip pain. Petitioner described axial back pain radiating up and involving the entire spine. He also complained of persistent pain in the right greater trochanteric region, as well as in the groin with a clicking sensation in the hip. His back pain was intermittent, somewhat worse with sitting. Petitioner denied any true lower extremity radicular pain complaints. He

described subjective weakness of the right lower extremity related to pain and clicking in his hip/groin area. Petitioner denied any prior lumbar issues and advised Dr. Phillips that he was working full duty in a new job as a dispatcher. With respect to his cervical spine, Petitioner described axial neck pain radiating towards the right shoulder area. He described a subjective feeling of weakness involving the entire right upper extremity, but denied any true radicular pain into the arm. He further denied any upper extremity paresthesias. Petitioner rated his diffuse spinal pain at a 4-5/10 level at the time of the IME. On physical examination, Dr. Phillips recorded a normal spinal posture and a normal gait. Petitioner was able to heel and toe walk. He had no lumbar tenderness to palpation, with full lumbar range of motion. Petitioner had 5/5 strength of the bilateral lower extremities with intact sensation in the L2-S1 dermatomes. Petitioner had normal reflexes and a negative straight leg raise bilaterally. The cervical examination revealed full and pain free range of motion with negative Spurling's and Lhermitte's signs. Upper extremity motor, sensory and reflex testing were all normal. (RX 5)

Dr. Phillips reviewed Petitioner's March 27, 2018 lumbar MRI. He noted it showed some disc desiccation at the L5-S1 level, with well-maintained disc height. He noted that the discs proximally were "pristine". He further noted that on the axial view at the L5-S1 level, there was a minimal diffuse disk bulge which he did not consider to be of any clinical consequence. Dr. Phillips also opined there was no significant neural compression documented in the MRI. (RX 5)

Dr. Phillips diagnosed Petitioner with a hip injury occurring in October of 2017. He noted there was no notation of any low back or neck symptoms until 2018. He opined that Petitioner's lumbar MRI was unremarkable and did not document any evidence of any acute structural injury to the lumbar spine. Dr. Phillips opined that, at most, Petitioner had some mild disc desiccation at the L5-S1 level, which he stated was a common incidental finding with no evidence of any acute structural injury. He opined that Petitioner was certainly not a lumbar surgical candidate. Dr. Phillips opined that based upon the information provided, there was no clear-cut evidence that Petitioner suffered any kind of lumbar injury. Dr. Phillips diagnosed Petitioner with diffuse spinal pain. He stated that Petitioner had long ago reached MMI with regard to any lumbar condition and felt that Petitioner could return to work at full duty, without restrictions, as related to the lumbar spine. (RX 5)

Dr. Phillips found no evidence of any pre-existing lumbar condition and further stated that the work related accident did not aggravate, accelerate or exacerbate any lumbar condition. He opined that Petitioner's subjective low back complaints were not substantiated by any objective evidence. (RX 5)

Dr. Phillips opined that while the therapy and treatment Petitioner underwent for the lumbar spine after March 2018 would have been reasonable to address any subjective complaints, he did not believe that treatment

was related in any way to the October 25, 2017 injury. Dr. Phillips opined that a finding of MMI was not appropriate, as there was no evidence that Petitioner suffered any kind of lumbar injury as a result of the October 25, 2017 injury. As such, he did not perform an AMA Impairment Rating, as he opined there was no lumbar injury suffered. (RX 5)

Petitioner next saw Dr. Sokolowski on September 30, 2019, with unchanged complaints. The physical examination was again unchanged, as were the multiple diagnoses. Dr. Sokolowski maintained his recommendations regarding work conditioning and permanent restrictions. (PX 3, RX 8)

Dr. Phillips' December 5, 2019 IME (RX 5)

At the time of the IME on December 5, 2019, Petitioner reported improvement in his hip pain. He continued to allege axial neck pain which radiated up to the occipital area. He additionally complained of some achiness around the shoulder and proximal arms. Petitioner denied any radicular symptoms into the upper extremities. Petitioner stated he had previously experienced subjective weakness of the arms, which had improved. Petitioner additionally complained of pain in the anterior neck as well as pain around the pectoral-clavicle area. Petitioner reported a "popping" in the left clavicle. Petitioner stated that his injuries were caused by the chiropractor he was referred to after his initial injury. Petitioner reported that he had previously worked as a dispatcher, but was unable to continue working that position due to "chronic pain". (RX 5)

On physical examination, Dr. Phillips noted a normal posture of the spine. Petitioner had no obvious Waddell signs, with minimal tenderness to palpation of the cervical spine. Cervical flexion was to 80 degrees, which Petitioner alleged reproduced axial neck pain. Petitioner had 5/5 strength with normal range of motion. Petitioner had intact sensation to light touch from the C5 through C8 dermatomes pattern, bilaterally. Petitioner had normal reflexes with full shoulder range of motion. (RX 5)

Dr. Phillips reviewed Petitioner's cervical MRI film from January 15, 2018. He noted that the disc height and signal intensity were perfectly maintained throughout the cervical spine with normal cervical lordosis and no evidence of any disc herniation or neural compression. Dr. Phillips opined that the MRI study was a completely normal cervical MRI. (RX 5)

Dr. Phillips opined there was no evidence of any cervical pathology or cervical injury noted within the medical records or documented in his examination of Petitioner. He believed Petitioner was capable of returning to work full duty without restrictions from a cervical spine standpoint. He did not believe Petitioner required any treatment for the cervical spine in general, or as related to the work accident. (RX 5)

Dr. Phillips noted that Petitioner complained of subjective neck pain but had no objective findings whatsoever. There was no evidence of any specific cervical spine condition or pathology. Dr. Phillips opined

that Petitioner's subjective cervical spine complaints were completely unrelated to the October 25, 2017 work accident. He noted there was no evidence of any specific cervical complaints in the period immediately following the work injury. He further noted Petitioner had complaints of nonspecific cervical neck pain with diffuse scapular shoulder girdle pain that was not attributable to the cervical spine. Dr. Phillips further opined that Petitioner's imaging studies were completely normal. Dr. Phillips did not believe Petitioner had any pre-existing or degenerative conditions with respect to the cervical spine, but noted regardless there was no competent cause that could explain Petitioner's ongoing subjective symptoms as it relates to the cervical spine. (RX 5)

Dr. Phillips opined there was no evidence that Petitioner sustained any kind of injury to the cervical spine as a result of the October 25, 2017 work injury. He did not believe Petitioner's cervical spine condition had any relationship to the October 25, 2017 work accident, whatsoever. Dr. Phillips did not believe Petitioner required any cervical spine treatment as a result of the October 25, 2017 injury. (RX 5)

Dr. Phillips opined that MMI was not applicable, as there was no evidence of any cervical injury as a result of the October 25, 2017 work injury or subsequent treatment. He believed Petitioner could return to work full duty without any restrictions as it related to the cervical spine. Dr. Phillips additionally opined that an impairment rating was not applicable, as Petitioner did not suffer any kind of injury to the cervical spine from the October 25, 2017 work accident. (RX 5)

Petitioner returned to see Dr. Sokolowski on March 2, 2020. Petitioner continued to claim ongoing pain in the lumbar spine, right hip, cervical spine, and right shoulder. Petitioner rated his pain at a 2-8/10, diffusely throughout the body. The physical examination was unchanged, as were the diagnoses. Dr. Sokolowski maintained a recommendation for work conditioning. (PX 3, RX 8)

Petitioner returned to Dr. Sokolowski on October 5, 2020. Petitioner's complaints were unchanged and he again rated his pain at a 3-9/10 level diffusely throughout the body. The physical examination was unchanged, as were Dr. Sokolowski's diagnoses. Dr. Sokolowski again recommended work conditioning and a follow up in 32 weeks. (PX 3, RX 8)

Petitioner returned to see Dr. Sokolowski on May 7, 2021 with continued complaints of back pain, neck pain, right shoulder pain and hip pain. Petitioner stated that he remained functionally limited and continued to allege pain at a 3-9/10 level, diffusely. The physical examination was largely unchanged. Dr. Sokolowski maintained his earlier diagnosis of right groin pain, right buttock pain, labral tear, lumbar radiculopathy and cervical pain after manipulation by a chiropractor. Dr. Sokolowski opined that if Petitioner did not undergo work conditioning, he would be restricted to his current capabilities and instructed Petitioner to follow up in 36 weeks. (PX 3, RX 8)

Deposition Testimony

Dr. Sokolowski testified on behalf of Petitioner, while Dr. Levin and Dr. Phillip testified on behalf of Respondent with respect to their IME opinions.

Dr. Sokolowski Deposition (PX 2)

Dr. Sokolowski testified via evidence deposition on May 6, 2019. A copy of the deposition transcript was entered into evidence as Petitioner's Exhibit 2. Dr. Sokolowski is a Board Certified Orthopedic Surgeon and he specializes in spine surgery.

Dr. Sokolowski testified regarding his treatment of Petitioner. He testified he first saw Petitioner on November 1, 2017, at which time Petitioner reported an injury on October 25, 2017. (PX 2, 8) He then reviewed his physical examination findings from that visit. (PX 2, 8-9) Dr. Sokolowski testified that he was concerned about co-existent right hip and lumbar spine pathology. (PX 2, 9) Dr. Sokolowski testified he referred Petitioner for an MR arthrogram, which confirmed a labral tear in the right hip. (PX 2, 9-11) Dr. Sokolowski testified he referred Petitioner to Dr. Domb for treatment of the right hip condition, including surgery. (PX 2, 11-13)

Dr. Sokolwski testified that Petitioner underwent a lumbar MRI on March 27, 2018, which he opined showed an L5-S1 disc herniation. (PX 2, 13) Dr. Sokolowski testified this correlated with Petitioner's ongoing complaints. Dr. Sokolowski testified that he recommended physical therapy, which caused an increase in Petitioner's neck and periscapular pain. He testified Petitioner underwent a cervical MRI that showed annular pathology at the C3-C4 level. (*Id.*).

Dr. Sokolowski testified that Petitioner did not report a full resolution of his right hip complaints after surgery. He testified Petitioner reported ongoing right hip pain at 2/10 level, in addition to ongoing cervical, lumbar, periscapular and right shoulder pain. (PX 2, 13-15) Dr. Sokolowski testified that Petitioner may require surgery to address his lower extremity complaints in the form of an L5-S1 fusion. Dr. Sokolowski testified this was due to ongoing numbness and radicular complaints into the right lower extremity from the lower back. (PX 2, 16-18) Dr. Sokolowski testified that his diagnosis of lumbar radiculopathy was based upon a straight leg test, Petitioner's pain complaints and his review of the MRI report. (PX 2, 18-19)

Dr. Sokolowski testified that his diagnosis of lumbar radiculopathy was causally related to the work accident based upon the temporal nature of Petitioner's complaints. (PX 2, 20-21). Dr. Sokolowski testified that Petitioner presented with an onset of symptoms in the buttock, which then moved into the groin and lower

extremity. (PX 2, 21) Dr. Sokolowski testified that Petitioner reported periscapular pain at the first visit, and conceded that complaint was not recorded in the corresponding medical record. (PX 2, 22)

Dr. Sokolowski then testified to Petitioner's cervical spine condition. Petitioner's cervical spine symptoms were directly attributable to the chiropractic care Petitioner underwent. (PX 2, 24) Dr. Sokolowski did not offer any testimony that Petitioner's lumbar spine condition was caused or affected in any way by the same chiropractic treatment.

On cross-examination, Dr. Sokolowski testified that he performs surgery on all parts of the spine. He confirmed that he performed general orthopedic surgery on all body parts until shortly before the deposition. (PX 2, 25). Dr. Sokolowski testified that a large portion of the surgeries he performs are revision surgeries on patients who treated with other providers. (PX 2, 26)

Dr. Sokolowski testified that Petitioner complained of cervical spine pain at the first visit on November 1, 2017, and agreed that was not recorded within the medical records. (PX 2, 31-32) Dr. Sokolowski testified that Petitioner complained of cervical pain on a pain diagram. When presented with the pain diagram, Dr. Sokolowski conceded that Petitioner did not make any indication of cervical spine pain. (PX 2, 32)

Dr. Sokolowski testified that a labral tear would produce a positive straight leg raise test, due to the nature of the testing. (PX 2, 33) Dr. Sokolowski conceded that Petitioner did not allege any radiating pain at the November 1, 2017 visit as well. Dr. Sokolowski testified that Petitioner had intact sensation to light touch in all dermatomes at the same visit. Dr. Sokolowski testified that the primary diagnosis at the first visit was hip pathology of some kind. (PX 2, 34) Dr. Sokolowski testified that he did not diagnose Petitioner with any kind of lumbar or cervical spine condition at the first visit. (PX 2, 35) He testified that he did not review any other medical records prior to his evaluation, including the chiropractic records. (PX 2, 35) Dr. Sokolowski testified that he had not reviewed the chiropractic records prior to the deposition. Dr. Sokolowski confirmed his knowledge of the chiropractic care was based entirely upon Petitioner's statements to him. (PX 2, 35, 42)

Dr. Sokolowski testified that individuals with labral tears would also have pain with straight leg testing, a repeat finding that he based his diagnosis of radiculopathy on. (PX 2, 40) Dr. Sokolowski agreed that Petitioner's complaints appeared and disappeared during treatment. (PX 2, 40-42). Dr. Sokolowski testified it was his understanding that Petitioner's neck pain began after a vigorous chiropractic session. He testified he never reviewed the corresponding chiropractic records. (PX 2, 41-42) Dr. Sokolowski testified that he felt Petitioner's primary cervical diagnosis was facet joint mediated pain. (PX 2, 43) He agreed that the alleged disc bulge from the cervical MRI was relatively small. (PX 2, 44) Dr. Sokolowski further agreed that Petitioner's pain diagrams did not indicate any symptoms in the neck or periscapular area. (*Id)* Dr. Sokolowski testified that Petitioner did not complete a pain diagram documenting any kind of cervical condition until March 23, 2018.

(PX2, 45). Dr. Sokolowski testified this was the first time his medical record documented neck pain. (PX 2, 45-46)

Dr. Sokolowski testified that all of Petitioner's lumbar MRI findings could be considered degenerative in nature. (PX 2, 47). Dr. Sokolowski testified that it was not possible tell the age of a disc bulge based upon a review of an MRI. (PX 2, 48). Dr. Sokolowski testified that he did not actually review any MRI films in connection with his treatment of Petitioner. (PX 2, 50). He further testified that he had expected Petitioner's lumbar symptoms to resolve after hip surgery. (*Id)*

When questioned regarding the pain diagrams completed by Petitioner, Dr. Sokolowski testified that Petitioner underlined axial back pain at every visit (PX 2, 51). He then conceded this was not accurate - a diagnosis of axial back pain did not appear until May 24, 2018. (PX 2, 51-52).

Dr. Sokolowski testified that he did not diagnosis Petitioner with any kind of right shoulder pain until January 17, 2019. (PX 2, 57-58). Dr. Sokolowski testified he was offering no opinion with respect to Petitioner's right shoulder condition. (PX 2, 58)

Dr. Sokolowski then testified that the first time he ever discussed potential surgery was in a narrative report requested by Petitioner's attorney. (PX 2, 61). He testified he reviewed no other medical records from any outside medical provider in connection with formulating his opinions. *(Id.)*

Deposition Testimony of Dr. Mark Levin (RX 4)

Dr. Levin testified via evidence deposition on September 4, 2019. A copy of the transcript was entered into evidence a Respondent's Exhibit 4.

Dr. Levin is a Board Certified Orthopedic Surgeon. He examined Petitioner for an Independent Medical Examination on February 27, 2018 and November 20, 2018, at the request of Respondent. (RX 4, 7) Dr. Levin testified that he obtained a history from Petitioner. (RX 4, 10) Petitioner told Dr. Levin that he lifted a 5 gallon bucket of paint on October 25, 207 and felt immediate low back and right leg pain. Petitioner said that he continued to work and was eventually referred to a chiropractor by his aunt. *(Id.)* Petitioner told Dr. Levin that his neck pain began after undergoing chiropractic care. (RX 4, 11)

Dr. Levin testified to his first examination of Petitioner conducted on February 27, 2018. (RX 4, 12) Petitioner complained of a burning pain in his right hip, as well as a shooting pain in the right knee and foot. *(Id.)* Petitioner admitted that he had no neck pain at the time of the injury. Petitioner told Dr. Levin that he went swimming once per week and that his neck condition was 70-80% improved. Dr. Levin briefly noted that Petitioner had undergone chiropractic treatment related to lower back pain eight to ten years prior to his evaluation. (RX 4, 13)

Dr. Levin testified regarding his examination of Petitioner's cervical spine and lack of any significant findings. (RX 4, 14) He further noted that an examination of Petitioner's lumbar spine did not document any tenderness to palpation over the paraspinal musculature or buttocks. He testified Petitioner had normal and full range of motion of the lumbar spine. *(Id.)* Dr. Levin testified that the only positive orthopedic findings could be explained by Petitioner's hip pathology. (R X 4, 16)

Dr. Levin testified that he reviewed Petitioner's MRI films of both the right hip and cervical spine. He testified the January 15, 2018 cervical MRI was unremarkable. (RX 4, 21) He testified the MRI showed minimal bulging at the C3-C4 level without evidence of any herniation or nerve impingement. *(Id.)*

Based upon his review of the records, the actual MRI films, and the physical examination, Dr. Levin testified that he diagnosed Petitioner with a right hip labral tear which was causally related to the October 25, 2017 accident. (RX 4, 22) Dr. Levin testified he agreed with surgical intervention for the same. *(Id)* Dr. Levin testified that Petitioner should have recovered from the hip surgery three to six months post-operatively. (RX 4, 23) Dr. Levin testified that Petitioner's alleged neck condition was not related in any way to the October 25, 2017 accident. *(Id.)*

Dr. Levin then testified to his November 12, 2018 examination of Petitioner. Dr. Levin testified that Petitioner reported being released by Dr. Domb for his right hip two weeks before the evaluation. (RX 4, 26) Dr. Levin testified that Petitioner now reported doing a chair massage at King Spa, three to four months before this evaluation which led to pain in the neck and mid-scapular area. (RX 4, 27) Dr. Levin testified that Petitioner denied any kind of right hip pain on a daily basis. Dr. Levin reviewed the IME findings discussed above and testified that Petitioner's right hip condition had dramatically improved after surgery, as expected. (RX 4, 31) Dr. Levin testified that Petitioner had reached Maximum Medical Improvement with respect to the right hip by the time of the IME. (RX 4, 33) He testified that Petitioner should be capable of working full duty, without restrictions, with respect to the right hip. (RX 4, 34) Dr. Levin testified that he assigned Petitioner a 2% leg/1% whole person AMA Impairment rating and discussed the steps he took to obtain the rating. (R X 4, 37)

On cross examination, Dr. Levin testified that he did not review any security camera footage of the accident and did not review any chiropractic records. (RX 4, 42-43) Dr. Levin testified that Petitioner told him that the back and right leg pain began as a result of the accident, while his neck pain began as a result of chiropractic care. (RX 4, 43) Dr. Levin testified that his examination of Petitioner's cervical spine was unrelated to Petitioner's work accident and further testified that his examination of Petitioner's cervical spine was objectively normal. (RX 4,46-47).

Deposition Testimony of Dr. Phillips

Dr. Phillips testified via evidence deposition on July 28, 2020. A copy of his deposition transcript was entered into evidence as Respondent's Exhibit #5.

Dr. Phillips is a Board Certified Orthopedic Surgeon, specializing in managing spinal disorders. He testified he examined Petitioner on two occasions, July 25, 2019 and December 5, 2019. Dr. Phillips testified he obtained a history from Petitioner. He testified Petitioner reported an injury occurring as a result of lifting a 5-gallon bucket of paint and feeling a "snap" in his right buttock. (RX 5, 13) Petitioner reported undergoing right hip surgery in June 2018, but alleged he actually felt worse after surgery than before. *(Id.)* Dr. Phillips testified that Petitioner reported developing "whole spine" pain at some point after surgery. *(Id.)*

Dr. Phillips testified that he reviewed records, the MRI films and an FCE. (RX 5, 12) He testified that Petitioner's complaints immediately following the October 25, 2017 accident were consistent with a hip injury, but were not consistent with a spinal injury at all. (RX 5, 14) Dr. Phillips testified that at the time of the July 25, 2019 evaluation, Petitioner was complaining of axial pain throughout the entire spine. *(Id.)* Dr. Phillips testified that Petitioner denied any kind of radiating pain or pain into his leg at that evaluation. *(Id.)*

With respect to any cervical condition, Dr. Phillips testified that Petitioner complained of neck pain towards the right shoulder, but denied any radicular pain into the right arm. (RX 5, 15) Dr. Phillips testified that Petitioner's complaints were significant in that the lack of radicular symptoms did not suggest any kind of pinched nerve issue. *(Id.)* Dr. Phillips testified the complaints were not consistent with any kind of pinched nerve in either the lumbar or cervical spine. *(Id.)*

Dr. Phillips then testified regarding his physical examination of Petitioner. He testified that Petitioner had completely normal examinations of both the lumbar spine and the cervical spine. (RX 5, 16) Dr. Phillips testified that he found no evidence of a pinched nerve either during his examination of Petitioner or on review of the diagnostic imaging. (RX 5, 17) Dr. Phillips testified that the March 27, 2018 lumbar MRI was a "good" MRI and was a completely normal study for an individual of Petitioner's age. (RX 5, 18) Dr. Phillips testified there was no evidence of any nerve compression, disc herniation, or structural injury to the lumbar spine. *(Id.)* Dr. Phillips testified there was no evidence documenting any kind of acute injury to the lumbar spine based upon his review of the MRI. *(Id.)*

Dr. Phillips testified that he disagreed with Dr. Sokolowski and that he strongly disagreed with Dr. Sokolowski's review of the MRI. (RX 5, 19). Dr. Phillips noted that it was important to actually review the films and further noted that Petitioner had no symptoms suggestive of a disc herniation. (RX 5, 17, 19). Dr. Phillips noted that Dr. Sokolowski only referred Petitioner for hip treatment at the initial evaluation. (RX 5, 19).

Dr. Phillips testified he found no evidence, either upon examination or review of records or films, that Petitioner suffered any kind of injury to the lumbar spine. (RX 5, 20) Dr. Phillips testified that Petitioner's records from Dr. Sokolowski failed to document radicular symptoms following the accident, which would be expected if Petitioner truly had a disc herniation. *(Id.)* Dr. Phillips testified that Petitioner had no positive objective findings on examination of the lumbar spine and that the MRI films were frankly better than he would expect in most individuals of a similar age to Petitioner. (RX 5, 21)

Dr. Phillips testified that it was his expert opinion that Petitioner did not suffer any kind of injury to the lumbar spine. *Id.* Dr. Phillips testified his opinion was based on multiple factors, including that Petitioner first presented with obvious hip pain, for which he eventually underwent surgery. (RX 5, 22). Dr. Phillips testified that the medical records immediately following the accident did not document any lumbar spine pain, which Petitioner seemed to develop diffusely months after the accident. (RX 5, 22) Dr. Phillips testified that Petitioner's treatment with Dr. Sokolowski was not causally related to any work accident of October 25, 2017. (RX 5, 24) Dr. Phillips testified that Petitioner had no nerve compression of any kind and that he had no idea why any doctor would recommend a fusion procedure for diffuse pain throughout the entire spine. (RX 5, 25) Dr. Phillips testified there was absolutely no indication for any kind of spinal surgery. *(Id.)*

Dr. Phillips testified that he did not believe a finding of MMI was appropriate, as he did not believe Petitioner suffered any kind of work accident to the lumbar spine. (RX 5, 26). He further did not believe Petitioner required any kind of work restrictions. *(Id.)*

Dr. Phillips then testified regarding his December 5, 2019 examination of Petitioner. He testified this exam was focused primarily upon Petitioner's cervical spine condition. (RX 5, 28). Dr. Phillips testified that Petitioner complained of pain that radiated from the occipital to the base of the skull. *(Id.)* He testified that Petitioner had no radicular complaints into the upper extremities. *(Id.)* Dr. Phillips testified that Petitioner presented with strange complaints of pain in the pectoral clavicle area, which was a very unusual complaint for any individual with significant cervical issues. (RX 5, 29) Dr. Phillips testified that Petitioner's complaints were not likely to have any kind of relationship to his cervical spine, based solely upon the complaints themselves. *(Id.)*

Dr. Phillips testified that Petitioner "sort of" attributed his spinal complaints to chiropractic care he underwent. *(Id.)* Dr. Phillips testified that Petitioner had no actual radicular complaints in either the upper or lower extremities. *(Id.)* Dr. Phillips testified that he reviewed the chiropractic records, but could not recall the specifics of the two visits at the time of the deposition. (RX 5,30-31) Dr. Phillips testified that Petitioner's complaints at the time of the second IME were limited to neck pain at the base of the skull and achiness in the shoulders. (RX 5, 32) Dr. Phillips testified that Petitioner made no radicular complaints in the time period

immediately following the accident. *(Id.)* He testified that Petitioner had a completely normal physical examination. (RX 5, 32-33)

Dr. Phillips further testified he reviewed the actual films from Petitioner's January 15, 2018 cervical MRI, which were completely normal. (RX 5, 33) He testified the MRI showed normal disc height, normal signal intensity throughout, normal alignment and did not show any kind of herniation. (RX 5, 34) Dr. Phillips testified he disagreed with Dr. Sokolowski's review of the MRI report. *(Id.)*

Dr. Phillips testified that he found no evidence that Petitioner had suffered any kind of cervical spine injury at any point. *(Id.)* Dr. Phillips testified that he did not believe Petitioner suffered any kind of cervical injury as a result of either the work accident or the chiropractic care he underwent. *(Id.)* Dr. Phillips testified that Petitioner's medical records did not show any initial complaints of neck or lumbar radicular symptoms immediately following the accident or the chiropractic manipulation. (RX 5, 35). Dr. Phillips further noted that Petitioner's complaints of diffuse pain throughout the entire spine were inconsistent with his examination of the records, including the chiropractic records. *(Id.)* Dr. Phillips testified that Petitioner exhibited no objective evidence of any kind of cervical spine condition. (RX 5, 35-36). Dr. Phillips testified that Petitioner's diagnostic imaging did not document any kind of injury to either the cervical or lumbar spine. (RX 5, 36) He was unable to find any evidence of cervical spine pathology. *(Id.)*

Dr. Phillips testified that he did not believe Petitioner required any kind of medical treatment to either the lumbar or cervical spine and did not require any kind of restrictions. (RX 5, 37) He testified that Petitioner did not report his spinal conditions were related to chiropractic care to him until the second IME. *(Id*.) Dr. Phillips again testified that he did not believe Petitioner required any kind of surgery or injections. (RX 5, 38-39) Dr. Phillips testified that Petitioner did not truly have a positive straight leg raise and that Petitioner's complaints to Dr. Sokolowski were inconsistent with an L5-S1 injury. (RX 5, 60 – 61) Dr. Phillips testified there was no evidence Petitioner suffered any kind of disc herniation as a result of either the work accident or any subsequent medical treatment. (RX 5, 64)

On cross-examination, Dr. Phillips testified he had no opinion with respect to Petitioner's hip condition. (RX 5, 42) He testified he did not review any job description or video evidence in connection with the exam. Dr. Phillips testified he was aware of the chiropractic treatment at the time of the July 25, 2019 IME and Petitioner did not attribute his symptoms to the same until the December 2019 exam. (RX 5, 43.45) Dr. Phillips testified that Petitioner's primary complaint to Dr. Sokolowski at his initial examination of Petitioner was groin pain. (RX 5, 44) Dr. Phillips testified that, at the first IME, Petitioner alleged right hip pain after the accident, then alleged lumbar and cervical pain at the second IME, which Petitioner attributed to chiropractic care. (RX 5, 46)

Dr. Phillips testified Dr. Sokolowski's physical examinations were not consistent with a diagnosis of lumbar radiculopathy. (RX 5, 50) Dr. Phillips testified he found no evidence of radiculopathy during his two examinations of Petitioner. *(Id.)* Dr. Phillips testified that at the time of the December 2019 IME, Petitioner alleged all of his spinal pain was due to the chiropractic care he underwent. (RX 5, 53) Dr. Phillips testified that the first appearance of any cervical spine complaints was a January 12, 2018 note from Dr. Sokolowski. (RX 5, 57, 59)

CONCLUSIONS OF LAW

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

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d).

To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between his 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)

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

Petitioner's current condition of ill-being is, in part, causally related to the injury.

The Arbitrator finds that Petitioner's condition of ill-being regarding his right leg, to wit: status post right hip labral tear with surgical repair by Dr. Benjamin Domb (arthroscopic labral repair, acetabuloplasty, iliopsoas bursectomy, femoroplasty (of the peripheral compartment) and capsular plication), with release to full duty work at MMI, as of October 2, 2018, is causally related to the injury.

This finding is based upon the medical records and the persuasive expert opinions of Dr. Mark Levin and Dr. Frank Phillips.

The remaining conditions of ill-being that Petitioner apparently relates to the October 25, 2017 work injury, to wit: cervical bulging disc/pain that Petitioner feels bulge when he turns his head, lumbar radiculopathy, periscapular pain, thoracic pain, headache, swollen and painful left eye, right knee pain/locking

up, right ankle roll (instability?), right leg pain, right shoulder pain, chest pain/costochondritis are not causally related to the injury.

This finding is based upon the medical records, and the persuasive expert opinions of Dr. Mark Levin and Dr. Frank Phillips. Further, the Arbitrator finds that the benign spinal physical exams noted by Drs. Levin and Phillips to be correct and to be persuasive as to the lack of any causation regarding any alleged condition of ill-being regarding Petitioner's lumbar spine and cervical spine.

Petitioner's testimony is found to be not credible. First, because of many of the complaints that he claims are causally related to the injury, e.g.: cervical bulging disc/pain that Petitioner feels bulge when he turns his head, periscapular pain, thoracic pain, headache, swollen and painful left eye, right knee pain/locking up, right ankle roll (instability?), right leg pain, right shoulder pain, left shoulder pain, chest pain/costochondritis, simply cannot be related to the lifting of a five gallon bucket of paint and felling a pop, with pain in the right buttock/hip. Second, his disagreement with the accuracy of the medical records of Maximus Health, Dr. Sokolowski and Dr. Domb is not persuasive. The Arbitrator finds that the records correctly reflect the complaints/ histories given by Petitioner at the times listed. Also, did Petitioner's aunt refer him to Maximus, or was it the owner of Respondent? This was not explained. Fourth, Dr. Sokolowski's causation opinions are not persuasive, because they rely upon the information provided to him by Petitioner and really do not line up with the accident and the medical records. Petitioner did not have coexistent radiculopathy; he had a labral tear of the right hip. Cervical complaints first documented almost 3 months after the lifting incident are not causally related.

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?

Petitioner's claimed medical expenses were submitted as Petitioner's Exhibits 7 through 12.

PX 7 is a bill from Dr. Sokolowski for $1,280.00 for services rendered in 2020, 2021 and 2022. This bill is denied, based upon the Arbitrator's finding on the issue of causation, above.

PX 8 is a bill from Kalina Pain Institute for $916.16 for services rendered in February and March of 2019. This bill is denied, based upon the Arbitrator's finding on the issue of causation, above.

PX 9 is a bill from Hinsdale Orthopaedics for $162.00 for a hip x-ray performed on 2/1/2018. This bil is awarded.

PX 10 is a bill from Edgebrook Open MRI, apparently in the amount of $7,742.36. This bill is denied based upon the Arbitrator's finding on the issue of causation, above. Additionally, it is noted that there are

several bills for "travel", which are found to be not reasonable and not necessary, as well as not being causally related.

PX 11 is a bill from Maximus Health, in the amount of $240.00. This bill is not awarded because services were rendered for the right shoulder (not related) and right hip and the fees are not segregated.

PX 12 is a bill from Prescription Partners, in the amount of $1,242.20, for services rendered in 2020 and 2021. This bill is denied, based upon the Arbitrator's finding on the issue of causation, above.

Thus, Respondent shall pay reasonable and necessary medical expenses of $162.00, as provided in Sections 8(a) and 8.2 of the Act.

K. What temporary total disability benefits are dispute?

Petitioner alleged entitlement to TTD benefits from November 1, 2017 through April 5, 2019. Based upon the findings set forth in Section F above, Petitioner reached MMI for his right hip condition by October 2, 2019. As such, the Arbitrator finds that Petitioner is not entitled to further any TTD benefits.

Thus, Respondent shall pay Petitioner temporary total disability benefits of $425.34/week for 48 weeks, commencing November 1, 2017 through October 2, 2018, as provided in Section 8(b) of the Act.

L. What is the nature and extent of the injury?

The Arbitrator finds that Petitioner suffered a right hip labral tear with surgical repair by Dr. Benjamin Domb (arthroscopic labral repair, acetabuloplasty, iliopsoas bursectomy, femoroplasty (of the peripheral compartment) and capsular plication), with release to full duty work at MMI, as of October 2, 2018 as a result of the October 25, 2017 work injury. Under Section 8.1b of the Act, there are five factors for evaluating a claimant's permanent partial disability: (i) the level of impairment per an impairment rating under Section 8.1b(a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the alleged injury; (iv) the employee's future earning capacity; and (v) evidence of the disability corroborated by the treatment records.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that an AMA impairment Rating of 2% Right Leg/1% Whole Person Impairment was submitted into evidence. The Arbitrator gives appropriate weight to this factor in determining PPD

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 store associate at the time of the accident. The Arbitrator notes that Petitioner's ongoing complaints are due to personal complaints unrelated to the October 25, 2017 work accident. Dr. Domb released Petitioner to regular work regarding his right hip condition. The Arbitrator takes

note of the physical requirements of Petitioner's job and therefore gives moderate weight to this factor in determining PPD.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 34 years old at the time of the accident. Petitioner required surgical intervention for the right hip and was released to return to work, full duty without restrictions. Therefore, the Arbitrator awards this factor moderate weight in determining PPD

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner underwent a right hip labral repair before obtaining a full duty release. Petitioner thereafter returned to employment in a dispatch role and owns his own business where he works as an independent contractor for multiple entities. The Arbitrator notes that Petitioner did not introduce any significant evidence of any wage impairment at trial. The Arbitrator gives some weight to this factor in determing PPD.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, Arbitrator finds that Petitioner suffered a right hip labral tear. Dr. Domb, Petitioner's treating hip surgeon, released Petitioner from care without restrictions as of October 2, 2018. The Arbitrator gives greater weight to this factor in determining PPD.

Based on the above factors, and the Record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 25 % loss of use of the right leg, pursuant to §8(e) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC006939
Case Name	Lynne Spencer v. Illinois Central School Bus Co
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0327
Number of Pages of Decision	17
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Robert Newman

DATE FILED: 7/31/2023

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LYNNE SPENCER,

Petitioner,

vs. NO: 15 WC 006939

ILLINOIS CENTRAL SCHOOL BUS CO.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice[1], causal connection, benefit rates, medical expenses, temporary total disability (TTD), prospective medical care, permanent disability (PPD), and penalties and fees, and being advised of the facts and applicable law, reverses the Decision of the Arbitrator as set out below.

FINDINGS OF FACT

At the time of her alleged accident on February 20, 2015, Petitioner was 70 years old and had worked as a school bus driver for Respondent for five years. That morning, she arrived early at the bus lot to perform her DOT check. The lot contained 180 to 200 buses, and there was no fencing, lighting or security of any kind. The doors to the buses remained unlocked overnight. Since the weather the night before had been frigid and snowy, the buses had been previously cold-started by workers who had left the keys in the buses after having left their engines to run for 15 minutes. Petitioner drove to her bus, opened the unlocked doors and entered the dark bus. As she reached for her checklist and to turn the ignition key, she was struck on the back of her head. She testified that she saw black, then flashes of light. She had a raised bump on her head from the incident, but she did not believe she had fallen. She switched on the bus lights and having neither

[1] Petitioner included "notice" as an issue on her Petition for Review. However, Respondent stipulated to having received timely notice on the Request for Hearing, and the Commission does not address that issue on review.

seen anyone nor observed anything out of place, she returned to her car. She then drove to the office building on the lot. She was helped inside by coworkers and reported that she had been hit on the head with something. Jerald Marshall, a driver trainer, bus driver and union steward at Respondent observed a large "goose egg" on the back of Petitioner's head. Five to ten minutes later, Marshall inspected Petitioner's bus and found fresh urine in the rear of the cabin. The weather had been well below freezing on February 20, 2015, and several days before. Other employees searched the lot and inspected the bus but found no one. Marshall testified that people would sleep on the buses from time to time at night.

An ambulance and the police were called, and Petitioner was taken to the emergency room at Delnor Hospital where she reported being struck in the back of the head with an unknown object. She was diagnosed with having a hematoma on the back of her head as well as hypertension and released.

Petitioner followed up with her primary care physician, Dr. Tebeau, who diagnosed her with a concussion, memory loss, and post-trauma anxiety ("too early to label PTSD") on February 21, 2015. Dr. Tebeau noted that Petitioner could not recall all the events after she was struck. She told the doctor about people sometimes sleeping on the buses, but she repeated that she did not see the person who hit her. Dr. Tebeau continued to treat Petitioner for her anxiety and PTSD before referring her to a psychiatrist.

On September 23, 2015, Dr. Tebeau noted that Petitioner was seeing a counselor, Margaret Couch, for her post-traumatic stress, anxiety, tearfulness, and isolating behavior. She had also begun treatment with a psychiatrist, Dr. Foroutan. Petitioner provided a consistent history of her assault, and both treaters diagnosed her with PTSD related to the attack. Petitioner continued to suffer from panic attacks, sleep disturbance, agoraphobia, and crying spells through her last appointment with Dr. Foroutan, on July 15, 2021.

Two days after the incident, Marshall spoke with Louis Garcia, Respondent's manager in charge of the bus lot. Garcia informed him that if anybody asked, Petitioner fell down the stairs. He did not want other drivers being nervous about an assailant.

The Arbitrator found Petitioner had failed to prove she had suffered an accident arising out of and in the course of her employment as a bus driver and denied all benefits.

CONCLUSIONS OF LAW

Accident

For an injury to be compensable under the Act, the injury must "arise out of" and "in the course of" the employment. 820 ILCS 305/1(b)3(d) (2012); *Land & Lakes Co. v. Industrial Comm'n,* 359 Ill. App. 3d 582, 591-92 (2005). Both elements must be present at the time of the

injury in order to justify compensation. *Caterpillar Tractor Co. v. Industrial Comm'n,* 129 Ill. 2d 52, 60 (1989).

The Commission is not bound by the Arbitrator's findings, and its province is "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *City of Springfield v. Industrial. Comm'n*, 291 Ill. App. 3d 734, 740 (1997) (citing *Kirkwood v. Industrial Comm'n*, 84 Ill. 2d 14, 20 (1981)). Inconsistencies between the testimony of witnesses are for the Commission to weigh. *Shafer v. IWCC*, 2011 IL App (4th) 100505WC, ¶35; *Dig Right in Landscaping v. IWCC,* 2014 IL App (1st) 130410WC, ¶27. Where all witnesses exhibit some degree of bias, the Commission's function is to resolve evidentiary conflicts. See, for example, *Steel & Mach. Transp., Inc. v. IWCC,* 2015 IL App (1st) 133985WC, ¶35 (where the claimant's testimony conflicted with that of the employer's three witnesses, it was within the prerogative of the Commission to credit claimant's testimony over that of the employer's witnesses). In cases where an unwitnessed accident is alleged, the compensability of the injury is dependent upon the claimant's credibility. *Adams Truck Lines v. Industrial Comm'n,* 193 Ill. App. 3d 814, 819 (1990); *Kress v. Industrial Comm'n,* 190 Ill. App. 3d 72, 79 (1989).

In this case, the Arbitrator found Petitioner not credible and that she failed to prove she suffered an accident arising out of and in the course of her employment as a bus driver. Based on a preponderance of the credible evidence presented by the record in its entirety, the Commission disagrees. Specifically, the Commission finds Petitioner credible in her testimony regarding her assault by an unidentified assailant at work on February 20, 2015. Petitioner's credible testimony that she was assaulted and struck on the head is buttressed by the fact that her coworkers observed a bump on her head shortly after. Petitioner was diagnosed with a hematoma at the emergency room. Jerald Marshall found fresh urine on Petitioner's bus despite temperatures being below freezing for days prior to Petitioner's assault. Lastly, Petitioner's description of the assault was consistently reported to her treating physicians, the §12 examiners, and at arbitration. Accordingly, the Commission finds that an assault occurred on February 20, 2015 as supported by the record.

Clearly, Petitioner was in the course of her employment at the time of the assault. "In the course of the employment" refers to the time, place, and circumstances under which the worker is injured. "Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work, or within a reasonable time before and after work, are generally deemed to have been received in the course of the employment." *Suter v. Ill. Workers' Comp. Comm'n*, 2013 IL App (4th) 130049WC, ¶18. The record in this matter indicates that Petitioner arrived at the bus lot early, because the day was snowy, and she wanted to prepare her bus for the route. Prior to leaving the lot, she was required to perform a DOT check of her vehicle. The assault occurred as she began preparing to perform that check. She was "in the course of" her employment at the time of the assault as it was reasonable for her to arrive early at the bus lot to begin preparations for her route.

The Commission further finds that the assault "arose out of" Petitioner's employment as a bus driver for Respondent. Petitioner's conduct in readying her bus for the morning route was clearly anticipated by Respondent, as the DOT checklist was required to be performed every morning before the bus left the lot to begin its route. Furthermore, the requirements and circumstances of Petitioner's employment clearly contributed to the risk of an assault in this case. Petitioner was required to report to the bus lot very early in the morning, the bus lot had no security or lighting, and the buses were left unlocked overnight. See *Caterpillar Tractor Co.,* 129 Ill. 2d at 57; *Purcell v. Illinois Workers' Comp. Comm'n,* 2021 IL App (4th) 200359WC, ¶26.

Based on the preponderance of the credible evidence, the Commission finds that Petitioner proved that she sustained an assault at work which arose out of and in the course of her employment and reverses the Arbitrator's finding that she failed to prove she sustained a work-related accident on February 20, 2015.

Causal Connection

Respondent also disputed that Petitioner's current condition of ill-being is causally connected to the work incident on February 20, 2015. The Commission notes that Petitioner's treaters, Dr. Foroutan, Dr. Tebeau, and Counselor Couch, causally related her PTSD, anxiety, panic disorders, agoraphobia, and fear of buses to her assault. Respondent obtained §12 evaluations of Petitioner by a neurologist, Dr. Schlageter, and a clinical psychologist, Dr. Landre. Dr. Schlageter confirmed that Petitioner's neurological complaints of pain on the bridge of her nose and in her right jaw and pressure pain in her head resulted from her work accident. He could not provide an opinion as to her psychological condition as that was outside his expertise. Dr. Landre diagnosed Petitioner with "at least" anxiety and depression that could be causally related to the assault and recommended continued treatment for PTSD. Neither §12 examiner reported any symptom magnification.

In addition to the medical opinion and testimony regarding Petitioner's causally related mental health conditions, the Commission further notes that a finding of causal connection is warranted under the chain of events in this matter. A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 64 (1982). Here, there is no evidence that Petitioner sustained the head injury prior to her date of accident, and she was clearly able to perform her job as a school bus driver. After the alleged date of accident, she was diagnosed with a concussion and PTSD. She is no longer able to enter a bus, let alone to return to her previous position as driver. Accordingly, the Commission finds that Petitioner met her burden to prove causal connection between her work assault and her subsequently diagnosed mental health conditions.

Average Weekly Wage

Petitioner's average weekly wage (AWW) was disputed at arbitration. Respondent alleged the AWW was $418.23 and provided a wage statement covering the 52 weeks prior to the date of accident. Petitioner argued her AWW was $440.98 and explained that four weeks out of the 52 listed were not complete work weeks. The Arbitrator accepted Petitioner's calculation and found her AWW to be $440.98. While Respondent raised this issue on its Petition for Review, it failed to address the issue in its Statement of Exceptions and, therefore, the issue is waived. The Commission affirms the Arbitrator's finding of AWW.

Medical Expenses

Petitioner claimed the reasonable and necessary medical bills related to her head injury and the resulting PTSD, anxiety, and depression. Petitioner offered Dr. Foroutan's and Counselor Couch's records and bills. Respondent is ordered to pay Petitioner the fee schedule rate or the negotiated rate, pursuant to §§8(a) and 8.2, for the bills from Dr. Foroutan and Counselor Couch related to Petitioner's treatment for PTSD, anxiety, and depression.

TTD

Pursuant to §8(b) of the Act, a petitioner is temporarily totally incapacitated from the time an injury incapacitates her for work until such time as she is as far recovered or restored as the permanent character of her injury will permit. Once an injured employee's physical condition stabilizes, she is no longer eligible for TTD benefits, although she may be entitled to permanent partial disability under §8(d) or permanent total disability compensation under §8(f). *Archer Daniels Midland Co. v. Industrial Comm'n,* 138 Ill. 2d 107, 118 (1990).

Petitioner was assaulted on February 20, 2015. She never returned to her bus driving job for Respondent or to any other gainful employment. Her treating physicians found that she was unable to return to her position as a bus driver and should avoid all dark areas, as these remained triggers for her PTSD. Petitioner sought TTD benefits from her date of accident to her last appointment with Dr. Foroutan on July 15, 2021. However, Dr. Foroutan testified at her deposition on August 5, 2019, that Petitioner had reached maximum medical improvement prior to the deposition. As Petitioner is not entitled to TTD after her condition has stabilized, the Commission finds she was temporarily totally disabled for 232-4/7 weeks from February 20, 2015, through August 5, 2019.

Permanent Disability

Petitioner argues that as a result of her assault, she is permanently totally disabled. Petitioner is not obviously unemployable, and no medical evidence supports a claim of total disability. However, Petitioner alleges that she falls under the "odd lot" category of permanent

total disability. *Pisano v. Illinois Workers' Comp. Comm'n,* 2018 IL App (1st) 172712WC, ¶73. Petitioner may prove entitlement to permanent total disability under the "odd lot" theory by showing diligent but unsuccessful attempts to find work or by showing that, because of her age, skills, training, and work history, she will not be regularly employed in a well-known branch of the labor market. *Sharwarko v. Illinois Workers' Comp. Comm'n*, 2015 IL App (1st) 131733WC, ¶58. Although Petitioner did not seek employment after her assault, her vocational rehabilitation expert, Laura Belmonte, testified that there was no stable labor market available to Petitioner. Belmonte concluded that Petitioner at 77 was no longer employable based upon her outdated clerical skills, age, and unrelated health conditions.

However, Respondent's expert, Julie Bose, observed that the only work restrictions placed on Petitioner by her physicians were to avoid dark places and not to drive buses. She opined that Petitioner could have worked as a dispatcher or scheduler for a bus company or in an entry-level clerical position. She also suggested Petitioner could work remotely from her home as a customer service representative or in a call center, though she admitted that Petitioner's age and overall poor physical health would be barriers to her finding employment.

The Commission finds that Petitioner has not proved she is permanently totally disabled under §8(f) as a result of her assault, although her psychological and unrelated physical conditions and her advanced age weigh heavily against her return to the workforce. Petitioner offered no evidence to prove she is entitled to a wage loss differential under §8(d)1. Therefore, the Commission finds that an award under §8(d)(2) is appropriate for her permanent partial disability.

The five factors upon which the Commission must base its determination of the level of permanent partial disability benefits to which a claimant is entitled include the following: (i) the level of impairment contained within a permanent partial disability impairment report; (ii) the claimant's occupation; (iii) the claimant's age at the time of injury; (iv) the claimant's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b(b) (West 2020). However, "[n]o single enumerated factor shall be the sole determinant of disability." *Id*. § 305/8.1b(b)(v).

Regarding factor (i) Level of Impairment, the Commission gives no weight to this factor as an impairment rating was not submitted by either party.

Regarding factor (ii) Occupation, the Commission assigns significant weight to this factor. Petitioner's mental health injury prohibits her from returning to work as a school bus driver, resulting in a loss of occupation.

Regarding factor (iii) Age, the Commission assigns significant weight to this factor, noting Petitioner was 70 years old at the time of her accident and 77 at the time of arbitration. Having to cope with a permanent mental health injury, PTSD, as well as health conditions associated with her advanced age, Petitioner will likely have a more difficult time performing her job duties or finding alternative employment than would a younger person. Her vocational rehabilitation expert,

Laura Belmonte, testified that Petitioner's age would constitute a significant barrier to finding employment.

Regarding factor (iv) Earning Capacity, the Commission assigns some weight to this factor, noting Petitioner testified she did not return to work or attempt to return to work for Respondent, due to her ongoing mental health issues. She continues to suffer the ill effects of her work-related PTSD, and these will impact her ability to find and perform any regular employment. Her vocational rehabilitation expert testified that she is unemployable.

Regarding factor (v) Disability, the Commission gives significant weight to this factor, and in doing so concludes the medical evidence and Petitioner's credible testimony support a substantial permanent disability award. In assessing Petitioner's disability, the Commission relies on Petitioner's credible testimony that since the assault, she does not have the same quality of life and continues to suffer from her psychological injuries on a daily basis.

The Commission concludes an award of 50% person as a whole pursuant to Section 8(d)(2) for Petitioner's mental health injuries is appropriate.

Penalties and Fees

Petitioner sought penalties and fees under §§19(k), 19(l) and 16 and accused Respondent of employing litigation tactics that were frivolous and vexatious and unreasonably denying Petitioner benefits. Generally, an employer's reasonable challenge to liability does not warrant the imposition of penalties. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 763 (2003). Given the disputed facts surrounding this unwitnessed assault by an unidentified assailant, Respondent's denial of medical and temporary total disability benefits is not so unreasonable as to justify the imposition of penalties and fees. Penalties and fees are denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed July 15, 2022, is hereby reversed. The Commission finds Petitioner sustained an accident on February 20, 2015, that arose out of and in the course of her employment and provided timely notice thereof. The Commission further finds that Petitioner's current condition of ill-being is causally related to the work accident.

IT IS FURTHER ORDERED BY THE COMMISSION that in the year preceding the work injury, Petitioner's average weekly wage was $440.98.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred for treatment and contained in Petitioner's Exhibits 3 (Dr. Foroutan) and 5 (Couch), as provided under Section 8(a) and Section 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary total disability benefits of $293.99 per week for 232-4/7 weeks, from February 20, 2015, through August 5, 2019, that being the period of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner permanent partial disability benefits of $264.59 for 250 weeks, as the work assault caused the loss of use of 50% of the person-as-a-whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's claim for an award of penalties and attorney's fees pursuant to §§16, 19(k) and 19(l) of the Act is 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 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 the Circuit Court.

July 31, 2023

MP/dak
o-6/15/23
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	15WC006939
Case Name	Lynne Spencer v. Illinois Central School Bus Co
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Gerald Granada, Arbitrator

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Robert Newman

DATE FILED: 7/15/2022

THE INTEREST RATE FOR THE WEEK OF JULY 12, 2022 2.68%

/s/ Gerald Granada, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

LYNNE SPENCER
Employee/Petitioner

v.

ILLINOIS CENTRAL SCHOOL BUS CO
Employer/Respondent

Case # **15** WC **6939**

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 **Gerald Granada**, Arbitrator of the Commission, in the city of **Geneva and Wheaton**, on 3/30/22. 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 **Permanent total disabilty benefits & continuing treatment**

FINDINGS

On **2/20/15**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**21,166.85**; the average weekly wage was $**440.98**.

On the date of accident, Petitioner was **70** years of age, ***single*** with **0** dependent children.

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

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

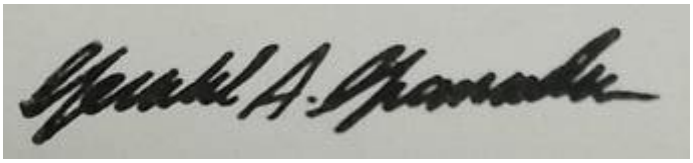
ORDER

Petitioner failed to prove accident. Therefore, all benefits are denied.

The Petition for Penalties and Attorney's Fees is denied.

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

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



JULY 15, 2022

Signature of Arbitrator Gerald Granada

FINDINGS OF FACT

This case involves Petitioner Lynn Spencer, who alleges to have sustained injuries arising out of and in the course of her employment with Respondent Illinois Central School Bus on February 20, 2015. Respondent disputes Petitioner's claim, with the issues being: 1) accident; 2) causation; 3) average weekly wage; 4) medical expenses; 5) TTD; 6) nature and extent; and 7) penalties and attorney's fees.

The trial of this case began on July 10, 2020 before a different arbitrator: former Arbitrator Robert Harris in Wheaton. The case was subsequently reassigned to this arbitrator, who heard further testimony on October 21, 2021 in Geneva, and on March 30, 2022 in Wheaton.

Petitioner worked for Respondent as a bus driver. She had worked for Respondent as a bus driver for 5 years prior to February 20, 2015. On that day, her bus route began at 6:56 am, so she arrived at the bus lot early around 5:00 or 5:30 am. Before getting onto her bus, she would normally get her bus keys and her Department of Transportation/DOT safety checklist before she would leave for her route. Petitioner testified that Respondent wanted her to punch-in at 6:00 am.

Petitioner testified that when she arrived at the bus lot on February 20, 2015, she was told that the buses had been cold-started and the keys were already in the buses. She then drove her personal car to her assigned bus, opened the doors and climbed the stairs. Petitioner testified that when she was going up the stairs of her bus, she thought it was strange because it was warm on the bus, and the buses are usually cold even when they are started earlier in the day because the heaters on the buses are not allowed to be turned on. There were no lights on inside Petitioner's bus when she entered, and she described the inside of the bus as being dark.

Once inside the bus, Petitioner was standing next to her driver's seat facing the window to get her DOT note pad. She then turned to turn on the bus when she described that "something hit me from behind really hard, and then immediately everything was black, and I saw flashes of actual stars and flashes like you would on the 4th of July, and I don't know how long that went on, but when it finally stopped, I was still standing and I was holding onto the wheel both hands." (10/21/21 hearing T. 70) She described being struck on the left back side of her head. She testified that she was in a lot of pain, felt dizzy and was scared because she did not know what was going on. Petitioner then testified that she was able to turn on an interior bus light and described the following: "**I looked around, didn't see anyone, but I was hurting so bad that I turned it off.**" (10/21/21 hearing T.72 – emphasis added)

After not seeing anyone on the bus and turning the light off, Petitioner testified that she was going down the bus stairs and thinks she passed out maybe two to three minutes because "immediately [she] was on the bottom of the stairs," before she got up and went straight to her car and drove slowly to the front door of the bus office where she spoke with a number of people before the police arrived and Petitioner was ultimately taken away by ambulance.

Petitioner was taken by ambulance to the emergency room at Northwestern Medicine where she complained of pain and reported that she did not remember the events that occurred that morning. (PX 4, p.800) The records from that ER visit show Petitioner did have a hematoma on the back of her head, but she did not lose consciousness. In addition to documenting Petitioner's complaints of pain in her back and the back of her head, the history in the initial records indicate: "**She states that sometimes people sleep on the bus and was worried that maybe that happened; however, she did not see anybody, no one else saw anybody in the bus yard.**" (PX 4, p. 789 – emphasis added)

Following the ER visit, she treated with her primary care physician, a psychiatrist (Dr. Foroutan) and a counselor named Couch. (10/21/21 hearing T.77) None of them had released her to return to driving or to nighttime activity. (10/21/21 hearing T.77) She was also examined at Respondent's request by a neurologist Dr. Schlageter and a clinical psychologist, Dr. Landre.

Mardjan Foroutan MD

Dr. Foroutan is a psychiatrist who had treated Petitioner. (PX1 p.5, 7) After the event, Petitioner would not go near buses, she was very anxious and she could not engage in sustained activity, and she could not get out of the house. (PX1 p.8-9) She had improved with treatment, but still experienced extreme anxiety when she saw a bus or thought about being on a bus or driving a bus. (PX1 p.9) Foroutan suspected that Petitioner may have had past psychological trauma, including PTSD, which was severely exacerbated by the events from February 20, 2015. (PX1 p.11) Foroutan prescribed an antipsychotic to calm her down and allow her to sleep. (PX1 p.14) The medication also dealt with depression and anxiety disorder. (PX1 p.14-15) Foroutan thought Petitioner would not be able to drive a bus due to the PTSD. (PX1 p.16-17) Because of Petitioner's age and the severity of the attack, Foroutan thought that Petitioner would never fully recover. (PX1 p.25-26) Counseling and medication would permit her to engage in activities of daily living. (PX1 p.26) Foroutan said that her treatment for Petitioner was all related to the February 20, 2015 incident. (PX1 p.29) Foroutan had little information about what past abuse Petitioner had suffered, but suspected she had been in past abusive relationships. (PX1 p.40) Foroutan suspected that Petitioner might also have a bipolar condition but the condition was quite stable for her. (PX1 p.46, 80) Foroutan also thought Petitioner had borderline personality disorder. (PX1 p.46) Borderline personality patients are on the

borderline between psychosis and personality disorder. (PX1 p.48) These patients are pretty dramatic, very rejection sensitive. (PX1 p.48) They are unstable toward their sense of self, their relationships and their environment. (PX1 p.48) Petitioner was still very upset by 2020, she still had panic attacks, felt out of control and had crying spells. (PX11 p.58) The 7/15/21 note documented continuing panic attacks and crying spells and her desire to avoid dark spaces and buses. (PX11 p.59)

Margaret Couch LCSW, MSW

Margaret Couch began counseling Petitioner on 9/22/15. (PX5 p.5, 8) Petitioner's physical symptoms from the February 20, 2015 incident resolved, but the emotional symptoms intensified for Petitioner. (PX5 p.5) She experienced panic attacks several times each day, had trouble sleeping, was fearful of leaving her home and was often too depressed to get out of bed. (PX5 p.5) She became socially paralyzed, impacting her relationships with family and friends. (PX5 p.5) Couch agreed that Petitioner suffered from PTSD. (PX5 p.5) Her counseling of Petitioner revealed a long history of childhood trauma, bringing them to the forefront of her daily life and causing them to escalate. (PX5 p.5) Couch worked on educating Petitioner about what she was going through and normalizing her experiences. Petitioner continued experiencing daily panic attacks through early October and November 2015. By 12/16/15, Petitioner was only reporting 1 to 2 panic attacks per week, some continuing sleep disturbance and very few days where she was unable to get out of bed in a timely fashion. (PX5 p.6) An updated report from 7/19/16 indicated they were still trying to address the PTSD, including panic attacks, agoraphobia, flashbacks and hyposomnia. (PX5 p.7) Couch related each of those issues to the February 20, 2015 incident. (PX5 p.7) Petitioner was making slow and steady progress and she continued suffering from great anxiety relating to the financial pressures of being unable to seek employment and provide an income for herself. (PX5 p.7)

Nicholas Schlageter MD (IME)

Schlageter was Respondent's first IME, a board certified neurologist. (RX4 p.6) He examined Petitioner on 5/4/15. (RX4 p.11) Petitioner reported pain on the bridge of her nose, pain in the right jaw and pressure pain involving the whole head, which she experienced two times a week for a few minutes. (RX4 p.12) She also complained of anxiety for which she received counseling, Citalopram and Alprazolam. (RX4 p.13) She had an elevated blood pressure on examination. (RX4 p.16) Schlageter thought her complaints were related to the February 20, 2015 incident. (RX4 p.18) The neurological examination was normal and he thought she could return to work from a neurological standpoint. (RX4 p.20) Dr. Schlageter opined that it was possible that Petitioner might have had a syncope attack and fallen rather than being attacked by someone. (RX4 p.24) The loss of balance might be due to high blood pressure. (RX4 p.24)

Nancy Landre PhD (IME)

Nancy Landre evaluated Petitioner at the request of Respondent. (RX5 p.9) She is a clinical psychologist. (RX5 p.7) Landre testified that the Petitioner has an impaired memory about the events of February 20, 2015. (RX 5, p. 30. Dr. Landre relied on the Delnor report saying the petitioner did not remember what had happened that day, Resp. Ex 3; the differences in the reports given to others, for example about whether she had been unconscious; individuals who have had head injuries tend to have unreliable memories of events surrounding the events; and the petitioner's account does not reconcile with the other witness Markham - not finding any vagrant or culprit. (RX 3, p. 30) Dr. Landre did not feel that the petitioner was making up her testimony; Dr. Landre felt the petitioner has an impaired ability to remember the events of the day of February 20, 2015. (RX 5, p. 79-80)

Petitioner testified that she considered returning to work but was being held back by her fear of having panic attacks while working. (10/21/21 hearing T.87) Prior to working as a bus driver, she worked as an executive assistant at various places.

There were several other witnesses who have testified in this case over the years. Following is a summary of each witness' testimony.

Jerald Marshall

Jerald Marshall testified before Arbitrator Harris on July 10, 2020. (See PX 12) He heard about Petitioner's attack and went to Petitioner's bus to investigate after the attack. (7/10/20 hearing T.18) Marshall was the union steward and always went out to check any problems his members were having at the worksite. (7/10/20 hearing T.18) Marshall testified as to a conversation he had with manager Luis Garcia two days after the alleged incident. Marshall testified that people stayed on the buses at night as the buses were not locked. He further testified that he found urine on Petitioner's bus 5 to 10 minutes after he saw the bump on her head.

Jeffrey Jurs

Jeff Jurs works as a mechanic for Respondent. (10/21/21 hearing T.8) Randy Brown told Jurs about the Petitioner's alleged. On the day of the alleged incident, Jurs also searched in the yard for a culprit both by truck and on foot. (10/21/21 hearing T. 12) He did not find any urine or other sign of someone who was not supposed to be on the bus. (10/21/21 hearing T. 16) Jurs explained that there is an on-board camera showing the inside of the bus when the bus ignition key is turned on. The camera starts about five minutes after

the key is turned on, and it is programmed to record about forty-five minutes after the key is turned off. (10/21/21 hearing T. 11; 3/30/22 hearing T. 9,10, 23, 24) The duration of time the buses are left running to warm up by the cold starters varies. (3/30/22 hearing T. 25) Jurs showed Officer Grove an onboard video recording. This is a Digital Video Recording on the bus that shows the interior of the bus. (3/30/22 hearing T. 8) On the video recording, Jeff Jurs saw cold starters, then himself and the police officer. (10/21/21 hearing T. 18, 19, 36) The police report by Officer Grove also makes this reference. (PX 7) On the day of the claimed occurrence , Jurs showed the Digital Video Recording to Officer Grove. It showed, the cold starters, then the next person aboard the bus was Jurs and then the Officer. Pet. Ex 7. The petitioner herself was not seen, on the bus, nor any one else. (10/21/21 hearing T. 17-18) There was no vagrant nor trespasser seen on the bus. There was no recording of the petitioner being struck by anyone or anything. Eventually the DVR records over the recorded data. (3/20/22 hearing T. 47) Jurs further testified that the lights in the yard were generally turned on when the drivers arrived. (3/30/22 hearing T. 33) He also testified that he is not aware of people having been sleeping on the buses; that this bus terminal was not in a high crime area; and that there were no other similar reports of people being struck on a bus. (3/30/22 hearing T. 15)

Jose Cortes

Cortes worked for Respondent for 12 years and was the dispatcher at the time of the attack. (10/21/21 hearing T.41-42) He received a call from Petitioner saying she had been struck over the head. (10/21/21 hearing T.43) He found Petitioner sitting in her car at the front of the building. (10/21/21 hearing T.45) Petitioner reported that she was a little dizzy and he told other workers to escort her inside. (10/21/21 hearing T.46) Mr. Cortez said he had worked at the Illinois Central bus location in St. Charles for 11 years and there were no other incidents like this one. (10/21/21 hearing T. 49-50) He did not know that bus location to be a high crime area. (10/21/21 hearing T. 51)

Warren Markum

Warren Markham was a cold starter and a route driver. He had been warming up the busses from 3:30 to 5:00 that morning. (RX 1, p. 13-15, 51) The process of starting and warming the busses and turning off the busses takes about an hour and a half. (RX 1, p. 51-52) Mr. Markham went aboard the bus assigned to the Petitioner on orders from a manager, Louis, to "sweep the bus," to make sure there was no one on the bus. (RX 1, p. 17, 40) Mr. Markham was searching for anyone who might have struck Petitioner. (RX 1, p. 17) Mr. Markham did not find any one aboard the bus. (RX 1, p. 17) He did not find any evidence that any one had been on the bus, except that he did see a little snow had been tracked around the driver's area. (RX 1, p. 56) He searched the yard and did not find any vagrant or culprit. (RX 1, p. 18) When he had been performing the cold starts that day, he had not seen anyone other than the other cold starters. (RX 1, p.17) He did not find any evidence that any one had been staying during the night, aboard the bus. (RX 1, p.19) He did not find any urine on the bus. (RX 1, p. 19, 45, 58-59) Mr. Markham testified that his note had the wrong date on it because he is not good with dates. (RX 1, p. 22-26) He testified that there was not a problem with vagrants or other people staying on the buses, and that there was not an issue of crime in the bus company parking lot, to his knowledge.

Randy Brown

Brown was a driver and lot man on the accident date. (3/30/22 hearing T.50) Randy Brown testified under subpoena. On the day of the alleged occurrence, the Petitioner told Randy Brown that she had been hit on the head. Brown searched around Petitioner's bus and on the bus and did not find any vagrant or culprit. Mr. Brown testified he might have looked through the back door of the bus. Brown said there was no urine on the bus and that he would have had to clean up the urine if any were found. He testified that the area around the Petitioner's bus was well lit from overhead pole lights. Brown testified that as a lot man, he was around the bus yard for his entire shift. He did not see vagrants around the bus yard. He testified that the bus yard on Randall Road in St Charles was not in a high crime area and that he did not have knowledge of any homeless camp near the bus yard. Brown knew of no other similar incidents of anyone claiming to have been struck on a bus in the years 2012-2017.

Officer Grove Report

The report by Officer Grove of the St Charles Police Department was entered into evidence. (PX. 7) Officer Grove indicated that arrived at the scene at 5:38 am and spoke to the Petitioner on that date of the alleged incident. Officer Grove noted the following:

> Spencer reported that she went to her bus #2634, to start it up. After starting the bus Spencer looked down to turn the lights on and advised that she was hit in the back of the head by an unknown subject. Spencer advised that she thought that she was knocked unconscious briefly because she advised that she saw stars and then woke up at the bottom of the steps next to the bus door. Spencer stated that she did not hear or see anything and she didn't know what she was hit with. Spencer had a raised bump on the back of her head from [t]he incident. (PX. 7)

Officer Grove also noted the bus had a camera and viewed the video taken in the bus that morning with Mr. Jurs. Officer Gove noted the following about the video:

> Footage shows the bus being boarded by two of the cold starters as identified by Jurs. The next movement that is caught on camera is when Jurs entered the bus after being advised about the incident. I am the next subject seen on the video when I arrived on the scene. It is believed that the Spencer incident took place prior to the video activating after she started the bus. Nobody else is seen on the bus when it was recording.

CONCLUSIONS OF LAW

1. Regarding the issue of accident, the Arbitrator finds that Petitioner failed to meet her burden of proof. In support of this finding, the Arbitrator relies on the preponderance of witness testimony and evidence compiled over the 3 years of arbitration hearings. Petitioner alleges that she was assaulted on her school bus on February 20, 2015 by an unknown assailant who struck her on the back of her head. In support of that claim, Petitioner is relying on her own testimony, the bump found on her head and circumstantial evidence. When viewing the evidence as a whole, the facts do no support Petitioner's claim. The Arbitrator notes the following facts gleaned from the evidence:

a. Petitioner testified that after she was allegedly struck, she turned on the lights in her bus and did not see anyone;

b. The history given by Petitioner at the ER also indicated that she did not see anybody in the bus yard;

c. The video taken before Petitioner got on her bus does not show anyone else on the bus other than the starters and subsequently Mr. Jurs and Officer Grove;

d. If Petitioner had started her bus as she indicated to Officer Grove, the video camera would have activated and showed Petitioner or anyone else on the bus after she started it;

e. Multiple co-workers searched the Petitioner's bus and the area around her bus and found no evidence of someone who was not supposed to be there;

f. Only one witness testified to having found urine on Petitioner's bus and that testimony was clearly rebutted by a number of other witnesses;

g. Petitioner told Officer Grove she was knocked unconsciousness, then reported to the ER that she did not remember what happened that morning, and at trial testified that she never told anyone that she had been knocked unconscious after testifying that she passed out at the bottom of the stairs.

If Petitioner's claim is to be believed, then we are dealing with an assailant who was able to get onto a school bus without being seen by the cold starters, evade the onboard surveillance cameras, strike a blow to Petitioner, hide themselves from Petitioner - even with the lights turned on, urinate on the bus, escape from the school bus undetected, and avoid several searchers after the alleged assault. Drawing such a conclusion would call for a great leap in speculation and inference that is not supported by the evidence presented. While there may be an argument that Petitioner had a syncope episode or even slipped and fell outside of her bus, those theories were not pursued by Petitioner and would also call for speculation and inference. Liability under the Act cannot rest on imagination, speculation or conjecture, or upon a choice between two views equally compatible with the evidence, but must be established by facts established by a preponderance of the evidence. *Standard Oil Com v Industrial Commission*, 339 Ill. 2d 252, 171 N. E. 2d 166, *McDonald v Industrial Commission*, 39 Ill. 2d 396, 235 N. E. 2d 824.

The Arbitrator notes that the Commission has previously dealt with workers who were assaulted by an unknow assailant. In *Heath v Industrial Commission* 628 N. E. 2d 335, 256 Ill. App. 3d 1008, 194 Ill. Dec. 838, (1993) a petitioner was working as a stockman in a

Jewel Food Stores after hours, unloading produce that was delivered late. The store was closed and only he and two other workers were in the store. An intruder came into the store and shot the petitioner but did not harm the other employees and did not take anything. The petitioner did not recognize the person who shot him and did not have any information about that person's motive. The Commission and Courts on review found that the petitioner had failed to prove that the accident had arisen out of the employment and denied benefits. Similarly, in *Potenzo v Illinois Workers Compensation Commission* 881 N. E. 2d 523, 378 Ill. App. 3d 113, (2007), an employee was on a loading dock, in an alleyway behind 4355 N. Sheridan Rd. in Chicago, making a delivery to a Jewel store, when he was attacked by someone who grabbed him by the ankle and pulled him down. The Appellate Court ruled in favor of the petitioner in *Potenzo* on the basis that he was a travelling employee and the risks of being assaulted in an alley unloading food products were risks to which the petitioner had been exposed to a greater degree than the general public because of his employment. Assuming arguendo that the Petitioner in the instant case was assaulted, the facts in the present case are more in line with the *Heath* decision in that there was no clear motive for the attack. Although Petitioner's job as a bus driver would make her a travelling employee - similar to the petitioner in *Potenzo* - in the present case, Petitioner did not even begin her travelling duties and had not yet clocked in to start her shift. Despite the similarities of the prior decisions, the facts in the instant case do not support Petitioner's claim that she was assaulted. Essentially, the facts presented by Petitioner failed to support her claim of an accident arising out of and in the course of her employment on February 20, 2015.

2. Based on the Arbitrator's findings regarding the issue of accident, all compensation is denied and the other issues are rendered moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	06WC035989
Case Name	Jeanine Bridges v. State of Illinois Department of Public Aid
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0328
Number of Pages of Decision	16
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Thomas Lichten
Respondent Attorney	Charlene Copeland

DATE FILED: 7/31/2023

/s/ Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JEANINE BRIDGES,

Petitioner,

vs. NO: 06 WC 35989

STATE OF ILLINOIS,
DEPARTMENT OF PUBLIC AID,

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 maintenance 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.

In his order, the Arbitrator awarded Respondent "credit for medical benefits that **it** 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 also defend and hold Petitioner harmless from any claims for reimbursement from Medicare or any other third-party payor.**"

Section 8(j) provides, in pertinent part, as follows:

> In the event the injured employee receives benefits, including medical, surgical or hospital benefits under any group plan covering

> non-occupational disabilities contributed to wholly or partially by the employer, which benefits should not have been payable if any rights of recovery existed under this Act, then such amounts so paid to the employee from any such group plan as shall be consistent with, and limited to, the provisions of paragraph 2 hereof, shall be credited to or against any compensation payment for temporary total incapacity for work or any medical, surgical or hospital benefits made or to be made under this Act… Any employer receiving such credit shall keep such employee safe and harmless from any and all claims or liabilities that may be made against him by reason of having received such payments only to the extent of such credit.

The Respondent is not entitled to a credit and Petitioner is not entitled to a hold harmless because Medicare is not covered under Section 8(j) of the Act. As the Respondent is not entitled to a credit, it is not required to hold Petitioner harmless pursuant to Section 8(j) for any Medicare benefits paid. Therefore, the Commission strikes the hold harmless language from the Arbitrator's Decision as it relates to Medicare.

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

IT IS FURTHER ORDERED BY THE COMMISSION Respondent shall be given credit for medical benefits that it 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.

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

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

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

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

July 31, 2023

O: 07/20/23
CAH/tdm
052

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

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	06WC035989
Case Name	Jeanine Bridges v. State of Illinois Department of Public Aid
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	William McLaughlin, Arbitrator

Petitioner Attorney	Thomas Lichten
Respondent Attorney	Charlene Copeland

DATE FILED: 9/6/2022

/s/ William McLaughlin, Arbitrator
Signature

INTEREST RATE WEEK OF AUGUST 30, 2022 3.23%

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 **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

Jeanine Bridges
Employee/Petitioner

v.

State of Illinois Department of Public Aid
Employer/Respondent

Case # **06** WC **035989**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **William J. McLaughlin**, Arbitrator of the Commission, in the city of **Chicago**, on **06-27-2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **05/08/2006**, 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 $**38,162.00**; the average weekly wage was $**733.88**.

On the date of accident, Petitioner was **51** years of age, ***married*** with **0** dependent children.

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

Respondent ***has*** 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 $**33,301.63** under Section 8(j) of the Act.

ORDER

Credits

Respondent shall be given credit for ***$33,301.63*** for ***disability*** benefits paid under Section ***8(j)*** of the Act.

Medical benefits and Hold Harmless

Respondent shall be given credit for medical benefits that **it** 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 also defend and hold Petitioner harmless from any claims for reimbursement from Medicare or any other third-party payor.**

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $**489.25**/week for **4/7** weeks, commencing **05/12/2006** through **05/15/2006**, as provided in Section 8(b) of the Act.

Permanent Total Disability

Respondent shall pay Petitioner permanent and total disability benefits of $**489.25**/week for life, commencing **10/20/2009**, 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 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

September 6, 2022

ICArbDec

FINDINGS OF FACT

The Petitioner was a 51-year-old office coordinator for the Illinois Department of Public Aid in the Child Support division in downtown Chicago, when she suffered a work injury on May 8, 2006. She had been employed by the State of Illinois since 1987.

The Petitioner's duties included typing on the computer, taking files and putting them into the system, telephoning clients, going to different floors, getting files, working the front desk, meeting with clients, and in general doing whatever was needed. *(R. 9-11)*

On May 8, 2006, the Petitioner arrived for work at 8:00 a.m. She was sitting in her chair at her desk, talking to a supervisor on the 12th floor, when her chair collapsed and she fell to the floor on her right side. She screamed. Her head hit the floor and bounced up. The arm of the chair lodged in her right hip and back. She noticed pain in her neck, head, back and right hip. A supervisor, Mary Marrow, got on the floor and told the Petitioner that the reason the chair had collapsed was that the screws had come out. A co-worker, Donnie Wallace, helped her walk to the bus stop, where she took a bus to the University of Chicago Urgent Care Clinic on Cottage Grove.

At the clinic the doctor examined the Petitioner. The next day the Petitioner tried to go back to work but was in too much pain, so she went back to the urgent care clinic. She was off work for one week, from May 9 to May 15, 2006. The doctor ordered a course of physical therapy at a facility at 47th and Lake Park.

The Petitioner returned to work on May 15, 2006 and tried to do her normal work. She had pain in her back, neck, legs, arms and right hip. Every time she had to get up and walk to the front desk she would scream due to the pain. She was dragging her right leg.

The Petitioner kept working until October 20, 2009, missing scattered days and partial days due to her pain. She was treated at the University of Chicago Medical Center during this period. The treatment included more physical therapy, various tests including MRI's, EMG's, CAT scans, and a pain clinic referral. The Petitioner received one epidural steroid injection into her back that did not help. On October 20, 2009, a doctor at the University of Chicago Medical Center took her off work. She has never worked after that. *(Pet. Ex. 15)*

The Petitioner thereafter underwent four surgical procedures for her work injuries, as follows.

1. February 10, 2010, by Dr. Luu at the University of Chicago Hospital: Right total hip arthroplasty. *(Pet. Ex. 10)*
2. June 10, 2010, by Dr. Gupta at Weiss Memorial Hospital: Partial C2 and C5 laminectomy, C3 and C4 laminoplasty with Mitek suture anchor reconstruction and local morselized autograft. *(Pet. Ex. 11)*
3. October 14, 2010, by Dr. Gupta at Weiss Memorial Hospital: L2-3, L3-4, L4-5 lumbar laminectomy *(Pet. Ex. 12)*
4. October 15, 2014, by Dr. Segal at Mercy Medical Center in Cedar Rapids, Iowa: Removal of prior instrumentations at C5-C6 and C6-C7, anterior cervical discectomy C3-C4, anterior cervical discectomy C4-C5, removal of extruded fragments with microscopic magnification dissection, arthrodesis C3-C4, arthrodesis C4-C5, interbody prosthesis at C3-C4 and C4-C5, allograft fusion with plate and six screws. *(Pet. Ex. 13)*

On March 27, 2012, Dr. Gupta filled out a physician's statement for the Illinois Department of Central Management Services stating that the Petitioner was permanently and totally disabled

from any occupation. Dr. Gupta stated, "Ms. Bridges is 1.5 years status post lumbar laminectomy and 21 months status post cervical laminoplasty. She continues to have chronic back, leg, arm and neck pain. She has done physical therapy without relief. She is disabled." *(Pet. Ex. 15)*

After moving to Iowa, the Petitioner came under the care of Dr. Jill Powers, whose treatment included pain medications, more physical therapy, chiropractic treatment, and a referral to Dr. Segal, who performed the Petitioner's cervical spine surgery of October 15, 2014. *(R. 21-24), Pet. Ex. 4, Pet. Ex. 5, Pet. Ex. 6, Pet. Ex 7)*

The Petitioner testified that she continues to have pain 24/7, some days more than others. The pain is in her back, neck, right hip and leg, left leg and foot, and right arm. Her left arm goes numb, coming from her neck. It is hard sometimes for her to raise her arms above her head. She has been using a walker to ambulate for many years, with use of her current walker for seven years. She has also been using a motorized scooter, ordered by Dr. Powers, for about two years. She is unable to walk without using the walker or scooter except for short distances and by holding onto things. She can drive short distances to a store, but goes only to stores that have motorized scooters, because it is too painful for her even to hold onto a shopping cart and walk. She has no social activities except going to the community room in her building and playing bingo. She cannot go anywhere or do anything because she does not have anybody to help her do things. She cannot stand more than two minutes to wash dishes due to her back pain, so must sit in a chair in the kitchen to wash dishes. She has a bench in her bathtub to bathe because she cannot stand to shower. She cannot make her bed without doing one side, sitting, then doing the other side, and sitting. *(R. 23-31)*

Dr. Samuel J. Chmell, a board-certified orthopedic surgeon and professor of medicine at the University of Illinois School of Medicine, examined the Petitioner on June 4, 2016. Dr. Chmell

also reviewed voluminous medical records covering Ms. Bridges' treatment as well as a number of radiographic studies, including x-rays and MRI scans. Dr. Chmell's deposition was taken on November 1, 2019. *(Pet. Ex. 1)*

Dr. Chmell opined that the Petitioner's conditions of ill-being of her lumbar spine, cervical spine and right hip were causally connected to her work injury of May 8, 2006, and that she was fully disabled from gainful employment as a result of her May 8, 2006, work injury.

The State of Illinois, through the State Employees Retirement System, put the Petitioner's name in for Social Security Disability benefits and provided a lawyer to represent her after she was denied initially. On August 29, 2012, the Social Security Administration, Office of Disability Adjudication and Review, issued a fully favorable decision finding that the Petitioner became entitled to disability benefits as of October 20, 2009. *(Pet. Ex. 16)*

The Respondent did not submit anything into evidence.

CONCLUSIONS OF LAW

F. Is Petitioner's current condition of ill-being causally connected to this injury?

The Arbitrator finds that there is a causal connection between the Petitioner's work injury of May 8, 2006 and her current condition of ill-being. In so finding the Arbitrator relies upon the unrebutted opinion of Dr. Samuel J. Chmell, a board-certified orthopedic surgeon and professor at the University of Illinois School of Medicine, who examined the Petitioner on June 4, 2016. *(Pet. Ex. 1)*

Dr. Chmell opined that the Petitioner sustained injuries to her cervical spine, lumbar spine, and right hip on May 8, 2006, when the chair on which she was sitting collapsed, and she fell to the floor.

Dr. Chmell diagnosed three conditions of ill-being that were causally related to this May 8, 2006, occurrence. These were the following.

1. Traumatic aggravation of osteoarthritis right hip status post right total hip replacement.
2. Traumatic aggravation of degenerative disc disease of the lumbosacral spine status post L2-3, L3-4, and L4-5 laminectomies.
3. Traumatic aggravation of degenerative disc disease of the cervical spine with cervical stenosis and cervical radiculopathy status post C2 and C3 laminectomies, C3-4 laminoplasty with internal fixation and subsequent removal of anterior internal fixation with anterior cervical decompression and fusion C3-4, C4-5 with interbody prosthesis at C3-4 and C4-5.

Dr. Chmell stated that Ms. Bridges' treatment, including her right total hip replacement surgery of February 10, 2010, her lumbar spine surgery of October 14, 2010, and her cervical spine surgeries of June 10, 2010 and October 15, 2014, were all attributable to her May 8, 2006 work occurrence.

The Arbitrator finds Dr. Chmell's opinions persuasive and well supported by his detailed physical examination and review of the voluminous medical records.

The Arbitrator notes that the Respondent failed to submit any medical opinion evidence or any other evidence to rebut Dr. Chmell's opinion. *(Pet. Ex. 1)*

The Arbitrator further notes that all of the medical records evidence as well as the Petitioner's testimony, fully supports the finding that a causal connection exists between the May 8, 2006 work injury and the Petitioner's resulting condition of ill-being of her right hip, lumbar spine and cervical spine.

K. Is the Petitioner entitled to TTD benefits?

The Arbitrator finds that the Petitioner was temporarily totally disabled for one week following her undisputed work injury of Monday, May 8, 2006. The dates of temporary total disability are from May 9, 2006, to May 15, 2006. This finding is based on Petitioner's unrebutted testimony. *(R. 14-15)* Because the Petitioner's temporary total disability lasted less than 14 days, the Respondent is not obligated to pay Petitioner for her first three days of temporary total disability. Therefore, the Petitioner is entitled to 4/7 week of TTD benefits at the TTD rate of $489.25 per week.

L. What is the nature and extent of the injury?

The Arbitrator finds that, as a result of her May 8, 2006, work injury, the Petitioner was rendered permanently and totally disabled under Sec. 8(f), commencing as of October 20, 2009.

In so finding the Arbitrator relies upon the testimony of the Petitioner, which was credible, as well as the opinions of permanent and total disability stated in the medical records by Dr. Gupta *(Pet. Ex. 15)* and Dr. Chmell *(Pet. Ex. 1)*

The Arbitrator notes that not only did Respondent not offer into evidence anything to rebut the opinions of Petitioner's treating and examining doctors, Respondent required Petitioner to apply for permanent total disability benefits under Social Security and provided Petitioner with legal representation to assist her in securing a fully favorable decision from the Social Security Administration Office of Disability Adjudication and Review, dated August 29, 2012, which granted Petitioner's application for disability benefits under the Social Security Act with an effective disability onset date of October 9, 2009. *(Pet. Ex. 16)*

The Arbitrator notes that there is no evidence in the record to support any finding other than that of permanent total disability. Dr. Samuel J. Chmell, Petitioner's examining orthopedic

surgeon, stated that, “As a result of the 5/08/2006 work occurrence, Ms. Bridges is fully disabled from gainful employment.” Dr. Chmell stated that as a result of her work injuries, Ms. Bridges could not even perform sedentary work. *(Pet. Ex. 1, p. 37)*

The Arbitrator places great weight to the opinion of Dr. Chmell on the condition of Petitioner. Dr. Chmell based his opinion on Petitioner’s pain in her neck and upper extremities, back and lower extremities, and the lateral aspect of her right hip when standing or walking. Also, sitting increases her back pain, and reaching with her arms can increase the neck pain. She has multiple areas of pain that make it difficult for her to stay on task and would make her a fall risk in a work environment. Her right leg tends to give out, and she was using a cane when Dr. Chmell examined her. *(Pet. Ex. 1, p 28)*

Dr. Gupta filled out a Physician’s Statement on March 27, 2012, stating that Ms. Bridges was permanently and totally disabled from employment in any occupation. *(Pet. Ex 15)* Dr. Blackman filled out a similar form on November 3, 2009, stating that, as of October 20, 2009, Ms. Bridges was temporarily totally disabled and that it was unknown whether she would be able to return to any employment. *(Pet. Ex. 15)*

The Petitioner, whose testimony the Arbitrator finds credible, testified that she has pain 24/7, with some days worse than others, in her neck, back, right hip and leg, left leg and foot, and right arm, and numbness in her left arm and shoulder. She stated that it is hard to raise her arms above her head. When she washes dishes, she must sit in a chair in the kitchen because she cannot stand for over two minutes because of the pain. She has a bench in her bathtub because she cannot stand to shower. When she makes her bed, she can do only one side at a time, with sitting down in between.

For the past seven years the Petitioner has been using a rolling walker to ambulate. She used a different walker and a cane before that. She also has a motorized scooter to get around that was ordered by Dr. Jill Powers, her primary care physician, because of the pain in her back. *(Pet. Ex. 7)* She is able to drive short distances occasionally to the store. She only patronizes stores that have scooters, because her back is so painful that she cannot even hold onto a shopping cart and walk. She has had no social activities in the 12 years since she moved to Iowa except going down to the community room in her building and playing bingo. She is unable to walk independently except for short distances and must hold onto things to move around. She still takes pain medications prescribed by Dr. Powers. The physical therapy ended in 2022, and the chiropractic treatment in 2020, because there was no more improvement. *(R. 22-31; Pet .Ex. 5, Pet. Ex. 6)*