ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC013617
Case Name	Cristie A Mayer v. Cook County Sheriff's Office
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0242
Number of Pages of Decision	27
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Michael Marovich,
Respondent Attorney	Jynnifer Bates-Cotharn,

DATE FILED: 6/1/2023

/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

CRISTIE MAYER,

Petitioner,

vs. NO: 13 WC 13617

COOK COUNTY SHERIFF'S OFFICE,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 10, 2022 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $597.52 per week for a period of 93 & 6/7 weeks, representing November 8, 2011 through October 18, 2012 and October 22, 2012 through August 27, 2013, 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. Respondent shall have a credit of $29,350.52 for TTD benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses detailed in Petitioner's Exhibit 18, including an unpaid $312.00 for treatment from Dr. Ramos, and $1,323.00 for out-of-pocket medical as provided in §8(a), subject to §8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, Respondent shall pay Petitioner directly the sum of $312.00 after all 8(j) credits have been applied, 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 shall provide and pay for recommended continuing treatment, medical expenses, including, but not limited to the recommended surgical intervention and and rehabilitative treatment arising from that surgery as provided in §8(a) of the Act.

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

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

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

Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

June 1, 2023

/s/ *Deborah J. Baker*

DJB/lyc

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	13WC013617
Case Name	Cristie A Mayer v. Cook County Sheriff's Office
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	24
Decision Issued By	Raychel Wesley, Arbitrator

Petitioner Attorney	Michael Marovich
Respondent Attorney	Jynnifer Bates-Cotharn

DATE FILED: 8/10/2022

/s/ Raychel Wesley, 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)

Cristie Mayer Case # **13** WC **13617**
Employee/Petitioner

v. Consolidated cases:

Cook County Sheriff's Office
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 **Raychel A. Wesley**, Arbitrator of the Commission, in the city of **Chicago**, on **April 28, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, November 8, 2011, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $46,606.56; the average weekly wage was **$896.28**.

On the date of accident, Petitioner was **35** years of age, **married** with **four** 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 $**29,350.52** for temporary total benefits that have been paid; $**0** for TPD; $**0** for maintenance and $**0** for other benefits, for a total credit of $**29,350.52**.

Respondent is entitled to a credit of $312.00 under Section 8(j) of the Act.

ORDER

- Respondent is liable for all reasonable and necessary medical expenses related to the November 8, 2011 accident, including the unpaid services regarding Dr. Ramos' September 28, 2018 bill for $624.00 of which $312.00 is still due and owing; Respondent shall pay Petitioner directly the sum of $312 after all 8(j) credits have been applied.

- In addition, Respondent shall reimburse Petitioner $1,323.00 for out-of-pocket expenses paid by Petitioner for medical treatment;

- Respondent shall hold petitioner harmless for any claim for reimbursement from any health insurance provider for their payment of these expenses and shall provide any payment information to Petitioner if any such claim is made, including but not limited to those medical bills listed in Petitioner's Exhibit #18.

- Respondent shall pay continuing, medical expenses, including, but not limited to the recommended surgical intervention and any rehabilitative treatment arising from that surgery and current related treatment going forward.

- Respondent shall pay Petitioner temporary total disability benefits of $597.52 per week for 93 6/7 weeks, commencing 11/08/11 through 10/18/12 & 10/22/12 through 08/27/13, as provided in Section 8(b) of the Act.

- Respondent shall be given a credit of $29,350.52 for TTD already paid.

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

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

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

Raychel A. Wesley

Signature of Arbitrator

August 10, 2022

ICArbDec19(b)

Mayer v. Cook County
13WC 013617

This matter was heard before Arbitrator Raychel A. Wesley on Petitioner's 19b Petition on April 28, 2022. The issues in dispute are medical causal connection, the petitioner's entitlement to the payment of temporary total disability benefits, payment of medical expenses and ongoing treatment, including proposed surgery.

The Petitioner testified that on November 8, 2011, she was employed as a Correctional Officer in the Sheriff's Department of Corrections for Respondent. (Trial Transcript p. 21-25) She testified she had been employed with Cook County since January 31, 2011. (T. 25)

The Petitioner testified that on November 8, 2011, while working, she was walking to "roll call" when she slipped and fell. She testified that she was walking to the checkpoint to enter the division (post #5), where there is restricted access. (T. 29) She testified that she was walking toward the entrance way when she slipped and fell backwards and hit her head on the pavement that was slippery and wet due to the rain. (T. 32) The petitioner testified that she fell and hit her tailbone and head on the pavement. (T. 33)

The Petitioner testified that she received an accident report from Sergeant Young, and she completed it on November 9, 2011. (T. 36, PX. 2)

The Petitioner testified that she initially received treatment at Mount Sinai emergency room (T. 30) She underwent an MRI scan of the brain without contrast (PX. 3) The impressions revealed a normal scan. (PX. 3) She also underwent x-rays of the cervical spine that revealed no fracture of C1 through T1. (PX. 3) She underwent x-rays of the lumbar spine that revealed mild degenerative changes through the lumbar spine and mild levoscoliosis that limited evaluation of the intervertebral spaces. (PX. 3) Petitioner was diagnosed with a fall, and a blunt head injury, and she was referred to Dr. Perez for further evaluation. (PX. 3) Petitioner underwent a CT scan

of the brain without contrast on November 9, 2011. The impressions revealed a normal CT scan of the brain. (PX. 3) She treated with Dr. Perez of Midwest Primary Care who (T. 41) diagnosed a cervical strain and a concussion. He prescribed physical therapy and authorized her off work. The petitioner was evaluated on November 9th, November 15th and December 1, 2011 by Dr. Perez. She complained of cervical pain, headaches and blurred vision. (PX. 2) She underwent an MRI scan of the cervical spine on December 6, 2011 that revealed mild reversal of the normal cervical lordosis centered at the C4 level, multilevel degenerative changes of the cervical spine that were most significant C3-6. (PX. 3) There were degenerative changes at several levels, but they did not appear to significantly deform the spinal cord. There were also several levels of neural foraminal narrowing. (PX. 3)

On January 5, 2012, the petitioner underwent the first of several independent medical examinations with Dr. Zelby. She reported an injury at work on November 8, 2011. She reported pain at the bottom of her neck extending into the tops of the shoulder blades, more to the right. She also complained of pain in the right arm one to two times per week. She described her neck pain as constant and complained of suboccipital headaches once every one to two weeks. She was able to drive her car and put on her shoes and socks. Dr. Zelby performed a physical examination and noted review of the petitioner's MRI scan report from December 6, 2011. He diagnosed underlying degenerative cervical spondylosis and a cervical strain. He explained that her MRI revealed degenerative changes that were prominent on the left and would not cause right upper extremity symptoms. Dr. Zelby testified that there were no acute or post traumatic abnormalities, so it appeared the reported injury did not cause her degenerative condition to become symptomatic and it did not exacerbate her condition in any way. (RX. 1) He opined petitioner was neurologically normal on examination. He recommended 4-6 weeks of

progressive physical therapy, emphasizing range of motion, stretching and core strengthening exercises. He estimated she would be at maximum medical improvement on completion of same. He released her to return to light duty work. He opined she would be able to return to full duty work at the conclusion of physical therapy. (RX. 1, RX. 3) His subsequent examinations of the Petitioner on April 25, 2012, June 25, 2012, October 12, 2012, March 13, 2013, and March 28, 2014 were essentially the same. Petitioner presented complaints, treatment history and symptoms and Dr. Zelby consistently released her to return to work along the lines of his first examination of her. He did not agree with Petitioner's treaters course of treatment nor their recommendations for further care.

Petitioner continued to treat with Dr. Perez through his passing, at which time, she continued her treatment with Dr. Moshin, also of Midwest Primary Care and various other Midwest Primary Care physicians as identified below. Under the care of Dr. Perez, she was diagnosed with intervertebral disc disorder and cervical spondylosis with myelopathy. (PX. 3, PX. 17)

The petitioner participated in physical therapy at Accelerated Rehabilitation Centers. PX 5). She presented with occasional headaches that had increased in frequency. She also had cervical spine pain that radiated down the right upper extremity and right hand. She attended a total of 22 visits through May 3, 2012 and at that time she was able to meet 98.3% of her job demands. (PX. 5) On June 6, 2012, the petitioner was diagnosed with intervertebral disc disorder with myelopathy. (PX. 3) The petitioner underwent a functional capacity evaluation on June 20, 2012 that revealed she could perform 88% of her job duties (PX. 5)

On September 10, 2012, at Respondent's request, Dr. John Cherf performed an independent medical examination of the petitioner's right shoulder. He diagnosed painful right

shoulder "of unknown etiology" that is independent of the work-related injury of November 8, 2011. (RX. 16) He opined that there was no causal relationship between the November 8, 2011 work injury and petitioner's right shoulder symptoms (RX. 16) He reasoned that the petitioner had no complaint of right shoulder symptoms until May, and the mechanism of injury as described was insignificant for causing shoulder pathology. (RX. 16) He noted she had not received any treatment for her right shoulder, and he opined that she needed no additional treatment for her right shoulder. He also opined that petitioner could return to full duty work with no restrictions. This included unrestricted ability to drive a vehicle and carry a weapon/ firearm. (RX. 16) He testified that she reported no right shoulder symptoms until May of 2012, when she felt pain while performing home exercises. (RX. 14) He noted that the x-rays he took were normal. He testified that he was unsure of what was causing petitioner's right shoulder pain, and that the symptoms seemed independent of the injury in question. (RX. 14)

Petitioner treated with Dr. Desai of Little Company of Mary on referral from Dr. Perez who first evaluated the petitioner on December 3, 2012. (PX. 6) He noted her complaints and recommended an EMG and recommended that she work the day shift to prevent any worsening of her condition. (PX. 6, PX. 11)

The petitioner first treated with Dr. Mohsin on February 26, 2014. Her diagnoses included migraine with aura, cervical spondylosis with myelopathy, and intervertebral disc disorder with myelopathy, and deferred making any determination regarding her return to work pending her consult with Dr. Earman. (PX. 4)

On March 7, 2014, the petitioner presented to Dr. Earman of OrthoSpine Center, Ltd. for the initial evaluation. She presented with her chief complaints, and history of accident. Her past medical history was reviewed. Dr. Earman reviewed the MRI scan from March 2011 and

diagnosed cervical disc degeneration and cervical spondylosis without myelopathy. He recommended that she continue working light-duty and requested a repeat MRI scan to compare to the 2011 study to determine if there was progression in any of the levels. He also recommended ongoing inflammatory use and other medications to keep her comfortable. (PX. 7

On March 10, 2014, the petitioner had another cervical MRI which showed cervical spondylosis. The findings revealed slight loss of normal cervical lordosis centered at the C4 level. There was mild to moderate central stenosis at C3 – 4 level and mild central stenosis at C4 – 5 and C5 – 6 due to disc bulge and osteophyte. There was also bilateral foraminal stenosis at C5 – 6 and bilateral foraminal narrowing at C4 – 5. Dr. Earman interpreted it as showing pressure on the spinal cord at the C4-5 level and compression on the spinal cord at C4-5 but not on the spinal cord. (T. 22, PX. 7)

Petitioner returned to Dr. Earman and he treated her through her release to return to work with restrictions. He made a referral to Dr. Mochinzuki, who treated out of the same office as Dr. Shin. (PX. 7)

On December 9, 2016, the petitioner treated with Dr. Shin, on referral from Dr. Earman. (T. 48, PX. 9) Dr. Shin testified that he specializes in physical medicine and rehabilitation. (PX. 9) Dr. Shin testified that petitioner's complaints at the time of his initial evaluation included "neck pain chronic and acute numbness and weakness in extremities." (PX. 9) He testified that petitioner was working modified duty work at the time of the evaluation. He also testified that petitioner's pain complaints that day "may or could have persisted" as a result of the November 8, 2011 work accident. (PX.). He testified that his diagnosis was chronic pain, which was pain that persisted for a minimum of six months. (PX. 9) He noted that petitioner reported primary

area of pain was in the neck, but she also had pain in her upper arms and shoulders. He testified that he ordered a second MRI scan of the cervical spine to evaluate the level of degeneration compared to the past. (PX. 9) He testified that his treatment plan considered referral to an interdisciplinary, non-interventional, non-opioid based chronic pain program. (PX. 9)

On September 7, 2017, the petitioner underwent an MRI scan of the cervical spine at Palos Hospital with indications of neck pain. The diagnostic was compared to a prior study taken on December 6, 2011. No definite acute appearing abnormality was seen compared to the prior exam. (PX. 9, PX. 17)

On April 4, 2018, the petitioner presented to Midwest Primary Care for treatment with Dr. Jennifer Courts. She presented for follow-up regarding her MRI scan results. She had chronic neck pain, she stated she had undergone an EMG for arm and hand pain related to the neck compression. She also stated her left hand felt weaker and more painful recently. She was scheduled with neurology for an appointment in May and confirmed participating in physical therapy in the past. Physical examination revealed limited range of motion of the neck and left-hand grip that was weaker than the right. Dr. Courts diagnosed spinal stenosis and the cervical root region. She noted review of the cervical spine and referred her to neurosurgery based on the findings. She diagnosed migraine with aura and prescribed medication. (PX. 4) She received conservative care from her through February 18, 2020. It was noted that she saw an orthopedic physician on February 3, 2020 and he wanted to perform a cortisone injection followed by more physical therapy.

On September 28, 2018, the petitioner presented to Dr. Ramos, neurosurgeon, at University of Chicago on referral from Dr. Mohsin for a second opinion. (T. 52, PX. 4) Dr. Ramos reviewed the petitioner's medical history. Dr. Ramos opined that the petitioner was

symptomatic with chronic neck pain, radiculopathy, sensory loss in the hands and early malign myelopathy with weakness in the hands and hyperreflexia. He also acknowledged cervical spondylitic changes of the cervical spine with associated stenosis. He recommended she consider surgery to compress the spinal cord in the form of anterior cervical approach at C4-5 and C5-6 levels. He also recommended an arthroplasty over fusion but would need x-rays and a CT scan to determine her candidacy for same. He indicated this cervical discectomy and fusion may also be an option. He requested a follow-up visit after the diagnostic reports were complete. (PX. 10, PX. 17)

On March 12, 2019, the petitioner returned to Dr. Mohsin for follow-up visit. She stated that she would like to return to full duty status, and she was working light-duty as a result of a neck injury. She stated that she wanted to return to full duty with no restrictions and she could not have any restrictions due to some changes at work. She still had neck pain and was getting acupuncture to help her. A physical examination revealed that her neck was supple and Dr. Mohsin diagnosed intervertebral disk disorder with myelopathy. He agreed to remove her restrictions and released her to return to full duty work.

The petitioner had a telephone conference with Dr. Ramos on June 4, 2019. He ordered a CT scan and an MRI scan of the petitioner's cervical spine for preoperative planning purposes. (PX. 10).

On June 12, 2019, the petitioner underwent x-rays of the cervical spine. The impressions revealed degenerative changes at C4-5 and C5-6 levels. (PX. 5)

On June 27, 2019, the petitioner underwent an MRI scan of the cervical spine without contrast. The impressions revealed broad based central disc protrusion at C6-7 resulting in mild

central canal stenosis, new from prior exam of March 15, 2018; there was multilevel degenerative spondylosis elsewhere in the cervical spine that was otherwise not significantly changed from the prior examination. This is most severe at C4-5 and C5-6 where there is moderate and mild to moderate central canal stenosis, respectively. Multilevel up to severe neural foraminal narrowing was noted. (PX. 13) Dr. Ramos testified that he reviewed the findings of the diagnostics and recommended cervical laminoplasty surgery for the petitioner to potentially alleviate her pain complaints with respect to spinal cord compression. (PX. 10) Dr. Ramos testified that he was unable to provide a causation opinion with respect to basis of petitioner's need for surgery. (PX. 10)

Also on June 27, 2019, the petitioner underwent a CT scan of the cervical spine without contrast. The impressions revealed multilevel degenerative spondylosis of the cervical spine that was most significant at C4-5, where there was a broad-based disc osteophyte complex resulting in moderate central canal stenosis. There was minimum disc vacuum phenomenon immediately superior and inferior to the broad-based disc phenomenon immediately superior and inferior to broad based disc bulge, new from the prior exam of February 9, 2018. The findings were of unclear clinical significance and may simply indicate evolution of degenerative disc disease. The degree of central canal narrowing was grossly unchanged; there was bilateral osseous neural foraminal narrowing; there was broad-based central disc protrusion at C6-7 resulting in mild central canal stenosis, new from prior CT of February 19, 2018. (PX. 13)

On September 16, 2019, Respondent's Dr. Graf performed an independent medical examination of the petitioner's cervical spine. Dr. Graf requested additional information to provide a causation opinion. (RX. 11) On January 10, 2020, Dr. Graf authored an addendum to his September 16, 2019 report. He acknowledged review of additional records to provide a

causation opinion. (RX. 12) He reviewed films of the December 6, 2011 MRI of the cervical spine, a September 7, 2017 MRI of the cervical spine, a February 9, 2018 MRI scan of the cervical spine, the March 5, 2018 MRI of the cervical spine, a February 27, 2019 MRI scan of the cervical spine, June 12, 2019 x-rays of the cervical spine and a June 27, 2019 MRI scan. (RX. 12) Dr. Graf opined that the petitioner's initial neck and vague arm complaints were causally related to the November 8, 2011 work injury, but at the time of his evaluation of the petitioner, her pain appeared to be secondary to right lateral epicondyle pain only. He explained that this would not relate to the cervical spine and would not improve with a cervical surgery. (RX. 12). He opined that petitioner had mild to moderate cervical degeneration in 2011. The imaging studies showed worsening of the cervical degeneration with time. He opined that this was normal progression of typical cervical spondylosis. (RX. 12) He explained that it was possible that petitioner's cervical complaints were related to a February 2017 injury. (RX. 12) He opined that the petitioner's course of treatment had been prolonged in nature, and he agreed with Dr. Zelby that petitioner had reached maximum medical improvement in March of 2014. (RX. 12) He opined that an anterior cervical decompression and fusion at C4-5 and C5-6 would be reasonable, but he questioned the level of improvement the procedure would offer. (RX. 12) Dr. Graf testified that the imaging studies showed congenital spinal stenosis, which is a narrowing of the spinal canal that would be from a congenital cause, or "that she was born with it." He explained that some people have slenderer spines than others. (RX. 9a) He testified that he diagnosed pre-existing cervical spinal stenosis and ongoing degeneration prior to the claimed injury. (RX. 9a) He testified that it was his opinion that the petitioner's course of treatment through the date that Dr. Zelby opined she had reached maximum medical improvement, or on March 28, 2014 (RX. 9a) Dr. Graf testified that he described petitioner's right arm complaint as

"vague" because they did not follow a specific anatomic nerve root distribution. (RX. 9a) Dr. Graf testified that the objective findings did not support a finding of myelopathy because the petitioner did not have a positive Spurling's sign, Hoffman's sign, or inverted radial reflex. (RX. 9a) On October 28, 2020, Dr. Graf completed an addendum report for the petitioner. He reviewed the petitioner's June 3, 2012 functional progress note, and he opined that petitioner was capable of returning to full duty work at the time of the June 3, 2012 evaluation, regardless of causation. (RX. 13) Dr. Graf testified that he identified nonorganic pain signs when evaluated the petitioner with respect to pain that was out of proportion to the evaluation (RX. 9a) He explained that her 8-9/10 pain ratings were extreme because he had a normal neurologic examination. He noted that her pain levels were more consistent with someone who was hospitalized. (RX. 9a)

On July 9, 2021, the petitioner presented at Little Company of Mary for evaluation of her neck pain. She had ongoing neck pain with neuropathy down both arms to her hands, and she wanted to discuss whether she should have surgery. She was diagnosed with cervical spondylosis with myelopathy and migraine with aura. She was advised to contact Dr. Goldberg for a second opinion regarding her surgical candidacy but testified that she was unable to schedule with him and thus, Dr. Goldberg never evaluated the petitioner. (T. 49-52) The petitioner testified that she wishes to undergo cervical surgery. (T. 54)

CONCLUSIONS OF LAW

Respondent made numerous *Ghere v. I.C.*, 278 Ill.App.3d 840, 663 N.E.2d 1046 (4th Dist. 1996) objections during Petitioner's treating physician's evidence depositions[1] The Arbitrator

[1] .[1] (PX. 10, page 30, lines 16-23; PX. 10, page 31, lines 4-6; PX. 10, page 38, lines 8-11; PX. 6, page 16, lines 7-9 and page 24, lines 4-6; PX. 4, page 39, lines 18-22 and page 74, lines 2-4; PX. 9, page 15, lines 3-5 and page 19, lines 19-23 and PX. 7, page 24, lines 18-23 and page 25, lines 1-5 and 7-10 and PX. 8, page 8, lines 9-11).

overrules any *Ghere* objections made by Respondent finding that the treating physicians who testified for Petitioner did not generate reports and that Petitioner's tendering of all the medical records involved in this case far before 48 hours of this 19(b) hearing eliminated any *Ghere* issues.

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

Respondent stipulated that it paid TTD to Petitioner for the time period of November 8, 2011 to October 18, 2011. (Arb. Ex. 1). By doing so, Respondent has conceded that Petitioner's injuries during that time period were causally connected to her November 8, 2011 work accident and also encompasses causal connection of the injury. *Fontalvo v. Food Team Inc*., 12 IWCC 0565, 2012 WL 2131244 (2012).

Based on the evidence presented, the Arbitrator finds that all aspects of Petitioner's neck, right shoulder, right arm and right hand injury are causally connected to her November 8, 2011 work accident as supported by the testimony and medical records in this case. The Arbitrator finds that the opinions of Petitioner's treating physicians are more credible than Respondent's experts. Her treating physicians consistently and credibly testified that it was their opinions, based upon a reasonable degree of medical and surgical certainty, that her current complaints are either directly caused by her November 8, 2011 work accident, or that this work accident was "a" cause of them. Dr. Mohsin stated that her EMG results correlate to nerve injuries in her cervical spine. (PX. 4, page 39). He stated that the EMG results show probable injury in her neck from C7 to T1. (PX. 4, pages 39-40). He also feels that the injuries that caused the EMG test results would have had to happen before December 14, 2012 and the injuries to the nerves in her neck would have been present far before any car accident that happened in 2014 or any fall downstairs that happened in 2018. (PX. 4, page 40). It is his opinion that her December 14, 2012 EMG test

results are consistent with her complaints about falling on November 8, 2011 and hitting the back of her head and the complaints that she had to the doctors at Midwest Primary Care after that date. (PX. 4, page 40).

Dr. Mohsin further testified that her complaints would be consistent with an aggravation of her cervical stenosis. (PX. 4, pages 49-50). It is his opinion that as a result of her November 8, 2011 fall at work, she sustained a neck injury that is causing problems with the nerve and this is causing pain, discomfort and weakness in her right upper extremity. (PX. 4, page 82). He also feels that it caused her to develop migraines. (PX. 4, page 82). He testified that the November 8, 2011 fall at work was at least one cause or "a" cause of the medical conditions he treated her for and that all the treatments and diagnostic testing that he ordered, or that are shown in her Midwest Primary Care medical records, were reasonable and necessary to treat the injuries she sustained in her November 2011 fall at work or that were aggravated by it. (PX. 4, pages 82-83).

No doctor testified on Respondent's behalf that any alternative traumatic incident is the cause of Petitioner's current medical complaints. Instead, Respondent's experts all believe her current complaints are due to the natural progression of the degenerative conditions in her cervical spine which, they contend, existed prior to November 8, 2011.

No medical evidence was presented to establish that Petitioner had suffered from migraines prior to November 8, 2011. The fact that there was testimony that Petitioner told certain doctors that she had migraines prior to November 8, 2011 was directly contradicted by her credible arbitration testimony and the fact that no medical records have been presented which establish this fact (T. 21). The Arbitrator adopts the causal testimony of Petitioner's treating physicians based on the above.

The Arbitrator adopts Petitioner's medical expert testimony over Respondent's Drs. Cherf and Graf. Dr. Cherf's role in this matter was to render opinions regarding any shoulder injury Petitioner sustained in her November 8, 2011 fall at work. (RX. 14, page 27). Petitioner is not claiming a right shoulder injury in this matter, she is complaining of a cervical spine injury that affects her right shoulder area, arm and hand. In addition, one of the basis for his opinions in this case is that Petitioner did not complain of any right shoulder symptoms such as pain until May of 2012. (RX. 14, pages 15, 28 & 37). This allegation is in direct conflict with the medical evidence presented which established that within six days of the date of this accident, Petitioner reported right shoulder pain that went down her right arm. (Ex. 2, Bates 48 of PX. 4). Furthermore, Dr. Cherf noted that she first noticed her right shoulder pain in May of 2012 after doing some at home physical therapy exercises involving rubber bands. (RX. 14, pages 28-29) Neither he, nor any other doctor in this case has testified that her current complaints have anything to do with this May 2012 incident. More importantly, even if someone did, it would be an injury that directly arose from Petitioner performing at-home medical treatment due to the injuries she sustained in her November 8, 2011 work accident. (See T. 54-56).

The Arbitrator relies on Petitioner's medical expert testimony over Respondent's Dr. Graf because his opinions are not supported by the medical records admitted or the facts presented. Dr. Graf testified that he felt Petitioner's initial arm and neck complaints and medical treatments, up until March 28, 2014, were causally connected to her November 8, 2011 fall at work, but no treatment after that date was. (RX. 9a, page. 26-27 & 30). The medical records and testimony presented in this case establish that Petitioner has consistently and repeatedly made complaints of pain with her right shoulder, arm and hand. She also had the same complaints after March 28, 2014. As such, Dr. Graf failed to explain how all her complaints and

medical treatment up to March 28, 2014 could be related to her November 8, 2011 fall, but none after that date, when none of her symptoms or complaints changed.

In addition, he felt that her current complaints were due to her stenosis. (RX. 9a, pages 32-33). While this may be true, Dr. Graf failed to explain how her stenosis wasn't aggravated by her fall at work given that prior to November 8, 2011, any pre-existing conditions she had, were asymptomatic, but became symptomatic after her fall. His position is especially confusing given that he believes that her initial neck and "vague" arm complaints were causally connected to her fall. (RX. 9a, pages 33, 34, 37-38, 40 & 42). He attempts to justify this position by saying that the fall only caused a temporary exacerbation of her pre-existing condition which lasted until March 28, 2014. (RX. 9a, page 43). This opinion is not supported by the medical evidence presented inasmuch as the evidence presented showed that her neck and arm complaints continued consistently from March 28, 2014 to the present. He fails to reconcile his opinions with the medical evidence presented.

Some of Dr. Graf's testimony supports Petitioner's position in this matter. Dr. Graf feels that the surgery being suggested is not a "completely unreasonable" recommendation. (RX. 9a, page 54). He also stated that if she had pain in her right shoulder that radiated down to her wrist on November 15, 2011, this would be indicative of cervical radiculopathy. (RX. 9a, page 76). He also stated that he does not feel that Petitioner is malingering. (RX. 9a, age 76-77). This opinion appears to directly conflict with Dr. Zelby's opinion that many of Petitioner's complaints are the result of symptom amplification. (RX. 1, pages 94-95).

The Arbitrator adopts Dr. Mohsin's testimony in which he states that he does not feel that her motor vehicle accident or subsequent 2018 fall are a cause of her symptoms. (PX. 4, page 91). It is his opinion that the subsequent fall might have caused some exacerbation of the pain

but the pathology or the damage that was done was definitely from the November 8, 2011 fall and the symptoms from the November 8, 2011 fall. (PX. 4, page 91). He further thinks that this is the reason that she needs the surgery. (PX. 4, page 91). As supported by Dr. Earman's office notes, prior to the date of this May 2014 automobile collision, anterior cervical discectomy with fusion of her C5-6 surgery were already being discussed. (PX. 7, page 26). As testified to by Dr. Mohsin, it would appear that her pain levels had returned to pre-auto accident levels shortly after the date of the car collision given that on July 28, 2014, she had no findings on exam that were attributed to, or pain complaints that she had previously mentioned that she noted after this car accident. (PX. 4, page 96, 97 & 98 & Ex. 3, Bates 28-31 of PX. 4).

With respect to Paragraph J, were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary, the Arbitrator finds as follows:

Based upon the Arbitrator's findings in Section F, the Arbitrator finds that the medical services provided to Petitioner in this case were reasonable and necessary. This was testified to by Petitioner's treating physicians, Mohsin, Earman, Shin and Ramos. (PX. 4, page 83; PX. 7, page 37; PX. 9, pages 24-25 & PX. 10, page 30). In addition, even Respondent's experts stated that they felt that Petitioner's medical treatment, up to certain dates, were reasonable and necessary. (RX. 1, pages 39-40 & 84 and RX. 9a, pages 22 & 28).

The Arbitrator further finds that Respondent has not paid all appropriate charges for all reasonable and necessary medical services. Respondent shall pay all medical bills per the applicable fee schedule and shall hold Petitioner harmless if BCBS of Illinois attempts to recoup any payment made by them. The Arbitrator further finds that Respondent is responsible for all bills listed in PX. 18, up to the applicable fee schedule, and shall hold Petitioner harmless if BCBS of Illinois attempts to recoup any payment made by them for those charges.

With respect to Paragraph K, Is Petitioner entitled to any prospective medical care the Arbitrator finds as follows:

The Court may order an employer to authorize prospective medical care, upon findings of: 1) a causal connection between the claimant's current condition and their injuries; and 2) that the recommended treatment is reasonable and necessary to treat the injuries.

The need for prospective surgery is supported by Petitioner's treating physicians' testimony in this case and the medical records admitted into evidence.

Dr. Moshin testified that he believed that Petitioner needed surgery and that he agreed with her neurosurgeon's recommendations. (PX. 4, pages 71-73) He testified that he felt she needed surgery because her symptoms were ongoing and were progressively getting worse. (PX. 4, pages 73-74). It is his opinion that she might or could benefit from the proposed surgery that is being recommended and he doesn't have any objection to it. (PX. 4, pages 83-84). He felt that she still has symptoms which indicates to him that she needs surgery, especially due the fact that she is losing strength in her hand and arm. (PX. 4, page 88). He does not feel that her motor vehicle accident or subsequent fall is a cause of her previous symptoms; the subsequent fall might have caused some exacerbation of the pain but the pathology or the damage that has been done is definitely from the November 8, 2011 fall, the symptoms from the November 8, 2011 fall; he has based his opinions and recommendations on this as the basis for surgery. (PX. 4, page 91).

Dr. Ramos testified that it is his opinion that she needed a cervical laminoplasty surgery involving her C4-5 and C5-6 levels in which he would do a posterior, or back of the neck, approach to avoid having hardware placed in her spine. (PX. 10, pages 26-27 & Ex. 2, Bates 7-8 of PX. 10). He felt that this surgery would help, potentially, to alleviate her complaints she

presented to him and she would benefit from the surgery. (PX. 10, page 30). He felt that it was a reasonable treatment option to deal with her complaints. (PX. 10, page 30).

The Arbitrator finds that Petitioner has established that her current medical complaints are related to her November 8, 2011 fall at work. Therefore, there does exist a causal connection between Petitioner's current condition and the injuries she suffered in her November 8, 2011 work accident. Based on the foregoing, the Arbitrator finds that the recommended surgery is reasonable and necessary to treat the injuries she sustained in her November 8, 2011 work accident.

With respect to Paragraph L, What temporary benefits are in dispute, the Arbitrator finds as follows:

The parties agree that between November 8, 2011 and October 18, 2012, Respondent paid temporary total disability benefits to Petitioner as a result of her November 8, 2011 fall at work. Dr. Graf testified that he felt Petitioner was capable of returning to work as of March 28, 2014 (RX. 9a, pages 30-31), some two years after the date suggested to by Dr. Zelby. Dr. Graf's testimony, if accepted as true, would be contrary to Respondent's position that they did not owe Petitioner TTD from October 22, 2012 through August 27, 2013. Petitioner is claiming that she was not paid TTD while off work from October 22, 2012 through August 27, 2013. It would appear that even Respondent's IME Dr. Graf would support that position given that he testified that Petitioner should have been able to return to work after March 28, 2014. (RX. 9a, pages 30-31).

Despite the contradictory testimony of Respondent's IME doctors, the Arbitrator places more credibility in the testimony of Petitioner's treating physicians in this matter.

Petitioner introduced various off work notes from her treating physicians, all of which support her claim for TTD benefits.[2] She was not paid any TTD from July 3, 2013 through August 27, 2013. (T. 73). Respondent's Exhibit 17 corroborates Petitioner's testimony. This exhibit shows that no TTD payments have been made by Respondent since October 18, 2012. (RX. 17) The Arbitrator further finds that between the dates of July 3, 2013 to August 27, 2013, a time period of 7 and 6/7 weeks, Petitioner attempted to work but was not permitted to do so by Respondent. Further, the medical records submitted for these time periods indicated that Petitioner was still suffering from pain in her neck, shoulders and right arm with tingling and numbness running from her neck to her fingers. She also had cervical injections done during this time period. (Ex. 2, Bates 10-12 of PX. 4). Additionally, she was undergoing diagnostic testing during this time and suffering from migraines. (Ex. 3, Bates 62-65 of PX. 4; PX. 6, pages 10-13 and Ex. A, Bates 3-8 of PX.6; Ex. 3, Bates 54-56 of PX. 4 & Ex. 3, Bates 48-51 of PX. 4).

The Arbitrator finds that Petitioner was entitled to TTD from November 8, 2011 to October 18, 2012 and October 22, 2012 through August 27, 2013, or a total of 93 6/7 weeks.

With respect to Paragraph N, Is Respondent due any credit, the Arbitrator finds as follows:

For the University of Chicago/Dr. Ramos medical bill of $624.00, Respondent shall be entitled to a Section 8(j) credit of $312.00 towards this bill.

With respect to Paragraph O, Is Petitioner entitled to reimbursements for out-of-pocket expenses paid by her and is Respondent required to indemnify or hold harmless Petitioner for any medical payments made by BCBS of Illinois, the Arbitrator finds as follows:

[2] (PX. 20, Bates 3), (PX. 20, Bates 3), (Ex. A, Bates 14-16 of PX. 6), (Exhibit 2, Bates 10-12 of PX. 4), (PX. 20, Bates 6), (PX. 20, Bates 6), (PX. 20, Bates 7, 8, 9, 10 & 11), (T. 65-66), (PX. 20, Bates 11), (PX. 19), (T. 69-70 & 71), (T. 71), (T. 72), (T. 72).

Petitioner submitted evidence that her husband's health insurance carrier, Blue Cross/Blue Shield of Illinois (hereinafter called "BCBS"), paid for certain medical treatments from November 8, 2011 through December 31, 2016. (T. 79 & PX. 18) As of January 1, 2017, her medical insurance carrier, BCBS of Illinois paid for medical treatments until the present. (T. 79-80). The treatment dates and billing amounts were submitted into evidence as Petitioner's Exhibit #18.

The Arbitrator finds that these bills correspond to the specific medical records and billings admitted into evidence that are attached to Exhibit 18 and which Drs. Mohsin, Desai, Earman and Shin all testified were causally connected to Petitioner's November 8, 2011 work accident. (PXs. 4, page 83; PX. 6, pages 29-30; PX. 7, page 7 & PX. 9, pages 34-35.). In addition, Dr. Edwin Ramos testified that her complaints and symptoms presented to him on September 28, 2018 were caused by what he observed on her MRI films from September 17, 2017 and 2019 CT scan. (RX. 10, pages 21, 35, 37 & 38). The Arbitrator further finds that Petitioner's Little Company of Mary Hospital treatments listed in PX. 18 were for treatment of her neck, shoulder and cervical spine injuries sustained in her November 8, 2011 work accident and the development of migraine headaches afterwards which Petitioner testified caused her to become dizzy, unsteady and to fall at times. (T. 60-61 & 2 & Ex. 10, Bates 1-22 of PX. 4). The Arbitrator finds that these services were fair and reasonable and causally related to her November 8, 2011 work accident.

Respondent shall reimburse Petitioner $1,323.00, as itemized in PX. 18, for reasonable and necessary medical expenses which Petitioner paid out of pocket. Said payments shall be made directly to Petitioner and shall not contain the name of any medical providers or BCBS as payees, pursuant to *Carreno v. Cambridge Homes*, 09 I.W.C.C. 0940, 2009 WL 3269723.

Pursuant to *Springfield Urban League v. IWCC*, 2013 IL App (4th) 120219 (Ill. App. 2012) Respondent shall indemnify and hold petitioner harmless for any claim for reimbursement from any health insurance provider for their payment of any expenses listed in Petitioner's Exhibit 18, and shall provide any payment information to Petitioner if any such claim is made.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC023574
Case Name	Stephanie Figueroa v. DHL Express Inc
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0243
Number of Pages of Decision	24
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Andrew Kriegel
Respondent Attorney	Christopher Jarchow

DATE FILED: 6/5/2023

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

STEPHANIE FIGUEROA,

Petitioner,

vs. NO: 21 WC 23574

DHL EXPRESS, INC.,

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 accident, causation, medical expenses, prospective medical treatment, temporary total disability benefits and permanency and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Statement of Facts contained in the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission adopts the Statement of Facts contained in the Arbitrator's Decision, with the following corrections of scrivener's errors:

In the third line of the second paragraph under the Findings of Fact on page 2 of the Arbitrator's Decision, the Commission strikes the duplicate phrase "deliver a package".

In the partial sentence in the last line of the second paragraph on page 2 of the Arbitrator's Decision, the Commission strikes the word "to" and replaces with the word "on".

In the fourth paragraph on page 5 of the Arbitrator's Decision, the Commission strikes the third and fourth sentences.

In the last sentence of the second full paragraph on page 7 of the Arbitrator's Decision, the Commission inserts the word "to" before "recommend".

In the fourth line of page 9 of the Arbitrator's Decision, the Commission replaces the word "October" with the word "November".

Additionally, the Commission strikes the Arbitrator's Conclusions of Law and replaces with the following Conclusions of Law:

ACCIDENT

The Petitioner testified that she was working for Respondent delivering packages when the dolly she was using to deliver a heavy package blew a tire. The package was leaning forward and Petitioner went over with the package and the dolly and in that moment, she felt the strain on her back and then the pull. (T. 14)

The contemporaneous medical records of Concentra, Dr. Madireddy and Dr. Fisher are consistent with the Petitioner's description of the mechanism of injury as well as pain complaints. (Px5, Px6, Px7) Petitioner testified that she reported the accident to her supervisor on the same date on which the accident occurred and subsequently sought medical treatment on August 12, 2021, wherein she reported a consistent mechanism of injury. She reported a history of no prior injuries to her upper back and was diagnosed with a thoracic strain. (Px5) Petitioner followed up with Concentra, Dr. Madireddy and Dr. Fisher consistently, and at every appointment subsequent to her accident, provided the same description of the mechanism of injury. The Respondent has presented no evidence rebutting the accident, notice of accident or mechanism of injury.

The Arbitrator found Petitioner failed to prove she sustained an accident that arose out of and in the course of her employment with Respondent on August 10, 2021 and specifically found the Petitioner was not credible. The Arbitrator's finding was predicated on a string of supposed facts, including, but not limited to: (1) that Petitioner continued to work the remainder of her shift following the August 10, 2021 event; (2) the text messages to the supervisor reporting the accident were not in evidence and Petitioner could not even recall the last name of the supervisor; (3) Petitioner worked the day following the alleged event in a heavy demand level job and did not report the August 10, 2021 event in person until August 12, 2021; and 4) the fact that the Petitioner did not report the October 15, 2021 motor vehicle accident to Dr. Fletcher, obtained multiple tests to the same body parts from different providers and, in fact, did not testify as to this intervening event until it was elicited during cross examination.

Whether the Petitioner sustained an accidental injury that arose out of and in the course of her employment is a question of fact. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill.App.3d 665, 674 (2009). In resolving disputed issues of fact, 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. *Id.* at 675.

The Commission disagrees with the Arbitrator's interpretation of the evidence and concludes that Petitioner did, in fact, meet her burden of proof as it pertains to the issue of accident. First, Petitioner testified that although the strain was painful, she was able to continue to work the remainder of her shift as well as her shift on the following day. Once she experienced pain at a level where she was unable to get out of bed, she sought medical treatment. (T. 19-21) The Commission

finds that Petitioner credibly testified that although she initially felt pain, her injury progressed. Her description of injury and progression of pain is corroborated by the treating records of Concentra, Dr. Madireddy, and ultimately Dr. Fletcher. Next, the Commission finds that despite Petitioner's inability to recall the last name of the supervisor to whom she reported injury, or provide a copy of the text message, Respondent had a representative present at the trial who could have been called as a witness to refute this testimony and did not. Finally, the Commission finds that Petitioner was not untruthful regarding the October 15, 2021 accident, she simply did not testify to it on direct exam. When questioned during cross exam and redirect exam regarding the motor vehicle accident, Petitioner was forthcoming and did not deny the accident nor the body parts injured and treatment she received in relation to same. The Commission does not believe the omission of testimony regarding the motor vehicle accident on direct exam impugns the Petitioner's credibility as to the August 10, 2021 accident.

Therefore, after carefully considering the totality of the evidence, the Commission reverses the Decision of the Arbitrator as to accident and finds that the Petitioner met her burden of proof that she sustained an accident arising out of and in the course of her employment on August 10, 2021.

CAUSAL CONNECTION

In addition to proving accident, the Commission also finds Petitioner met her burden of proving that her condition of ill-being was causally connected to the work accident of August 10, 2021. Before the work accident of August 10, 2021, Petitioner had no prior complaints of injury or treatment to her thoracic spine. A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient to prove a causal nexus between the accident and the employee's injury. *Int'l Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 63-64 (1982). There is no evidence to suggest that Petitioner was injured and/or unable to perform her job prior to the work accident of August 10, 2021. Following the work accident, Petitioner sought medical treatment from the occupational clinic, her primary care physician, and ultimately an orthopedist. Petitioner's ability to perform her job duties was impeded and she was ultimately placed off work.

However, the Commission finds that on October 15, 2021, the Petitioner was involved in a subsequent intervening motor vehicle accident that broke the chain of causal connection between the work accident of August 10, 2021 and injuries sustained therein. The Commission finds that the medical records support that the mechanism of injury sustained in this accident resulted in more than a mere temporary exacerbation of the injuries the Petitioner sustained in the initial work accident.

Subsequent to the motor vehicle accident of October 15, 2021, the Petitioner began treatment with Dr. Koutsky on October 28, 2021. Dr. Koutsky noted that Petitioner had a history of low back pain in the past however "it was worsened on October 15 of 2021." (Rx8, p. 9) Dr. Koutsky further indicated an "aggravation of lumbar symptoms after being involved in a motor vehicle accident that occurred on October 15 of 2021." (Rx8, p. 10)

Every natural consequence that flows from an injury that arose out of and in the course of one's employment is compensable under the Act absent the occurrence of an independent

intervening accident that breaks the chain of causation between the work-related injury and an ensuing disability or injury. *National Freight Industries v. Illinois Workers' Compensation Comm'n*, 2013 IL App (5th) 120043WC ¶26. An employer is relieved of liability only if the intervening cause completely breaks the causal chain between the original work-related injury and the ensuing condition of ill-being. *Global Products v. Illinois Workers' Compensation Comm'n*, 392 Ill.App.3d 408,411 (2009). The Commission finds the automobile accident of October 15, 2021 rose to the level of a subsequent intervening accident, thus breaking the chain of causation between the work-related accident and ensuing disability or injury.

TEMPORARY TOTAL DISABILITY AND MEDICAL

Additionally, the Commission finds that the Respondent paid the temporary total disability payments and medical expenses through the date of the intervening accident and therefore does not award any additional benefits in the form of temporary total disability payments or medical expenses. Additionally, the Commission does not award any prospective medical treatment.

Finally, the Commission remands this matter to the Arbitrator for a determination of permanency.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on March 22, 2022, is reversed as stated herein.

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

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

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

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

June 5, 2023

MEP/dmm
O: 4/18/23
49

/s/ *Maria E. Portela*

/s/ *Deborah J. Baker*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC023574
Case Name	FIGUEROA, STEPHANIE v. DHL EXPRESS INC.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	19
Decision Issued By	David Kane, Arbitrator

Petitioner Attorney	Andrew Kriegel
Respondent Attorney	Christopher Jarchow

DATE FILED: 3/22/2022

THE INTEREST RATE FOR THE WEEK OF MARCH 22, 2022 0.87%

/s/ David Kane, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Stephanie Figueroa
Employee/Petitioner

v.

DHL Express, Inc.
Employer/Respondent

Case # **21** WC **023574**

Consolidated cases: **Not Applicable**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **David Kane**, Arbitrator of the Commission, in the city of **Chicago, IL** , on **March 1, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **August 10, 2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 $**47,760.61**; the average weekly wage was $**945.21**.

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 $**4,315.86** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**4,315.86**.

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

ORDER

For the reasons set forth in the attached memorandum, the Arbitrator finds petitioner lacked credibility and failed to meet her burden of proof on the issues of accident and causal connection.

Respondent shall have a credit for $4,315.86 in TTD benefits paid prior to trial.

The Arbitrator views the remaining disputed issues as moot. Compensation 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.

David A. Kane

Signature of Arbitrator

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Stephanie Figueroa,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 21 WC 023574
	)	
DHL EXPRESS USA, INC.	)	
	)	
Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties agree that on August 10, 2021 Petitioner and Respondent were operating under the Illinois Workers' Compensation Act and their relationship was that of an employer and employee. The parties agree that on August 10, 2021, Petitioner was 31 year old, single with zero dependent children. The parties agree that prior to trial Respondent paid $4,315.86 in TTD benefits.

The threshold issues in dispute in this claim include: (1) whether Petitioner suffered an injury that arose out of and in the course of her employment with Respondent on August 10, 2021, (2) whether Petitioner's current condition of ill-being remains causally connected to the alleged August 10,2021 work injury, (3) whether Respondent is liable for payment of medical bills from Concentra, Hermosa Medical & Diagnostic Center, and Illinois Bone & Joint Institute, (4) whether Petitioner is entitled to TTD benefits for the period of October 21, 2021 through March 1, 2022, and (5) whether

Respondent is liable for authorization and payment of prospective medical treatment pursuant to Section 8(a) of the Illinois Workers' Compensation Act.

FINDINGS OF FACT

Petitioner testified she is employed by DHL as a drive/courier. Petitioner testified that she was employed in this capacity for about one year. Petitioner testified her job required her to drive a truck or sprinter van, depending on her assignment for the day. Petitioner testified her primary job duties included delivering packages to customers. Petitioner testified that her work shifts were typically eight hours long though shifts could sometimes be up to 11 hours. Petitioner testified that her job duties included driving her vehicle to a destination, locating verifying packages and delivering various packages to customers. Petitioner testified that the packages could weigh anywhere from a few ounces to up to 80 pounds. Petitioner testified that she would use a dolly to assist with moving packages that weighed around 75-80 pounds.

At the time of trial petitioner was 31 years old (AX.1) Petitioner testified she was working for DHL on August 10, 2021 when she injured her back while delivering a package deliver a package weighing over 100 pounds. Petitioner testified that she slid the package onto a dolly when the tire blew out. Petitioner testified that she attempted to maneuver the package onto the dolly when she felt a pull and straining sensation in her mid to upper back. The Petitioner testified that she managed to deliver the package and then reported the injury to her employer via text message. Petitioner testified that she reported the injury to "Amanda." Petitioner claimed to not know Amanda's last name. Petitioner did not bring the text messages to the trial

date. Petitioner testified the event occurred sometime between approximately 11:00 a.m. and 1:00 p.m. Petitioner testified that this was the beginning of her shift and that she was able to complete the remaining deliveries. Petitioner testified she returned to work on August 11, 2021, the next day, and worked a full shift.

Petitioner testified that after her shift on August 11, 2021, her back pain became worse. Petitioner testified she went home that evening and felt a sharp/stabbing/tightness in her back. Petitioner testified she had difficulty getting out of bed. Petitioner admitted she did not seek medical treatment on either August 10th or August 11, 2021.

Petitioner testified the following day, August 12, 2021, she reported to work and spoke with her supervisor, Eboni Hawthorne. Petitioner testified she described to Ms. Hawthorne how she injured her low back two days prior on August 10, 2021. Petitioner testified that she then sought treatment at Concentra Occupational Clinic.

Petitioner initiated medical treatment with Concentra Medical Center on August 12, 2021. Petitioner was seen by Physician's Assistant, Sophie Nyambal. Petitioner complained of left upper back pain. Petitioner indicated the pain had radiated into her left armpit from her scapula. Petitioner had no complaints of numbness or tingling into her legs. Petitioner had no leg pain or low back pain at the time. X-rays of Petitioner's thoracic spine were normal. Petitioner was placed on light duty and told to follow-up. Petitioner was assessed with a thoracic spine strain (PX5; p.97-102)

Petitioner initiated Physical Therapy at Concentra August 12 and August 13, 2021 (PX5; p.64-96) and August 17-August 23, 2021 (PX5; p.29-51)

Petitioner followed-up at Concentra on August 16, 2021. Petitioner was evaluated by Dr. Koita. Petitioner reported no changes in her pain levels and she was diagnosed with a thoracic strain and told to continue light duty. (PX5; 9.52-63).

Petitioner returned to Concentra on August 26, 2021. Petitioner complained of upper back and low back pain. Petitioner now reported that the low back pain radiated to the left buttock. Petitioner was told to continue physical therapy and take Naproxen for pain. Petitioner was also given a Toradol shot and suggested to continue with light duty. (Px5; p.17-28).

Petitioner followed-up with Concentra Medical Center on September 2, 2021. Petitioner was evaluated by Dr. Nelkovski. Petitioner was recommended to continue with physical therapy. Petitioner was prescribed steroids for pain. Petitioner reported that her upper back was improving with therapy and that it was 80% resolved. However, Petitioner's lower back was only about 25% - 30% resolved. Petitioner was placed on light duty and told to continue with physical therapy. (PX5; p.6-16)

Petitioner initiated treatment with Hermosa Medical and Diagnostic Center on August 18, 2021Petitioner denied muscle aches, muscle weakness and joint pain. Petitioner denied swelling in the extremities. Petitioner's neurologic examination revealed a normal gait. Petitioner's

physical exam was essentially normal. Petitioner was assessed with a thoracic back strain. Petitioner was recommended to have an MRI of the thoracic spine. Petitioner was kept off work and recommended to return on August 25, 2021. (PX6; p.158)

Petitioner returned to Hermosa Medical Clinic on August 25, 2021. Petitioner's physical exam was normal. Petitioner's diagnosis was revised to include both thoracic and lumbar sprains. Petitioner now complained of radiating pain to the left buttock and left leg. Petitioner was recommended to have an MRI of both the thoracic and lumbar spines. (PX6; p.161-162)

Petitioner underwent an MRI of the lumbar spine at Advantage MRI on August 25, 2021. The radiologist interpreted the MRI showing a mild disc bulge with facet hypertrophy involving L3-L4, L4-L5, causing mild deformity of the thecal sac. There was mild neuroforamina narrowing. The nerve roots were within normal limits. (PX7; p.207)

Petitioner underwent an MRI the thoracic spine at Advantage MRI on August 25, 2021. The radiologist interpreted this MRI as being an unremarkable examination of the thoracic spine. (PX7; p.209)

Petitioner followed-up with Hermosa Medical Center on September 1, 2021. Petitioner's symptoms remained the same. Petitioner underwent MRIs on August 25, 2021 of the thoracic and lumbar spines. The August 25, 2021 MRI of the thoracic spine was found to be unremarkable. Petitioner's MRI of the lumbar spine of August 25, 2021 appeared to show a mild disc bulge, facet hypertrophy involving L3-4, L4-5, causing mild deformity of the

thecal sac. Petitioner's diagnosis of thoracic and lumbar sprains remained the same. Petitioner was referred to Dr. Theodore Fisher and kept on light duty. (PX6, p.163-165)

Petitioner initiated medical treatment with Dr. Theodore Fisher of Illinois Bone & Joint Institute on September 17, 2021. Petitioner presented for evaluation of the thoracic and lumbar spine. Dr. Fisher indicated that Petitioner did have MRIs completed of the thoracic and lumbar spine and had them with her. Petitioner denied any weakness, right sided symptoms, gait instability, over weakness, bowel, or bladder abnormalities. On neurologic examination, Petitioner denied tingling or numbness in the hands or feet. Dr. Fisher noted that on examination of her back, Petitioner presented with slight tenderness to the mid thoracic region on the right side. Petitioner had tenderness to palpation around the lower lumbar paraspinal muscles. Petitioner reported discomfort with extension and rotation of the back. Petitioner's lower extremities had 5/5 strength, normal reflexes, and negative Babinski. Dr. Fisher diagnosed Petitioner was thoracic pain, L4-L5 herniated disc and L5-S1 spondylolisthesis. Dr. Fisher recommended Petitioner undergo a repeat MRI of at least a 1.5 tesla given that the prior MRIs were reportedly of poor quality. (PX7; p.201-204)

Petitioner underwent a Section 12 examination with Dr. Vivek Mohan on October 6, 2021. Dr. Mohan testified he found positive Waddell signs on exam. (RX3; p.14-15) Dr. Mohan testified that the August 2021 thoracic and lumbar spines were normal and age appropriate. (RX3; p.21-22) Dr. Mohan testified he found no evidence of a low back injury at all. (RX3; p.23) Dr. Mohan testified that petitioner at most had a thoracic sprain that had resolved

after her treatment at Concentra (RX3; p.23-24) Dr. Mohan testified Petitioner attained maximum medical improvement and full duty work. (RX3; p.25-26)

Petitioner testified on cross-examination that she was involved in a motor vehicle collision on October 15, 2021. Petitioner testified she was traveling to be evaluated by Dr. Fisher when she was struck by another vehicle. Petitioner testified that she is involved in litigation for that October 15, 2021, motor vehicle accident. Petitioner admitted that she was treating with Dr. Koutsky following the October 15, 2021, motor vehicle accident. Petitioner did file an insurance claim for the October 15, 2021, accident motor vehicle accident. (RX10).

Petitioner was evaluated by Dr. Fisher on October 15, 2021, following the motor vehicle accident. Petitioner continued to complain of thoracic and lumbar pain for about two months. Dr. Fisher's records are silent regarding the motor vehicle collision that day. Dr. Fisher continued recommend Petitioner undergo a repeat MRI. (PX7; 181-182)

Petitioner began treatment with Dr. Koutsky on October 28, 2021. Petitioner's intake information indicated that she was represented by an attorney for the motor vehicle accident by the name of Lee Schneider. Petitioner provided a history of being a 31-year-old female present for evaluation of neck and low back pain. Petitioner described the low back pain as radiating down the left leg to her ankle including some numbness and tingling. Petitioner's symptoms reportedly began following a motor vehicle accident October 15, 2021. Dr. Koutsky points out that Petitioner does have

a history of low back pain in the past however "*it was worsened on October 15 of 2021*." (RX8; p.9) Dr. Koutsky explained Petitioner was a restrained driver when a car from the right T-boned her. Dr. Koutsky indicated Petitioner was present for cervical symptoms as well as an "*aggravation of lumbar symptoms after being involved in a motor vehicle accident that occurred October 15 of 2021*." (PX8; p.10) Dr. Koutsky recommended a repeat MRI and referred Petitioner to physical therapy. (RX8; p.9-10).

Petitioner underwent an MRI of her cervical spine on November 9, 2021. The radiologist interpreted the cervical MRI as showing straightening of cervical lordosis due to muscle spasm, multilevel disc desiccation, ligamentous flavum hypertrophy and facet joint arthropathy, with no significant disc herniation. (RX9; p.4-5)

Petitioner underwent an MRI of the lumbar spine on November 9, 2021. The radiologist interpreted this MRI as showing "straightening of lumbar lordosis possibly due to muscle spasm, disc desiccation, ligamentous flavum flavor hypertrophy, and facet joint arthroplasty, and diffused central disc bulge at L4-L5 causing mild thecal sac indentation without central canal stenosis or neuroforaminal stenosis." (RX9; p.6-7)

Petitioner returned to Dr. Fisher on November 17, 2021. Petitioner remained symptomatic in her low back. Petitioner's diagnosis was modified

to only include L4-L5 herniated disc, L5-S1 spondylolisthesis, and left sciatica. Dr. Fisher continued to recommend a repeat MRI. Dr. Fisher did not comment on the October 15, 2021, motor vehicle accident. Dr. Fisher did not comment on the MRIs that already took place on October 9, 2021. In fact, Dr. Fisher continued to recommend MRIs despite the fact that Petitioner just had them a few days prior. (PX 7)

Petitioner returned to Dr. Koutsky on November 29, 2021. Petitioner presented for recheck of her neck and low back pain. Petitioner described the low back pain as radiating down the left leg to her ankle and her heel including some numbness and tingling. Dr. Koutsky again indicated that Petitioner's low back pain *was worsened* on October 15, 2021, following a motor vehicle accident. Dr. Koutsky indicated that Petitioner's lumbar symptoms were *aggravated* following the October 2021 motor vehicle accident. Dr. Koutsky recommended injections which Petitioner refused. (RX8; p.15-16)

Petitioner followed up with Dr. Fisher on December 15, 2021. Dr. Fisher's recommendations remained the same. Dr. Fisher continued to recommend Petitioner undergo a repeat MRI. Dr. Fisher's diagnosis remained the same. Dr. Fisher’s records are silent regarding the October 15, 2021 motor vehicle collision. Dr. Fisher’s record is silent regarding the November 2021 MRIs. Dr. Fisher continued to recommend a repeat MRI. (PX10; p.215-217)

Petitioner followed up with Dr. Fisher on January 14, 2022. Dr. Fisher's recommendations remained the same. Dr. Fisher continued to recommend

Petitioner undergo a repeat MRI. Dr. Fisher's diagnosis remained the same. Dr. Fisher's records are silent regarding the October 15, 2021 motor vehicle collision. Dr. Fisher's record is silent regarding the November 2021 MRIs. Dr. Fisher continued to recommend a repeat (PX10; p.221-224)

Petitioner returned to Dr. Koutsky on December 28, 2021. Petitioner was again seen for a recheck of her neck and low back pain. Dr. Koutsky again noted that Petitioner did have low back pain in the past, but it was worsened following the on October 15, 2021 motor vehicle accident. Dr. Koutsky indicated that Petitioner's lumbar symptoms were aggravated following the October 15, 2021, work accident. Dr. Koutsky again recommended Petitioner undergo injections which Petitioner did wish to pursue. Dr. Koutsky wrote a prescription for cervical and thoracic pain management and evaluation. Dr. Koutsky referred Petitioner to physical therapy.(RX8; p.17-18)

Petitioner testified that she did undergo the injections as recommended by Dr. Koutsky.

CONCLUSIONS OF LAW

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

The Arbitrator reviewed Petitioner's testimony and observed her demeanor. After considering the totality of the evidence, the Arbitrator concludes that Petitioner failed to prove that she sustained an accident that

arose out of and in the course of her employment with Respondent on August 10, 2021. Specifically, the Arbitrator finds Petitioner is not credible. As such, the Arbitrator denies Petitioner's claim in its entirety.

The Arbitrator finds several questionable aspects to Petitioner's testimony. Though not one of these aspects alone would necessarily render Petitioner's testimony credible, when viewed in the totality, the Arbitrator has serious doubts as the veracity of Petitioner's testimony. As a result, the Arbitrator finds that the Petitioner is not credible.

First, Petitioner testified that she felt immediate low back pain following an event on August 10, 2021. However, Petitioner continued to work the remainder of her shift in a very heavy job. Petitioner testified that she reported her work incident immediately upon its occurrence to her supervisor named "Ashley." Petitioner was not able to provide the last name of Ashley. Furthermore, did not present any evidence in support of those text messages.

Second, the Arbitrator also notes while the Petitioner reports she was injured on August 10, 2021, sometime between 11:00 a.m. and 1:00 p.m., she completed the remainder of her shift in a rather heavy physical job. Further, Petitioner testified she returned to work and worked a full shift of at least hours the following day, August 11, 2021. It was not until two days later, August 12, 2021, when she returned to work to report her work incident to Ms. Hawthorne. The Arbitrator questions how Petitioner could continue to work in such a heavy physical manner if she was injured as severely as she testified and reported to her various physicians.

Finally, and most telling, the Arbitrator takes great issue with the facts surrounding the October 15, 2021 motor vehicle accident. Petitioner did not address the October 15, 2021 motor vehicle accident on direct examination. Petitioner admitted on cross-examination that she was involved in a separate car accident just weeks after the August 2021 work incident. Petitioner testified she was traveling to see Dr. Fisher when she was t-boned by another driver. Despite this, Dr. Fisher does not comment on this motor vehicle collision in the October 15, 2021 note (PX7; 181-182) Petitioner had an opportunity to report the motor vehicle collision to him on October 15, 2021, November 17, 2021, December 15, 2021 and Janaary 14, 2022, yet Dr. Fisher's notes are silent on the issue. Even more concerning, at each instance Dr. Fisher recommended Petitioner undergo a repeat MRI despite the fact she already had the repeat MRIs at the instruction of Dr. Koutsky on November 9, 2021. (RX9; p.4-7) Dr. Fisher makes no mention of Dr. Koutsky's involvement in the claim. The Arbitrator questions why Petitioner is reportedly seeing two orthopedic physicians for essentially the same body parts. Petitioner clearly withheld crucial information for, Dr. Fisher necessary for her well being and care involving the intervening incident of October 15, 2021.

The Arbitrator notes that Petitioner's testimony is not credible. Because the Arbitrator finds that the claimant is not credible, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that she sustained an accidental injury that arose out of and in the course of her employment on August 10, 2021.

In support of the Arbitrator's Decision with respect to F (causal connection), the Arbitrator finds as follows:

In light of the Arbitrator's findings that Petitioner failed to prove an accident arising out of her employment, the Arbitrator need not find that the Petitioner sustained any condition causally connected to the alleged accident of August 10, 2021.

***Alternatively*:** The Arbitrator had an opportunity to review the record as a whole with respect to causation. The Arbitrator notes that when Petitioner initially began treatment at Concentra, she began to complain of thoracic and lumbar pain. Petitioner underwent a course of physical therapy with Concentra. Dr. Mohan testified that it was his opinion that at most Petitioner sustained a lumbar strain and that she had attained a state of maximum medical improvement. Dr. Mohan testified that based upon Petitioner's physical exam findings, positive Waddell factors, MRIs, and medical records, there is no evidence of a low back injury at all. Dr. Mohan explained that Petitioner had positive Waddell's signs on examination, including poor effort and abnormal pain behavior. Dr. Mohan explained that Petitioner had age-appropriate degenerative disc disease at L3-4 and L4-5 based on the MRI. Dr. Mohan explained that the Petitioner had attained a state of maximum medical improvement as of August 26, 2021, which was the date in which Petitioner showed signs of improvement.

Furthermore, Petitioner was involved in an intervening motor vehicle accident on October 15, 2021. Petitioner initiated treatment with Dr. Koutsky for this motor vehicle collision on October 28, 2021. Petitioner had

"worsening" low back pain. Dr. Koutsky indicated Petitioner admitted to prior low back problems, though reported it worsened after October 15, 2021. Dr. Koutsky opined on October 28, November 9 and December 28, 2021 that the October 2021 motor vehicle accident "worsened" and "aggravated" Petitioner's low back injury. This alone is sufficient to find that the claimant's current condition of ill being is severed from the August 10, 2021 events and is instead related to the intervening and unrelated accident of October 15, 2021.

Based on the foregoing, the Arbitrator finds that Petitioner's current condition of ill-being is no longer causally related to the events of August 10, 2021. The Arbitrator finds that Petitioner sustained an intervening motor vehicle accident to the same body parts which broke the causal link between her current symptoms and those of the August 10, 2021 work accident. The Arbitrator adopts the findings of Dr. Koutsky that Petitioner's condition was aggravated and worsened as a result of the October 15, 2021 motor vehicle accident. As a result, the Arbitrator finds that Petitioner's current condition of ill-being is not causally related to the events of August 10, 2021.

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

In light of the Arbitrator's finding with respect to accident and causation, the Arbitrator denies Petitioner's claim with respect to all medical services provided.

In support of the Arbitrator's Decision with respect to L (temporary total compensation), the Arbitrator finds as follows:

Based upon the Arbitrator's finding with respect to accident and causation, the Arbitrator finds that Petitioner has failed to prove she is entitled to compensation for temporary total disability. The Arbitrator notes that the Respondent paid a total of $4,315.86 in TTD benefits prior to trial. Respondent shall be entitled to a credit for $4,315.86 paid prior to trial.

In support of the Arbitrator's Decision with respect to K (prospective medical), the Arbitrator finds as follows:

In light of the Arbitrator's finding with respect to accident and causation, the Arbitrator denies Petitioner's claim with respect to prospective medical. The Arbitrator also notes that Petitioner is seeking authorization of repeat MRIs as recommended by Dr. Fisher. However, Petitioner already underwent these repeat MRIs on November 9, 2021 at Molecular Imaging. It is clear Dr. Fisher was not even aware of the October 2021 intervening injury or the resulting November 2021 MRIs. A physician's opinions are only as valid as the factual basis underyling that opinion. *Snelson v. Kamm,* 204 Ill. 2d 1, 27 (2003). It is evident Dr. Fisher did not have all pertinent details of Petitioner's medical history. As such, Dr. Fisher's recommendations are hereby moot.

ORDER OF THE ARBITRATOR

For the reasons set forth above, the Arbitrator finds that Petitioner lacked credibility and failed to meet her burden of proof on the issues of accident and causal connection. The Arbitrator views the remaining disputed issues as moot. Compensation is denied.

The Respondent is entitled to a credit of $4,315.86 in TTD benefits paid before trial. Compensation is denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC019478
Case Name	Kahlil Zahran v. S&B Food & Liquors & IWBF
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0244
Number of Pages of Decision	24
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Mitchell Kline
Respondent Attorney	MOSA ELMOSA, Danielle Curtiss

DATE FILED: 6/5/2023

/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

KHALIL ZAHRAN,

Petitioner,

vs. NO: 16 WC 19478

S&B FOOD AND LIQUORS, INC. and ILLINOIS STATE TREASURE as the *ex officio* custodian of the INJURED WORKERS' BENEFIT FUND,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner and notice given to all parties, the Commission, after considering all issues and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the following changes incorporated as stated herein.

The Commission affirms and adopts the Arbitrator's finding that Petitioner failed to prove by a preponderance of credible evidence that he sustained an accident arising out of and in the course of his employment on April 9, 2016. The Commission agrees that Petitioner lacked credibility, and due to the numerous inconsistencies in the record, the Commission would be left to speculate as to which version of events was accurate. Since Petitioner has failed to establish that a compensable accident did in fact occur on the alleged accident date, all other issues in this case are rendered moot. As a result, the Commission hereby strikes the analysis on all issues in the Decision of the Arbitrator's Conclusion of Law section except for the analysis pertaining to the issue of accident.

The Commission incorporates the changes as stated herein into the Decision of the Arbitrator, and in all other respects, affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that since Petitioner failed to prove that he sustained a compensable accident arising out of and in the course of his employment on April 9, 2016, all other issues are rendered moot. For this reason, the Commission hereby strikes the Arbitrator's analysis of all other issues excluding that pertaining to the issue of accident provided in the Conclusions of Law section in the Decision of the Arbitrator. All benefits under the Illinois Workers' Compensation Act are hereby denied based on the Commission's finding of

no accident. After incorporating said changes, the Commission affirms and adopts the Decision of the Arbitrator dated June 29, 2022.

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.

June 5, 2023

DLS/met
O- 4/12/23
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	16WC019478
Case Name	ZAHRAN, KAHLIL v. S&B FOOD & LIQUORS, INC. AND ILLINOIS STATE TREASURER AND EX-OFFICIO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	22
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Mitchell Kline
Respondent Attorney	Mosa Elmosa, Danielle Curtiss

DATE FILED: 6/29/2022

THE INTEREST RATE FOR THE WEEK OF JUNE 28, 2022 2.50%

/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

Khalil Zahran
Employee/Petitioner

v.

S&B Food and Liquors, Inc. and Illinois State Treasurer and Ex-Officio Custodian of the Injured Workers' Benefit Fund, State of Illinois,

Employer/Respondent

Case # **16** WC **19478**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts**, Arbitrator of the Commission, in the city of **Chicago**, on **November 15, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **April 9, 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 earned $**0**; the average weekly wage was $**0**.

On the date of accident, Petitioner was **32** years of age, ***married*** with **1** dependent child.

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

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

Respondent shall be given a credit of $**0** 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 that Petitioner has failed to sustain his burden of proving an accident occurred which arose out of and in the course of his employment. All compensation is denied.

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

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

JUNE 29, 2022

Signature of Arbitrator

ICArbDec19(b)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Khalil Zahran	)	
	)	
Employee/Petitioner	)	
v.	)	
	)	Case No. 16 WC 19478
S&B Food and Liquors, Inc. and Illinois State Treasurer and Ex-Officio Custodian of the Injured Workers' Benefit Fund, State of Illinois,	)	
	)	**Chicago, IL**
	)	
Employer/Respondent	)	

Findings of Facts and Conclusions of Law

I. FINDINGS OF FACT

Petitioner pursued this action under the Workers' Compensation Act and sought relief from S&B Food & Liquors, Inc. (hereinafter "S&B"), and the Injured Workers' Benefit Fund (hereinafter IWBF. On July 15, 2021, the parties appeared at a hearing before Arbitrator Charles Watts. Mitchell Kline of Law Office of Mitchell A. Kline appeared on behalf of Petitioner. Mosa Elmosa of Elmosa & Associates appeared on behalf of S&B. Assistant Attorney General Danielle Curtiss of the Illinois Attorney General's Office appeared on behalf of IWBF. At hearing, Petitioner's Exhibits 1-4, S&B's 1-3, and IWBF's Exhibits 1-2 were admitted into evidence. All issues were in dispute.

Testimony of Petitioner

Petitioner was employed at S&B Food and Liquor from late 2015 until mid-April of 2016. In this role, Petitioner stocked coolers and shelves, swept and mopped the floors, operated the cash register, and surveilled the store for potential shoplifters. Petitioner worked ten hours

per day from 12:00 p.m. until 10:00 p.m., with some days staying until as late as midnight. Petitioner worked seven days per week. S&B paid Petitioner in cash for a rate of $10.00 per hour.

On April 9, 2016, Petitioner arrived for his shift at 12:00 p.m. Petitioner began to fill beer coolers with stock located from the back of the store between 1:00 p.m. and 2:00 p.m. In the back of the store, next to the where Petitioner was working, a staircase that led into the basement. Petitioner testified that he picked up a case of beer, and his foot slipped into the hole of the staircase. Petitioner fell backwards into the hole, hitting his back and arms on the stairs. As Petitioner was falling, the cardboard beer box tore, and beer cans fell on top of him. Petitioner stopped falling when his foot then became lodged in the space between the third to last step and the second to last step.

Petitioner testified that his co-worker Timothy Mayes found him immediately after the fall with his foot stuck in the staircase. The testimony was that Mayes helped Petitioner up and brought him to the front of the store. At the front of the store, Mohammad, Petitioner's boss, asked Petitioner if he was injured. Petitioner testified that emergency services were neither offered nor called. Petitioner testified he experienced pain in his back and both his left and right arm.

Petitioner testified he tried to work after his injury but ultimately decided to go home for the day due to pain in his back and bilateral arms. Petitioner drove himself home from S&B. Petitioner waited at home until his mother was available to drive him to the hospital. Petitioner arrived at Christ Hospital around midnight on April 10, 2016.

At Christ Hospital, Petitioner was examined, given pain medication, and discharged. Petitioner returned home in the early hours of April 10, 2016. He testified that he spent the rest of the day sleeping and resting.

At midnight on April 12, 2016, Petitioner returned to S&B to discuss the future of his employment with Mohammad. Petitioner did not receive an answer from Mohammad regarding employment, and Petitioner left. On April 16, 2016, Petitioner returned to the store in order to get a final answer regarding employment. One of Mohammad's business partners informed Petitioner that he was not welcome there and that if he were to return, legal actions would be taken. Petitioner left the store and never returned.

Petitioner testified that he received financial help from his aunt. In return for this financial assistance, Petitioner trained new employees at several of his aunt's gas stations. Petitioner testified that he was not paid for the work, as this was his form of repayment to his aunt. He testified that when a new employee was hired, or one of the stations was short staffed, he would help out. Petitioner's described duties at his aunt's gas stations were to show new employees how to operate the cash register, where to stock food and drink, and other clerical duties. Petitioner testified he occasionally operated the cash register for no more than several hours at a time. Petitioner had no set schedule.

Petitioner admitted to two other injuries in his lifetime. The first notable injury occurred before the injury in April of 2016. Petitioner suffered a head injury after being struck by a car at 95th and Cicero. Petitioner states that his head crashed into the car's windshield. This injury resulted in Petitioner needing staples at the site of his injury. Petitioner testified that he did not file a lawsuit nor did he file an insurance claim.

The second notable injury came from a car accident that occurred at a Pete's Fresh Market in Oak Lawn. Petitioner testified that the car he was in was struck from the vehicle's right side. He further testified that he experienced severe pain on the right side of his body, specifically his lower back.

Petitioner testified on direct examination that he still feels the back pain stemming from the incident in this case. Petitioner lives with his wife and two children. Petitioner testified that he cannot pick up his child. Petitioner testified he has not worked since the accident.

Testimony of Timothy Mayes

Timothy Mayes ("Mayes") testified via WebEx while incarcerated at Big Muddy Correctional Center. Mayes is serving 54 months for the offense of Aggravated Domestic Battery, a Class 2 felony, and 48 months for the offense of Aggravated Battery of a Peace Officer, a Class 2 felony. Mayes testified that he worked with Petitioner at S&B and earned $30.00 per day. Mayes worked 3 days per week, 14 hours per day, from 12:00 p.m. through 2:00 a.m. In this role, he was responsible for stocking beverage coolers, sweeping, and mopping.

Mayes testified that on April 9, 2016, at approximately 9:00 p.m., he was standing in the front of the store smoking a cigarette while on his shift, when he saw Petitioner fall backwards out of the corner of his eye. Mayes went to assist Petitioner and observed Petitioner's bone sticking out of his left arm. Mayes did not observe any blood. Mayes did not call emergency services because it did not occur to him. Petitioner placed an ace bandage on his left arm, which he found in his car. Mayes testified that Petitioner went back to work after the alleged fall.

Testimony of Mohammad Abdal Fatah

Mohammad Abdal Fatah (Fatah) appeared with an Arabic translator. He testified that he works at Citgo, located at 1336 127th Street, Calumet Park, Illinois. Fatah works seven days per

week from 11:00 a.m. to 10:00 p.m. Fatah testified that he has worked with Petitioner at Citgo for four to five years and that Petitioner works at the cash register six days per week, at either 3:00 p.m. to 11:00 p.m. or 8:00 a.m. to 8:00 p.m. In this role, Petitioner, according to Fatah, is required to stand at the cash register for the entire shift. The testimony was that Petitioner last worked at Citgo three to four days before the date of hearing.

Testimony of Mohammad Salem

Mohammad Salem ("Salem") testified that he took over the management of S&B in 2015 and purchased the store in 2016. On April 9, 2016, Salem was working at the store when Petitioner and Mayes came to him to inform him that Petitioner fell. Salem testified he offered to call an ambulance and Petitioner declined. Salem testified that Petitioner did not appear to be in pain.

Salem testified that Petitioner left the work for the day at 3:00 p.m. or 4:00 p.m. because he was tired. Later in the day, Petitioner called off for work the next day. Petitioner returned to work on April 13, 2016. Petitioner informed Salem that he went to the emergency room and everything was fine. Petitioner worked the entire shift on April 13, 2016, April 14, 2016, and April 16, 2016.

On April 16, 2016, Petitioner came into the store and said that he needed two to three weeks off, which Salem was not able to provide. Salem denied firing Petitioner. Salem obtained video of Petitioner on April 13, 2016, which shows Petitioner standing inside the store. (RX 1). The Arbitrator notes that during the duration of the videos, Petitioner is standing without any apparent issue. Additionally, in on video, Petitioner is holding his phone in his left hand up to his ear for an extended period of time. *Id.* In another video, Petitioner has both hands in his pockets, and neither arm is in a sling or any sort of bandage. *Id.*

Salem testified that he did not carry workers' compensation insurance on April 9, 2016. He has since obtained insurance with Ace Insurance.

Testimony of Investigator Oscar Delgado

Investigator Oscar Delgado testified that he works as a private investigator and was hired by S&B. Delgado testified that he went to Citgo, located at 1336 127th Street, Calumet Park, Illinois, on July 13, 2021 at 10:05 p.m. Delgado approached the checkout counter and observed Petitioner behind the cash register. Delgado observed Petitioner ringing up customers, and handling money. Delgado obtained photographs and video of Petitioner working at the store. (RX 2; RX 3). Petitioner is standing during the entire duration of the video, and in all of the photos. He appears to be smiling and laughing, and moving around without any issues. *Id.*

Deposition Transcript of Khalil Zahran v. S & B Food and Liquor

The deposition of Petitioner was taken by the parties in Khalil Zahran v. S&B Food and Liquor, case number 18 L 2785 on October 22, 2019 (Respondent IWBF Exhibit "IWBFX" 2). In this deposition, Petitioner discusses two prior accidents he sustained, in addition to the alleged accident in this matter. Petitioner is also questioned at length with regard to his work history, and ability to find employment.

Petitioner testified that he was in a car accident on April 17, 2018 in the parking lot of Pete's Market in Bridgeview. (IWBFX 2). In this accident, a car backed into Petitioner's vehicle while he was driving. *Id.* Petitioner experienced pain to the right side, middle of his back, chest, and left knee. *Id.* He underwent a course of physical therapy with Dr. Terk for four months, 12 visits per month. *Id.* After seeing Dr. Terk, Petitioner no longer felt pain in his neck or back. *Id.* Petitioner indicated that he also had pain on his left side hip and leg, but Dr. Terk did not focus on that in treatment. *Id.*

Petitioner also testified that he was hit by a car in Oak Lawn in 2011 at the age of 16 or 17. *Id.* In this accident, Petitioner flew up onto the car, and hit the back of his head. *Id.* He received staples in his head. *Id.*

Regarding the alleged accident on April 9, 2016, Petitioner testified that his right leg slipped into the hole in the floor, and he fell. *Id.* He experienced pain on his left side, and his back. *Id.* Petitioner was unable to put any pressure on his left leg, and was bleeding under his elbow and on his back. *Id.* Both Salem and Mayes asked Petitioner whether they should call an ambulance, and he declined. *Id.* Petitioner drove himself home six miles, after sitting on a milk crate for 20 minutes. *Id.* Petitioner testified that he went home and slept, and went to the emergency room the next day around midnight. *Id.* Petitioner's mother drove him to Christ Hospital, where his right arm was wrapped with a bandage, and he was sent home. *Id.*

Petitioner testified that he no longer experiences any pain in his right arm. *Id.* He experiences daily pain in his left leg and back. *Id.* He is unable to place any pressure on the back of his left leg. *Id.* Petitioner cannot stand or sit for prolonged periods of time, and his left ankle hurts. *Id.* Petitioner testified that a lumbar surgery has been recommended, but he was told to lose 10 pounds, and to quit smoking. *Id.*

Petitioner testified he has not worked since April 2016. *Id.* He has tried finding employment, but he has been unsuccessful due to his physical limitations. *Id.* He attempted to obtain employment at Citgo at 127th Street, but Abdala, the owner, informed him that he could not give him a steady schedule. *Id.*

Petitioner testified that his wife helps him with activities of daily living, such as dressing and showering. *Id.* Petitioner's wife helps him put on his shoes. *Id.* Petitioner does not, however,

need help in the bathroom. *Id.* Petitioner lives on an apartment on the third floor with no elevator. *Id.*

Summary of Petitioner's Medical Treatment

Petitioner testified that he first sought treatment at around midnight on April 10, 2016 at Christ Hospital. The Arbitrator notes that no medical records were submitted into evidence for that date. The medical record submitted earliest in time is an MRI dated April 29, 2016, which revealed annular disc bulge at L3-S1. No herniations were noted. (PX 4).

Petitioner sought treatment at Integrity Medical Group on May 2, 2016, with complaints of right elbow and low back pain. Petitioner has been completing physical therapy as recommended. *Id.* Petitioner continued to follow up with Integrity Medical Group for his right elbow and back. *Id.* On June 27, 2016, Petitioner reported that the low back pain has been constant, and he is taking five to six Norco per day. (PX 3). Dr. Farag recommended a transforaminal lumbar epidural steroid injection at L4-S1. *Id.*

The next record submitted into evidence is dated December 19, 2016. *Id.* On this date, Petitioner followed up with Integrity Medical, and continued to complain of pain to the low back and right elbow. *Id.*

Petitioner again followed up at Integrity Medical on January 30, 2017. *Id.* Petitioner was diagnosed with low back pain, lumbar radiculopathy, lumbar intervertebral disc displacement, and lumbar facet arthropathy. *Id.* Dr. Farag again recommended a transforaminal epidural steroid injection, physical therapy, and medication. *Id.* Dr. Farag noted the work restrictions to be no lifting or carrying more than 15 pounds, no pushing or pulling more than 25 pounds, and no bending or twisting of the low back. *Id.*

More than a year later, on March 23, 2018, Petitioner was evaluated by Dr. Koutsky at Chicago Pain and Orthopedic Institute for chronic low back pain. *Id.* He stated that his symptoms began after a work-related injury that occurred on April 9, 2016 where he was grabbing a case of beer, and turned his right foot, and fell down into a stairwell. *Id.* MRI of the lumbar spine on April 29, 2016 reveals some annular bulging at L3-L4 and L4-L5, and L5-S1. No evidence of any large herniated disc. *Id.* Diagnosed with left 4-L5, L5-S1 radiculopathy. Ordered to continue with physical therapy. He was authorized to return to work limited duties on March 23, 2018. *Id.* No lifting, carrying greater than ten pounds. *Id.*

Petitioner followed up at Chicago Pain on April 10, 2018. The Arbitrator notes that this evaluation is the initial evaluation, despite the fact that Petitioner was seen by this treating doctor less than one month prior. Petitioner reported that he fell into a hole which led to the basement, and notified his supervisor. *Id.* He was fired two days later. *Id.* The next day, he went to Holy Cross Hospital, where imaging was done. *Id.* Physical therapy was recommended, three times per week, for eight months. *Id.* Petitioner reported bilateral back pain on the date of treatment. MRI of the lumbar spine revealed L3-L4 two millimeter disc bulge with neuroforaminal narrowing, L5-S1 two millimeter disc bulge with neuroforaminal narrowing. Dr. Koutsky recommended bilateral L4-L5 and L5-S1 transforaminal ESI. Dr. Koutsky opined that the Petitioner's symptoms are causally related to the work injury. The Arbitrator notes that this note indicates that Petitioner is ordered to remain off work, despite the fact that he was authorized to return to work on March 23, 2018. *Id.*

On April 24, 2018, Petitioner underwent a bilateral L4-L5 and L5-S1 transforaminal ESI with Dr. Jain. *Id.* Petitioner followed up with Chicago Pain on May 29, 2018. *Id.* He reported 80% relief following the injection, but it was short-lived. Petitioner complained of low back

pain, restricted on the left side with mild pain radiating down his right lower extremity. Additional physical therapy was recommended. Recommend to continue PT. *Id.*

On July 10, 2018, Petitioner underwent a left sided L4-L5 facet joint injection with Dr. Jain. *Id.* It was noted that Petitioner is to remain off work. On August 7, 2018, Petitioner underwent a left L3, L4, and L5 medial branch nerve block with Dr. Jain. *Id.* On August 28, 2018, Petitioner underwent a second left L3, L4, and L5 medial branch nerve block with Dr. Jain. *Id.* Petitioner underwent a left L3, L4, and L5 medial branch radiofrequency ablation on October 2, 2018 with Dr. Jain. *Id.*

Petitioner saw Dr. Patel at Chicago Pain on November 7, 2018, who opined that no further interventional procedures are medically necessary. *Id.* Dr. Patel noted that Petitioner was not interested in a surgical consult; rather, he requested a refill of Norco. *Id.* Dr. Patel advised that Norco is not indicated for low back pain and he should wean off the Norco as soon as possible. *Id.* The Norco prescription was filled one last time, and Dr. Patel noted that no further refills would be given. *Id.* Dr. Patel indicated that Petitioner does not need to set up any further treatment with Chicago Pain.

Nine months later, on August 9, 2019, Petitioner saw Dr. Farag at Midwest Anesthesia & Pain with complaints of low back pain. *Id.* Since he was last seen, he had procedure w with Dr. Jain. He reported that his low back pain was overall the same. *Id.* He informed Dr. Farag that he cannot hold urine for long periods. *Id.* He feels short of breath when he lays on his stomach. *Id.* He feels shooting pain if he puts too much weight on his left heel. *Id.* Dr. Farag recommended a series of left L4-S1 transforaminal ESIs. *Id.* If no improvement is seen, recommend consult with spine surgeon. *Id.*

Petitioner followed up with Dr. Farag on August 20, 2019. *Id.* Petitioner was diagnosed with low back pain, lumbar radiculopathy, lumbar facet arthropathy. *Id.* Dr. Farag recommended one to three L4-S1 transforaminal ESIs, combined with home exercise. *Id.* If Petitioner does not see relief, a new MRI is recommended, with a possible EMG/NCV and spine surgeon consultation. *Id.* Dr. Farag noted that there is evidence that prolonged inflammation and pain leads to cellular changes that can possible predispose patients to chronic pain/hypersensitivity to pain. *Id.* He further opined that it is possible that delayed treatment has caused him to develop chronic pain, which may never fully resolve. *Id.* Dr. Farag noted that Petitioner should avoid lifting/carrying more than 15 pounds and avoid bending/squatting more than 2 times an hour. *Id.*

Over a year later, on August 31, 2020, Petitioner again saw Dr. Farag. *Id.* Dr. Farag noted that Petitioner has not been working. *Id.* A new MRI was recommended over a year ago, but it was never completed. *Id.* A new MRI is recommended. *Id.*

Petitioner underwent a lumbar MRI on September 16, 2020, which revealed normal lumbar alignment, small central herniated disc at L5-S1 with no neural compression. Normal T2 signal off all discs. (PX 4).

Petitioner followed up with Dr. Farag on September 29, 2920. (PX 3). Dr. Farag recommended pain management, and advised against surgical intervention. *Id.*

Petitioner saw Dr. Salehi at Neurological Surgery and Spine Center. *Id.* Petitioner was diagnosed with annular tear and disc herniation at L5-S1. Dr. Salehi did not recommend surgical intervention. *Id.* Petitioner was given work restrictions of light duty: no lifting greater than 20 pounds, no pushing or pulling greater than 35 pounds, no repetitive bending or twisting.

Petitioner saw Dr. Farag on April 26, 2021. (PX 4). He was diagnosed with a lumbar disc herniation and lumbar radiculopathy. *Id.* Dr. Farag opined that Petitioner would need to be seen

every three months indefinitely for pain management, and a L5-S1 transforaminal ESI is recommended. *Id.*

CONCLUSIONS OF LAW

A. Was Respondent-Employer operating under and subject to the Illinois Workers' Compensation Act or Occupational Diseases Act?

Petitioner testified that he was employed by Respondent-Employer, S&B, as a convenience store clerk on April 9, 2016, when the accident occurred. He further testified that the Respondent-Employer was a convenience store which sold items such as beer and food. Petitioner's role as a convenience store clerk involved stocking coolers and shelves of beer and other beverages, sweeping and mopping the floors, operating the cash register, and surveilling the store for potential shoplifters. Based upon the automatic coverage provisions of Section 3 of the Act, the Arbitrator finds that the Petitioner has established by a preponderance of the evidence that on April 9, 2016, the Respondent-Employer was operating under and subject to the Illinois Workers' Compensation Act.

B. Was there was an Employee-Employer relationship?

This Arbitrator finds an employee-employer relationship existed between the Petitioner S&B. Mohammad Salem, the owner of S&B appeared, and admitted that Petitioner was an employee of S&B April 9, 2016. The Arbitrator finds that an employee-employer relationship existed between Petitioner and Respondent-Employer S&B.

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

The Arbitrator finds that an accident did not occur that arose out of Petitioner's employment by Respondent because Petitioner failed to present any credible evidence of an accident.

Petitioner attempted to prove that an accident occurred through his testimony, witness testimony, and medical records. The evidence Petitioner presented at trial, however, directly contradicts. Therefore, the Arbitrator is left to speculate which version of events are accurate.

Petitioner testified that on April 9, 2016, he fell down a staircase inside S&B. He testified that his leg became lodged in the space between the third to last step and the second to last step. Petitioner admitted a photo of the staircase at trial (PX 1). A common sense viewing of this photo makes it clear to the Arbitrator that if Petitioner's testimony were true, he would have hit his head on the floor of the basement. Petitioner testified that he did not hit his head; rather, his foot got stuck, and he laid there suspended on the staircase until Mayes assisted him. As Petitioner's testimony contradicts what the photo displays, the Arbitrator is left to question what actually occurred.

The deposition transcript further makes it unclear as to whether an accident occurred on April 9, 2016. At the deposition, Petitioner testified that he was bleeding on his elbow. (IWBFX 2). When questioned at trial, Petitioner denied bleeding on the elbow. He also denied that emergency services were offered to him. At the deposition, Petitioner testified that both Mayes and Salem offered emergency services. *Id.* Additionally, at the deposition, Petitioner testified that, after the accident, which occurred April 9, 2016, around 1:00 p.m. or 2:00 p.m., he slept for an entire night. (IWBFX 2). He then went to the emergency room the next day at midnight, which would have been April 12, 2016. At trial, Petitioner testified that he went to the Christ Hospital emergency room on April 10, 2016 at midnight. If the accident did, in fact, occur in the middle of the day, and the Arbitrator believes that he only stayed at S&B for 20 minutes after the accident, then Petitioner would have been sleeping during the time he was alleged to have been at Christ Hospital. As no medical records from the date of accident were entered into evidence

confirming when treatment occurred, the Arbitrator finds that Petitioner's testimony was not credible.

Additionally, Petitioner called Mays as a witness to the accident. The Arbitrator finds that Mayes was not a credible witness due to both his prior felony convictions, as well as his inconsistent testimony. Under Illinois Rule of Evidence 609, "evidence that a witness has been convicted of a crime is admissible if the crime. . . was punishable by death or imprisonment in excess of one year under the law which the witness was convicted." Ill. R. Evid. 609.

In this case, Mayes was convicted of two Class 2 felonies, Aggravated Domestic Battery and Aggravated Battery of a Peace Officer. Therefore, the Arbitrator can consider the felonies when assessing credibility so long as the probative value is not substantially outweighed by the danger of unfair prejudice. *Id.* Here, Mayes was a witness in a workers' compensation matter. Petitioner is not facing a loss of liberty or other punishment. In fact, Petitioner brought this matter before the Illinois Workers' Compensation Commission, and therefore availed himself to the court. Clearly, the probative value of Mayes's convictions outweighs any minimal unfair prejudice. The Arbitrator finds Mayes to not be a credible witness due to his current felony convictions, of which he is still currently serving time.

Additionally, Mayes is not a credible witness because his testimony was contradicted by Petitioner's testimony and medical records. Mayes testified that he saw Petitioner fall backwards onto the staircase on April 9, 2016 while inside S&B. Mayes testified that Petitioner placed a bandage on his left arm, where the bone was sticking out. The Arbitrator notes that Petitioner's testimony, as well as the medical records, reflect that an injury occurred to Petitioner's right arm. Additionally, no other party testified that Petitioner's bone was visible.

Next, Mayes testified that the accident occurred at 9:00 p.m. However, Petitioner testified that the accident occurred at 1:00 p.m. or 2:00 p.m. Petitioner testified that he was not seen by the emergency room until midnight on April 10, 2016. Therefore, Mayes's testimony succeeds in only confusing the Arbitrator as to what occurred on the date of the alleged accident.

There is also the unbelievable testimony that Mayes worked 14 hour shifts for which he was paid $30 in total.

Lastly, it is unbelievable to the Arbitrator that Mayes witnessed Petitioner sustain a substantial fall, where his bone was allegedly sticking out of his arm, and Mayes did not call an ambulance.

The Arbitrator therefore finds that Mayes's testimony was not credible, and it is not considered in making a determination of whether Petitioner sustained his burden of proving that an accident occurred that arose out of and in the course of employment.

The medical records submitted by Petitioner at trial do not support Petitioner's assertion that he was injured on April 10, 2016. Petitioner testified that he first sought treatment at around midnight on April 10, 2016 at Christ Hospital, but no medical records were submitted to prove same. The first medical record submitted was April 29, 2016, which was an MRI. (PX 4). The Arbitrator is left to question whether the Christ Hospital visit occurred, or, if it did occur, there may be an unknown reason that the records were not submitted at trial.

After reviewing all of the admitted evidence, the Arbitrator is left with more questions than answers as to what occurred on the date of injury. "It is a well-settled principle of law that it is the Petitioner's burden to prove all of the elements of his case by the preponderance of credible evidence. Moreover, liability cannot rest on imagination, speculation or conjecture, but must be based on the facts." Burns, 02 I.I.C. 0643 (Ill. Indus. Com'n Aug. 13, 2002).

This Arbitrator finds that Petitioner has presented no credible evidence that an accident occurred which arose out of an in the course of his employment for Respondent and Petitioner is not entitled to compensation for his injuries.

C. What was the date of the accident?

The Arbitrator finds Petitioner failed to meet his threshold burden of showing an accident occurred which arose out of his employment. All compensation is denied.

D. Was timely notice of the accident given to the Respondent?

The Arbitrator finds Petitioner failed to meet his threshold burden of showing an accident occurred which arose out of his employment. All compensation is denied.

E. Is the Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator finds Petitioner failed to meet his threshold burden of showing an accident occurred which arose out of his employment. All compensation is denied. Therefore, the Arbitrator need not address causation.

Additionally, the Arbitrator finds that Petitioner's current condition is not causally related to any work accident. Petitioner underwent an MRI on April 29, 2016, which revealed annular disc bulge at L3-S1. No herniations were noted. (PX 4). He then underwent less than two months of treatment with Integrity Medical Group, from May 2, 2016 through June 27, 2016. Nearly six months later, Petitioner treated with Integrity on December 19, 2016 and January 30, 2017. Petitioner did not treat again until over a year later, on March 23, 2018. The extensive gaps in treatment are indicative of the fact that Petitioner was treating for an unrelated medical condition, as the April 9, 2016 injury clearly no longer required medical treatment. The Arbitrator finds that Petitioner reached MMI on June 27, 2016. Any treatment after this date is not causally related to this work accident.

F. What were the Petitioner's earnings?

The Arbitrator finds Petitioner failed to meet his threshold burden of showing an accident occurred which arose out of his employment. All compensation is denied.

Additionally, the Arbitrator finds that Petitioner failed to sustain his burden of proving his average weekly wage. Here, no evidence was presented of Petitioner's actual wages. Under the act, "'[a]verage weekly wage' which shall mean the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury … divided by 52." 820 ILCS 305/10.

The Arbitrator is forced to speculate as to Petitioner's average weekly wage. Petitioner claimed an average weekly wage of $700.00. He testified that he worked ten hours per day, seven days per week, and was paid $10.00 cash. Petitioner did not submit receipts, check stubs, or any tax documents to corroborate his testimony that he was paid $700.00 per week. Petitioner had the opportunity to cross examine Respondent-Employer Salem regarding this issue. He failed to do so. In light of the Arbitrator's finding that Petitioner's testimony was not credible, Petitioner has failed to sustain his burden in proving average weekly wage.

Based on the lack of evidence presented of average weekly wage, the Arbitrator finds that Petitioner had an average weekly wage of $0.

G. What was the Petitioner's age at the time of the accident?

The medical records of Petitioner established that the Petitioner's date of birth is May 3, 1983, making him 32 years of age on the date of accident. The Arbitrator finds that Petitioner was 32 years old on the date of accident.

H. What was the Petitioner's marital status at the time of the accident?

Petitioner' testimony established that at the time of the accident Petitioner was married with one dependent child under the age of 18 on the date of accident. The Arbitrator finds that Petitioner was married with one dependent child on the date of the accident.

I. Were the medical services that were provided to the Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The Arbitrator finds Petitioner failed to meet his threshold burden of showing an accident occurred which arose out of his employment. All compensation is denied.

J. What temporary benefits are in dispute?

The Arbitrator finds Petitioner failed to meet his threshold burden of showing an accident occurred which arose out of his employment. All compensation is denied.

K. Is Respondent IWBF liable for payment to Petitioner?

The Arbitrator finds Petitioner failed to meet his threshold burden of showing an accident occurred which arose out of his employment. All compensation is denied. Therefore, the Arbitrator need not address liability of the IWBF.

L. Was adequate and proper notice of hearing given to the Respondent-Employer?

The Arbitrator finds Petitioner failed to meet his threshold burden of showing an accident occurred which arose out of his employment. All compensation is denied. Therefore, the Arbitrator need not address notice.

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

The Arbitrator finds Petitioner failed to meet his threshold burden of showing an accident occurred which arose out of his employment. All compensation is denied. Therefore, the Arbitrator need not address nature and extent.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC005888
Case Name	Jeffrey Ragland Sr v. Knight Hawk Coal
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0245
Number of Pages of Decision	25
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Roman Kuppart
Respondent Attorney	Julie Webb, Kenneth Werts

DATE FILED: 6/5/2023

/s/ Deborah Simpson, Commissioner

Signature

17WC5888
Page 1

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jeffrey Ragland, Sr.,
Petitioner,

vs. NO: 17 WC 5888

Knight Hawk Coal,
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 and Sections 1(d)-(f) of the Occupational Diseases Act and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 8, 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.

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

June 5, 2023:
o5/24/23
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	17WC005888
Case Name	RAGLAND SR, JEFFREY v. KNIGHT HAWK COAL
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	23
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	Roman Kuppart
Respondent Attorney	Kenneth Werts

DATE FILED: 4/8/2022

/s/William Gallagher, Arbitrator

Signature

INTEREST RATE WEEK OF APRIL 5, 2022 1.11%

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

Jeffrey Ragland, Sr.
Employee/Petitioner

v.

Knight Hawk Coal
Employer/Respondent

Case # 17 WC 05888

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville [Herrin Docket], on February 24, 2022. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other Sections 1(d)-(f) of the Occupational Diseases Act

FINDINGS

On June 2, 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 earned $61,152.00; the average weekly wage was $1,176.00.

On the date of accident, Petitioner was 61 years of age, married with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $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

Based upon the Conclusions of Law attached hereto, claim for compensation is denied.

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

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

William R. Gallagher, Arbitrator

April 8, 2022

ICArbDec p. 2

Findings of Fact

Petitioner filed an application for Adjustment of Claim which alleged he sustained an occupational disease to his lungs and/or heart. The Application alleged a date of last exposure of June 2, 2016, and that Petitioner sustained the occupational disease as a result of inhalation of coal mine dust including but not limited to coal dust, rock dust, fumes & vapors for a period in excess of 29 years (Arbitrator's Exhibit 2).

At the time of trial, Petitioner was 66 years old. Petitioner has one year of junior college and received his electrical certificate. Petitioner worked in mine construction for two years and in coal mine employment for 29 years. All of his coal mine employment was underground. Petitioner testified that he was regularly exposed to coal and rock dust. He was also exposed to diesel fumes and calcium chloride fumes which bothered him. Petitioner's last day of employment in the coal mines was June 2, 2016. He was working for Respondent at its Cutler mine. He was 61 years old on that date and his job classification was shuttle car operator. Petitioner testified that he was exposed to and breathed coal dust on that date. Petitioner testified that he was laid off on that date.

Petitioner graduated from high school in 1973. Petitioner worked for Ethics Manufacturing where he made car harnesses from 1973 to 1975. From 1975 to 1977 he worked for Ruttman Construction and Gunther-Nash doing mine construction. He worked at Freeman No. 6 in Waltonville from 1977 to 1989 when the mine shut down. From 1990 to 1999 Petitioner sold, set up and delivered farm equipment. In 1999 he went back to work for Freeman at its Crown II mine in Girard. Petitioner testified that he retired from that mine. From 2003 to 2009 he again worked selling, setting up and delivering farm equipment. Petitioner worked for Respondent from 2009 to 2016 when he was laid off.

While working at Freeman No. 6, Petitioner worked as a laborer for approximately six years. In that job he shoveled the belt lines, cleaned up coal and did whatever he was asked to do including running equipment. He had to build stoppings and carry blocks and timbers. He then became a scoop operator for five years. He testified that a scoop operator cleaned up after the miner pulled out as it worked at the face. He next worked as a roof bolter for three years. He had to load the bolts onto the roof bolter. He testified that the bundle of bolts weighed approximately 50 pounds. He would put 40 to 50 bundles on the miner. He testified that he would be short of breath by the time he was done doing that. Petitioner testified that he would have to stop before he finished loading the bolts. He testified that he would take breaks or people would come to assist. His next job was running a continuous miner for two to three years at the face of the mine. He testified that running the miner was a very dusty job. While at Crown II he worked as a laborer for approximately one year. At that job he also ran equipment including a bolter and continuous miner. He was a continuous miner operator for about three years at Crown II. When Petitioner went to Respondent, he worked as a laborer for approximately a year and ran a continuous miner for four years. From there he transferred into a repairman job for approximately one year. As a repairman he cleaned the coal, repaired equipment, changed motors, moved cables and had to move everything around preparing for the next shift. This work was performed at the face of the mine. He had to carry oil and grease as well as pumps and other things that he would have to change out on the equipment that went bad. He would have to hang and move the cable to get it prepared for the next shift. When carrying the parts and the grease and oil, he would have to stop and take breaks before he got to where he was going. Petitioner also ran a shuttle car which hauls the coal from the back of the miner to the belt. He testified that the shuttle car operator was a very dusty job.

Petitioner described his exertional requirements while working in the coal mine as heavy labor. He had to bend, stoop and squat at times to do his jobs while in these classifications. Petitioner testified that while bent over he had breathing problems. He could not do it for long periods of time. Petitioner testified that the dust conditions at Respondent were always heavy. He testified that they had to fight the whole time to keep the dust down and away as much as possible. Petitioner testified that he wore a mask. Petitioner testified that he took a shower every day after he came out from underground. He testified that he would have to blow his nose first thing and it was packed with coal dust even after wearing his mask. He testified that he never wore the same set of clothes two days in a row because they were just too dirty.

Petitioner testified that as of arbitration he had breathing problems. He testified that he first noticed the breathing problems being severe at least eight to ten years ago. He testified that he noticed just quick shortness of breath. He could not get air in and his distance walking got shorter and shorter as he went. He testified that he coughed and that bending over was just terrible. He testified that shoveling on the belt line bothered him. He testified that he would have to work in short spurts. He would shovel, quit, shovel, quit. Petitioner testified that the cable that he worked with as a repairman was three to four inches across. He would have to drag that cable and move it out of the roadways and tuck everything off to the side so it would not get run over. He testified that he would have to hang it over crosscuts so machinery could get through. He testified that he could not lift the cable by himself. He always had to have help.

Petitioner testified that if he were to walk outside on level ground at a normal pace he could walk 25 to 50 yards before he would become short of breath. He testified that at 50 yards he would have to stop and catch his breath. He testified he could not walk an incline fast and that would shorten the distance he could walk by probably a third or two-thirds.

Petitioner testified that he was examined by Dr. Istanbouly in April 2017 at the request of his attorney. Petitioner testified that he told Dr. Istanbouly at that time that he could walk a half to one block. He testified that he could no longer do that. Petitioner testified that he lives in a two-story house. He testified that he cannot always go all the way up the stairs to the second floor. He testified that it is difficult. Petitioner testified that since he first noticed his breathing problems they have gotten progressively worse as the years go by. Petitioner testified that he has never taken any breathing medication. He testified that his breathing problems affect his activities of daily life. He does not have any stamina due to his breathing. He testified that he has given up almost all of his hunting activities and his grandkids' activities. He testified that he watches them instead of doing it. He testified that carrying things bothers him. He can carry things but only for very short distances and he has to push a cart like a walker. Petitioner testified that intimacy with his wife is a definite problem. Petitioner does woodworking as a hobby. When he does the woodworking, he wears a mask. He testified that he can only do the woodworking for a half hour or less before he has to stop.

Petitioner testified that while working in the mines he had to stop and take breaks because of his breathing. He also needed the help of his co-workers to complete some jobs. Petitioner testified that Dr. Burge at SIMCA is his treating physician. Petitioner testified that he went to a doctor for breathing problems. He testified that he also did some tests when he was hired by Respondent. He has seen Dr. Pothoneni and Dr. Sirikonda. He testified that Dr. Mohr has also seen him for his breathing. He testified that he talked to these doctors about working in the dust as a coal miner. Petitioner testified that he has never done anything other than manual labor in his career.

Petitioner testified that he has never smoked. Other than his breathing problems he has had a mitral valve repair and had one bypass. He takes medication for high cholesterol. Petitioner testified that while working at

Respondent, he completed his job every day. He testified that it was harder at the end than it was when he started. He testified that as of arbitration he could not do any of his former coal mining jobs.

Petitioner testified that he was injured while working with Diedrich Implement on August 9, 2006. Petitioner testified that a chain off a truck struck him in the groin area. He testified that he required surgery. He received 26% man as a whole in settlement of that claim. He had a permanent injury as a consequence of that accident. He testified that it took a while to get everything healed up. Said injury effected his "manhood". Petitioner had a left heart catheterization in March 2015. He was diagnosed with atrial fibrillation in January 2016. He was diagnosed with mitral valve regurgitation in May 2016. It was after that that he was laid off from the mine. Shortly after his layoff he went to Missouri Baptist Hospital where he had a mitral valve repair, bypass surgery and a Maze procedure performed. Said procedure was performed on July 1, 2016. He testified that he has not worked since that time. Petitioner received disability for his lost time because of his heart condition through the end of 2016. Following the surgical procedure at Missouri Baptist, Petitioner had to be readmitted to the hospital a couple of times because of pericardial effusion. He testified that water built up around his lungs following his surgery. He testified that it was an allergic reaction to the anesthesia.

Petitioner underwent another stress test in May 2021. Following that stress test they did a cardiac catheterization to check up on his heart surgery. Petitioner testified that since leaving the mine, he has treated with Suburban Chest and Sleep Specialists which is Dr. Sirikonda, Barnes Jewish Medical Center, Prairie Cardiovascular, Cardiac Thoracic and Vascular Surgery and Southeast Pulmonology which would be Dr. Pothineni.

Petitioner testified that while he was employed in the mines from time to time he was offered the opportunity to undergo chest x-ray screening for black lung by NIOSH. He testified that he did not take that opportunity while employed with Respondent. He testified that he was screened at other mines. He testified that after the chest x-ray they would write to him and tell him what his chest x-ray revealed. He testified that he did not bring those letters with him to arbitration.

Petitioner testified that he is a deer hunter and he hunts from a stand. Petitioner testified that he killed one deer this past season. Petitioner testified that it was a 10 point buck. He did not pick up the deer. His boys took it in for him. Petitioner testified that he lives on six acres and maintains that yard by mowing it. Petitioner testified that he uses a wood lathe to turn small chunks of wood into bowls and vases. He testified that he mostly gives the items away. He testified that his other hobbies include fishing. He testified that in good weather he might fish six to eight times per year. Petitioner has a 17-foot boat from which he fishes. Petitioner testified that he travels once or twice a year. They go to Montauk State Park in Missouri and camp.

Petitioner testified that after his mitral valve repair and his heart catheterization, he still had breathing problems. Petitioner testified that when he deer hunts he drives his side by side less than 100 yards from where he hunts. When walking from the side by side to where he hunts, he has to stop probably twice. Petitioner testified that he does not fish alone. He has someone to help him crank the boat onto the trailer.

Dr. Istanbouly examined the Petitioner on April 26, 2017, at the request of his counsel (Petitioner's Exhibit 1, p 6). Dr. Istanbouly specializes in pulmonary, critical care and sleep medicine (Petitioner's Exhibit 1, p 5). Dr. Istanbouly practiced in Southern Illinois from April 2003 until March 2019. At that time he took a position at Hines VA in Maywood, Illinois (Petitioner's Exhibit 1, pp 5-6). Dr. Istanbouly saw Petitioner one time to evaluate him in conjunction with his state black lung claim (Petitioner's Exhibit 1, p 23). Dr. Istanbouly testified that for many years he performed on average five to seven such examinations a month. He testified that over time those

declined with his moving to Chicago and then with COVID, but they have resumed slowly. Dr. Istanbouly travels to Southern Illinois once a month and performs those examinations and also has a pulmonary clinic in Du Quoin at Marshall Browning Hospital. Dr. Istanbouly testified that the exams are always at the request of a claimant attorney (Petitioner's Exhibit 1, p 24).

Dr. Istanbouly noted that Petitioner worked as a coal miner for 29 years with all of that time being underground. Petitioner's last month of employment was May 2016. In the last year of employment he worked as a machine operator. He testified that in that job he sat for half of his shift but the rest of the shift he was required to walk and do some lifting and shoveling. Petitioner was a never smoker. Petitioner had significant chronic respiratory symptoms, including chronic daily cough for years, mild to moderate in intensity and productive of significant white-yellowish sputum, close to a quarter of a cup a day. In addition, Petitioner mentioned exertional dyspnea as he would get short of breath by walking half a block to one block. He also mentioned occasional wheezing incidents. Petitioner also mentioned heartburn occasionally, once or twice a week (Petitioner's Exhibit 1, pp 7-8).

Dr. Istanbouly testified that the pulmonary function test he performed on Petitioner revealed a mild nonspecific ventilatory limitation with no evidence of hyperactive airways disease (Petitioner's Exhibit 1, p 9). Dr. Istanbouly reviewed a chest x-ray taken at Ferrell Hospital on January 12, 2017. He testified that Petitioner's chest x-ray revealed mild bilateral interstitial changes with mild cardiomegaly (Petitioner's Exhibit 1, p 10). Dr. Istanbouly testified that the main culprit for Petitioner's mild nonspecific ventilatory limitation was his long term coal dust inhalation. He testified that he could not rule out Petitioner's coal dust exposure as at least a causative factor in his ventilatory defect (Petitioner's Exhibit 1, p 12). Dr. Istanbouly testified that he diagnosed Petitioner with coal workers' pneumoconiosis, which was related to his long term coal dust inhalation (Petitioner's Exhibit 1, p 16).

Dr. Istanbouly testified that the disease process of coal workers' pneumoconiosis was caused by fine particles being inhaled and reaching the deep parts of the airways ending in the alveoli creating a local irritation or inflammation that will end up with tiny scars, which are the small round opacities seen on the x-ray (Petitioner's Exhibit 1, p 17). Dr. Istanbouly testified that not every coal miner who is exposed to coal dust gets coal workers' pneumoconiosis. Dr. Istanbouly testified that the scarring and fibrosis of pneumoconiosis are permanent. He testified that the scarring and fibrosis of coal workers' pneumoconiosis cannot carry on the function of normal healthy lung tissue. He testified that by definition if one has coal workers' pneumoconiosis he will have an impairment in the function of the lung at least at the site of the scar or fibrosis (Petitioner's Exhibit 1, pp 17-18).

Dr. Istanbouly testified that the American Thoracic Society definition of chronic bronchitis is chronic daily cough for at least three months in at least two consecutive years with sputum production. Dr. Istanbouly testified that Petitioner met the criteria for chronic bronchitis. He testified that the cause of Petitioner's chronic bronchitis would be long term coal dust inhalation (Petitioner's Exhibit 1, pp 18-19). Dr. Istanbouly testified that due to coal workers' pneumoconiosis, Petitioner could not have additional exposure to coal dust without endangering his health (Petitioner's Exhibit 1, pp 20-21).

Dr. Istanbouly testified that he is familiar with the *AMA Guides to Evaluation of Permanent Impairment, Sixth Edition*. Dr. Istanbouly testified that based on Table 5-4 of the *AMA Guides*, Petitioner would be in Class 1 impairment rating (Petitioner's Exhibit 1, p 22).

Petitioner did not relate to Dr. Istanbouly a past history of respiratory disease. Petitioner did not relate to Dr.

Istanbouly smoke, dust or fumes being a trigger for his complaint of cough. Petitioner did not relate to Dr. Istanbouly leaving his work at the mine due to respiratory disease (Petitioner's Exhibit 1, p 24). Dr. Istanbouly testified that Petitioner did not relate to him any problem in completing the physical demands of his job because of respiratory problems or disease. Dr. Istanbouly did not know why Petitioner left the mine when he did (Petitioner's Exhibit 1, pp 24-25). Dr. Istanbouly testified that Petitioner had surgery on his heart in June 2016. His last employment was in May 2016. Dr. Istanbouly testified that there was a good possibility of an association between the two (Petitioner's Exhibit 1, p 25). Dr. Istanbouly testified that there are causes for cough and sputum as well as dyspnea on exertion other than pulmonary disease. He testified that heart disease can cause respiratory symptoms including dyspnea on exertion (Petitioner's Exhibit 1, pp 25-26). Dr. Istanbouly testified that deconditioning is associated with dyspnea on exertion. Petitioner related to Dr. Istanbouly a 20 pound weight gain since he left the coal mine (Petitioner's Exhibit 1, p 26).

Dr. Istanbouly reviewed no treatment records regarding Petitioner. He testified that Petitioner was not taking any breathing medication at the time he saw him and based upon the history he obtained, Petitioner had never taken breathing medication in the past (Petitioner's Exhibit 1, pp 26-27). Dr. Istanbouly testified that he did not diagnose Petitioner with an obstruction or restriction but with a mild nonspecific ventilatory limitation. Petitioner's FEV1/FVC ratio was 74%. Dr. Istanbouly agreed that according to the *AMA Guides* Table 5-4, for an individual to fall in Class 0, his FEV1/FVC ratio has to be above the lower limit of normal and/or greater than 75% of predicted. Dr. Istanbouly testified that Petitioner's lower limit of normal was 65.6. Petitioner's ratio was 74% so it was greater than the lower limit of normal and it was 99% of predicted (Petitioner's Exhibit 1, pp 28-29).

Dr. Istanbouly testified that when he met with Petitioner, he was presented with the chest x-ray of January 12, 2017, along with Dr. Smith's interpretation of same. He testified that he had not seen any other interpretations of chest imaging on Petitioner (Petitioner's Exhibit 1, p 29). Dr. Istanbouly is neither an A-reader or B-reader of films. When he interprets a film for black lung, he determines whether the film is positive or negative for pneumoconiosis and if it is positive, he classifies what he sees as mild, moderate or severe. He characterized what he saw on Petitioner's film as mild pneumoconiosis. Dr. Istanbouly does not assign profusion ratings to the films he reviews. Dr. Istanbouly testified that a profusion of 1/0 is abnormal and a profusion of 0/1 is a negative film. Dr. Istanbouly testified that he did not know the difference between the two and that when it comes to the profusion system, his knowledge was very superficial (Petitioner's Exhibit 1, p 31). Dr. Istanbouly testified that a majority of the individuals who are exposed to coal mine dust do not develop pneumoconiosis. He testified that based on the results from NIOSH's Coal Workers' Health Surveillance Program, about 20 to 25 percent of coal miners have positive x-rays (Petitioner's Exhibit 1, p 32). The correlation in detection of pneumoconiosis between chest x-ray and pathology is fairly good and even higher with CT scanning (Petitioner's Exhibit 1, p 32).

Dr. Istanbouly testified that in his report the only thing he had listed under assessment/plan was coal workers' pneumoconiosis. He testified that chronic bronchitis in Petitioner's case was a manifestation of simple coal workers' pneumoconiosis (Petitioner's Exhibit 1, pp 32-33).

Dr. Henry K. Smith is a diagnostic radiologist (Petitioner's Exhibit 2, p 3). Dr. Smith has been board certified in radiology since 1973. He took the B-reading exam for the first time in 1987 and has been continuously certified as a B-reader since that time (Petitioner's Exhibit 2, p 11). Dr. Smith testified that he failed the B-reading exam twice somewhere around 1999. He testified that he failed because of overreading the films. He was finding more disease than was present on the standard film (Petitioner's Exhibit 2, pp 50-51). Dr. Smith received his Doctor of Osteopathic Medicine in 1968 from Kirksville College of Osteopathic Medicine (Petitioner's Exhibit 2, pp 6-7, Deposition Exhibit 1). Dr. Smith did a rotating general internship at Carson City Hospital in Carson City,

Michigan and a radiology residency at Memorial Osteopathic Hospital in York, Pennsylvania (Petitioner's Exhibit 2, p 7). Dr. Smith operated his own private radiology practice from 1988 to 2016. Since leaving his practice, he has been doing consulting work in the field of radiology including a lot of B-readings (Petitioner's Exhibit 2, pp 9-10).

Dr. Smith testified that in performing a B-reading, he starts with determining the quality of the film. The next step is to determine if there are small opacities present. If opacities are present, he determines if there are enough to be called pneumoconiosis. If so, then he determines whether they are round or linear opacities and categorizes them by size (Petitioner's Exhibit 2, pp 19-21). Dr. Smith testified that with coal workers' pneumoconiosis, the preponderance of those small opacities are round. He testified that with other kinds of pneumoconiosis, such as asbestos-related, they are linear or irregular opacities. In coal workers' pneumoconiosis, opacities occur primarily in the upper to mid lung zones (Petitioner's Exhibit 2, p 21). The next thing he considers is the profusion which is the concentration or density of the findings in the lungs (Petitioner's Exhibit 2, p 22). Dr. Smith testified that the profusion tells the reader what degree of involvement is present (Petitioner's Exhibit 2, p 23). Dr. Smith testified that the last thing included in completing the B-reading form is the obligatory findings which are things which need to be recorded other than the findings of black lung (Petitioner's Exhibit 2, p 25). Dr. Smith described an opacity as a small, abnormal density one would not see on a normal chest x-ray. It is often seen with people who have occupational lung disease or pneumoconiosis (Petitioner's Exhibit 2, pp 28-29).

At the request of Petitioner's counsel, Dr. Smith reviewed chest x-rays of Petitioner dated January 30, 2016, June 4, 2016, and January 12, 2017, and a CT scan dated March 1, 2016 (Petitioner's Exhibit 2, p 36). Dr. Smith testified that the film of January 2016, was quality 1. Dr. Smith testified that his impression was simple coal workers' pneumoconiosis with small opacities of classification p/s in all lung zones of profusion 1/1 (Petitioner's Exhibit 2, pp 37-38). The chest x-ray of June 2016, was quality 2 because it was a portable AP film. Dr. Smith testified that he found interstitial fibrosis with p/s opacities in the upper, middle and lower lung zones of profusion 1/1. There was an incidental linear parenchymal band, which is a little scar tissue in the lateral right lower lung (Petitioner's Exhibit No 2, pp 38-39). The chest x-ray of January 2017, was quality 1. Dr. Smith testified that the film revealed interstitial fibrosis with p/s opacities in all lung zones of profusion 1/1. There were linear streaky density changes laterally in both lower lungs related to plate-like atelectasis or scarring (Petitioner's Exhibit 2, p 39). Dr. Smith testified that the CT scan of March 2016 revealed radiographic p-type changes present in the lung. There were also linear streaky density changes in the posterior lung zones that he attributed to compressive subsegmental atelectasis or scarring. Dr. Smith's final impression of the CT scan was consistent with simple coal workers' pneumoconiosis of predominant p-type opacities and profusion 1/1. Dr. Smith testified that subsegmental atelectasis or parenchymal scarring are little local areas of collapse of the lung from poor inspiration or elevated diaphragm. He testified that the scarring is permanent but the plate-like atelectasis can come and go (Petitioner's Exhibit 2, p 40). Petitioner had coal workers' pneumoconiosis and damage to his lungs as a result of same (Petitioner's Exhibit 2, pp 40-41).

From 1988 to 2016 Smith Radiology was a freestanding diagnostic walk-in medical facility (Petitioner's Exhibit 2, p 53). Dr. Smith testified that Smith Radiology made $1,250,000.00 in annual income after expenses. He testified that of that income maybe 10% was from medical legal exams or interpretations (Petitioner's Exhibit 2, p 55). Dr. Smith testified that over the years he has interpreted chest x-rays for black lung for over 20 law firms. He testified that over 80% of those firms represented claimants (Petitioner's Exhibit 2, pp 55-56). Dr. Smith testified that presently he is reviewing films for black lung for five firms that represent claimants. Dr. Smith testified that one of the firms was Petitioner's counsel. He has also reviewed films for Culley & Wissore. He testified that he has read more than 345 films for Culley & Wissore or Petitioner's counsel (Petitioner's Exhibit

2, pp 57-59). Dr. Smith testified that when he received films from Culley & Wissore he would get two or three films at a time on a frequency of twice a month. He might receive a tiny bit more than that from Petitioner's counsel (Petitioner's Exhibit 2, p 60). Dr. Smith testified that at his peak he was interpreting 2,000 films a year for law firms. Presently he is interpreting about 1,500 films year (Petitioner's Exhibit 2, pp 61-62).

Dr. Smith has never sat on any committee with NIOSH. Dr. Smith has not held any office in any capacity with the College of Osteopathic Medicine or the Osteopathic Board of Radiology (Petitioner's Exhibit 2, p 64). Dr. Smith testified that the syllabus that he uses to study for the B-reading exam he pretty much takes as gospel. He testified that the panel that puts that together are the peers that he aspires to be. He testified that he respects them highly. He testified that the leaders in the field have been chosen to put that syllabus together. Dr. Smith testified that a new syllabus has been authored for NIOSH and that Dr. Cris Meyer was one of the authors of that syllabus. Dr. Smith testified he agrees with the current B-reading syllabus that small opacities associated with exposure to silica and coal dust are usually rounded (Petitioner's Exhibit 2, pp 65-66). Dr. Smith agreed with the B-reading syllabus that the small round opacities usually involve the upper lung zones first and as the dust exposure continues, all the lung zones may become involved. Dr. Smith testified that this has been his experience (Petitioner's Exhibit 2, pp 68-69). Dr. Smith testified that the scarring that is reflected by opacities on chest imaging is permanent. He testified that the profusion and opacity size will not regress (Petitioner's Exhibit 2, p 68).

Dr. Smith testified that simple pneumoconiosis is unlikely to progress once the exposure ceases. He testified that pulmonary impairment is determined by appropriate pulmonary function testing and not by a chest x-ray. Dr. Smith testified that if one wants to know whether there is any functional impairment, and if present, the degree of same, he would want to have valid pulmonary function testing (Petitioner's Exhibit 2, pp 69-70).

Dr. Smith did not know whether the monitors he uses for interpreting chest x-rays were in compliance with the guidelines that are set forth in the Code of Federal Regulations. He did not know whether the equipment complied with the DICOM Standard that is set forth within the Code of Federal Regulations (Petitioner's Exhibit 2, p 71).

Dr. Smith testified that adoption of profusion ratings was done to avoid imprecise descriptive terms of what was seen on the films, such as early, moderate or severe pneumoconiosis (Petitioner's Exhibit 2, pp 71-72). Dr. Smith testified that any A or B-reader knows what is meant by 1/0 profusion. He testified that describing 1/0 profusion is something different than saying early because what is early to one person may not be early to another (Petitioner's Exhibit 2, pp 72-73).

Dr. Cristopher Meyer reviewed chest x-rays and a CT scan for Petitioner at the request of Respondent's counsel. Dr. Meyer reviewed a chest x-rays dated January 30, 2016, June 4, 2016 and January 12, 2017. The CT reviewed was taken March 1, 2016. He testified that the January 30, 2016 chest x-ray was quality 2 due to scapula overlap and excessive edge enhancement with some overlying ECG leads (Respondent's Exhibit 2, p 4). Dr. Meyer testified that the January 2016 chest x-ray revealed lung volumes that were slightly low with a little bit of what he described as plate-like atelectasis, which means a linear band of atelectasis at the bases. He testified that there were a few septal lines which were marked on the B-reading form as "kl", Kerley Lines, which are typically seen with some very mild edema. There were no small round, small irregular/linear or large opacities on the chest x-ray. He testified that there were no findings of coal workers' pneumoconiosis (Respondent's Exhibit 2, pp 6-7). Dr. Meyer testified that plate-like atelectasis occurs in the lungs in areas where surfactant, which is the lubricating material in the lungs, gets deficient and the lung sticks together a little bit. It is a line that can show up in the lung parenchyma where the lung stuck together and did not pop open when the patient took a breath in. He testified

that it is not a sequelae of dust exposure. He testified that it often clears with a deep breath (Respondent's Exhibit 2, pp 7-8). Dr. Meyer testified that the January 30, 2016, chest x-ray was interpreted by Dr. Ryan Watson. Dr. Meyer testified that his report was concordant with Dr. Watson's in that both described atelectasis and an enlarged cardiac silhouette or cardiomegaly. He testified that their reports were essentially the same (Respondent's Exhibit 2, pp 8-9).

Dr. Meyer testified that the chest x-ray of June 4, 2016, was a portable chest radiograph that he rated quality 2 for improper position because of the overlying scapula. He testified that NIOSH does not recommend portable chest x-rays for interpretation of black lung. He testified that portable chest radiographs are not the optimal way to look for occupational lung disease although within the ILO guidelines, there is a stipulation that the interpretation of the examination is up to the interpreting physician as to the quality of the overall exam (Respondent's Exhibit 2, p 4). Dr. Meyer testified that the June 2016 study showed a little bit of linear or plate atelectasis at both bases. Other than that, the lungs were clear. His impression was no radiographic findings of coal workers' pneumoconiosis (Respondent's Exhibit 2, p 8). Dr. Meyer testified that the June 4, 2016, chest x-ray was interpreted by Dr. Matthew Bokermann. He testified that Dr. Bokermann also described atelectasis at both bases as did Dr. Meyer. Dr. Meyer testified that his report was concordant with Dr. Bokermann's report (Respondent's Exhibit 2, pp 8-9). Dr. Meyer testified that following his review of these x-rays of January 2016 and June 2016, he reviewed the interpretations of Dr. Henry Smith. Dr. Meyer disagreed with Dr. Smith's findings of small opacities of size p/s with profusion of 1/1 on each of these chest x-rays (Respondent's Exhibit 2, Deposition Exhibit A).

Dr. Meyer testified that the a chest x-ray dated January 12, 2017 was from Ferrell Hospital and the chest CT scan dated March 1, 2016 was from Southeast Imaging. Dr. Meyer testified that the chest radiograph was quality 1 and the chest CT scan was of good quality (Respondent's Exhibit 1, p 40). Dr. Meyer testified that there were no findings of coal workers' pneumoconiosis on this imaging. He testified that there were linear parenchymal bands in the lower lobes and there was a calcified granuloma in the left lower lobe with calcified hilar lymphnodes and splenic calcifications consistent with old granulatomous disease (Respondent's Exhibit 1, pp 40-41). Dr. Meyer testified that linear parenchymal bands are seen all the time in middle and older aged patients. They are typically focal areas of scarring that occur from prior infection or perhaps an episode of aspiration or inflammation. They are described as parenchymal bands to distinguish them from findings of more diffuse pulmonary fibrosis. He testified that it is actually just a focal area of scarring. He testified that it is not a sequelae of coal mine dust exposure (Respondent's Exhibit 2, p 41). Dr. Meyer noted that there were marginal syndesmophytes suggestive of ankylosing spondylitis on the CT scan (Respondent's Exhibit 1, Deposition Exhibit B). Dr. Meyer testified that it would be hard to conceive of coal macules in the lungs with a negative chest CT. He testified that CT scans are well recognized as being the gold standard for identifying interstitial lung disease (Respondent's Exhibit 1, p 61).

Dr. Meyer has been board certified in radiology since 1992 (Respondent's Exhibit 1, p 7). Dr. Meyer has been a B-reader since 1999 (Respondent's Exhibit 1, p 19). Dr. Meyer was asked to take the B-reading exam by Dr. Jerome Wiot who was part of the original committee that designed the teaching course which was called the B-reader program (Respondent's Exhibit 1, pp 19-21). Dr. Meyer testified that there are several ways to study for the B-reader examination. There is a course module that contains a whole series of films that NIOSH will send to the physician or the American College of Radiology runs a B-reading course. Dr. Meyer testified that he has participated in the course previously while studying for the examination and was recently asked to have a more active academic role in helping with the B-reader course in the future. Dr. Meyer is the co-director of the ACR B-reader course. Dr. Meyer was a member of the American College of Radiology Pneumoconiosis Task Force that completed a new syllabus for the course as well as a test that was delivered to NIOSH in 2017 (Respondent's

Exhibit 1, pp 31-32). Dr. Meyer testified that the B-reader training course was a weekend course in which there were a series of lectures describing the B-reader classification system. The teachers of the course would go through standard examples of the various components of the B-reading system. The course participants would then review a series of practice examples with mentors overseeing the practice examples. Dr. Meyer testified that the faculty for the B-reading course is typically experienced senior level B-readers (Respondent's Exhibit 1, pp 32-33).

Dr. Meyer testified that typically after one takes the course, he would take the B-reading exam. Dr. Meyer testified that the certifying exam is six hours long with 120 chest x-rays to be categorized. The pass rate for the examination runs roughly 60%. Dr. Meyer testified that radiologists have a 10% higher pass rate on the B-reading exam than other specialties. In Dr. Meyer's opinion radiologists have a better sense of what the variation of normal is (Respondent's Exhibit 1, pp 33-34). Dr. Meyer testified that one of the most important parts of the B-reading training and examination is making the distinction between a 0/1 and 1/0 film (Respondent's Exhibit 1, pp 34-35).

Dr. Meyer testified that the B-reader looks at the lungs to decide whether there are any small nodular opacities and based on the size and appearance of the small opacities they are given a letter score (Respondent's Exhibit 1, p 22). Dr. Meyer testified that specific occupational lung diseases are described by specific opacity types. Coal workers' pneumoconiosis is characteristically described by small round opacities. Diseases that cause pulmonary fibrosis, like asbestosis, would be described by small linear opacities (Respondent's Exhibit 1, p 28). The distribution of the opacities is also described. Different pneumoconioses are seen in different regions of the lung. Coal workers' pneumoconiosis is typically an upper lung zone predominant process. Idiopathic pulmonary fibrosis or asbestosis is a basilar or linear process. The last component of the interpretation is the extent of the lung involvement or so-called profusion (Respondent's Exhibit 1, pp 22-23). Dr. Meyer testified that the profusion is basically trying to describe the density of the small opacities in the lung (Respondent's Exhibit 1, p 30). Dr. Meyer testified that a negative film for coal workers' pneumoconiosis does not necessarily rule out the disease. He agreed that many coal miners that have had negative chest x-rays for coal workers' pneumoconiosis actually had it pathologically (Respondent's Exhibit 1, p 47).

Dr. Meyer did not pass the B-reading test the first time he took it (Respondent's Exhibit 1, p 69). He testified that he was two years out of his residency, around 1994, when his commanding officer at the hospital told him he was to go take the B-reading exam. He had no idea that he was actually supposed to study for the exam so he showed up on a weekend, took the American College of Radiology course and sat for the examination. Dr. Meyer testified that he became certified as a B-reader in 1999 and has not failed the B-reader exam since then (Respondent's Exhibit 1, pp 70-71).

At the request of Respondent, Dr. James Lockey reviewed medical records and films regarding Petitioner. Dr. Lockey is a physician at the University of Cincinnati Medical Center (Respondent's Exhibit 3, p 4). Dr. Lockey completed a pulmonary fellowship in 1978. He is board certified in internal medicine as well as in pulmonary and occupational medicine. Dr. Lockey has been certified as a B-reader continuously since 1988 (Respondent's Exhibit 3, p 5). Dr. Lockey was on the American College of Radiology Task Force for redoing the B-reading training program using the ILO system. The task force updated the training films and the B-reader instruction pamphlet as well as the training course and exam (Respondent's Exhibit 3, p 6). Dr. Lockey was recruited to the University of Cincinnati to run the division of occupational and environmental medicine starting in 1986. He has been heavily involved in research in occupational lung disease. He has treated individuals with pneumoconiosis (Respondent's Exhibit 3, pp 7-8).

Dr. Lockey reviewed a chest x-ray of Petitioner dated January 12, 2017, as well as a chest CT scan dated March 1, 2016. He testified that neither of the radiographic studies demonstrated changes consistent with pneumoconiosis (Respondent's Exhibit 3, p 28). Dr. Lockey testified that his review of the chest x-ray and CT scan results reported by the various treating physicians demonstrated old granulomatous changes consistent with histoplasmosis as well as discoid atelectasis versus linear scarring involving the lung bases. There were no reported changes by the treating physicians of findings consistent with coal workers' pneumoconiosis (Respondent's Exhibit 3, p 28). Dr. Lockey testified that in interpreting a film for pneumoconiosis, he first grades the quality of the film and then determines what opacity types, if any, are present. If opacities are present, he then determines the lung zones involved (Respondent's Exhibit 3, pp 18-19). Dr. Lockey testified that he also indicates whether there are diseases or manifestations on a chest x-ray other than pneumoconiosis (Respondent's Exhibit 3, p 19). In Petitioner's case, Dr. Lockey marked calcified granuloma and parenchymal bands as other findings. He also indicated other abnormalities which in this case meant valvular repair and post-surgical changes from heart surgery. Petitioner also had vertebral column abnormalities (Respondent's Exhibit 3, p 20). Dr. Lockey testified that profusion is the number of opacities on the chest film. He testified that profusion of 1/0 indicates that there are very early changes on the film consistent with pneumoconiosis. A profusion category of 0/1 indicates the film is considered normal but the possibility of early changes do exist (Respondent's Exhibit 3, pp 20-21). Dr. Lockey testified that the distinction between a film with a profusion of 0/1 versus one that has a profusion of 1/0 is the borderline between a film that is positive for disease or negative for disease (Respondent's Exhibit 3, p 21). Dr. Lockey testified that when he does an interpretation of a chest x-ray for pneumoconiosis, he does a side by side reading with the standard ILO films. Dr. Lockey testified that the distinction between a film with a profusion of 0/1 versus a film that is 1/0 is emphasized in the B-reading course (Respondent's Exhibit 3, p 21). Dr. Lockey testified that he helped to rewrite the syllabus for the B-reader training course. He testified that the syllabus is the training manual that is used to help educate physicians on the ILO classification system and the B-reading classification system (Respondent's Exhibit 3, pp 21-22).

Dr. Lockey testified that under most circumstances there is little or no progression of simple coal workers' pneumoconiosis once the exposure ceases. Dr. Lockey agreed with the position taken by the American Thoracic Society that an older worker with a mild pneumoconiosis may be at low risk for working in currently permissible dust exposure levels in the mine until he reaches retirement age (Respondent's Exhibit 3, p 22). Dr. Lockey is familiar with the *AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition* and specifically Chapter 5 entitled "The Pulmonary System." Dr. Lockey testified that according to the *Guides*, chest imaging is not a factor, let alone a key factor, in the determination of impairment (Respondent's Exhibit 3, pp 22-23). Dr. Lockey agrees with the *Guides* that the correlation of chest interpretations with physiologic measurements is poor. Dr. Lockey testified that there is not any clinical significance to subradiographic pneumoconiosis unless there is an indication of a decrease in diffusion capacity which could mean that there could be changes interfering with the alveolar capillary membrane. Dr. Lockey agreed with the opinion expressed by Dr. Istanbouly that a majority of coal miners do not develop coal workers' pneumoconiosis. Dr. Lockey also agreed with Dr. Istanbouly that the correlation between chest x-ray evidence of pneumoconiosis and pathologic evidence is fairly good (Respondent's Exhibit 3, p 23). Dr. Lockey reviewed pulmonary function testing performed on Petitioner under the direction of Dr. Istanbouly on April 25, 2017. He testified that the lower limit of normal for Petitioner's FEV1/FVC ratio was 65.6%. Petitioner's ratio was 74%. Petitioner's FEV1/FVC ratio was greater than 75% of predicted. Petitioner's results from his spirometry with regard to his FEV1/FVC ratio placed him in Class 0 impairment according to the *AMA Guides* (Respondent's Exhibit 3, pp 23-24).

Dr. Lockey testified that there were two factors contributing to Petitioner's dyspnea and changes in his lung volumes. Those were valvular heart disease and hyperostosis. Dr. Lockey testified that hyperostosis is a marked overgrowth of bone which in this case involved Petitioner's vertebral column. Dr. Lockey testified that the etiology of Petitioner's respiratory symptoms was not his workplace exposure (Respondent's Exhibit 3, p 24). Dr. Lockey testified that because of Petitioner's valvular heart disease, he underwent cardiac surgery and post-surgery his lung volumes demonstrated a decrease, which is not uncommon when someone has his chest opened up for cardiac surgery. There tends to be a reduction in his lung volume parameters. Dr. Lockey testified that individuals with hyperostosis and ankylosing spondylitis have an abnormality involving their chest wall. The chest wall becomes more restrictive in nature and that is reflected as a restrictive pattern on pulmonary function tests. When an individual takes a deep breath, his chest rotates up interiorly and when he breathes out it tends to decrease the AP diameter. In someone with Petitioner's condition, the ribs are frozen and they do not increase when he takes a deep inspiratory effort and that is reflected as a restrictive pattern on pulmonary function testing. Dr. Lockey testified that Petitioner's valvular heart disease and hyperostosis were not related to his workplace exposure (Respondent's Exhibit 3, pp 24-25).

Dr. Lockey testified that there were numerous pulmonary function studies in the records that he reviewed. He testified that the studies did not demonstrate airway obstruction. They did tend to demonstrate, in relationship to the lung volume studies, at times a restrictive pattern. The diffusion capacities were essentially normal until the most recent values where there was a decrease in diffusion capacity, but it did correct for alveolar volume (Respondent's Exhibit 3, p 46). Dr. Lockey testified that a restrictive defect means the lungs are not as large as they normally should be and that could be from numerous causes. He testified that it could be related to something actually going on within the lung itself, a neurological condition or due to a chest wall condition such as in Petitioner. He testified that the only time that he has seen coal workers' pneumoconiosis give a restrictive pattern to the degree on Petitioner's pulmonary function testing is when a person had progressive massive fibrosis that is obvious on both chest x-rays and CT scans. He testified that Petitioner did not have that. Dr. Lockey testified that when someone has simple coal workers' pneumoconiosis, the pulmonary function tests are either normal or there may be a mild obstructive pattern. He testified that with progressive massive fibrosis, it could be restrictive, obstructive, or a combination (Respondent's Exhibit 3, pp 47-48). Dr. Lockey testified that after Petitioner had surgery to correct his valve defect, he still had shortness of breath. Dr. Lockey noted that Petitioner had some complications after the surgery with pericardial effusions. He also had demonstrated he had some secondary mild pulmonary hypertension which probably did not correct after his valvular surgery, which is not an uncommon finding. Dr. Lockey testified that Petitioner's abnormality of the chest wall, on top of his chest wall surgery, most likely contributed to his persistent shortness of breath (Respondent's Exhibit 3, p 51). Dr. Lockey testified that he saw no objective evidence that Petitioner's 29 years of coal dust exposure played any role in his shortness of breath (Respondent's Exhibit 3, p 52).

Medical records of Heartland Regional Medical Center were admitted into evidence. Petitioner underwent pulmonary function testing on February 18, 2010. Same was interpreted by Dr. Suhail Istanbouly as revealing a moderate non-specific ventilatory limitation with no evidence of hyperactive airways disease. Reduced lung volumes were consistent with mild restrictive defect. Petitioner had a normal diffusion capacity (Respondent's Exhibit 5, p 44). Petitioner underwent stress test with echocardiogram on February 19, 2010. The conclusion was normal stress echo with no evidence of regional wall motion abnormalities (Respondent's Exhibit 5, pp 41-42). Petitioner underwent CT of the chest on September 4, 2015, which was interpreted as revealing areas of scattered bilateral scarring which was unchanged. The impression was chronic granulomatous infection of the chest (Respondent's Exhibit 5, pp 8-9). Petitioner underwent pulmonary function testing on September 4, 2015. The interpretation was that the spirometry showed non-specific ventilatory defect. Lung volume measurement and

diffusing capacity were within normal limits. The doctor noted that in comparison to pulmonary function tests performed on March 9, 2015, and February 18, 2010, the FVC and FEV1 were unchanged to slightly improved. The total lung capacity was unchanged and the diffusing capacity was unchanged to mildly improved (Respondent's Exhibit 5, pp 4-5).

Medical records of Prairie Cardiovascular Consultants were admitted into evidence. Petitioner was seen on December 6, 2012, for diagnosis of chest pain. The doctor indicated that the quality of pain appeared atypical for angina. Review of systems respiratory revealed no chronic cough. Physical examination of the chest revealed the lungs clear to auscultation (Respondent's Exhibit 6, pp 100-102). Petitioner underwent stress test on December 10, 2012. The impression was no EKG evidence of ischemia with normal rest/stress myocardial profusion imaging. The ejection fraction was calculated at 64%. This was interpreted as a normal study (Respondent's Exhibit 6, pp 96-99). Petitioner was seen in follow up on February 17, 2014. Petitioner reported overall he had been doing well. He was still working in the coal mine. Review of systems respiratory was negative for chronic cough. Physical examination of the chest revealed the lungs clear to auscultation (Respondent's Exhibit 6, pp 92-94).

Petitioner underwent chest x-ray and pulmonary function testing on March 9, 2015. The clinical history provided for the chest x-ray was shortness of breath and cigarette smoker. The impression was minimal plate-like atelectasis of the lingula, right middle and both lower lobes. There were minimal linear infiltrates of the left lower lobe consistent with underlying pneumonitis (Respondent's Exhibit 6, p 90). The spirometry revealed a non-specific ventilatory defect. There was no evidence of airflow limitation. There was no significant bronchodilator response. Lung volume measurements and diffusing capacity were normal (Respondent's Exhibit 6, pp 88-89). A CT of the chest was taken on March 17, 2015. The impression was bibasilar subsegmental atelectasis versus scarring. There was chronic granulomatous infection of the chest (Respondent's Exhibit 6, pp 86-87).

Petitioner was seen in the office on March 23, 2015. At that time it was noted he had exertional chest discomfort and shortness of breath. It was noted he had put on 10 more pounds of weight. He was becoming more and more short of breath. It was noted that he had been inactive due to the fact he had been taking care of some sick members of his family. His symptoms worsened with activity. Review of systems respiratory revealed shortness of breath. Physical examination of the chest revealed the lungs clear to auscultation (Respondent's Exhibit 6, pp 79-81). Petitioner underwent a left heart catheterization with selective coronary arterography and left ventriculogram on March 31, 2015. Impression was non-critical coronary disease and normal left ventricular function (Respondent's Exhibit 6, pp 73-75). Petitioner was seen on September 10, 2015, at which time he was noted to be stable. Review of systems respiratory revealed no chronic cough. Physical examination of the chest revealed the lungs clear to auscultation (Respondent's Exhibit 6, pp 70-72).

Petitioner was seen on January 30, 2016, at Memorial Hospital of Carbondale. He had been transferred from another hospital with a diagnosis of atrial fibrillation with rapid ventricular response. He was noted to be in his usual state of health until the day of admission. He started having recurrent episodes of chest pain. His review of systems respiratory revealed no chronic cough. Chest x-ray was performed and showed bibasilar atelectasis and mild cardiomegaly (Respondent's Exhibit 6, pp 67-69). Petitioner was seen in follow up on February 18, 2016. Review of systems respiratory revealed shortness of breath. The diagnoses were proximal atrial fibrillation, hypertension and pure hypercholesterolemia (Respondent's Exhibit 6, pp 54-56). Petitioner underwent chest x-ray on April 15, 2016. The history was chest pain with shortness of breath and anxiety. The impression was cardiomegaly with normal pulmonary vascularity. There was linear increased opacity within the right lower lung, unchanged from chest x-ray dated January 30, 2016, and was likely a small focus of fibrosis (Respondent's Exhibit 6, p 53). Petitioner was admitted to Pinckneyville Hospital on April 16, 2016, and discharged the same

date. It was noted that he had been at work in the coal mine the day prior and started feeling palpitations with a rapid heart rate. He had some associated chest tightness. He was initially found to be in an irregular heart rhythm which spontaneously changed back to regular rhythm while in route to the emergency room. On examination his lungs were clear to auscultation bilaterally with no wheezes, crackles or rhonchi. He had no increased work of breathing. His diagnoses included GERD (Respondent's Exhibit 6, pp 50-51). Petitioner was seen on May 9, 2016, in follow up. He was in sinus rhythm at that time. In history obtained from Petitioner, he related marked increase in shortness of breath with exertion over the past two years. He further noted that he had been seen by a pulmonologist and that he may have some pneumoconiosis related to his coal dust exposure as a miner, but he was told this was fairly mild. Review of systems respiratory revealed shortness of breath. Physical examination of the chest revealed same to be clear to auscultation (Respondent's Exhibit 6, pp 46-49). Petitioner underwent transesophageal echocardiography on May 27, 2016. No abnormalities were found except the mitral valve revealed moderate to severe regurgitation directed eccentrically (Respondent's Exhibit 6, pp 42-45).

Petitioner was seen on June 2, 2016, in consultation at Memorial Hospital of Carbondale. Petitioner related progressive shortness of breath on exertion for the past few weeks to the point he was unable to do his ADLs for the past 48 hours. Physical examination of the chest revealed the lungs clear to auscultation. The assessment was dyspnea on exertion likely secondary to worsening of mitral valve regurgitation (Respondent's Exhibit 6, pp 38-41). Petitioner underwent cardiac catheterization on June 14, 2016. The impression was no significant coronary artery disease, mild pulmonary hypertension and severe mitral regurgitation with prolapse of the valve leaflet (Respondent's Exhibit 6, pp 26-28).

On June 16, 2016 Dr. Panchamuki authors a to whom it may concern letter stating that Petitioner was under his care for cardiac condition and is unable to return to work until seen by Dr. Kouchoukos (Respondent's Exhibit 6, p 25). On June 21, 2016, Dr. Kouchoukos authors a letter to Dr. Panchamuki wherein he states that Petitioner has experienced atrial fibrillation which was quite symptomatic. He recommends that because of same and his shortness of breath he should undergo mitral valve replacement, MAZE procedure and possible bypass (Respondent's Exhibit 6, p 24).

Medical records of Memorial Hospital of Carbondale were admitted into evidence. Petitioner presented to the emergency room on June 4, 2016, reporting that he had been coughing up blood. He had streaks of bright red blood in his sputum. Petitioner reported he had been working a lot outside that day, putting up electric wiring for a swimming pool. He was walking a lot around the house and garage, more than he usually does. He noticed that he had been coughing on and off and then began coughing bloody sputum a few times while taking a shower. He also had intermittent chest tightness as well. A focus review of systems respiratory revealed dyspnea on exertion and productive cough. On examination respiratory he had normal breath sounds with no respiratory distress. There were no rales, rhonchi or wheezing. The differential diagnoses included bronchitis and possible viral syndrome. He was admitted for hospital care (Respondent's Exhibit 4, pp 36-43). Chest x-ray performed on that date showed bibasilar atelectasis or scarring. Otherwise, he had no acute cardiopulmonary process. (Respondent's Exhibit 4, p 44). As of June 5, 2016, Petitioner had no acute medical complaints other than some shortness of breath on exertion. Physical examination of the lungs showed they were clear to auscultation bilaterally (Respondent's Exhibit 4, pp 27-29). Petitioner was discharged home on June 6, 2016, in very stable condition (Respondent's Exhibit 4, pp 19-20).

Medical records of Southeast Pulmonlogy were admitted into evidence. Petitioner was seen on March 1, 2016. The history of present illness was dyspnea. His onset of symptoms was one year prior but recently the dyspnea had worsened. Episodes occurred daily. His symptoms were aggravated by bending forward, moderate activity

like climbing stairs and mild activity such as walking. His dyspnea was relieved by rest. Associated symptoms included anxiety, dry cough and wheezing. Petitioner was noted to be a never smoker. His review of systems respiratory was positive for chronic cough, cough, dry cough, dyspnea and wheezing. It was also positive for environmental allergies. Respiratory examination was normal. It was noted that the parenchymal changes on CT were not sufficient to explain his dyspnea. Petitioner also reported intermittent dysphagia and voice change (Respondent's Exhibit 9, pp 59-63). CT of the thorax was performed on March 1, 2016. The clinical indication was to assess for left sided pulmonary nodule. The impression included no worrisome pulmonary parenchymal nodule. There were findings suggestive of ankylosing spondylitis. There was incidental evidence of old healed granulomatous disease (Respondent's Exhibit 9, p 48).

Petitioner was seen on March 14, 2016. He was continuing to report dyspnea which was intermittent with little activity as well as dysphagia. Pulmonary function testing was also performed on this date. His respiratory examination was normal. The assessment was dysphagia and vocal cord dysfunction. The doctor noted that dyspnea remained unexplained. Although Petitioner tested positive with methacholine at the highest concentration, it was borderline for hyperreactivity. The doctor noted that the pulmonary function testing did not show any COPD (Respondent's Exhibit 9, pp 40-43). Spirometry performed on March 14, 2016, demonstrated a normal FEV1/FVC ratio. Lung volumes, airway resistance and diffusion capacity of the lungs were all normal (Respondent's Exhibit 9, p 28). Petitioner underwent a modified barium swallow test on April 4, 2016, for the history of dysphagia and cough. Impression was no significant stasis in the vallecular piriform sinuses (Respondent's Exhibit 9, p 22).

Medical records of Suburban Chest and Sleep Specialists were admitted into evidence. Petitioner was seen on October 24, 2016, with complaint of dyspnea. Petitioner related that over the last three weeks he had started noticing chest tightness and dyspnea. He had minimal cough without purulent or bloody expectoration. He reported that he had been seen by Dr. Sewall recently and been told that his cardiac status was stable. Review of systems respiratory was negative other than for dyspnea (Respondent's Exhibit 11, pp 7-9). Chest x-ray performed on the same date revealed a linear scar or atelectasis in the lung bases bilaterally. No pleural effusions were identified. (Respondent's Exhibit 11, pp 12-13). Petitioner was seen on January 24, 2019, with complaint of worsening dyspnea over the last couple years of unclear ideology. It was noted that Petitioner suffered a mild restrictive ventilatory defect based on pulmonary function testing performed in 2016. Petitioner complained of cough that was rarely productive of mucus. His dyspnea was present and worse with activity. He had some sinus congestion and post nasal drip. He had no symptoms of GERD, dysphagia or aspiration. Review of systems respiratory revealed nothing beyond what was recorded as his current symptoms. Physical examination of the chest revealed the lungs expanded symmetric bilaterally. The lungs were clear (Respondent's Exhibit 11, pp 3-6).

Medical records of SIMCA were admitted into evidence. Petitioner was seen for an initial visit on February 19, 2015. He was wanting to reestablish care and stated that he took Nexium for reflux daily. He occasionally had some dysphagia to solids. He complained of dyspnea on exertion and noticed it most at work when he was underground. He denied any chronic cough or wheezing. He had no history of inhaler use. Review of systems respiratory was negative for any cough or wheezing but positive for shortness of breath. Physical examination of the lungs showed no dyspnea (Respondent's Exhibit 7, pp 87-90). Petitioner was seen on March 16, 2015. He reported that his shortness of breath seemed to be slowly worsening. He noted worsening seasonal allergies and intermittent productive cough for the past few years. He wondered if he had developed black lung. Physical examination of the lungs revealed no dyspnea with good air movement and no wheezing. He had a few basilar

crackles on the left greater than the right. Assessment was dyspnea and atypical angina (Respondent's Exhibit 7, pp 81-84).

Petitioner was seen on August 28, 2015, in follow up regarding his lungs. He reported an occasional nonproductive cough. He had no wheezing. He often felt dyspnea with activities. Physical examination of the lungs showed no dyspnea. On auscultation there was diminished air movement and dry rales/crackles bilaterally, worse on the left. There was no wheezing. Assessments were solitary nodule of the lung and dyspnea as well as spasms of the back (Respondent's Exhibit 7, pp 75-78). Petitioner underwent a CT of the chest on September 4, 2015. There was a small calcified granuloma in the left upper lobe. There was a 2 mm nodule adjacent to the left major fissure. The 3 mm nodule within the left lower lobe was unchanged. There were scattered areas of bilateral scarring, which were also unchanged (Respondent's Exhibit 7, pp 71-72).

Petitioner was seen on February 16, 2016. Since the last visit he had been hospitalized with a new onset of atrial fibrillation and went back into sinus rhythm with medication. He continued to have some exertional dyspnea. Petitioner requested a referral to a pulmonologist. Physical examination of the lungs showed no dyspnea. There was diminished air movement and dry rales/crackles in the bilateral bases on auscultation. There was no wheezing (Respondent's Exhibit 7, pp 68-70). Petitioner was seen on July 14, 2016, in follow up after having mitral valve repair and CBG on July 1, 2016. He reported having shortness of breath with mild exertion. His review of systems respiratory showed shortness of breath. Physical examination of the lungs showed no dyspnea. There was no wheezing, rales or crackles. His breath sounds were normal with good air movement and lungs clear to auscultation (Respondent's Exhibit 7, pp 62-65). Petitioner was seen on August 24, 2016, in ER follow up. He was having trouble breathing for the past few days and post nasal drip and head congestion. He was having a harder time catching his breath and had thoracentesis two weeks prior. He had persistent atrial fibrillation. He had significant pleural effusions on the left and thoracentesis. He was told it was "allergic reaction to the surgery." Over the past three days he had increasing dyspnea, chest tightness, fatigue and palpitations. Review of systems respiratory showed a mild cough and difficulty breathing. There was no wheezing. Physical examination of the lungs showed mild dyspneic respiratory effort. There were some decreased breath sounds on the left base. He had no wheezing or rales/crackles (Respondent's Exhibit 7, pp 58-61). Petitioner was seen on August 31, 2016, for follow up after recently being admitted to the hospital for shortness of breath from atrial fibrillation and pleural effusion. He had a cardioversion and then was started on Amiodarone. Shortness of breath had improved but he still noted some shortness of breath with exertion. He had a mild cough which was occasionally productive. He had no wheezing. Physical examination of the lungs showed no dyspnea with respiratory effort. Auscultation showed no wheezing, rales/crackles or rhonchi. Breath sounds were normal with good air movement and clear to auscultation (Respondent's Exhibit 7, pp 54-57).
Petitioner was seen on December 8, 2016. He had not had any further episodes of atrial fibrillation. He would get short of breath walking short distances. Review of systems respiratory showed no cough or wheezing and there were normal respirations. Physical examination of the lungs showed no dyspnea on respiratory effort. Auscultation revealed no wheezing, rales/crackles or rhonchi and breath sounds were normal with good air movement (Respondent's Exhibit 7, pp 49-53). Petitioner was seen on January 9, 2017. He was complaining of a head cold going into the third week. His review of systems respiratory showed a dry cough with some mild chronic difficulty breathing. There was no wheezing. Physical examination of the lungs showed no dyspnea on respiratory effort. Auscultation revealed good air movement with no wheezing (Respondent's Exhibit 7, pp 45-48).

Petitioner was seen on May 25, 2018, for lab results and also complaining of back spasms, heart rate elevation with exertion and shortness of breath on exertion. Petitioner related occasional light headedness and shortness of breath with exertion. His wife reported that at night after climbing stairs his heart rate increased into the 120s and

it took hours to come back to normal. Petitioner related shortness of breath climbing stairs and he had to sit down and rest following same. Review of systems respiratory revealed shortness of breath with exertion. Physical examination of the chest revealed the lungs clear to auscultation with no adventitious sounds. (Respondent's Exhibit 7, pp 39-44). Petitioner was seen on July 6, 2018. Petitioner's review of systems respiratory was positive for chronic shortness of breath. Physical examination of the chest revealed the lungs clear to auscultation with no wheezing, rales or ronchi (Respondent's Exhibit 7, pp 35-38).

Petitioner was seen on January 7, 2019, for his annual check-up. Petitioner related shortness of breath with exertion. He was limiting his activity. He indicated that same was getting worse. It was recorded that he had a history of black lung from working in the coal mine. He had no cough or wheeze. It was indicated that previous pulmonary function testing showed decreased diffusion capacity. He had no obstructive or restrictive changes. Physical examination of the chest revealed the lungs clear to auscultation with no adventitious sounds. With regard to his dyspnea on exertion, Petitioner was going to see a pulmonologist in St. Louis for follow up and further testing (Respondent's Exhibit 7, pp 31-34). Petitioner was seen on April 1, 2019. Review of systems respiratory was positive for chronic shortness of breath. Physical examination of the chest revealed the lungs clear to auscultation with no adventitious sounds (Respondent's Exhibit 7, pp 25-30). Petitioner was seen on October 7, 2019. His problem list included dyspnea. With regard to Petitioner's hypertension it was noted he suffered no shortness of breath. Review of systems respiratory was negative for cough, wheeze or shortness of breath. Physical examination of the chest revealed the lungs clear to auscultation with no wheezing, rales or ronchi (Respondent's Exhibit 7, pp 15-19). Petitioner was seen on April 6, 2020, to review lab results. Review of systems respiratory was negative for cough or shortness of breath (Respondent's Exhibit 7, 12-15). Petitioner was seen on November 9, 2020, with chief complaint of cough. He tested positive for COVID in the middle of October and came out of quarantine on October 30, 2020. He continued to suffer cough and fatigue. The cough was productive. Review of systems respiratory was positive for cough and shortness of breath with fatigue. Physical examination of the chest revealed normal effort and breath sounds with no dyspnea. The assessment was COVID 19 (Respondent's Exhibit 7, pp 7-10). Petitioner was seen on December 4, 2020. He reported that he had COVID in October and had suffered shortness of breath since that time. He had persistent cough with yellow sputum. Physical examination of the chest revealed the lungs clear with no dyspnea or adventitious sounds. Petitioner was noted to have residual shortness of breath post COVID (Respondent's Exhibit 7, pp 3-6).

Medical records of Missouri Baptist Medical Center were admitted into evidence. Petitioner was seen on June 30, 2016 with complaint of increasing shortness of breath for the past year and a half. He had several episodes, three of which had required hospitalization, of rapid heart rate presumably rapid atrial fibrillation. Review of systems pulmonary was negative for any asthma, bronchitis, pneumonia, tuberculosis or emphysema. His history was significant for shortness of breath. It was noted that he had GERD and described occasional trouble with swallowing. Physical examination of the lungs showed they were clear to percussion and auscultation. Impressions were moderate to severe mitral regurgitation secondary to prolapse of the posterior leaflet of the mitral valve and possible anterior leaflet prolapse, paroxysmal atrial fibrillation, coronary artery disease with an ostialstenosis of the large diagonal branch of the anterior descending coronary artery, hyperlipidemia, GERD and benign prostatic hypertrophy (Petitioner's Exhibit 3, pp 43-45). On July 1, 2016, Petitioner underwent mitral valve repair and single vessel coronary artery bypass grafting (Petitioner's Exhibit 3, p 41). Pulmonary consultation was obtained for perioperative pulmonary management on July 1, 2016. It was noted that Petitioner had a history of exposure to a significant amount of dust as he worked in a coal mine. He had been told that there were some lung nodules that were calcified and also some evidence of coal miner's disease. Physical examination of the chest showed good air entry bilaterally without any crackles or wheezing. Chest examination revealed symmetric expansion bilaterally. Chest x-ray was performed which showed no evidence of acute process

(Petitioner's Exhibit 3, pp 46-48). A progress note dated July 4, 2016, noted that Petitioner had some shortness of breath and complained of some sinus congestion. Breath sounds were diminished at the bases bilaterally (Petitioner's Exhibit 3, pp 49-51). On July 6, 2016, Petitioner was reporting shortness of breath with activity. He was now on room air and off the oxygen. The chest x-ray showed improving mild bibasilar pleural and parenchymal opacities (Petitioner's Exhibit 3, pp 52-53). Petitioner was discharged on July 7, 2016. It was noted that after diuresis Petitioner was discharged on room air and in sinus rhythm without any shortness of breath (Petitioner's Exhibit 3, pp 41-42).

Petitioner returned to the hospital on July 10, 2016. It was noted that he had done well after being discharged on July 7, until the previous date when he experienced shortness of breath and dizziness. He was seen in the emergency room in Pinckneyville. There was concern about accumulating more fluid due to a moderate pericardial effusion that was noted at discharge on July 7. A stat echo obtained in the emergency room showed no pericardial tamponade with a small pericardial effusion, less than 1.5 cm. He still complained of vague shortness of breath. His lungs were notable for basilar crackles bilaterally. Chest x-ray showed cardiomegaly with mild pulmonary vascular redistribution (Petitioner's Exhibit 3, pp 62-63). Petitioner was admitted to the hospital again on July 15, 2016, for bilateral pleural effusions. He had presented to the local ER with complaints of chest pain and shortness of breath. Evaluation revealed new onset of large bilateral pleural effusions. He was admitted for further evaluation and management. Physical examination of the chest showed the lungs were clear to auscultation bilaterally. Chest CT was negative for pulmonary embolism. Same revealed large bilateral pleural effusions and small pericardial effusion (Petitioner's Exhibit 3, pp 5-6). During the hospitalization Petitioner underwent a thoracentesis on the left side where 750 ml of fluid was removed. On discharge Petitioner's vital signs were stable and he denied shortness of breath (Petitioner's Exhibit 3, pp 3-4).

Petitioner was seen on August 16, 2016, for chest x-ray for history of pleural effusion and thoracentesis. Findings included basilar atelectasis on the right and retrocardiac consolidation on the left with small pleural effusion. No definite pneumothorax was seen (Petitioner's Exhibit 3, pp 75-76). Petitioner underwent another chest x-ray on August 24, 2016. The impression showed interval improvement in infiltrate and non-specific obscuration of the left base. There was a small left pleural effusion (Petitioner's Exhibit 3, p 94). He was seen for pulmonary consultation on August 24, 2016. It was noted that he completed approximately a month course of Prednisone and Colchicine with some improvement in his symptoms. However, following discontinuation of the Prednisone he had recurrence of the effusion and needed another drainage, the last being only nine days prior. His primary complaint was increased dyspnea and decreased exercise capacity over the last two days. He reported minimal cough but without any sputum production. In the emergency room he was noted to have a small left sided pleural effusion as well as atrial fibrillation with rapid ventricular response. The lungs revealed good air entry bilaterally with very minimal diminished air entry at the left base. Assessment was worsening dyspnea. There was doubt that the small left pleural effusion was contributing to the significant dyspnea. Review of systems respiratory was positive for shortness of breath, dyspnea with exertion, but negative for any wheezing or coughing (Petitioner's Exhibit 3, pp 85-87). Petitioner underwent chest x-ray on October 24, 2016. History for same was cough and shortness of breath for more than three weeks. Minimal linear scar or atelectasis was noted in the lung bases bilaterally. No pleural effusions were identified (Petitioner's Exhibit 3, pp 96-97). Petitioner underwent pulmonary function testing on November 9, 2016. The interpretation was possible obstruction with mild restriction, moderately reduced diffusion capacity and no evidence of exertional hypoxemia (Respondent's Exhibit 12, pp 3-7, 13).

Medical records of Barnes Jewish Hospital were admitted into evidence. Petitioner was seen by cardiology on August 12, 2016, for cardiac evaluation and ongoing management of complaints of mitral valve disease, atrial

fibrillation and coronary artery disease. He was six weeks post single-vessel bypass grafting to the diagonal artery, MAZE procedure and mitral valve repair. His early post-operative course was complicated by a large left pleural effusion requiring thoracentesis. He also had recurrence of his proximal atrial fibrillation which appeared to be persistent. He had been feeling well and walking without limitations. For the past couple of days he had a marked increase in his exertional dyspnea, orthopnea and abdominal distention. Chest x-ray taken on this date showed a recurrence of the left pleural effusion with mild cardiomegaly. EKG showed atrial fibrillation. His review of systems was positive for dyspnea. Physical examination respiratory was positive for left diminished breath sounds and breath sounds dull to percussion on the left. Assessments were afib and non-rheumatic mitral valve insufficiency (Respondent's Exhibit 10, pp 196-200). Petitioner underwent sonographically guided left thoracentesis on August 16, 2016 (Respondent's Exhibit 10, p 192). Petitioner underwent chest x-ray on September 7, 2016. The impression was linear areas of scarring or atelectasis involving both lung bases and mild cardiomegaly with central pulmonary vascularity prominence. (Respondent's Exhibit 10, p 185). Petitioner was seen on September 12, 2016, with persistent dyspnea with low to moderate levels of effort. Review of systems respiratory was positive for dyspnea. Physical examination respiratory showed respirations were non-labored and breath sounds were clear throughout. Assessments were atrial fibrillation, coronary artery disease of native artery of native heart with stable angina pectoris and non-rheumatic mitral valve insufficiency (Respondent's Exhibit 10, pp 173-179). Petitioner was seen on December 12, 2016. He continued to note symptoms of limiting exertional chest tightness and he continued to have exertional dyspnea. A recent chest x-ray showed no recurrence of his pleural effusion. Pulmonary function testing showed some moderate decrease in diffusion. Review of systems respiratory was negative for snoring, hemoptysis and dyspnea. Physical examination respiratory remained negative with clear breath sounds throughout (Respondent's Exhibit 10, pp 152-155). There was a note on file that Petitioner could not return to work at that time (Respondent's Exhibit 10, p 156). A letter was issued on December 16, 2016, providing that Petitioner was cleared to return to work on December 22, 2016, on light duty and to return without restriction on December 29, 2016 (Respondent's Exhibit 10, p 147).

Petitioner was seen on June 21, 2017, with chief complaint being coronary artery disease, atrial fibrillation and mixed hyperlipidemia. Petitioner was maintaining sinus rhythm with no clinical recurrence of atrial fibrillation since discontinuing Amiodarone. He had compensated chronic diastolic heart failure, doing well with diuretics. Petitioner related that he was feeling well. He remained dyspneic with exertion and fatigued somewhat easily. Review of systems respiratory was positive for shortness of breath but negative for cough. Physical examination of the chest revealed the lungs clear to auscultation with no adventitious sounds (Respondent's Exhibit 10, pp 127-131). Petitioner was seen on June 20, 2018, with chief complaint of valve disorder, stable angina, atrial fibrillation, congestive heart failure and hyperlipidemia. Petitioner was concerned because he was having sense of excessive tachycardia with fairly low levels of effort such as walking up a flight of stairs and the tachycardia persisted for upwards of an hour. Review of systems respiratory was positive with shortness of breath. Physical examination of the chest revealed the lungs clear to auscultation with no wheezing, rales and ronchi (Respondent's Exhibit 10, pp 92-99). Petitioner was seen on July 29, 2019. Petitioner overall felt well. He was back from European vacation where he did a lot of walking and did well with that. He denied excessive dyspnea. Physical examination of the chest revealed the lungs clear to auscultation with no wheezing, rales and ronchi (Respondent's Exhibit 10, pp 75-79).

Petitioner was seen on August 5, 2020. He related that overall he felt well and that there had not been an interval change in his health since last seen. He was physically active. He had some non-limiting exertional dyspnea. Review of systems respiratory was positive for shortness of breath. Physical examination of the chest revealed the lungs clear to auscultation with no wheezing, rales and ronchi (Respondent's Exhibit 10, pp 56-60). Petitioner was seen on April 30, 2021, with chief complaint of congestive heart failure and atrial fibrillation. Petitioner

suffered from COVID in October 2020 and became quite ill. He had struggled since then. He related that he was now dyspneic with modest levels of effort and with some chest tightness with effort. Physical examination of the chest revealed the lungs clear to auscultation with no wheezing, rales and ronchi (Respondent's Exhibit 10, pp 46-47). In chart entry dated May 17, 2021, it was indicated that the stress test performed on Petitioner revealed some new areas of blockage and it was suggested that Petitioner undergo catheterization and a possible PCI (Respondent's Exhibit 10, pp 14-15). Petitioner was seen on November 29, 2021, with chief complaint of atrial fibrillation. It was noted that Petitioner was physically active. He had non-limiting dyspnea. Catheterization in May revealed a patent graft to the diagonal with mildly elevated right sided pressures. Physical examination on this date revealed the lungs clear to auscultation with no wheezing, rales and ronchi (Respondent's Exhibit 10, pp 7-8).

Conclusions of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner failed to prove that he sustained an occupational disease arising out of and in the course of his employment and that his current condition of ill-being is causally related to an occupational exposure.

In support of this conclusion the Arbitrator notes the following:

With regard to coal workers' pneumoconiosis, all of the retained physicians interpreted the chest x-ray of Petitioner dated January 12, 2017. In addition, Drs. Smith and Meyer reviewed chest x-rays dated January 30, 2016, and June 4, 2016. Dr. Lockey testified that for a chest x-ray to be positive for pneumoconiosis the profusion must be 1/0 or greater. Dr. Lockey described the protocol for proper reading of a chest x-ray for pneumoconiosis. He testified that profusion is important because that is the determination of whether or not the x-ray is positive or negative. Dr. Istanbouly did not follow this protocol and did not know the profusion of the film that he reviewed.

Dr. Istanbouly is not an A-reader or B-reader of films. He cannot say whether the film he reviewed had a profusion of 1/0 or 0/1. Although one does not have to be a B-reader to interpret films for the presence of coal workers' pneumoconiosis, such certification lends credibility to a physician's interpretation. Dr. Istanbouly testified that when he interprets a film for black lung, he determines whether it is positive or negative and if it is positive, he classifies it as early, moderate or severe. In this case he classified what he saw on Petitioner's chest x-ray as mild pneumoconiosis. Dr. Smith testified that the adoption of profusion ratings was done to avoid imprecise descriptive terms of what was seen on the films such as early, moderate or severe pneumoconiosis. Dr. Smith testified that any A or B-reader knows what is meant by 1/0 profusion. He testified that what early pneumoconiosis means to one person may not be what early pneumoconiosis means to another. Based on the above, The Arbitrator gives no weight to Dr. Istanbouly's interpretation of Petitioner's January 12, 2017, chest x-ray.

Dr. Smith interpreted the chest x-rays of January 30, 2016, June 4, 2016, and January 12, 2017, as positive for pneumoconiosis, profusion 1/1 with p/s opacities in all lung zones. On the January 30, 2016, chest x-ray, Dr. Smith noted dorsal scoliosis and spondylosis with calcified interior longitudinal spinal ligaments. Dr. Meyer testified that there were not any findings of coal workers' pneumoconiosis on these chest x-rays. Dr. Lockey testified that there were not any findings of coal workers' pneumoconiosis on the January 12, 2017, chest x-ray.

Dr. Smith, Dr. Meyer and Dr. Lockey also interpreted chest CT scan of Petitioner dated March 1, 2016. Dr. Smith interpreted the CT scan as having radiographic p-type changes present in the lungs. He also noted linear streaky density changes in the posterior lung zones that he attributed to compressive subsegmental atelectasis or scarring. Dr. Smith's final impression was that the CT scan was consistent with simple coal workers' pneumoconiosis of predominant p-type opacities and profusion 1/1. Dr. Lockey and Dr. Meyer testified that the CT scan did not demonstrate any opacities consistent with coal workers' pneumoconiosis. Dr. Meyer noted marginal syndesmophytes on the CT scan suggestive of ankylosing spondylitis. Dr. Lockey noted vertebral column abnormalities on Petitioner's chest imaging. The treating radiologist who interpreted this study found a single tiny subpleural nodule within the left lower lobe adjacent the fissure of no clinical significance, otherwise, there were no worrisome pulmonary parenchymal nodules. He also noted findings consistent with ankylosing spondylitis. The interpretation is in accord with that of Drs. Meyer and Lockey and discord with that of Dr. Smith. There was no evidence in the medical records that any treating physician interpreted Petitioner's chest imaging as being consistent with or having evidence of coal workers' pneumoconiosis. The treating radiology interpretations for chest x-rays taken of the Petitioner on January 30, 2016 and June 4, 2016 were concordant with Dr. Meyer's interpretation or said studies.

The Arbitrator finds Dr. Meyer and Dr. Lockey to be the most persuasive of the B-readers given that they not only are board certified B-readers, but they are also on the ACR Pneumoconiosis Task Force which is engaged in redesigning the training films and the B-reading instruction pamphlet and also updating the training course and exam. Dr. Smith testified that the panel which authored the B-reading syllabus are the peers he aspires to be and that the leaders in the field have been chosen to put that syllabus together.

Dr. Lockey noted that Petitioner had complaints of dyspnea on exertion and restrictive changes noted on his pulmonary function testing. Dr. Lockey testified that there were two significant factors contributing to these conditions, but they were not related to Petitioner's occupational exposure as a coal miner. Dr. Lockey noted that Petitioner's history of underlying valvular heart disease, moderate to severe mitral regurgitation, mild pulmonary hypertension as well as his intermittent atrial fibrillation were significant contributors to Petitioner's increasing dyspnea on exertion. Dr. Lockey testified that Petitioner's post-surgical pulmonary function parameters decreased secondary to his chest surgery and post-operative complications. Dr. Istanbouly was unaware of Petitioner's medical, surgical history and post-operative complications as he did not review any treatment records regarding Petitioner. A physician's causal relationship opinion is only as good as the foundation upon which it is based. Dr. Lockey testified that an additional contributing factor to Petitioner's increasing dyspnea on exertion and restrictive changes was the hyperostosis involving his vertebral spine and probable ankylosing spondylitis. Dr. Lockey testified that these conditions were not sequelae of coal mine dust exposure.

In regard to disputed issues (L) and (O) the Arbitrator makes no conclusions of law as these issues are rendered moot because of the Arbitrator's Conclusion of Law in disputed issues (C) and (F).

William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC010965
Case Name	Bryan Eisenhauer v. State of Illinois - Menard Correctional Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0246
Number of Pages of Decision	10
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Kenton Owens

DATE FILED: 6/5/2023

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Bryan Eisenhauer,
Petitioner,

vs. NO: 21 WC 10965

State of Illinois Menard Correctional Center,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the 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 June 15, 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.

June 5, 2023
o5/24/23
DLS/rm
046

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

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

/s/*Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC010965
Case Name	EISENHAUER, BRYAN v. STATE OF ILLINOIS/ MENARD CORRECTIONAL CENTER.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Kenton Owens

DATE FILED: 6/15/2022

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

/s/ Linda Cantrell, Arbitrator

Signature

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

June 15, 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

BRYAN EISENHAUER
Employee/Petitioner

v.

STATE OF ILLINOIS/
MENARD CORRECTIONAL CENTER
Employer/Respondent

Case # **21** WC **010965**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Herrin, Illinois** on **March 25, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☐ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ 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 **11/16/20**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**57,540.24**; the average weekly wage was $**1,106.54**.

On the date of accident, Petitioner was **40** years of age, ***married*** with **1** dependent child.

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

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

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

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

ORDER

Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's Group Exhibit 1 as they relate to the work accident of 11/16/20, directly to the medical providers pursuant to the Illinois medical fee schedule or PPO agreement, whichever is less, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits. The parties stipulate that Respondent shall receive credit allowed under Section 8(j) of the Act for any medical expenses paid through Respondent's group medical plan.

Respondent shall pay Petitioner the sum of $**663.92**/week for a period of **16.7** weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused permanent partial disability to the extent of **10%** loss of use of Petitioner's right foot.

Respondent shall pay Petitioner compensation that has accrued from **3/8/21** through **3/25/22**, 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.

JUNE 15, 2022

Arbitrator Linda J. Cantrell

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

BRYAN EISENHAUER,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No.: 21-WC-010965**
	)	
STATE OF ILLINOIS/MENARD CORRECTIONAL CENTER,	)	**Consolidated Case No.: 21-WC-10967**
	)	
Respondent.	)	

FINDINGS OF FACT

These claims came before Arbitrator Linda J. Cantrell for trial in Herrin on March 25, 2022. On April 26, 2021, Petitioner filed an Application for Adjustment of Claim alleging injuries to his right Achilles tendon as a result of responding to an inmate altercation on November 16, 2020. (Case No. 21-WC-010965). On April 26, 2021, Petitioner filed an Application for Adjustment of Claim alleging injuries to his right leg and ankle as a result of restraining a combative inmate on March 25, 2021. (Case No. 21-WC-010967).

The issues in dispute in Case No. 21-WC-010965 are medical bills and the nature and extent of Petitioner's injuries. The parties stipulate that Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent and that his current condition of ill-being is causally connected to the injury. The parties stipulate that all temporary total disability benefits have been paid and Respondent is entitled to credit for all TTD benefits paid. The parties further stipulate Respondent is entitled to credit for all medical bills paid through its group medical plan pursuant to Section 8(j) of the Act. All other issues have been stipulated. The Arbitrator has simultaneously issued a separate Decision in Case No. 21-WC-010967.

TESTIMONY

Petitioner was 40 years old, married, with one dependent child at the time of accident. Petitioner has been employed by Respondent as a Correctional Officer for six years. Petitioner testified that on 11/16/20 he felt a pull in his right Achilles tendon while running up an incline to respond to an emergency code for an altercation. He worked light duty while his foot was placed in a walking boot for approximately ten weeks. Petitioner testified he returned to full duty work, and he sustained another accident.

On 3/25/21, Petitioner attempted to restrain a combative inmate and was taken to the ground. He sustained injury to his right ankle that required surgery and physical therapy. He stated his foot was turned 90 degrees prior to surgery and the treatment improved his condition.

Petitioner testified that he tore his right Achilles tendon in 2012 that was surgically repaired. He stated he was able to return to full duty work without restrictions following surgery. Petitioner testified he passed a physical prior to becoming employed by Respondent. He currently has stiffness, soreness, and fatigue in his ankle toward the end of his work week. He has sharp pain with cold weather and lack of range of motion with climbing stairs. Petitioner takes Tylenol or Aleve 3 to 4 times per week for his symptoms. He does not take prescription medication.

Petitioner testified he attempted to golf but was not successful due to decreased range of motion in his ankle. He stated he is going to attempt to golf again in the future. Petitioner stated he has difficulty playing actively with his 3 year old daughter. He has difficulty maintaining his 8-acre property due to uneven terrain.

Petitioner testified he has not returned for treatment since being released in September 2021. He continues to work the same job duties that he did prior to his accidents.

MEDICAL HISTORY

On 11/30/20, Petitioner saw John Nugent, PA-C, at the Orthopaedic Institute of Southern Illinois, and reported moderate-to-severe symptoms, with constant aching and sharp pain. X-rays confirmed an area of fullness along the Achilles tendon, but no other lesions. An MRI was ordered and Petitioner was placed in a 3D boot. Petitioner was placed on work restrictions of no inmate contact.

Petitioner treated with Dr. Robert Golz for an Achilles tendon repair in 2012. Dr. Golz reviewed the recent MRI and diagnosed a partial thickness Achilles tendon tear. He ordered Petitioner to continue wearing the 3D boot and a night splint and to avoid stairs.

On 1/12/21, Petitioner reported doing well overall with some swelling and aching. He was released to full duty work.

On 1/29/21, Petitioner returned to Dr. Golz and reported that following a full workday and climbing up and down stairs, he began experiencing progressive hindfoot symptoms of pain, swelling, and limping. Physical examination showed soft tissue swelling and tenderness in the retrocalcaneal area and fusiform swelling, but an intact Achilles. Dr. Golz believed Petitioner aggravated the partial-thickness tear. He placed Petitioner back in a boot, gave him topical cream, and placed him on light duty restrictions with instructions to follow up in four weeks.

On 3/8/21, Petitioner was allowed to discontinue use of the walking boot and he was released to full duty work with instructions to follow up in six weeks.

Following Petitioner's work accident on 3/25/21, he presented to the emergency department at Memorial Hospital where his right foot was noted to be rotated externally. (PX3) X-rays revealed nondisplaced distal fibular diametaphyseal and posterior tibial malleolar fractures with posterior tibiotalar translocation. Petitioner's ankle was reduced and splinted, and he was transferred by ambulance to Herrin Hospital at the direction of Dr. Golz.

A CT scan revealed a trimalleolar fracture dislocation. Dr. Golz performed an open reduction internal fixation of the right ankle. Post-operatively, Petitioner was placed in a walking boot and he underwent physical therapy. Petitioner participated in therapy at Marshall Browning Hospital from 4/22/21 through 8/13/21 and returned to light duty work.

On 9/21/21, Petitioner he had good and bad days but he was improving overall. X-rays showed appropriate healing of the fractures. Petitioner had tenderness to palpation of the screw heads over the lateral aspect of the ankle, and the possibility of hardware removal in the future was discussed. Petitioner was released to normal activities and released from treatment.

CONCLUSIONS OF LAW

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Respondent stipulated that Petitioner's current condition of ill-being with respect to his right foot is causally connected to his work accident. Therefore, Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's Group Exhibit 1 as they relate to the work injury of 11/16/20, directly to the medical providers pursuant to the Illinois medical fee schedule or PPO agreement, whichever is less, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits. The parties stipulate that Respondent shall receive credit allowed under Section 8(j) of the Act for any medical expenses paid through Respondent's group medical plan.

Issue (L): What is the nature and extent of the injury?

Pursuant to § 8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 are to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

(i) **Level of Impairment**: Neither Party submitted an AMA rating. Therefore, the Arbitrator places no weight on this factor.

(ii) **Occupation**: Petitioner continues to work full duty without restrictions as a Correctional Officer for Respondent. Although Petitioner continues to work his full duties, he testified he has increased pain and fatigue in his right foot toward the end of his work week. The Arbitrator places some weight on this factor.

(iii) **Age**: Petitioner was 40 years old at the time of his injury. He is a younger individual and must live and work with his disability for an extended period of time. Pursuant to *Jones v. Southwest Airlines*, 16 I.W.C.C. 0137 (2016) (wherein the Commission concluded that greater weight should have been given to the fact that Petitioner was younger [46 years of age] and would have to work with his disability for an extended period of time). The Arbitrator places greater weight on this factor.

(iv) **Earning Capacity**: There is no evidence of reduced earning capacity contained in the record. The Arbitrator places some weight on this factor.

(v) **Disability**: Petitioner sustained a partial thickness Achilles tendon tear. He was treated conservatively with medication, rest, and a 3D walking boot. Petitioner testified he still experiences symptoms with increased activity, particularly stiffness, soreness, and fatigue in his ankle toward the end of his work week. He has sharp pain with cold weather and lack of range of motion with climbing stairs. Petitioner takes Tylenol or Aleve 3 to 4 times per week for his symptoms. He does not take prescription medications. Petitioner's hobby of playing golf has been adversely affected due to decreased range of motion in his ankle. He has difficulty playing actively with his 3-year old daughter and maintaining his 8-acre property. Petitioner has returned to full duty work as a Correctional Officer without restrictions. The Arbitrator places greater weight on this factor.

Based upon the foregoing evidence and factors, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 10% loss of use of the right foot, pursuant to Section 8(e) of the Act.

Respondent shall pay Petitioner compensation that has accrued from 3/8/21 through 3/25/22, and shall pay the remainder of the award, if any, in weekly payments.

Arbitrator Linda J. Cantrell

Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC010967
Case Name	Bryan Eisenhauer v. State of Illinois - Menard Correctional Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0247
Number of Pages of Decision	10
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Kenton Owens

DATE FILED: 6/5/2023

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Bryan Eisenhauer,
Petitioner,

vs. NO: 21 WC 10967

State of Illinois Menard Correctional Center,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the 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 June 15, 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.

June 5, 2023
o5/24/23
DLS/rm
046

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

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

/s/*Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC010967
Case Name	EISENHAUER, BRYAN v. STATE OF ILLINOIS/ MENARD CORRECTIONAL CENTER
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Kenton Owens

DATE FILED: 6/15/2022

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

/s/ Linda Cantrell, Arbitrator

Signature

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

June 15, 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

BRYAN EISENHAUER
Employee/Petitioner

v.

STATE OF ILLINOIS/
MENARD CORRECTIONAL CENTER
Employer/Respondent

Case # **21** WC **010967**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Herrin, Illinois** on **March 25, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **3/25/21**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**57,540.24**; the average weekly wage was $**1,106.54**.

On the date of accident, Petitioner was **41** years of age, ***married*** with **1** dependent child.

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

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

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

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

ORDER

Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's Group Exhibit 1 as they relate to the work accident of 3/25/21, directly to the medical providers pursuant to the Illinois medical fee schedule or PPO agreement, whichever is less, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits. The parties stipulate that Respondent shall receive credit allowed under Section 8(j) of the Act for any medical expenses paid through Respondent's group medical plan.

Respondent shall pay Petitioner the sum of $**663.92**/week for a period of **50.1** weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused permanent partial disability to the extent of **30%** loss of use of Petitioner's right foot.

Respondent shall pay Petitioner compensation that has accrued from **9/21/21** through **3/25/22**, 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.

JUNE 15, 2022

Arbitrator Linda J. Cantrell

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

BRYAN EISENHAUER,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No.: 21-WC-010967**
	)	
STATE OF ILLINOIS/MENARD CORRECTIONAL CENTER,	)	**Consolidated Case No.: 21-WC-10965**
	)	
Respondent.	)	

FINDINGS OF FACT

These claims came before Arbitrator Linda J. Cantrell for trial in Herrin on March 25, 2022. On April 26, 2021, Petitioner filed an Application for Adjustment of Claim alleging injuries to his right Achilles tendon as a result of responding to an inmate altercation on November 16, 2020. (Case No. 21-WC-010965). On April 26, 2021, Petitioner filed an Application for Adjustment of Claim alleging injuries to his right leg and ankle as a result of restraining a combative inmate on March 25, 2021. (Case No. 21-WC-010967).

The issues in dispute in Case No. 21-WC-010967 are medical bills and the nature and extent of Petitioner's injuries. The parties stipulate that Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent and that his current condition of ill-being is causally connected to the injury. The parties stipulate that all temporary total disability benefits have been paid and Respondent is entitled to credit for all TTD benefits paid. The parties further stipulate Respondent is entitled to credit for all medical bills paid through its group medical plan pursuant to Section 8(j) of the Act. All other issues have been stipulated. The Arbitrator has simultaneously issued a separate Decision in Case No. 21-WC-010965.

TESTIMONY

Petitioner was 41 years old, married, with one dependent child at the time of accident. Petitioner has been employed by Respondent as a Correctional Officer for six years. Petitioner testified that he initially sustained a work injury on 11/16/20 when he was running up an incline to respond to an emergency code and felt a pull in his right Achilles tendon. He worked light duty while his foot was placed in a walking boot for approximately ten weeks. Petitioner testified he returned to full duty work, and he sustained another accident which is the subject of this claim.

Petitioner testified that on 3/25/21 he attempted to restrain a combative inmate and was taken to the ground. He sustained injury to his right ankle that required surgery and physical therapy. He stated his foot was turned 90 degrees prior to surgery and the treatment improved his condition.

Petitioner testified that he tore his right Achilles tendon in 2012 that was surgically repaired. He stated he was able to return to full duty work without restrictions following surgery. Petitioner testified he passed a physical prior to becoming employed by Respondent. He currently has stiffness, soreness, and fatigue in his ankle toward the end of his work week. He has sharp pain with cold weather and lack of range of motion with climbing stairs. Petitioner takes Tylenol or Aleve 3 to 4 times per week for his symptoms. He does not take prescription medication.

Petitioner testified he attempted to golf but was not successful due to decreased range of motion in his ankle. He stated he is going to attempt to golf again in the future. Petitioner stated he has difficulty playing actively with his 3 year old daughter. He has difficulty maintaining his 8-acre property due to uneven terrain.

Petitioner testified he has not returned for treatment since being released in September 2021. He continues to work the same job duties that he did prior to his accidents.

MEDICAL HISTORY

On 11/30/20, Petitioner saw John Nugent, PA-C, at the Orthopaedic Institute of Southern Illinois, and reported moderate-to-severe symptoms, with constant aching and sharp pain. X-rays confirmed an area of fullness along the Achilles tendon, but no other lesions. An MRI was ordered and Petitioner was placed in a 3D boot. Petitioner was placed on work restrictions of no inmate contact.

Petitioner treated with Dr. Robert Golz for an Achilles tendon repair in 2012. Dr. Golz reviewed the recent MRI and diagnosed a partial thickness Achilles tendon tear. He ordered Petitioner to continue wearing the 3D boot and a night splint and to avoid stairs.

On 1/12/21, Petitioner reported doing well overall with some swelling and aching. He was released to full duty work.

On 1/29/21, Petitioner returned to Dr. Golz and reported that following a full workday and climbing up and down stairs, he began experiencing progressive hindfoot symptoms of pain, swelling, and limping. Physical examination showed soft tissue swelling and tenderness in the retrocalcaneal area and fusiform swelling, but an intact Achilles. Dr. Golz believed Petitioner aggravated the partial-thickness tear. He placed Petitioner back in a boot, gave him topical cream, and placed him on light duty restrictions with instructions to follow up in four weeks.

On 3/8/21, Petitioner was allowed to discontinue use of the walking boot and he was released to full duty work with instructions to follow up in six weeks.

Following Petitioner's work accident on 3/25/21, he presented to the emergency department at Memorial Hospital where his right foot was noted to be rotated externally. (PX3) X-rays revealed nondisplaced distal fibular diametaphyseal and posterior tibial malleolar fractures with posterior tibiotalar translocation. Petitioner's ankle was reduced and splinted, and he was transferred by ambulance to Herrin Hospital at the direction of Dr. Golz.

A CT scan revealed a trimalleolar fracture dislocation. Dr. Golz performed an open reduction internal fixation of the right ankle. Post-operatively, Petitioner was placed in a walking boot and he underwent physical therapy. Petitioner participated in therapy at Marshall Browning Hospital from 4/22/21 through 8/13/21 and returned to light duty work.

On 9/21/21, Petitioner he had good and bad days but he was improving overall. X-rays showed appropriate healing of the fractures. Petitioner had tenderness to palpation of the screw heads over the lateral aspect of the ankle, and the possibility of hardware removal in the future was discussed. Petitioner was released to normal activities and released from treatment.

CONCLUSIONS OF LAW

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Respondent stipulated that Petitioner's current condition of ill-being with respect to his right foot is causally connected to his work accident. Therefore, Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's Group Exhibit 1 as they relate to the work injury of 3/25/21, directly to the medical providers pursuant to the Illinois medical fee schedule or PPO agreement, whichever is less, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits. The parties stipulate that Respondent shall receive credit allowed under Section 8(j) of the Act for any medical expenses paid through Respondent's group medical plan.

Issue (L): What is the nature and extent of the injury?

Pursuant to § 8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 are to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

(i) **Level of Impairment**: Neither Party submitted an AMA rating. Therefore, the Arbitrator places no weight on this factor.

(ii) **Occupation**: Petitioner continues to work full duty without restrictions as a Correctional Officer for Respondent. Although Petitioner continues to work his full duties, he testified he has increased pain and fatigue in his right foot toward the end of his work week. The Arbitrator places some weight on this factor.

(iii) **Age**: Petitioner was 41 years old at the time of his injury. He is a younger individual and must live and work with his disability for an extended period of time. Pursuant to *Jones v. Southwest Airlines*, 16 I.W.C.C. 0137 (2016) (wherein the Commission concluded that greater weight should have been given to the fact that Petitioner was younger [46 years of age] and would have to work with his disability for an extended period of time). The Arbitrator places greater weight on this factor.

(iv) **Earning Capacity**: There is no evidence of reduced earning capacity contained in the record. The Arbitrator places some weight on this factor.

(v) **Disability**: Petitioner sustained a trimalleolar fracture dislocation and underwent an open reduction internal fixation of the right ankle. Post-operatively, Petitioner was placed in a walking boot and underwent approximately four months of physical therapy. Petitioner was placed at MMI without restrictions on 9/21/21. It was noted at that time Petitioner had good and bad days, but was improving overall. Petitioner had tenderness to palpation of the screw heads over the lateral aspect of his ankle, and the possibility of hardware removal in the future was discussed.

Petitioner testified he still experiences symptoms with increased activity, particularly stiffness, soreness, and fatigue in his ankle toward the end of his work week. He has sharp pain with cold weather and lack of range of motion with climbing stairs. Petitioner takes Tylenol or Aleve 3 to 4 times per week for his symptoms. He does not take prescription medications. Petitioner's hobby of playing golf has been adversely affected due to decreased range of motion in his ankle. He has difficulty playing actively with his 3 year old daughter and maintaining his 8-acre property. Petitioner has returned to full duty work as a Correctional Officer without restrictions. 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 **30%** loss of use of the right foot, pursuant to Section 8(e) of the Act.

Respondent shall pay Petitioner compensation that has accrued from 9/21/21 through 3/25/22, and shall pay the remainder of the award, if any, in weekly payments.

Arbitrator Linda J. Cantrell

Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC035095
Case Name	Jose Nambo v. Orkin Corporation
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0248
Number of Pages of Decision	14
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	John Budin
Respondent Attorney	Micaela Cassidy

DATE FILED: 6/6/2023

/s/ Deborah Baker, Commissioner

Signature

23IWCC0248

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOSE NAMBO,

Petitioner,

vs. NO: 18 WC 35095

ORKIN CORPORATION,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues[1] of whether Petitioner's current condition of ill-being is causally related to the September 7, 2018 work accident, entitlement to temporary disability benefits, and entitlement to incurred medical expenses as well as prospective medical care, and being advised of the facts and law, 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).

Correction

The Commission corrects Page 6 to reflect the employee's burden of proof for obtaining compensation under the Act is set forth in Section 1(d) (*820 ILCS 305/1(d)*).

CONCLUSIONS OF LAW

Temporary Disability

Finding Petitioner was first authorized off work at the November 14, 2018 evaluation with Dr. Roberto Levi, the Arbitrator found Petitioner was temporarily and totally disabled from

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

November 14, 2018 through January 19, 2022, the date of the hearing. The Commission agrees Petitioner is entitled to Temporary Total Disability ("TTD") benefits as of November 14, 2018, however we find the end date must be modified to conform to the Request for Hearing.

On the Request For Hearing, Petitioner claimed his entitlement to TTD benefits ended on March 21, 2021 (Arb.'s Ex. 1), which we observe corresponds to the start of Petitioner's employment with All Cell Technologies. As Petitioner did not allege he was temporarily and totally disabled from March 22, 2021 through January 19, 2022, the award of TTD benefits for that period was improper. *See Walker v. Industrial Commission*, 345 Ill. App. 3d 1084, 1088 (4th Dist. 2004). Moreover, as Petitioner testified he returned to work on March 21, 2021 (T. 43), his entitlement to TTD benefits ended on March 20, 2021.

The Commission modifies the award of TTD benefits as follows:

- Petitioner is entitled to TTD benefits from November 14, 2018 through March 20, 2021;
- the award of TTD benefits from March 21, 2021 through January 19, 2022 is vacated.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 15, 2022, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $650.23 per week for a period of 122 4/7 weeks, representing November 14, 2018 through March 20, 2021, 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 the award of Temporary Total Disability benefits from March 21, 2021 through January 19, 2022 is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $46,610.58 for medical expenses, as provided in §8(a), subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Responent shall provide and pay for L4-S1 decompression and fusion surgery as recommended by Dr. Paul Ackerman, including but not limited to any necessary pre-operative and post-operative rehabilitative treatment, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that 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 $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.

June 6, 2023

/s/ *Deborah J. Baker*

DJB/mck

O: 4/12/23

43

/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC035095
Case Name	Jose Nambo v. Orkin Corporation
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Jeffrey Huebsch, Arbitrator

Petitioner Attorney	John Budin
Respondent Attorney	John Connolly, Micaela Cassidy

DATE FILED: 7/15/2022

THE INTEREST RATE FOR THE WEEK OF JULY 12, 2022 2.68%

/s/ Jeffrey Huebsch, Arbitrator

Signature

J. Nambo v. Orkin Corp., 18 WC 035095

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)

Jose Nambo
Employee/Petitioner
v.
Orkin Corporation
Employer/Respondent

Case # **18** WC **035095**

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 **January 19, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **September 7, 2018** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**48,767.01;** the average weekly wage was $**975.34.**

On the date of accident, Petitioner was **36** years of age, ***single,*** with **0** dependent children.

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

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $650.23/week, for 166-1/7 weeks, commencing 11/14/2018 through 1/19/2022, pursuant to §8(b) of the Act.

Respondent shall pay Petitioner medical expenses, pursuant to §§8(a) and 8.2 of the Act, in the amount of $46,610.58, according to the Illinois Medical Fee Schedule, and as is set forth below.

Respondent shall authorize and pay for the L4-S1 decompression and fusion procedure recommended by Dr. Paul Ackerman, MD, in his evidence deposition, along with all related services, in accordance with Sections 8(a) and 8.2 of the Act.

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

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

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

/S/ Jeffrey Huebsch JULY 15, 2022

Signature of Arbitrator

STATEMENT OF FACTS

Testimony of Petitioner, Jose Nambo

Petitioner, Jose Nambo, testified that on September 7, 2018, he was employed by Respondent, Orkin Corporation, as a Termite Technician. His regular job duties included attic installation of insulation; gutter guard installation; termite treatment and bed bug treatments. The attic insulation and installation of gutter guards work required him to use a ladder. He used power tools to drill holes in cement to perform termite treatments. He also used a pick or shovel to dig trenches around the foundation of homes. The bed bug treatments involved propane tanks and heating rooms to around 150 degrees.

Petitioner had been employed by Respondent since April 27, 2017. He worked extensive and regular overtime in addition to his regular hours without restrictions or limitations prior to September 7, 2018. (PX 12) He reported to work at the Orkin facility in Elk Grove Village, Illinois nearly every morning with the company provided truck, that he was allowed to take home every night. His immediate supervisor was Tom Loch.

On September 7, 2018, Petitioner was dispatched to perform attic insulation at a residential home in Crystal Lake, Illinois. His co-worker was named Mark. Service manager Dan Adams was also in the home, working in the basement, at the time of Petitioner's injuries. Mark was outside working in the truck loading insulation that was then pumped into the attic where Petitioner installed it. At around 11:00 a.m., Petitioner tripped over wires in the attic and suddenly fell through the ceiling. His fall was stopped at chest height. He was able to pull himself up by bracing himself on the two by fours in the attic. He then climbed down the attic ladder. Petitioner felt immediate low back pain and right leg radiculopathy symptoms. Dan came upstairs where he looked at the hole in the ceiling. Dan was very upset, as was the homeowner.

Petitioner was told to drive back to Elk Grove Village, where he met with Tom Loch. Petitioner told Mr. Loch he was hurt. Mr. Loch, who was terminated from his employment with Respondent a year ago, ordered Petitioner to go to Concentra for drug testing. While at Concentra, Petitioner asked the nurse if a doctor could examine him for his back pain and right leg pain. The nurse informed him that only a drug test had been approved.

Petitioner did not go to the emergency room or seek treatment for his injuries until October of 2018.

Petitioner testified that prior to his fall through the ceiling on September 7, 2018, he was in excellent health, did not have any pain, was not under a doctor's care, and living without limitations or restrictions of any kind. He had no restrictions or limitations in any activities outside of work. He was not taking any pain medications for any reason. He had never seen any doctor or medical provider for low back pain or right leg radiculopathy.

Petitioner, who lived alone and supported himself through his employment with Respondent, continued working for about three more weeks after September 7, 2018. He had right leg and back pain during this time. He told Tom Loch and Jim Smith from Respondent that he was having pain. On cross examination, Petitioner testified that during this time, he performed regular termite technician job tasks. On re-direct, he said that he was not climbing any ladders or doing any type of attic or gutter installation work. He also began taking 600 mg of Ibuprofen, that he obtained from his sister, due to his back pain and right leg radiculopathy symptoms. He has not had any subsequent trauma to either his low back or right leg.

On or about September 27, 2018, Petitioner had a meeting with Tom Loch. Petitioner told him he refused to go up and down ladders for attic insulation work or gutter guard installation due to his back pain and right leg symptoms. Petitioner was scared of reinjuring himself if he had to climb a ladder. He asked for time off due to his pain. The request was denied. Mr. Loch told Petitioner he could request vacation time, but it takes

a month before it would be approved. Mr. Loch threatened Petitioner with termination unless he agreed to resume his full work activities that required climbing and the use of ladders.

The next morning, September 28, 2018, with Jim Smith, another supervisor, present, Mr. Loch requested that Petitioner sign a piece of paper saying that he refused to do his job. Petitioner refused to sign the piece of paper and was told by Mr. Loch that he was suspended. He was driven home by Mr. Loch. Petitioner had to surrender his company vehicle, cell phone and work supplies. Petitioner inquired of Mr. Loch when he would be called back to work. Mr. Loch told Petitioner that he would call him when he was needed again. The call never came. Petitioner was informed via letter stating he was terminated on or about November 16, 2018, for "job abandonment." Petitioner testified he never abandoned his job.

Neither Party called Tom Loch as a witness.

The first medical treatment took place on October 5, 2018, when Petitioner presented to John Stroger Hospital emergency room complaining of low back pain and right leg radiculopathy ever since a fall out of an attic at work 3-4 weeks ago. Slightly different histories of a fall from a roof and from an attic are also documented. Prior low back symptoms were denied. The complaints were also summarized as LBP and RLE "burning" and numbness as well as "clawing" and pain at the right foot. Weakness and bowel/bladder issue were denied. The physical exam noted a negative SLR, Numbness and tingling were endorsed, along with RLE diminished sensory exam, lateral R thigh and posterior lower leg. An antalgic gait was noted. A CT scan of his lumbar spine was ordered. The CT was said to show multilevel degenerative changes, greatest at L4-5, with severe spinal canal and severe right neural foraminal narrowing at L4-5, with what were said to be mild chronic appearing anterior wedge compression deformities at T12 and L1. On October 9, 2018, Petitioner returned to discuss test results and for a neurosurgical consult. The physical exam was largely benign, with decreased sensation at the right great toe web space. A lumbar MRI was recommended, along with a referral for follow up regarding hypertension. A Thoracic Spine CT was performed on November 10, 2018. It showed degenerative changes and what were said to be compression deformities at T&, T11, T12 and L1. (PX 2, RX 2)

Petitioner's brother referred him to Roberto Levi, M.D. Respondent denied approval for medical treatment.

On November 14, 2018, Petitioner was first examined by Roberto Levi, M.D. of Orthopaedic and Rehabilitation Centers, S.C., Chicago, Illinois (hereafter, "ORC"). X-rays, an MRI, and other diagnostic tests were performed. He subsequently, saw Gabriel Levi, M.D. at ORC, who believed Petitioner needed lumbar surgery due to his September 7, 2018, work related accident. Petitioner underwent physical therapy for extended periods of time at ORC, which he said was beneficial for his symptoms. He was also prescribed gabapentin and other narcotic medications for his work-related injuries. (PX 7)

Petitioner testified that despite the medical treatment he still had low back and pain shooting down the back of his right leg, all the way to his toes. The right leg symptom are his major complaint.

Dr. Gabriel Levi referred Petitioner to Paul Ackerman, M.D., a board-certified neurosurgeon, who examined Petitioner on May 3, 2019. Dr. Ackerman recommended a multilevel lumbar fusion. Petitioner's symptoms were corroborated by the lumbar MRI diagnostic tests.

Petitioner testified that he wants the surgery Dr. Ackerman recommended in order to help alleviate his right leg symptoms and his low back pain.

Since March 21, 2021, Petitioner has worked at a light duty, if not sedentary, job at AllCell Technologies, Broadview, Illinois, as an "engineering technician." It is a sit down job, which allows him to get up, stretch and walk throughout his shift. His job duties include soldering wires on computer boards and testing batteries. The heaviest weight that he lifts at this job is 15 pounds.

Petitioner testified that for his right leg radiculopathy symptoms, he continues to take Ibuprofen in the morning and at night before bed. Twice daily he drinks two types of Chinese herbal tea. Two bottles in the morning and two at night. This helps his "nervous system." He continues to do the home exercise program that

he learned at ORC, both in the morning and evening. These stretching exercise also help his symptoms. He described the exercises he does. He has also lost a significant amount of weight. On September 7, 2018, he weighed approximately 280 pounds. He now weighs 220 pounds.

Right leg radiculopathy, numbness, cramps, and shooting pain remains his chief complaint. He has trouble bending. His standing and walking tolerance is limited. Despite the PT and HEP measures, he continues to have numbness and cramps that shoot down his right leg on a regular basis. He often finds himself sweating due to the back pain and right leg pain/symptoms. He never sweated like this before September 7, 2018. His sleeping is disturbed due to pain.

Petitioner was examined by Dr. Jerry Bauer, a board certified neurosurgeon, at the request of Respondent on November 16, 2019. (RX 1, PX 10) Dr. Bauer's report was tendered into evidence with PX 10.

Testimony of James Smith

Respondent called James Smith to testify. He has been employed by Respondent for 8-1/2 years. He was a service manager in September of 2018. He acknowledged that Petitioner was a good worker and had never been disciplined prior to September 7, 2018. Petitioner never had any restrictions or limitations in performing his job duties as a termite technician. Tom Loch, who was terminated, would be the best witness to testify concerning the events of September 7, 2018, and the reasons for Petitioner's suspension/termination of employment with Respondent. Loch was the one to whom Petitioner would have interacted with regarding a work injury. Smith testified that Petitioner did not interact with him regarding any post-accident request for medical treatment. Smith testified that he was aware that Petitioner had been hurt on September 7, 2018, when he fell through the ceiling. After the accident, Petitioner told him that he hurt his knee (Leg?) and said that he could continue to do his job.

Mr. Smith did not know why Petitioner had been suspended. Petitioner had no prior history of being injured at work. Prior to September 7, 2018, Petitioner had never refused to do any part of his job and worked overtime whenever requested. Petitioner did say that he had injured his back during the meeting with Loch.

Though he was present at the time of Petitioner's injuries, Dan Adams, who still works for Respondent, was not called as a witness.

Evidence Deposition – Dr. Peter Ackerman

The evidence deposition of Paul Ackerman, M.D. was admitted as PX 9. Dr. Ackerman testified that Petitioner was referred to him by Gabriel Levi, M.D. He had the reports of Dr. Levi from April 3, and August 28, 2019. Dr. Ackerman is a board-certified neurosurgeon and a partner at Northwestern Neurosurgical Associates, Chicago, Illinois.

Petitioner told him that he was injured while installing attic insulation when he fell through the ceiling. Petitioner immediately felt low back pain and right leg pain, which made it very difficult for Petitioner to stand. The examination of Petitioner was remarkable for a partial right foot drop. Petitioner also had weakness throughout his right leg.

It was Dr. Ackerman's opinion that Petitioner was suffering from, "incapacitating mechanical low back pain with intractable right lower extremity radiculopathy causing neurological deficits, motor and sensory changes." He recommended multilevel lumbar fusion surgery as a result of the work-related injuries Petitioner suffered on September 7, 2018. Petitioner's injuries to his lumbar spine, as shown on the diagnostic tests, Petitioner's symptoms, and need for medical treatment after September 7, 2018, are all causally related to

Petitioner's fall in the ceiling while employed by Respondent on September 7, 2018. The fall aggravated the degenerative condition in Petitioner's lumbar spine. The surgery recommended by Dr. Ackerman is also causally related to Petitioner's work-related accident of September 7, 2018.

After surgery, Dr. Ackerman does not expect Petitioner to ever return to his past employment duties at Orkin. He does not expect him to return to medium duty work. He would not recommend Petitioner ever get up on ladders due to his symptoms and right leg weakness. Until the recommended lumbar surgery was performed he did not expect Petitioner to be able to return to any type of work. (PX 9)

Respondent's §12 Physician, Dr. Jerry Bauer

The evidence deposition of Dr. Jerry Bauer, M.D. was admitted as RX 1 and PX 10.

Dr. Bauer is a board-certified neurosurgeon. During his deposition, Dr. Bauer relied exclusively on his 12 page report. Pages 6-9 contain an accurate summary of Petitioner's medical treatment from October 5, 2018 to July 17, 2019. Dr. Bauer testified that Petitioner's history of injury was consistent throughout his medical treatment. There was no evidence of Petitioner having low back pain or right leg pain prior to September 7, 2018. There was nothing to support that Petitioner was on any pain medications prior to September 7, 2018; had any prior injuries to his right leg or low back; or any subsequent injuries. Petitioner was working without restrictions or limitations before September 7, 2018. The treatment received by Petitioner for his symptoms was fair and reasonable, necessary, and beneficial, including the treatment at ORC. The medications Petitioner was taking after his work-related accident of September 7, 2018, were reasonable and necessary.

Dr. Bauer did not endorse causation. Petitioner has severe spinal stenosis due to a preexisting degenerative condition. The fall did not aggravate, accelerate or exacerbate the degenerative conditions in Petitioner's lumbar spine. Petitioner did not suffer a back injury on September 7, 2018. Petitioner would require the fusion procedure with, or without the trauma.

Dr. Bauer also recommended a multi-level lumbar fusion surgery, very similar to the surgery recommended by Dr. Ackerman, in order to alleviate Petitioner's symptoms. The surgery is not related to the work accident. At this time, in his current condition, he would not recommend Petitioner returning to his prior job duties. Even after surgery, Petitioner will never return to work in the same functional capacity he had before September 7, 2018. (PX 10, RX1)

Application For Adjustment of Claim

The Application for Adjustment of Claim was signed by Petitioner on November 28, 2018 and filed on November 29, 2018. (RX 5)

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 her claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)),

including that there is some causal relationship between her employment and her injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989)

Decisions of an arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

The Arbitrator finds Petitioner's testimony to be credible.

In support of the Arbitrator's Decision relating to: (C), Did Petitioner sustain accidental injuries which arose out of and in the course of his employment by Respondent on September 7, 2018?, and (F), Is Petitioner's current condition of ill-being causally related to the injury? The Arbitrator finds:

Petitioner sustained accidental injuries which arose out of and in the course of his employment by Respondent on September 7, 2018. Petitioner's condition of ill-being regarding his lumbar spine is causally connected to the said work injury.

This finding is based upon Petitioner's credible testimony, which was largely unrebutted, the medical records and the persuasive testimony of Dr. Ackerman.

Regarding accident, there is no doubt that Petitioner stepped through a ceiling at a residential job for Respondent on September 7, 2018. This would definitely qualify as an accident that arose out of and in the course of Petitioner's employment by Respondent as a termite technician.

The question at issue is whether Petitioner sustained an injury as a result of the fall. The answer to this question is coupled with that regarding the issue of causation. After considering all of the evidence adduced, including the conflicting opinions of two well-qualified, board certified neurosurgeons, the Arbitrator does find that Petitioner sustained an injury to his lumbar spine as a result of the work accident of September 7, 2018 and the current condition of his lumbar spine is causally related to the injury.

As stated above, Petitioner's testimony is found to be credible. His testimony that he tried to tough out his low back and right leg complaints after the accident is believed. His testimony that he had no ladder jobs after the September 7, 2018 accident is unrebutted. It does make sense that Petitioner tried to continue working as his condition worsened, as he was probably not in a favored status at Respondent after causing damage to a customer's ceiling. No evidence was submitted regarding any prior low back issues for Petitioner. Tom Loch's testimony was not submitted to rebut Petitioner's testimony. Smith's testimony supports petitioner's testimony that he had leg complaints after the accident. Petitioner sought medical treatment at Stroger prior to his being fired by Respondent. Petitioner's histories to all of the providers are consistent. His complaints of low back and right lower extremity radiculopathy are consistent with the nature of the accidental injury that could be suffered with a fall through a ceiling and catching oneself between ceiling joists at the chest level, as was described by Petitioner.

Petitioner's current condition of ill-being regarding his lumbar spine (to wit: lumbar radiculopathy with need for L4-S1 fusion surgery, as shown by the records and testimony of Dr. Ackerman) is causally related to the injury.

In the present case, any inconsistencies in Petitioner's description of the mechanics of his accident are not fatal to Petitioner's case. The Arbitrator believes that the accident as described caused the degenerative conditions in Petitioner's lumbar spine to become symptomatic, leading to where he is at the time of trial. Petitioner's spine was obviously not in the best of shape immediately before the accident, but he was working full time at his job doing heavy physical labor and climbing and working on ladders and there was no evidence of any prior low back treatment or complaints. The accident aggravated or accelerated the degenerative condition of Petitioner's lumbar spine, such that the Arbitrator finds that his current condition of ill-being is causally connected to the work injury and is not simply the result of a normal degenerative process of the preexisting condition. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 29 193, 205 (2003) Here, Petitioner's lingering complaints, the lack of an intervening event and Dr. Ackerman's persuasive expert opinions support a finding of causal connection.

Dr. Bauer's opinion is not persuasive. There is no explanation by Dr. Bauer of how the degenerative condition was not aggravated, accelerated or exacerbated as a result of the accident, other than Petitioner did not suffer any back injury as a result of the September 7, 2018 event (which is apparently based on the lack of immediate medical treatment). The Arbitrator believes that Petitioner delayed seeking medical treatment because he wanted to continue with his job. As Petitioner's symptoms progressed and as he was assigned a job that would require ladder climbing, which he refused, he sought treatment for his injuries. He saw the doctors at Stroger and ORC regarding his back before he was fired and before he filed the Application for Adjustment of Claim. (RX 5)

In support of the Arbitrator's Decision relating to (J), Were the medical services that were provided to Petitioner reasonable and necessary?; and has Respondent paid all appropriate charges for all reasonable and necessary medical services? The Arbitrator finds:

The dispute as to Respondent's liability for payment of medical expenses is based upon the disputed issues of accident and causal connection. Having found in favor of Petitioner on these issues and based upon a review of the medical records and the opinions of Drs. Ackerman and Bauer, the Arbitrator finds that Petitioner has established that the medical bills related to the treatment of Petitioner's lumbar spine contained in Petitioner's Exhibit 11, are reasonable, necessary and causally related to the work injury sustained on September 7, 2018.

Respondent shall pay to Petitioner, the amount of $46,610.58 in medical expenses pursuant to Sections 8(a) and 8.2 of the Act and pursuant to the Illinois Fee Schedule, as follows:

1. John Stroger Hospital	**$2,741.00**
2. Orthopedic & Rehabilitation Centers	**$29,258.83**
3. Edgebrook Open MRI	**$4,575.00**
4. Northwestern Neurosurgical Assoc.	**$400.00**
5. RX Development	**$2,107.24**
6. Persistent Medical	**$7,528.51**

In support of the Arbitrator's Decision relating to (K), Is Petitioner entitled to any prospective medical care? The Arbitrator finds:

Based upon the Arbitrator's finding on the issue of accident and causal connection, above and the persuasive testimony of Dr. Ackerman, Respondent shall authorize and pay for the L4-S1 decompression and fusion procedure recommended by Dr. Peter Ackerman in his evidence deposition, along with all related services, in accordance with Sections 8(a) and 8.2 of the Act.

In support of the Arbitrator's Decision relating to (L) What temporary benefits is Petitioner entitled to? The Arbitrator finds:

The dispute to Petitioner's entitlement to temporary total disability benefits is based upon the disputed issues of accident and causal connection, which issues have been resolved in favor of Petitioner.

It is a well-settled principle that when a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized, *i.e.,* whether the claimant has reached maximum medical improvement. *Westin Hotel v. Industrial Comm'n,* 372 Ill.App.3d 527, 542, (2007)

Petitioner initially sought treatment from Stroger Hospital on October 5, 2018. The records of Stroger Hospital do not contain an off-work slip. No TTD is awarded where Petitioner is not medically authorized off work.

Petitioner then sought treatment from ORC on November 14, 2018 and Drs. Levi restricted him from work. He was also excused from work by Dr. Ackerman, pending surgery. Petitioner has not yet reached maximum medical improvement because of the need for the prospective medical treatment that is awarded above.

Accordingly, Respondent shall pay to Petitioner, temporary total disability benefits in the amount of $650.23 per week for 166 and 1/7 weeks, for the periods of November 14, 2018 through January 19, 2022, pursuant to Section 8(b) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC028665
Case Name	Christopher Fricano v. SR Fraser Inc
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0249
Number of Pages of Decision	16
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Kevin Morrisson
Respondent Attorney	Benjamin Schroeder

DATE FILED: 6/7/2023

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Christopher Fricano,

Petitioner,

vs. NO. 18WC028665

SR Fraser, Inc.

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue(s) of medical expenses, causal connection, prospective medical, temporary disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

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

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

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

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

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

SJM/sj
o-4/12/2023
44

June 7, 2023

/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	18WC028665
Case Name	Christopher Fricano v. SR, Fraser, Inc.,
Consolidated Cases	
Proceeding Type	
Decision Type	Amended Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Jessica Hegarty, Arbitrator

Petitioner Attorney	Kevin Morrisson
Respondent Attorney	Mark Wiedner

DATE FILED: 7/6/2022

THE INTEREST RATE FOR THE WEEK OF JULY 6, 2022 2.50%

/s/ Jessica Hegarty, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
AMENDED ARBITRATION DECISION

Christopher Fricano
Employee/Petitioner

v.

SR. Fraser, Inc.,
Employer/Respondent

Case # **18** WC **28665**

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 **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Joliet, Illinois**, 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 (thoracic spine) 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**

FINDINGS

On **July 30, 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 $**31,650.32** the average weekly wage was $**608.66**.

On the date of accident, Petitioner was **37** years of age, ***married*** with **4** 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.

ORDER

- Petitioner is entitled to TTD benefits, as provided in Section 8(a) of the Act of $405.98/week for 178 weeks, commencing July 31, 2018, through May 18, 2019; May 26, 2019, through June 8, 2019; and June 26, 2019, through January 20, 2022.

- Respondent shall be given a credit of $33,533.87 for TTD, $688.58 for TPD, 7,633.80 for PPD, for a total credit of $41,856.25.

- Respondent is liable for medical treatment following February 11, 2020, related to Petitioner's thoracic spine.

- Respondent is liable for prospective medical treatment concerning Petitioner's thoracic herniation at T1-T2, including the CT myelogram, consistent with the opinions of Dr. Mather.

- Petitioner's compensation is subject to a Child Support Lien from the Illinois Department of Healthcare and Family Services. (RX 1, pg. 1-21).

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.

Jason C. Hyatt

JULY 6, 2022

Signature of Arbitrator
ICArbDec p. 2

ADDENDUM TO THE DECISION OF THE ARBITRATOR

FINDINGS OF FACT

This matter proceeded to hearing pursuant to section 19(b) of the Illinois Workers' Compensation Act ("Act") on January 20, 2022, in Joliet, Illinois. (Arbitrator's Exhibit "Arb. Ex." 1).

The central dispute is whether the current condition of ill-being in Petitioner's thoracic spine is related to his work accident on July 30, 2018. (Id.).

Petitioner's Testimony

The Petitioner, who is now 40 years old, had worked for Respondent as a carpenter for approximately 4 - 5 months before the accident at issue. (Transcript "T" pg. 11). Petitioner's duties for Respondent included rough framing, building walls, roofing, and installing floors and staircases. "Pretty much building your whole house from the foundation up," Petitioner testified. (Id.).

On the morning of July 30, 2018, Petitioner was working on the first floor of a new house under construction. The walls had not yet been erected in the area he was working. Petitioner was installing Tyvek insulation on a wall frame that was laid out on the floor when he fell backward, 10 feet, off the side of the house into the basement:

> *I was kneeling down on the wall because it was laid down. I took a step back. I was on my knees and I moved my leg behind me and I felt it touch wood, so I believed I was on a surface. And next thing I know I woke up in a basement with severe injuries to my right hand, my fingers were dislocated and twisted, my wrist was broken… I had severe pain in my ribs, my shoulder, my neck and everywhere. (Id., p. 11).*

Petitioner testified he landed on the right side of his body. He testified the basement was covered in rock, "In basements before they pour the concrete they have big giant rock, C4, C5, about 2 inches in diameter rock… And when I fell, I hit that and it tore my ear apart and I had stitches in the side of my head". He also sustained lacerations down his chest, right arm and between his legs. Upon impact, he lost consciousness, "It knocked me out completely…When I woke in the basement, I noticed my hand was outstretched in front of me and my fingers were twisted at odd angles. I had shooting pain everywhere." (Id., p. 12).

His co-workers came into the basement, flipped Petition onto his back, removed the "work pouches" he wore containing various tools and helped Petitioner climb a ladder 10 feet out of the basement. Petitioner was then transported to the ER at Rush Copley Medical Center. (Id., p. 13-14).

Medical Records

Records from the ER at Rush-Copley Medical Center note that Petitioner presented on July 30, 2018, after falling backward about 8 feet onto a gravel surface, landing on his side at a construction site. (PX-1). It was noted that en route to the hospital, Petitioner became unresponsive, his eyes rolling back, possibly due to a seizure. (Id.). Petitioner awoke with painful stimuli and reportedly did not recall what happened. The Petitioner complained of pain to his right hand, right wrist, and right shoulder as well as his neck and right posterior ribs. (Id.).

On exam, Petitioner's bloody right ear exhibited a 1.5 cm laceration, involving a small portion of the cartilage. Diffuse tenderness to the right side of the neck was noted and a C-collar was applied immediately. Diffuse tenderness over the right lateral/posterior chest wall was noted. Obvious deformities to the right 2nd, 3rd, and 4th fingers were noted.

CTs of the Petitioner's abdomen/pelvis, head, chest, and cervical spine were performed. Of significance, the cervical spine CT noted degenerative changes, circumferential bulging of the disc with disc osteophyte complex producing multilevel moderate canal or foramina stenosis most marked at C3-C4.

X-rays of the right hand noted a comminuted nondisplaced fracture of the right distal radius components, a widening of the scapholunate space, and mild asymmetry of the carpal arches. (Id.). The right shoulder x-ray noted possible degenerative changes versus disruption of the AC joint. Clinical correlation was suggested to exclude post-traumatic etiology.

Joint dislocation reduction to correct Petitioner's dislocated fingers was performed. Sutures were applied to repair the right ear laceration and a splint was applied to Petitioner's right hand/wrist. (Id.)

Petitioner's discharge diagnosis noted: blunt head trauma, neck strain, contusion of the right shoulder, laceration of the right external ear, closed fracture of the distal end of the right radius, and dislocations of the right ring, middle, and index fingers. (Id.). The Petitioner was advised to follow up with an orthopedic specialist and prescriptions for Norco, Naprosyn, and Xanax, were issued. (Id.)

The following day, July 31, 2018, Petitioner presented to his primary care physician, Dr. Eric Janota, at Edwards-Elmhurst Health Center who noted the accident and ER treatment history. On examination, the back pain, neck pain, and neck stiffness was noted. The Petitioner requested a referral to an orthopedic doctor. (PX-2).

On August 2, 2018, pursuant to Petitioner's wife's request for "more pain meds" for her husband, Dr. Janota issued prescriptions for Hydrocodone every six hours and Naproxen, 2 times per day. (Id., 434).

On August 4, 2018, the Petitioner had sutures removed from his right ear at Edward-Elmhurst Medical Group. (Id.) Complaints of increased right shoulder pain were noted. (Id.).

On August 6, 2018, the Petitioner presented to Dr. Robert Welch, a hand and upper extremity surgeon at DuPage Medical Group Orthopaedics, with a history of falling 10 feet off a job site deck and landing on his right arm and shoulder. Complaints of pain in the right fingers, right shoulder, and right wrist were noted. (PX-4 pg. 382). Right wrist and hand x-rays were performed which showed a fracture of the right distal radius and dislocation of the PIP joints of the index, middle, and ring finger. Dr. Welch noted the Petitioner had "at least" a strain of the right shoulder. The Petitioner's right wrist was placed into a cast and a dorsal splint was supplied. The Petitioner was to follow up for repeat hand/wrist x-rays and reexamination of the right shoulder. Prescriptions were issued for Hydrocodone, every six hours for pain, Naproxen 500 mg. two times daily with meals, and Alprazolam for sleep. Off-work restrictions were noted. (Id., pg. 382-384).

On August 13, 2018, the Petitioner returned to Dr. Welch with complaints of right hand and right shoulder pain and stiffness in his right fingers. X-rays of the right wrist noted the radial styloid fracture maintained near the anatomic position. Physical therapy for the Petitioner's right finger stiffness and right shoulder was ordered. (Id., pg. 380). A prescription for Norco, 1-2 tablets every 4 hours, was issued. (Id., p. 382).

On September 5, 2018, Dr. Welch reviewed a right shoulder MRI, performed on August 30, 2018, noting a possible small focal tear of the posterior superior glenoid labrum and moderate degenerative hypertrophy of the acromioclavicular ("AC") joint that could be associated with impingement syndrome. (Id., pg. 375, 473). Dr. Welch diagnosed a grade 1 AC separation. (Id., 4 pg. 375). X-rays of the right wrist showed the fracture in an unchanged position with some bone growth. (Id., pg. 376). Dr. Welsh administered a cortisone injection to the right AC joint. Petitioner was placed in a removable splint. (Id.).

On September 26, 2018, Petitioner reported persistent right shoulder pain and that his shoulder pain had "changed status" following a steroid injection into the AC joint that day with "major pain" at the injection site.. (Id., pg. 371). Dr. Welsh recommended a right shoulder distal clavicle resection and continued therapy for the right hand/wrist. A prescription for 50 mg. Tramadol every six hours was issued for pain. (Id., pg. 372).

On October 17, 2018, Petitioner underwent an excision of the right distal clavicle performed by Dr. Welsh. (Id., 4 pg. 368). The operative note is not in the record. (PX 4). On October 30, 2018, Dr. Welch instructed Petitioner to begin physical therapy for the right shoulder. (Id., pg. 369). Petitioner would remain on light duty restrictions pending further notice. (Id., pg. 369).

On November 5, 2018, Petitioner presented for an initial evaluation at Northwestern Medicine Physical Therapy where Jeannine Knickerbocker, PT noted complaints of "shooting pain up the back of his neck and around shoulder blade". The therapist noted Petitioner has had a sling "on/off" since injury and was taking Tramadol at night. (PX-3 pg. 8).

On November 13, 2018, Dr. Welsh administered an injection for pain at the ulnocarpal joint and instructed Petitioner to continue therapy. (PX 4, pg. 367). Petitioner returned on December 11, 2018, reporting minimal improvement in his wrist following the injection. (Id., pg. 364).

On December 28, 2018, Dr. Welch noted Petitioner's complaints of pain at the superior and posterior aspect of the right shoulder. The recent MRI suggested a posterior superior labral injury. On exam, much of the right shoulder pain was reproduced with the posterior apprehension test. Pain and tenderness over the right ulnocarpal wrist joint was noted. A recent right wrist MRI showed a triangular fibrocartilage complex ("TFC") tear, for which he recommended surgery. (Id., pg. 360-361). The doctor referred Petitioner to Dr. Pulluru for evaluation of his ongoing shoulder pain. (Id., pg. 361).

On January 7, 2019, Petitioner presented to Dr. Raghu Pulluru regarding significant right shoulder pain that persisted after his recent distal clavicle resection surgery. On exam, the doctor noted a posterior shoulder subluxation, tenderness over the AC joint, and tenderness at the base of the neck. (Id., pg. 358). The right shoulder MRI showed a small posterior superior labral tear. The doctor's impression was right shoulder instability with a labral tear for which surgery was recommended. (Id.). Petitioner was off of work for the next 6 weeks. (Id.).

On January 21, 2019, a prescription for Norco 10 mg every four hours was issued by Dr. Pulluru. (Id., pp. 357).

On January 30, 2019, Petitioner underwent two surgeries at Naperville Surgical Center:

> The first, performed by Dr. Welch, consisted of arthroscopic debridement of the TFC tear and an ulnar shortening osteotomy.

The second procedure, performed by Dr. Pulluru, was a right shoulder arthroscopy with double row posterior labral repair, slap repair, subacromial decompression, capsular release, and open biceps tenodesis. (Id., 443-444).

On February 26, 2019, Petitioner's physical therapist noted complaints of tightness in the thoracic spine with deep breaths or coughing which prompted the therapist to begin thoracic manipulation and stretching. (Id., pg. 334).

On March 12, 2019, Dr. Welch noted Petitioner's reports of progress with his right wrist although numbness and tingling persisted. On exam, a positive Phalen's test for carpal tunnel syndrome was noted. The doctor noted an EMG may be necessary if symptoms persisted. Petitioner's current prescription medications were Cyclobenzaprine, 10 mg 3 times daily, and Hydrocodone 10 mg, every 4 hours for pain. (Id., pg. 323-324).

On March 14, 2019, Petitioner's therapist noted his report that "about 5 minutes before he left to drive to [physical therapy] he caught his toe on the second step from the top and fell." (Id., pg. 317; RX 3, pg. 1). Petitioner stated his right hand caught the lower rail and stopped some of his momentum and he felt a jerk in his shoulder. (Id.).

On April 24, 2019, a right wrist EMG noted mild sensory and motor fibers of the right median nerve and evidence of mild axon injury to the right ulnar nerve at the elbow. (Id., pg. 290-292).

On May 2, 2019, Dr. Pulluru administered an injection of Kenalog and lidocaine to Petitioner's right shoulder. (Id., pg. 283).

On May 7, 2019, PA Comstock noted Petitioner's report of improved numbness and tingling in his right hand. A diagnosis of right carpal tunnel syndrome was noted. A bone stimulator and splint were ordered. (Id., pg. 277-278).

On May 10, 2019, the Petitioner's therapist noted a history of Petitioner experiencing a strain/pull in his right biceps while working light-duty. He reportedly continued to work using his left hand. (Id., pg. 274).

On May 20, 2019, Petitioner reported to his therapist that he "sneezed and his thoracic spine stiffened up." (PX 4. pg. 269; RX 3, p. 3).

On May 24, 2019, the Petitioner returned to Dr. Pulluru with complaints of increased pain in his right upper extremity. Petitioner was reportedly performing more overhead activities, especially involving the biceps. A Kenalog and lidocaine injection was administered into the subacromial space of his right shoulder. It was noted that after the injection "a lot of his pain improved, but he will only do as well as his scapular function and neck area improves." (Id., pg. 265).

On June 11, 2019, the Petitioner's complaints of numbness in his small and ring fingers were noted by PA Comstock. Petitioner reportedly was waking up at night with numbness and pain in his right hand and right elbow pain. He reported dropping things due to weakness and numbness in his hand. A diagnosis of ulnar abutment syndrome in the right wrist was noted. A right ulnar nerve decompression and right carpal tunnel release were recommended. (Id., pg. 258-259). It was noted Petitioner's prescription for Norco was "discontinued or completed". (Id. p. 260).

On June 20, 2019, the Petitioner called Dr. Welch's office with complaints of neck pain extending to his fingertips on the right side. (Id., 402). On June 21, 2019, the Petitioner reported to his physical therapist that his back and right shoulder were aggravated while at work building houses. (Id., pg. 248-249).

On June 24, 2019, the Petitioner reported to Dr. Welch that he noticed, since Wednesday, "shooting pain from his neck into the right fingertips, and he feels like the rod in his arm was burning". Positive Phalen's and Tinel's signs were noted over the right carpal tunnel and positive Tinel's and elbow flexion test over the right cubital tunnel. Dr. Welch requested authorization for the carpal and cubital tunnel procedures and took Petitioner off of work. (Id., pg. 244-245).

On August 1, 2019, Dr. Pulluru examined Petitioner noting excellent stability in the right shoulder with good range of motion and a negative impingement sign. The doctor also noted tightness in the neck, tenderness at the base of the neck, and mild scapular dyskinesis. (Id., p. 224). The doctor believed the neck was the "primary source" of pain noting, "often times, that can be a result of activation from the shoulder". (Id., p. 223). Petitioner was now 6 months post right shoulder labral repair, SLAP repair, and open biceps tenodesis. (Id.). Dr. Pulluru noted the surgery had greatly improved Petitioner's shoulder. In his opinion, Petitioner's radiating neck pain and pain in the back of the shoulder blade were likely caused by the work accident, noting that Petitioner initially had neck pain following the accident, and the "shoulder component" had since been removed post-surgery. (Id., pg. 223-224).

On August 13, 2019, the Petitioner returned to Dr. Welch with numbness/tingling/pain in his right hand and right elbow. Surgical release of the carpal and cubital tunnels was again discussed. (Id., pg. 211-212). On that day, Petitioner was also evaluated at DuPage Medical Group/Rolling Ridge Pain Specialty for complaints of right neck pain radiating to the occipital region, into the trapezius, as well as the scapular region, right upper extremity, and all digits of the right hand. (Id., pg. 206). Positive findings of tenderness in the thoracic facets on the right were also noted. (Id., pg. 208). A cervical MRI was ordered in advance of a possible cervical epidural steroid injection ("CESI"). (Id., pg. 210).

On August 23, 2019, noted multilevel degenerative spondylosis worse at C6-C7, where the mild central canal and moderate left neural foraminal stenosis were noted. (Id., pg. 458).

On September 23, 2019, Petitioner returned to pain management where the above MRI was reviewed and a diagnosis of cervical radiculopathy and cervical stenosis was noted. (Id., pg. 176-180). CESI was recommended and Petitioner would follow up with his orthopedist if he had no relief. (Id., pg. 180).

On September 12, 2019, Petitioner underwent a right carpal tunnel release and right ulnar nerve decompression at the elbow. (Id., pg. 445).

On September 23, 2019, PA Bren noted Petitioner's complaints of right neck pain radiating into the occipital region. A diagnostic CESI was discussed and later administered at C7-T1 CESI by Dr. Yousuf Sayeed on October 1, 2019. (Id., pg. 171-180).

On October 22, 2019, PA Bren noted Petitioner presented reporting 60% improvement following the recent CESI. A second CESI with right bias was administered on November 5, 2019. (Id., pg. 141-142, 160-163).

On November 19, 2019, the Petitioner saw PA Bren again and reported mild additional relief from the recent injection. (Id., pg. 112-115).

On December 2, 2019, Dr. Welch noted Petitioner's complaints of persistent severe pain radiating down his right arm. A prospective stellate ganglion block was noted. (Id., pg. 97-99)

On December 10, 2019, a third CESI was administered to Petitioner's neck by Dr. Sayeed. (Id., pg. 96).

On December 19, 2019, the Petitioner was released from care from Dr. Pulluru regarding his right shoulder. Dr. Pulluru noted the problems faced by Petitioner stemmed from a pain syndrome in Petitioner's neck, not his shoulder. (Id., pg. 84)

On December 23, 2019, PA Bren noted Petitioner's report that the third CESI provided no relief. PA Bren then ordered Petitioner to consult with an orthopedic surgeon. (Id., pg. 74-77).

On January 13, 2020, the Petitioner presented to Dr. Steven Mather, an orthopedic surgeon, at Elmhurst Spine, for an initial consult regarding persistent neck pain radiating to his right hand and fingers. On exam, marked axial neck pain was noted with range of motion of the cervical spine. Dr. Mather reviewed the prior cervical MRI scans noting a herniation at T1-T2 that was not documented on the report. Dr. Mather thought this may be the source of his symptoms. A CT myelogram was ordered to further assess nerve compression. (Id., pg. 50-51).

On January 17, 2020, Dr. Sayeed suggested a possible spinal cord stimulator if a T1-2 discectomy was not performed. (Id., pg. 36-37).

On February 11, 2020, the Petitioner was released from care for his wrist by Dr. Welch. (Id., pg. 18-20).

On April 13, 2020, Dr. Mather noted Petitioner's complaints of severe neck pain traveling down the right arm posterior upper arm ulnar arm below the elbow, and into the fourth and fifth digits of the right hand. Petitioner continued to demonstrate weakness. Dr. Mather again noted the MRI demonstrated a herniation at T1-T2. Dr. Mather again requested a CT myelogram and third opinion as a "tie-breaker" relative to the neck injury being associated with the fall. The doctor noted Petitioner was off of work pending a possible posterior diskectomy and fusion at T1-T2. (Id., 4 pg. 2).

On May 6, 2020, EMG/NCS testing of Petitioner's right median, radial, ulnar, and dorsal cutaneous nerves were within normal limits. (RX 6, pg. 2-3).

On May 11, 2020, Petitioner returned to Dr. Welsh, noted that the recent EMG was within normal limits. Dr. Welch opined that much of Petitioner's symptoms appeared to be originating in the spine. (RX 6, pg.6). The doctor noted that hardware removal would be considered after Petitioner's spine issue is settled. Petitioner was released on an as-needed basis with work restrictions coming from Petitioner's spine doctors. (Id.).

SECTION 12 EXAMS

Dr. Gary Kronen

On August 6, 2019, the Petitioner attended an independent medical examination ("IME") with Dr. Gary Kronen for his right upper extremity. (RX 7, p. 1-7). Dr. Kronen diagnosed right elbow cubital tunnel syndrome and right carpal tunnel syndrome and found both conditions to be causally related to the work

injury. (Id., p. 4-5). He agreed that Petitioner would benefit from surgery with Dr. Welch and that Petitioner could only work left-handed duty at that time. (Id., p. 6-7).

Dr. Harel Deutsch

On September 9, 2020, at the request of Respondent, Petitioner underwent an IME with Dr. Harel Deutsch, a neurosurgeon at Rush Orthopedic. (RX-9). Dr. Deutsch reviewed Petitioner's medical records and examined Petitioner. (Id., pg. 1-9). On exam, Dr. Deutsch found no tenderness to palpation in the mid-thoracic area but some pain to palpation in the cervical spine and, also, the trapezius area on the right. (Id., pg. 8-9).

Dr. Deutsch noted that treatment for neck pain did not occur until June of 2019, a year after the accident. Further, the Petitioner's complaints of neck pain seemingly began after he was released to return to work in June of 2019, a year after the accident. Dr. Deutsch noted the MRI report did not note a disc herniation in Petitioner's neck or thoracic spine. He also noted the negative EMG study. In his opinion, Petitioner was at MMI, and treatment for the spine was unreasonable and unrelated to the work accident at issue. He further found that Petitioner was magnifying his symptoms and needed no restrictions. (Id.).

Dr. Jesse Butler

Dr. Jesse Butler, an orthopedic surgeon, performed an independent medical examination on August 9, 2021. (RX 11). On exam Dr. Butler noted Petitioner's complaints of neck pain extending up the back of his neck, pain into his fingertips with numbness and tingling in the thumb, index and long fingers, intermittent issues with the ring finger and small fingers of the right hand, burning pain to the right arm from the base of the neck, diffuse complaints through the scapula to the fingers. Dr. Butler reviewed the August 23, 2019, MRI scan noting a right-sided T1-T2 disc herniation and a C6-C7 small, central bulge with no cord compression. (Id., p. 5). Dr. Butler, however, did not believe the T1-T2 disc herniation related to any of Petitioner's subjective complaints which he noted were "readily explained by the multiple injuries sustained by the right upper extremity as a result of this work incident." (Id.). The doctor did not find evidence of symptom magnification or secondary gain. (Id.). He concluded that Petitioner does not require additional medical treatment to the cervical spine to cure or relieve the effects of his neck and upper back pain complaints, noting the negative EMG findings. (Id.). Petitioner had reached maximum medical improvement and does not require work restrictions relative to the neck/upper back condition. (Id.).

Dr. Mather deposition

On December 3, 2020, Dr. Mather was deposed. Dr. Mather confirmed the presence of a "reasonably large" herniated disk at T1 -T2 on the cervical MRI films, undocumented by the radiologist. (PX-5, pg. 7-8). The doctor though the MRI herniation at T1-T2 was consistent with shoulder blade pain and a numbing sensation into the medial aspect of the hand and the forearm. (Id., p. 8).

The doctor was aware of an EMG that did not demonstrate any radiculopathy but due to the false-negative rate of "about 15%" in EMG testing his opinions, in this case, were unchanged. (Id., pg. 9).

Dr. Mather testified he would require a CT myelogram to better assess the nerve compression he saw on the MRI. (Id., pg. 10-11). Depending on the results of that test he would perform a decompressive laminotomy and fuse the joint. Dr. Mather had Petitioner off work until he could perform the CT myelogram. (Id., pg. 12-13).

The doctor testified that a disc herniation at T1-T2 would cause low neck pain that would radiate into the medial aspect of the shoulder blade and that pain would run down the inside of the upper arm, inside of the arm below the elbow in the ulnar distribution. (Id., pg. 8). On cross-exam, Dr. Mather clarified that a T1-T2 herniation is not going to "give neck pain". Such herniation does not start in the neck itself. "It's going to give scapular pain, very low scapular pain." (Id., pg. 22).

Dr. Mather testified that most disc herniations are spontaneous and occur from wear and tear. (Id., pg. 10, 21).

Regarding causation, Dr. Mather agreed that a fall from "six to ten feet" landing on one's side onto gravel could cause a T1-T2 herniation. (Id., p. 10).

When asked whether Dr. Welch's chart from June 24, 2019 (which reflects complaints of shooting pain from Petitioner's neck to his right fingertips, worse from his elbow to his fingertips) is consistent with Dr. Mather's diagnosis of a T1-T2 herniation, Dr. Mather answered, "That could be, yes.". (Id., pg. 17).

Based upon the history of the injury, Dr. Mather opined that the herniation at T1-T2 was causally related to the Petitioner's July 30, 2018, fall. (Id., pg. 10). When asked again about causation, Dr. Mather testified it is his working diagnosis that Petitioner's T1-T2 herniation was caused or aggravated by the July 30, 2018, work injury. (Id., pg. 17).

Dr. Mather agreed that Petitioner could still have numbness in his fingers due to the cubital tunnel syndrome and carpal tunnel syndrome. (Id., pg. 20-21). When asked about the possibility that Petitioner's complaints are due to "residual orthopedic issues," Dr. Mather noted, "That wouldn't explain the scapular pain or the upper arm pain. But certainly in the finger numbness and tingling it could, yes." (Id. p. 21).

Regarding the possibility of a causal connection between a sneeze and a herniation, the doctor testified:

> *It's always possible. I mean anything is possible. It's possible that Oprah voted for Donald Trump, but it's not likely. (Id., p. 21).*

CAUSAL CONNECTION

Respondent only disputes the causal connection between Petitioner's thoracic spine condition and the work-related accident on July 30, 2018.

The Petitioner sustained significant traumatic injuries when he fell backward, 10 feet, out of a building landing on his right side on the ground of a rock-covered basement. He lost consciousness and was taken to the ER where complaints of right hand, right wrist, right shoulder, neck and right posterior rib pain were noted. (Id.). A comminuted nondisplaced fracture of the distal radius was diagnosed, he underwent closed reduction of the 2nd, 3rd, and 4th digits of his right hand. Blunt head trauma was noted. He had sustained a right ear laceration that was sutured. The right shoulder x-ray noted possible disruption of the AC joint which was later confirmed by Dr. Welch.

Over the next year, Petitioner underwent the following surgeries on his right upper extremity:
Distal clavicle excision (10/17/18), Arthroscopic debridement of the right TFC tear and right ulnar shortening osteotomy (1/30/19), Right shoulder arthroscopy with double row posterior labral repair, slap

repair, subacromial decompression, capsular release, and open biceps tenodesis (1/30/19), Carpal tunnel release and ulnar nerve decompression at the elbow (9/12/19).

The Arbitrator adopts the testimony credible, persuasive testimony of Dr. Mather who found a causal relationship between the accident at issue and a "reasonably large" herniation at T1-T2, evident on the August 23, 2019, MRI. Respondent's IME, Dr. Butler confirmed this diagnosis.

Dr. Mather agreed that a fall from ten feet landing on one's side onto gravel could cause a T1-T2 herniation. Even if Petitioner's symptoms of finger numbness and tingling are attributed to carpal and cubital tunnel syndrome, Petitioner's complaints of scapular pain and upper arm pain are consistent with a T1-T2 herniation.

Dr. Mather testified that thoracic findings are "very difficult" to reproduce on a physical examination. (Id., pg. 10).

> *This is a nerve that there is no objective test for. You can't really aggravate the nerve by exam very well, because it's not really provoked by the classic maneuver, which is called the Spurlings' maneuver. The nerve isn't so awfully compressed that it's going to give you an objective finding like atrophy of the hand muscles. And an EMG is about 85% sensitive. So we can't really go by the physical exam to tell us about the pain. We really have to go by the imaging.* (Id., p. 12).

Dr. Mather opined that it was possible that Petitioner's thoracic-related complaints could have been obscured by his various right upper extremity injuries and as the dominant sources of pain resolved, the thoracic complaints may have become more noticeable:

> *It does appear that it took several months for the initial, more acute, obvious problems, such as fractures and AC joint separations. Kind of easy diagnoses to kind of work themselves out and the dust to settle before he started complaining of more scapular pain and pain running down his arm. (PX 5 pg. 16).*

Petitioner's treating medical records note complaints of "shooting pain up the back of his neck and around shoulder blade" on November 5, 2018, approximately three months after the accident and a few weeks following the right distal clavicle excision. Petitioner next underwent right shoulder surgery on January 30, 2019, followed by a course of post-operative physical therapy when thoracic complaints were noted during his on February 26, 2019, March 5, 2019, and March 12, 2019. (PX 4 pg. 328, 334). Notably, in the March 12 note, the therapist noted Petitioner's relief with manual work, which the therapist felt "signaled scapular and thoracic contribution to symptoms". (Id., pg. 319-320).

Dr. Pulluru acknowledged that Petitioner's thoracic pain in March of 2019 was improved with therapy and on May 24, 2019, Dr. Pulluru noted "a lot of his pain improved, but he will only do as well as his scapular function and neck area improves." (Id., pg. 265). In August 2019, Dr. Pulluru opined the neck was the "primary source" of pain noting, "often times, that can be a result of activation from the shoulder". (Id., p. 223). In his opinion, Petitioner's radiating neck pain and pain in the back of the shoulder blade were likely caused by the work accident, noting that Petitioner initially had neck pain following the accident, and the "shoulder component" had since been removed post-surgery. (Id., pg. 223-224).

The Arbitrator places less weight on the opinions of Dr. Deutsch for the following reasons. It appears that he did not review the cervical MRI scans and instead, relied on the MRI report that failed to document the T1-T2 herniation. He also incorrectly claimed that Petitioner's neck complaints began in June of 2019. In

addition, Dr. Deutsch is the only doctor in this case who noted signs of malingering. Dr. Butler specifically noted that he found no evidence of malingering or symptom magnification in his IME report.

The Arbitrator acknowledges that Petitioner's EMG study was essentially normal, but found Dr. Mather's opinion on this matter persuasive.

Respondent's argument that Petitioner's thoracic herniation resulted from a sneeze in May of 2019, is unpersuasive in light of the treating medical record that shows complaints of right-sided numbness and thoracic complaints before this event. Further, Dr. Mather rather colorfully dismissed this unlikely causation theory. (PX-5 pg. 21-22).

The Arbitrator finds in favor of the Petitioner, based on a preponderance of the credible evidence contained in the record including the treating medical records, the chain of events, the diagnostic MRI scan that shows a herniation at T1-T2, the credible testimony of Petitioner, and the opinions of Dr. Mather, Dr. Welch, Dr. Pulluru, and to some extent, Dr. Butler.

PROSPECTIVE MEDICAL TREATMENT

Based on a preponderance of the evidence contained in the record, the Arbitrator awards prospective medical treatment, including the CT myelogram, consistent with the recommendations and testimony of Dr. Mather.

TTD

The Arbitrator finds Petitioner, based on a preponderance of credible evidence, is entitled to TTD consistent with the above findings, the Arbitrator awards TTD benefits, as provided in Section 8(a) of the Act of $405.98/week for 178 weeks, commencing:

- July 31, 2018, through May 18, 2019;
- May 26, 2019, through June 8, 2019; and
- June 26, 2019, through January 20, 2022.

This award is subject to Respondent's credit of $33,533.87 and permanency advance of $7,633.80.

Other Issues

Petitioner's compensation is subject to a Child Support Lien from the Illinois Department of Healthcare and Family Services. (RX 1, pg. 1-21). The record reflects Respondent was notified of the lien on or about August 2, 2018 (Id., pg. 2) and that a balance of $7,317.36 as of December 31, 2021, remained. (Id., 21).

Respondent has paid $33,533.87 in TTD benefits, $688.58 in TPD benefits and $7,633.80 in a PPD advance. (Arb. Ex. 1; RX 2, pg. 1-39). Some of the TTD benefits were withheld and paid to the State Disbursement unit per the Child Support Lien. (RX 2, pg. 1-37).

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC013964
Case Name	John Schnibben v. City of Peoria
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0250
Number of Pages of Decision	11
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Stephen Kelly
Respondent Attorney	Taylor Cascia, Kenneth M Snodgrass, Jr

DATE FILED: 6/7/2023

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOHN SCHNIBBEN,

Petitioner,

vs. NO: 19 WC 13964

CITY OF PEORIA,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of the nature and extent of Petitioner's permanent disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

CONCLUSIONS OF LAW

The Arbitrator concluded Petitioner sustained 25% loss of use of the person as a whole as well as 60% loss of use of the right leg. The Commission observes, however, the undisputed April 9, 2019 accident resulted in a single injury to a single body part; in that circumstance, the Act precludes an award of both a scheduled loss under §8(e) and a simultaneous award under §8(d). *See General Electric Co. v. Industrial Commission*, 89 Ill. 2d 432, 437 (1982). On Review, Petitioner nonetheless argues the dual award is appropriate because he sustained injuries to two body parts, a fracture to the femur and surgery to the right hip, as well as a loss of occupation. The Commission finds Petitioner's argument lacks merit as he sustained a single injury: a right femoral neck fracture. For the reasons detailed in our §8.1b(b) analysis, the Commission finds Petitioner's permanent disability is properly assessed under §8(d)2.

Section 8.1b(b)(i) – impairment rating

Neither party submitted an impairment rating. As such, the Commission assigns no weight to this factor and will assess Petitioner's permanent disability based upon the remaining enumerated factors.

Section 8.1b(b)(ii) – occupation of the injured employee

Petitioner was a captain in Respondent's Fire Department. Following treatment by Dr. Thomas Mulvey, Petitioner was discharged from care with permanent restrictions that Dr. Mulvey indicated precluded Petitioner from returning to work as a firefighter. Pet.'s Ex. 3. Petitioner thereafter underwent a return to duty evaluation at the occupational health clinic, and Dr. Edward Moody concluded Petitioner "is not fit to return to unrestricted firefighting." Pet.'s Ex. 2. The Commission finds Petitioner's injuries preclude him from returning to his usual and customary line of employment. This factor weighs heavily in favor of increased permanent disability.

Section 8.1b(b)(iii) – age at the time of the injury

Petitioner was 50 years old on the date of his accidental injury. The Commission notes that due to his age, Petitioner will experience his residual complaints for an extended period. This factor weighs in favor of increased permanent disability.

Section 8.1b(b)(iv) – future earning capacity

The Commission finds there is direct evidence that Petitioner's work accident had an adverse impact on his future earning capacity. Specifically, Respondent's vocational expert, David Patsavas ("Patsavas"), confirmed Petitioner's injury resulted in a loss of earning capacity. Patsavas' report reflects Petitioner was earning approximately $100,000 per year as a fire captain, but with his permanent restrictions, his salary range is $38,000 to $83,000. Resp.'s Ex. 3, Dep. Ex. 2. As such, Respondent's evidence indicates Petitioner's earning capacity has decreased anywhere from $17,000 to $62,000 annually.

Respondent nonetheless argues the earning capacity evidence supports decreased permanent disability. Respondent urges us to focus on Petitioner's line of duty pension and the fact that, if Petitioner had elected a wage differential, there would have been an associated reduction in his pension. Respondent further argues Petitioner improperly declined vocational rehabilitation and refused to "mitigate his job loss." The Commission does not find either argument to have merit. To be clear, since Petitioner did not pursue a wage differential award, any associated offset of his pension is hypothetical and immaterial. Similarly, Petitioner had no obligation to meet with Patsavas nor to undergo vocational rehabilitation or conduct a job search. The Commission finds Petitioner's injuries resulted in a significant impairment of his earning capacity. This factor weighs heavily in favor of increased permanent disability.

Section 8.1b(b)(v) – evidence of disability corroborated by treating medical records

Petitioner's undisputed work accident resulted in surgical intervention to his right hip. On April 9, 2019, Dr. Mulvey performed a reduction and internal fixation with cannulated pinning of mildly displaced right femoral neck fracture. Pet.'s Ex. 4. Petitioner underwent an extensive post-operative recuperative course, and on June 17, 2020, Dr. Mulvey opined Petitioner was doing well, "especially given the severity of his initial injury," and discharged Petitioner from care. Pet,'s Ex. 3. Dr. Mulvey noted Petitioner had "a healed fracture with restoration of a reasonable level of function and range of motion," but required a "more moderate to low impact" status to maintain the function of the joint. Pet.'s Ex. 3. On July 8, 2020, Petitioner was evaluated by Respondent's physician (T. 26) and Dr. Moody imposed significant permanent restrictions: maximum waist level lift/carry 35 pounds; occasional crawl,

kneel, squat, and stairs; no firefighting or training; no ladders or unprotected heights; and no running or jumping. Pet.'s Ex. 2.

Petitioner testified he continues to have residual hip complaints. He has a "slightly different gait," and he has intermittent pain and discomfort. T. 39. Petitioner has three large screws in his hip and he explained some of his pain is caused by the fascia rubbing over the screw heads. T. 41. Petitioner takes Ibuprofen when needed and he uses an ice machine and heating pads. T. 42. The Commission finds this factor is indicative of increased permanent disability.

Based on the above, the Commission finds Petitioner suffered a loss of occupation (firefighting) as a result of his work-related injury. We further find Petitioner sustained 40% loss of use of the person as a whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 13, 2022, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $813.87 per week for a period of 200 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 40% loss of use of the person as a whole. Respondent shall have a credit of $6,510.96 for the permanent partial disability advance paid July 18, 2020 (Resp.'s Ex. 5).

IT IS FURTHER ORDERED BY THE COMMISSION that the award of 60% loss of use of the right leg under §8(e) 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.

Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

June 7, 2023

/s/ *Deborah J. Baker*

DJB/mck

D: 5/24/23

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC013964
Case Name	SCHNIBBEN, JOHN v. CITY OF PEORIA
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Kurt Carlson, Arbitrator

Petitioner Attorney	Stephen Kelly
Respondent Attorney	Kenneth M. Snodgrass, Jr.

DATE FILED: 12/13/2022

THE INTEREST RATE FOR THE WEEK OF DECEMBER 13, 2022 4.63%

/s/Kurt Carlson, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

John Schnibben
Employee/Petitioner

v.

City of Peoria
Employer/Respondent

Case # **19** WC **013964**

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Peoria**, on **September 28, 2022**. By stipulation, the parties agree:

On the date of accident, **04-09-19**, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**89,212.24**, and the average weekly wage was $**1,715.62**.

At the time of injury, Petitioner was **50** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**6,510.96** for other benefits, for a total credit of $**6,510.96**.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of $**813.87**/week for a further period of **253.00** weeks ($205,909.11), as provided in Section **8(e)** & **8(d)(2)** and of the Act, because the injuries sustained caused 60% loss of use of the right leg (femoral neck fracture) and 25% loss of use of a person as whole (loss of occupation).

The Respondent shall be given a credit for the $6,510.96 credit for previous permanency advancement.

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

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

Kurt A. Carlson

Signature of Arbitrator

DECEMBER 13, 2022

FINDINGS OF FACT

Testimony of John Schnibben

The Petitioner testified that he began his employment with the City of Peoria on December 6, 1993 as a firefighter. (AT 12). At the time of the injury the Petitioner's job title was that of Captain. The Petitioner testified that prior to the injury, he did not sustain any injuries to his hip (AT 16).

The Petitioner testified that on April 9, 2019, he was cleaning equipment, washing the fire rescue truck. The Petitioner testified that he was on a ladder washing the top of the truck. One of his co-workers was holding the ladder in place. As the Petitioner was trying to turn the hose on, one of his co-workers turned on the hot water instead of the cold. The hot water scalded the Petitioner and the other man holding the ladder. The man holding the ladder bolted to turn the water off and when he did that, the ladder sprang out and the Petitioner fell and landed on the ladder, landing on his right hip (AT 16-17).

The Petitioner testified that he fell 12 feet and broke his femur in half at the right hip (AT 18). The Petitioner testified that he noticed pain immediately and was taken by ambulance to OSF St. Francis (AT 18-19).

The Petitioner testified that he was taken off work completely from April 9, 2019 through September 18, 2019 (AT 21). During that timeframe, the Petitioner testified that he was receiving his full paid salary (AT 22).

The Petitioner was working light duty from September 11, 2019 to October 21, 2019. After October 21, 2019, the Petitioner was off work for thyroid cancer treatment (AT 23-24).

The Petitioner testified that he finished his treatment for his right hip claim in June 2020. The Petitioner was placed with permanent restrictions and was unable to return to work as a firefighter (AT 25). During this timeframe, the Petitioner was receiving his full paid salary.

The Petitioner testified that subsequent to the permanent restrictions, he filed a line of duty disability pension (AT 28). The Petitioner testified that after July 2020, the City of Peoria did not offer a permanent light duty job (AT 28). At the time of trial, the Petitioner testified that he has not retuned to work as a firefighter (AT 29).

The Petitioner testified that at the time of trial he still notices occasional pain and discomfort in his right hip and that the traumatic injury has led to arthritis developing to his right hip (AT 39). The Petitioner further testified that he loves lifting weights and that activity has been hindered due to stiffness and less flexibility (AT 48). The Petitioner further testified that if he currently goes on hikes, he must rest afterwards and take Ibuprofen (AT 86).

Medical Treatment

The Petitioner was taken to OSF Hospital Emergency Room to receive medical treatment for his right leg and right hip (Pet. Exh. 4).

The Petitioner was treated by Dr. Thomas Mulvey at Midwest Orthopaedic Center, who diagnosed a right femoral neck fracture and performed surgery to repair the fracture (Pet. Exh. 3).

The Petitioner continued to follow-up with Dr. Mulvey, who recommended physical therapy 2-3 times per week for 4-6 weeks (Pet. Exh. 3).

On the June 26, 2019, visit with Dr. Mulvey, the Petitioner complained of a limp and discomfort in his right hip (Pet. Exh. 3).

On July 31, 2019, the Petitioner was evaluated by Dr. Mulvey, who noted that the Petitioner walks with an obvious limp. Dr. Mulvey advised it could take 6 to 12 months for recovery, which would be a gradual process (Pet. Exh. 3).

During his August 28, 2019, visit, Dr. Mulvey noted the CT scan showed a persistent fracture line in the femoral neck. Dr. Mulvey advised maximum medical improvement could take up to a year after the initial injury (Pet. Exh. 3).

On September 19, 2019, Dr. Mulvey released the Petitioner to restricted work, specifically sedentary work only (Pet. Exh. 3).

The Petitioner returned to light duty at the fire station from September 27, 2019, to October 18, 2019.

From October 21, 2019, to January 29, 2020, the Petitioner did not work, using his sick time to receive treatment for cancer.

On January 30, 2020, the Petitioner returned to light duty until February 1, 2020. Thereafter, the Petitioner was placed on Injured on Duty status until July 17, 2020.

On June 17, 2020, Dr. Mulvey evaluated the Petitioner's condition, finding he "has a healed fracture with restoration of a reasonable level of function and range of motion. I think long term he might have some general occasional discomfort and will require a more moderate to low impact functional status . . ." (Pet. Exh. 3).

Also, on July 8, 2020, a physician at OSF Occupational Health for the City of Peoria found the Petitioner required permanent restrictions, including no lifting more than 35 pounds, no firefighter training, no ladder climbing, no unprotected height working, no running, and no jumping (Pet. Exh. 2).

The Petitioner followed all treatment and physical therapy recommendations from his doctors and is unable to return to work in any capacity.

The Petitioner underwent three pension independent medical examinations. These were physicians scheduled by the pension board.

The Petitioner was examined by Dr. Newcomer for an independent medical examination on July 9, 2021. Dr. Newcomer opined the Petitioner was permanently disabled from performing full and unrestricted duties. Dr. Newcomer concluded the fall on April 9, 2019, was the direct result of the Petitioner's injury/disability (Resp. Exh. 11).

The Petitioner was next examined by Dr. Sostak for an independent medical examination on July 19, 2021. Dr. Sostak opined the Petitioner was permanently disabled from performing full, unrestricted duties and his disability was a direct result of the incident on April 9, 2019. Dr. Sostak concluded there was no medical care or treatment that would enable Petitioner to return to full, unrestricted duty and engaging in a heavy-duty position such as fireman could potentially lead to a breakdown of the repair and worsen his condition (Resp. Exh. 11).

Lastly, the Petitioner was examined by Dr. Brown for an independent medical examination on July 26, 2021. Dr. Brown opined Petitioner was permanently disabled from full, unrestricted duties and his disability was a direct result of the April 9, 2019, incident. Dr. Brown further concluded there was no additional treatment that would enable him to return to full and unrestricted firefighter duties (Resp. Exh. 11).

NATURE AND EXTENT OF THE INJURY

With regard to the issue of nature and extent, the Arbitrator notes that pursuant to Section 8.1b of the Act, for accidental injuries occurring after September 1, 2011, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability. Per 820 ILCS 305/8.1b(b), the criteria to be considered are as follows: (i) the reported level of impairment pursuant to subsection (a) [AMA "Guides to the Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. Applying this standard to this claim, the Arbitrator makes the following findings listed below.

With regard to Sec. 8.1(b) (i); the Arbitrator notes that there was no impairment rating performed on the Petitioner in this case. This factor will not be considered.

With regard to Sec. 8.1(b) (ii); the occupation of the Petitioner, the Arbitrator notes that the Petitioner was employed by the Respondent as a fire Captain at the time of the injury and has since been placed with permanent restrictions and unable to return to work for the Respondent.

With regard to Sec. 8.1(b) (iii); the Arbitrator notes that the Petitioner was 50 years old at the time of the injury.

With regard to Sec. 8.1(b) (iv); the Petitioner is unable to return to work as a fire Captain for the Respondent, but in all likelihood will return to work in some capacity with a different employer. The Petitioner was granted line-of-duty pension disability.

With regard to Sec 8.1(b) (v); the Arbitrator notes that the Petitioner underwent a closed mildly displaced right femoral neck fracture.

Based on the foregoing, the Arbitrator awards the Petitioner 60% loss of use of the right leg (femoral fracture) and 25% loss of use of a person as whole (job loss). The Respondent shall be given a credit for the $6,510.96 credit for previous permanency advancement.

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

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

Kurt A. Carlson

Signature of Arbitrator

Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC021259
Case Name	Margarita Espinoza v. Chicago Board of Education
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0251
Number of Pages of Decision	18
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Michael Casey
Respondent Attorney	Kathleen Ulbert

DATE FILED: 6/7/2023

/s/ Deborah Simpson, Commissioner

Signature

DISSENT: /s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Margarita Espinoza,
Petitioner,

vs. NO: 14 WC 21259

Chicago Board of Education,
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, permanent disability and temporary disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 15, 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.

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.

June 7, 2023
o4/12/23
DLS/rm
046

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

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

CONCURRENCE IN PART, DISSENT IN PART

I respectfully dissent from the Decision of the majority in two respects. First, I would have found that Petitioner was at MMI for her cervical condition and not entitled to any cervical treatment as of the date she

refused to participate in Respondent's §12 examination on February 9, 2015. Second, I would have modified the §8(d)2 award down to 15% PAW based on Petitioner's right shoulder and lumbar injuries, while still maintaining the award of 10% loss of use of the right hand under §8(e)9. In all other aspects not stated herein, I concur with the Decision of the majority.

Dr. John Cherf conducted an initial §12 examination focused on Petitioner's lumbar spine and left hip on August 25, 2014. During his examination, Dr. Cherf believed that Petitioner displayed abnormal illness behavior with a limitation of effort, superficial and nonanatomic tenderness, overreaction, and non-physiologic functions. He noted gait inconsistencies suggestive of significant behavior overlay and potentially purposeful misrepresentation. Nevertheless, Dr. Cherf found that Petitioner had sustained work-related lumbar and left hip injuries as a result of her accident on May 7, 2014. Dr. Cherf opined that Petitioner had not yet achieved MMI for her lumbar spine or left hip, but he anticipated her reaching MMI no later than five months post-injury, or by October 7, 2014.

Following Dr. Cherf's anticipated MMI date, and as Petitioner continued to pursue treatment, Respondent sought to obtain a second §12 examination to consider Petitioner's cervical spine, as well as reevaluate her lumbar and left hip conditions. However, on February 9, 2015, Dr. Cherf informed Respondent that the scheduled §12 examination had been canceled due to Petitioner's refusal to be evaluated without her daughter present. Dr. Cherf explained that when Petitioner arrived at the examination, he informed her that, based on his protocol, family members were welcome in his reception room but not in the examination room. Dr. Cherf stated that Petitioner refused to undergo the §12 examination without her daughter present and accused him of hurting her during his last examination. Dr. Cherf then contacted OrthoCentrix Solutions to review his office's protocol and offered to have a nurse present throughout the evaluation; however, Petitioner still refused to be evaluated without her daughter and left Dr. Cherf's office without undergoing any examination.

The Illinois Workers' Compensation Act affords Respondent the right to obtain a §12 examination in order to properly present their case. Dr. Cherf did not act unreasonably for sticking to his office's protocol despite Petitioner's personal demands. He even offered to have a nurse present for the entire evaluation to accommodate Petitioner's concerns. Dr. Cherf's first §12 examination in August 2014 did not look at the cervical spine, and instead, focused on Petitioner's lumbar spine and left hip only. Since Respondent has a right to obtain a §12 examination to evaluate the causality of the alleged cervical condition and Petitioner thwarted that right by refusing to participate, I would have found that Petitioner was at MMI for her cervical spine and not entitled to cervical treatment after the date of the canceled §12 examination on February 9, 2015.

Based on my finding that Petitioner had reached MMI for her cervical condition, I would have also modified down the §8(d)2 award to 15% PAW, while still concurring with the award of 10% loss of use of the right hand under §8(e)9. Pursuant to §8.1b, for accidents occurring after September 1, 2011, PPD shall be established using five enumerated criteria with no single factor being the sole determinant of disability. The criteria to be considered includes: (i) the reported level of impairment pursuant to (a) [AMA "Guides to Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b(b).

Regarding criterion (i), no AMA impairment rating was provided in this matter. As such, this factor can be afforded no weight.

Regarding criterion (ii), Petitioner was a high school Spanish teacher on her accident date. Dr. Ossama Abdellatif opined that Petitioner could return to full duty work at a primary school only but not at a high school, so as to prevent relapse and the need for future lumbar surgery. Petitioner never returned to work and ultimately

decided to retire on May 29, 2015, because she believed she could no longer move as quickly as one needed to when working in a high school setting and no longer had properly functioning motor skills. She also required medication that frequently made her dizzy. As such, I assign significant weight to this factor.

Regarding criterion (iii), Petitioner was 60 years old on the accident date, but there was no direct testimony as to how her age affected her disability. I assign some weight to this factor.

Regarding criterion (iv), as previously noted, Petitioner decided to retire as a result of her poor motor skills and frequent dizziness spells brought on by her medication. Petitioner did not receive full retirement benefits when she retired, because she did not meet the proper age for retirement. As such, I assign moderate weight to this factor.

Regarding criterion (v), Petitioner testified that before the accident, she could stand up, go to work, move around at the speed of high school students, take the bus, and drive, but now, her motor skills are slower and she has to take her time. Petitioner testified that her body did not move as it should due to her prescription medication, which she continues to take to relax her muscles and help her low back pain. Petitioner testified that she experiences low back pain all the time, but it worsens when she walks or moves about. She also continues to have ongoing neck complaints and sometimes has to move her whole body to avoid the pain caused by moving just her neck. Nevertheless, Petitioner testified that she does not have any current problems with her right wrist and hand, and although her right shoulder hurts, she could move it.

As for the treatment Petitioner underwent, she required several injections and facet blocks, as well as medication, physical therapy, work conditioning, and restrictions for her cervical condition. However, as previously discussed, I would have found that Petitioner was at MMI for her cervical condition at the time of her canceled §12 examination, and as such, Respondent was not liable for the cervical treatment after February 9, 2015. Still, Petitioner required extensive treatment for her causally related other lumbar, right shoulder, and right hand injuries, including a right shoulder surgery, carpal tunnel release, numerous injections and facet blocks, prescription medication, physical therapy, work conditioning, and work restrictions. Since the causally related body parts required extensive treatment both surgical and non-surgical in nature and Petitioner continues to complain of ongoing functional deficits, I assign this factor significant weight.

Based on the above, I agree that Petitioner's causally related lumbar and right upper extremity injuries have resulted in ongoing symptoms that affect Petitioner's daily life and ultimately influenced her decision to retire. However, whereas the Arbitrator's award of 20% PAW included consideration of Petitioner's current cervical condition, I would modify the §8(d)2 award to 15% PAW to account for my finding that Petitioner failed to establish the continued causality of her cervical condition after the MMI date of February 9, 2015. In all other aspects not specially addressed herein, I concur with the Decision of the majority.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC021259
Case Name	Margarita Espinoza v. Chicago Board of Education
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Rachael Sinnen, Arbitrator

Petitioner Attorney	Michael Casey
Respondent Attorney	Kathleen Ulbert

DATE FILED: 7/15/2022

THE INTEREST RATE FOR THE WEEK OF JULY 12, 2022 2.68%

/s/ Rachael Sinnen, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Margarita Espinoza
Employee/Petitioner

v.

Chicago Board of Education
Employer/Respondent

Case # **14** WC **21259**

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

DISPUTED ISSUES

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

FINDINGS

On **5.7.14**, 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 $**136,448.00**; the average weekly wage was $**2,624.00**.

On the date of accident, Petitioner was **60** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**19,289.70** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**19,289.70**.

Respondent is entitled to a credit of $**27,636.85** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,336.91/week for 81 6/7 weeks, commencing 5.8.14 through 12.1.15, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner directly for outstanding medical services listed in Petitioner's Exhibit 13 pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit of $27,636.85 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.

The Arbitrator makes an award of 10% loss of use of the right hand under Section 8(e)(9) and 20% loss of use the person as a whole under Section 8(d)(2) which corresponds to a total of 120.5 weeks of permanent partial disability benefits at a weekly rate of $721.66. 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.

JULY 15, 2022

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Margarita Espinoza,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 14WC021259
Chicago Board of Education,	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on April 25, 2022, in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's Request for Hearing. Issues in dispute include causal connection, medical bills, temporary total disability "TTD" benefits, and nature and extent of the injury. Arbitrator's Exhibit "Ax" 1. A petition for attorney's fee by Petitioner's former attorney (Horwitz, Horwitz & Associates) had been previously entered and continued until disposition. A fee agreement of 10% of attorney's fees plus costs to Horwitz, Horwitz & Associates was stipulated to on record by Petitioner's current attorney, Mr. Casey.

Alleged Accident on May 7, 2014

On May 7, 2014, the Petitioner was employed by Chicago Public Schools as a high school Spanish teacher. (Transcript p. 10). She was assigned to South Shore International College Prep High School. Petitioner had been hired by the Chicago Public Schools on March 10, 1998. At the time of the accident the Petitioner was 60 years old, married and had no dependents under the age of 18.

Petitioner testified that before the date of the accident on May 7, 2014, she had no complaints with her neck, no complaints with her right or left shoulder, no complaints of pain or any need to see a doctor for her right wrist. T 34-35. Before May 7, 2014, she did have complaints with regard to her low back. She had low back surgery 20 years before the accident date. T 35. She returned to work after that back surgery. T 36. She did have some occasional low back pain after that surgery, but it did not require her to go to see a doctor. T 36.

On May 7, 2014, Petitioner slipped and fell due to a substance on the washroom floor. Petitioner fell on her buttock and then fell backward hitting her head and hands on the floor (Transcript p. 11-12) Petitioner's Exhibit 1 contains the accident report completed on the day of the fall. It is noted in Exhibit 1 that Petitioner complained of left hip and low back pain.

After the fall the Petitioner denied transport via an ambulance to the hospital and decided to wait for her husband to pick her up and take her to a facility of her choosing. See Petitioner Exhibit 1.

Medical Treatment

Petitioner presented to Presence St. Mary of Nazareth Hospital emergency department on May 7, 2014. These records are contained in Petitioner's Exhibit 2. Petitioner presented with neck pain, left hip pain, and back pain from slipping on water and landing on her back. She denied any loss of consciousness, denied headaches, and denied numbness or tingling in her fingers. (Petitioner Exhibit 2, p. 9). Petitioner was diagnosed with neck, back and left leg strains. Petitioner testified she was referred by the hospital to follow up with her family doctor.

On 5/13/14, Petitioner was seen by Dr. Ravi Barnabas at Heron Medical Center. Dr. Barnabas' records document that Petitioner was leaving the bathroom while working, slipped and fell hitting the floor with her neck and back. She has pain in the back and leg. Diagnoses were displacement of cervical inter vertebral disc without myelopathy; cervicalgia; sprain of neck; cervical radiculitis; displacement of lumbar intervertebral disc without myelopathy; lumbago, thoracic and lumbosacral neuritis, or radiculitis, unspecified; contusion of lumbar court; contusion of cervical nerve root. MRI of the back was ordered. Back brace, medications and therapy were ordered. PX 3, p 4-5.

On May 13, 2014, Petitioner had a cervical MRI at Lakeshore Open MRI which was read as revealing a C5-6, 3-4 mm broad based disc herniation and a C6-7, 3-4 mm broad based disc herniation. (Petitioner Exhibit #4, p. 21) Petitioner had a lumbar MRI which was read as revealing L4-5 and L5-S1 disc desiccation and a bulge at L5-S1.

On 5/19/14 Heron Medical Center/Ravi Barnabas MD, OV. document: Left leg straight leg positive. Neck compression is positive. Diagnoses: cervical disc cervicalgia, cervical radiculitis; displacement of lumbar intervertebral disc without myelopathy; thoracic or lumbosacral neuritis or radiculitis. Plan: Continue present management; order pain management consultation. RX Dr. Hassan. PX 3, p 7.

Petitioner testified that she did follow the recommendation of Dr. Barnabas and was seen for pain consultation by Dr. Osama Abdellatif who is also known as Dr. Hassan. T 17-18. The records of Dr. Hassan were admitted in evidence as Petitioner Exhibit 4.

On June 10, 2014, Petitioner was seen at Midwest Diagnostic Specialists with Dr. Halwaji on referral from Dr. Hassan. Petitioner had complaints of pain in her shoulders, neck, mid and lower back, with pain numbness and tingling in her arms and legs. (Petitioner Exhibit #4, p. 19). Assessment included lumbar radiculopathy, lumbar facet syndrome, cervical radiculopathy, and bilateral shoulder pain. Plan included an EMG, a lumbar epidural steroid injection, MRI and ortho consult, physical therapy and medications. Petitioner was taken off work for 4. PX 4, p 87-89.

On 6/27/14 Lakeshore Open MRI and CT records document the following: MRI of the right shoulder performed ordered by Dr. Ravi Barnabas. Impression was: 1. Rotator cuff demonstrated some subtle attenuation involving the distal supraspinatus tendon and its insertion, probably a small focal partial thickness tear with surrounding inflammatory changes representing concomitant tendinitis and or bursitis; 2. The rest of the exam is unremarkable. MRI of the left shoulder was interpreted to reveal: 1. Rotator cuff appeared intact; 2 my rotator cuff tendinitis and or bursitis involving the distal supraspinatus tendon, as described above. 3. The rest of the exam is unremarkable. PX 5, p 6-7.

On July 23, 2014, Petitioner was discharged from physical therapy from Flexxion Rehabilitation. (Petitioner Exhibit #6, p. 21) She attended 16 sessions.

On August 18, 2014, Petitioner was discharged from physical therapy from Flexxion Rehabilitation. (Petitioner Exhibit #6, p. 21) She attended 12 sessions.

IME with Dr. Cherf

On August 28, 2014, Petitioner was seen for an independent medical evaluation with Dr. Cherf. Petitioner described having a prior work-related back injury 1988 states she was treated with surgery at L4-L5 level. Petitioner described her back pain as 7/10 back function is 55%. Described her back pain is being in her left buttock and radiating to the heel. Reported her back symptoms are exacerbated with walking and standing and relieved with rest. Denied numbness, tingling or bowel or bladder dysfunction. Described left hip pain as 7/10 and her left hip function at 55%. No right hip pain and normal right hip function. Her left hip symptoms are exacerbated with walking, standing, and stairs and relieved with rest. Ms. Espinoza was tearful during the end of the examinations. Dr. Cherf opined that petitioner suffered a work-related lumbar spine/strain and possible left hip sprain/strain/contusion on May 7, 2014. Dr. Cherf wrote that treatment to date appears excessive and that Petitioner should be on a home exercise program at this point. Dr. Cherf recommended anti-inflammatory medication for up to 2 to 3 months as well as a consultation with a board-certified physiatrist physical medicine and rehabilitation. Dr. Cherf opined that Petitioner did not require any restrictions as result of the work-related injury but recommended a functional capacity evaluation. It was noted that Ms. Espinoza had not reached maximum medical improvement when considering her lumbar spine sprain/strain and left hip sprain/strain/contusion of May 7, 2014. However, Dr. Cherf anticipated being at maximum medical improvement not later than 5 months post injury, or not later than October 7, 2014. RX1.

After the examination petitioner testified, she was told she had to return to work. She did not return to work because her motor skills were slow. T 22-23. She requested to teach only in grammar school rather than high school because in high school she would have to move more quickly. T 23-24.

On September 11, 2014 Petitioner was seen at by Dr. Barnabas post IME. It was noted that the IME put her at MMI and recommended an FCE. Petitioner advised that her pain was so bad she had gone to the emergency room on the prior Friday (no emergency room record was entered into evidence). She was given pain medication. Petitioner was seen in follow up at Herron on

9/29/14, 10/7/14, 10/28/14, and 12/18/14. There is no mention of right arm or right-hand pain in the Herron records.

On October 1, 2014, Petitioner had a lumbar facet block. On October 29, 2014, Petitioner had a radio frequency bilateral lumbar facet. (Petitioner's Exhibit #4, p. 38)

On 10/7/14 Heron Medical Center/Ravi Barnabas MD records document Petitioner has received one injection with Dr. Hassan. FCE was done at Flexion, waiting for the report. The patient is feeling much better after this injection. Low back pain is 6/10 and neck pain is 6/10. Diagnoses remain the same. Plan: patient will continue with present management; patient will see Dr. Hassan; return in 3 weeks. PX 3, p 14.

On 10/14/14 Pro Clinics/Dr. Osama Abdellatif/Dr. Hassan. Records document: Office visit work status off work for 4 weeks. Recommend MRI for further evaluation of right shoulder continue physical therapy medications. PX 4, p 71-73.

Initial Examination with Dr. Sokolowski

On November 19, 2014, Petitioner was seen by Dr. Sokolowski on referral from Dr. Hassan. Dr. Sokolowski reviewed an MRI of her lumbar spine dated May 13, 2014 from Lakeshore Open MRI and noted 2 levels of disc desiccation changes from L4 through S1 with the small herniation at L5-S1. He also reviewed the MRI of her cervical spine demonstrating 2 levels of disc herniations from C5-7. Dr. Sokolowski related the following diagnoses to Petitioner's work injury: Cervical pain, cervical radiculopathy, right shoulder rotator cuff tendinitis, Lumbar pain, and Lumbar radiculitis. The doctor noted that relief from epidural injections were diagnostically valuable. As numbness had not improved, a third lumbar epidural injection was recommended to see if she can get some increased relief. Dr. Sokolowski noted a positive Spurling's test and impingement on her cervical MRI. Dr. Sokolowski commended up to 3 cervical epidurals each year as needed to diminish her symptoms. Regarding the shoulder, Dr. Sokolowski didn't have her MRI images available. He noted that if intra-articular right shoulder pathology is seen on MRI, it would make sense to address shoulder pathology first, as it may diminish the stress upon her cervical spine. Petitioner was to continue seeing Dr. Hassan for ongoing pain management. PX 8, p 33-34.

On 12/10/14, Petitioner underwent a lumbar injection with Dr. Abdellatif at Northwest Chicago Medical. PX 9, p6-11. Petitioner returned to Dr. Barnabas on 12/16/14 at Heron Medical Center and was to continue with pain management. On 12/16/14, Petitioner returned to Dr. Abdellatif, was given an off work note and prescribed work conditioning. PX 4, p 51-53. Petitioner returned on 1/22/15 to Dr. Abdellatif and a series of cervical injections were recommended. PX 4, p 48-50. Petitioner received a series of cervical injections from Dr. Abdellatif from 1/28/15 through 2/18/15. PX 4, p 29-36. Petitioner testified that the injections helped for a little while and then the pain came back. T 27.

On January 30, 2015, Petitioner underwent a FCE at Oak Park Medical Center followed by work conditioning for 9 sessions from 2/3/25 through 3/3/15. (Petitioner Exhibit #10, p. 4)

Second IME with Dr. Cherf

On February 9, 2015, Petitioner was scheduled for a second independent medical evaluation with Dr. Cherf at the request of CPS. Petitioner wanted her daughter in the exam room and Dr. Cherf would not allow it. Additionally, the Petitioner alleged that Dr. Cherf had hurt her at the first IME. (Respondent Exhibit #1.) The IME was not completed due to the disagreements between Dr. Cherf and the Petitioner.

On 3/12/15 Petitioner returned to Pro Clinic (Drs. Abdellatif and Hassan) and a surgical consult was recommended "for further evaluation further treatment will continue based on consultation she has reached maximum medical improvement follow up when or if needed." It was noted that Petitioner could return to work full duty at primary school only no high school to prevent relapse and the need for future lumbar surgery. Diagnosis was lumbar radiculopathy. PX 4, p 26-28. Petitioner testified that the injections from Dr. Hassan helped for a little while and then the pain came back. T 27.

Petitioner does not return for treatment until July 10, 2015 when she is seen by Dr. Sokolowski. Petitioner was seen for her right shoulder pain and low back and left leg complaints. The doctor noted that the patient reports severe cervical pain and right shoulder pain. She still has findings consistent with cervical radiculopathy. Even most significant on exam today is severe dysfunction of her right shoulder. The doctor noted that she likely has a rotator cuff tear. Dr. Sokolowski wrote a new prescription for a right shoulder MRI explaining that if the right shoulder MRI demonstrates rotator cuff pathology or disruption, she would benefit from interventions directed at the shoulder. Petitioner was also given a prescription for a new MRI of her cervical spine noting that if the shoulder MRI demonstrates no significant shoulder pathology, then a surgical recommendation may be made for anterior cervical discectomy and fusion at the affected level as her last MRI demonstrated pathology principally from C5-7. Dr. Sokolowski noted that while Petitioner's lumbar spine remains, as her cervical and shoulder symptoms predominant at this point, no recommendations were made directed at the lumbar spine, but such recommendations may be made in the future. Petitioner was to remain under the care of Dr. Hassan. PX 8, p 28-32. (Petitioner Exhibit #8, p. 28)

On July 24, 2015 Petitioner had a second cervical MRI at RPS Imaging which was read as revealing C3-4, C4-5, C5-6 disk protrusions/herniations. (Petitioner's Exhibit #5, p. 8) On July 24, 2015 Petitioner had a second right shoulder MRI at RPS Imaging which was read as revealing an intact right rotator cuff. (Petitioner's Exhibit #5, p. 10)

On 8/24/15, Petitioner returned to Dr. Sokolowski who wrote that her right shoulder MRI shows supraspinatus tendinitis as well as a subscapularis tendinitis. MRI of the cervical spine dated July 24, 2015 demonstrates disc pathology at C5-6 with associated neural foraminal stenosis. The doctor opined that the patient's right shoulder pain appears to be the etiology of the majority of her shoulder and neck pain. Petitioner was to see a shoulder specialist and continue ongoing pain management with Dr. Hassan. With regards to her worsening lumbar symptoms, Dr. Sokolowski noted evidence of left sided lumbar radiculopathy and recommended a new MRI of her lumbar spine. PX 8, p 22-23.

On August 24, 2015 Petitioner had a lumbar MRI at RPS Imaging which was read as revealing an L5-S1 disk bulge/herniation. (Petitioner's Exhibit #5, p. 10)

Petitioner does not return to care until February 5, 2016 when she is seen by Dr. Sokolowski. Her back pain is rated at 7/10, left leg pain is rated at 7/10, and arm pain is 7/10. The doctor notes that it is diagnostically valuable and prognostically positive that each of the injections has given her short-term benefit, although she has not received lasting benefit. Dr. Sokolowski noted that Petitioner may be a candidate for lumbar decompression at L5-S1. He further wrote that in the absence of surgical management, she is likely to have ongoing pain perpetuity as a consequence of her work injury. He opined that a comprehensive pain management program could reasonably consist of episodic analgesics, injections, and/or periodic versus the physical therapy. PX 8, p 17-19.

Initial Examination by Dr. Frisch

On 11/3/16 Petitioner presented to Nicholas Frisch MD, at Amita Medical Group. It is noted that Petitioner recounts a fall when she was at work landing on her right side injuring her right shoulder back on May 5, 2014. Petitioner developed pain and numbness that radiates down the entire arm and encompasses all fingers. Dr. Frisch reviewed the MRI of the right shoulder obtained on September 30, 2016 and assessed Petitioner for right shoulder pain and weakness with MRI findings of full thickness rotator cuff tear and AC joint at arthralgia. He recommended surgery for arthroscopic rotator cuff repair along with subacromial decompression and distal clavicle excision. Dr. Frisch noted that the patient has more pain radiating down her arm with significant numbness and tingling than what he would expect. He opined that that such symptoms would not be coming from her shoulder pathology. Dr. Frisch recommended a cervical MRI to determine any cervical pathology before doing any surgeries on her shoulder. PX 11, p 13-24.

On November 30, 2016, Petitioner again saw Dr. Frisch. She had not completed the requested cervical MRI instead obtaining a lumbar MRI as recommended by her primary doctor. Petitioner also recommended for an EMG. (Petitioner Exhibit #11, p. 35) On December 7, 2016, Petitioner again saw Dr. Frisch but had not undergone the recommended EMG. (Petitioner Exhibit #11, p. 45)

Petitioner testified that her sister in Mexico was sick, and she had requested for Petitioner to go to Mexico. Petitioner went to Mexico and stayed with her sister in Mexico. As soon she returned to the United States, she went to see Dr. Frisch. T 31-32.

On April 17, 2017, Petitioner saw Dr. Frisch in follow up for her right shoulder. It was noted that she had sought treatment in Mexico and was taking methotrexate. It was noted that Petitioner's MRI showed no significant pathology to explain her pain or numbness in her hand. Dr. Frisch suspected that she has carpal tunnel syndrome but was awaiting the full EMG report. Dr. Frisch recommended right shoulder arthroscopic rotator cuff repair, subacromial decompression, distal clavicle excision along with combined right carpal tunnel release depending on confirmed EMG. PX 11, p 56-66, p 65.

Petitioner presented to Presence St. Mary of Nazareth Hospital emergency department on April 20, 2017 for a fall. (Petitioner exhibit 1, p. 50) Petitioner was noted to have an open scalp wound, sprain of unspecified hip and thigh, back sprain and cervicalgia.

On September 29, 2017, Petitioner had a right shoulder arthroscopy for a rotator cuff repair, subacromial decompression and distal clavicle excision as well as a right carpal tunnel release performed by Dr. Frisch at St. Mary's. (Petitioner Exhibit 1, p. 88) It is noted in the operative report that Petitioner had cancelled the surgery twice because she had to take care of ill family members. (Petitioner's Exhibit 1, p. 89) In the problem list the Petitioner is noted to have the following: low back pain, obesity, hypertension, varicose veins, hyperlipidemia, chronic gout, allergic rhinitis, tension headache, right foot pain, complete tear of right rotator cuff, weakness of left lower extremity, mass on right side of neck, CTS right wrist, and toenail fungus. (Petitioner Exhibit 1, p. 148)

Petitioner attended 29 physical therapy sessions at St. Mary's from 11/13/17 through 2/28/18.

Petitioner saw Dr. Frisch for post-op follow up on October 12, 2017. (Petitioner Exhibit #11, p. 99) Her shoulder incision was noted to healing well. She was advised to attend physical therapy.

Petitioner saw Dr. Frisch on November 9, 2017. (Petitioner Exhibit #11, p. 116) Petitioner had delayed physical therapy due to a car accident on November 2, 2017. (p. 116) Petitioner was advised to return after having physical therapy. By December 20, 2017, Petitioner had only had two physical therapy visits. (p.128)

On February 1, 2018, Petitioner saw Dr. Frisch and was advised to continue physical therapy. (Petitioner Exhibit #11, p. 153) Petitioner saw Dr. Frisch on March 15, 2018 and was noted to still have restrictions in her right arm and to have regressed in strength but without any apparent new accident. (p.188)

Petitioner's Current Condition

On 5/29/15 Petitioner retired from CPS. Petitioner testified that the Board of Education contacted petitioner after she saw Dr. Cherf on August 25, 2014 and told her to come back to work. She did not return to work. She testified she did not return to work because her motor skills were not functioning properly. She was not able to move, and she was taking medicine that made her dizzy. She retired because she was not able to go back to work. She did not get full retirement benefits when she retired on May 29, 2015 as she did not have the age for retirement. T 40-41.

Petitioner testified that as of the date of the hearing she notices differences in her daily activities than they were before the accident of May 7, 2014. She used to be able stand up and go to work and be moving around at the speed that the high school students move; she could take the bus and she could drive. Now her motor skills are very slow she has to take her time because of the medicine she takes. She takes medicine prescribed by Dr. Bradley who is her primary care physician. T 42. She takes medicine for flexing her muscles to relieve the pain. Petitioner testified that she has pain in her low back which is there all the time but sometimes it's worse. When she walks around and moves, that makes it worse. With regards to her right wrist and hand, she has no

problems with her right wrist and right hand now. T 43-44. With regard to her right shoulder and arm, it now hurts but she can lift her right arm above her head. She was not able to do that before the surgery. She was able to lift her right arm above her head before the accident. T 44. She has some pain with her left arm and shoulder, but she can move it. T 44. With regard to her neck, she does have problems and she has to move her whole body because if she just moves her neck, it hurts. T 45.

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).

On May 7, 2014, Petitioner slipped on a wet floor at work causing her legs to go forward in front of her. She put her arms down behind her to break her fall and struck her hands, buttocks, and whole body on the floor. See T 12-13. The Arbitrator compared Petitioner's description of the mechanism of injury with the record as a whole and does not find any overwhelming contradictions that would defeat Petitioner's claim. While the emergency room record of St. Mary of Nazareth Hospital and Dr. Barnabas' 5/13/14 initial treatment record do not include the detail that Petitioner braced herself with her hands as she fell backward, that detail is documented in the record of Dr. Osama Abdellatif (Dr. Hassan) on his initial examination of petitioner on 5/20/14. See PX 4, p 87. That fact is also documented in the history taken by the respondent IME, Dr. Cherf. See RX 1, p 1.

Petitioner testified that before May 7, 2014, she had no complaints with her neck, no complaints with her right or left shoulder, no complaints of pain or any need to see a doctor for her right wrist. See T 34-35. Petitioner admitted to past low back pain and stated she had low back surgery 20 years before the accident date. See T 35. She testified that she returned to work after her back surgery and although she had occasional low back pain, she did not return to any doctor. See T 36.

Petitioner's treating physicians opine that Petitioner's condition is causally related to her accident. On 5/20/14, Dr. Hassan opined that Petitioner's cervical spine, bilateral shoulders, and lumbar spine pain were primarily due to Petitioner's work injury. See PX 4, p 87. On 7/10/15, Dr. Sokolowski opined that Petitioner's cervical spine, lumbar spine and right shoulder were causally related to work injury. See PX 8, p 28- 29. Dr. Frisch noted that Petitioner sustained a fall at work resulting in a right shoulder full thickness rotator cuff tear with right arm pain due to a possible cervical pathology. See PX 11, p 13-24. Dr. Bradley noted that Petitioner's back pain was chronic since her fall at work. See PX14.

It is clear that Petitioner's treating physicians were trying to determine whether the pathology of Petitioner's right arm complaints were primarily from her shoulder or cervical spine. On 8/24/15, Dr. Sokolowski specifically noted that the right shoulder appeared to be the etiology of the majority of her shoulder and neck pain, and he recommended petitioner be seen by a shoulder specialist and continue treatment with Dr. Hassan for management of the lumbar spine radiculopathy. See PX 8, p 22. This led Petitioner to see Dr. Frisch who documented Petitioner's history of a fall at work, who diagnosed Petitioner with a right rotator cuff tear and ultimately determined that the cause of petitioner's numbness and tingling in her right hand was right carpal tunnel syndrome. See PX 11, p 13-24.

Respondent's IME Dr. Cherf opined that petitioner's current condition of ill being is a lumbar spine sprain/strain and the left sprain/strain/contusion and that these diagnoses are causally related to the work injury of May 7, 2014. The opinion of Dr. Cherf does not address the ongoing complaints of pain in the right shoulder and numbness and tingling in the right arm documented in the medical records by objective evidence consisting of MRI of the shoulder and EMG of the right upper extremity. The Arbitrator finds that the opinions of petitioner's treating physicians are more consistent with the body of medical records in evidence, are more consistent with Petitioner's testimony, and are more credible than the opinions of Dr. Cherf who saw Petitioner on one occasion. The Arbitrator gives greater weight to the opinions of the treating physicians.

The Arbitrator finds that Petitioner's current condition of ill-being with respect to the lumbar spine, cervical spine, right shoulder, and right hand is causally related to the injury of May 7, 2014.

Issue J, whether the medical services that were provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

Section 8(a) of the Act states a Respondent is responsible "…for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury…" A claimant has the burden of proving that the medical services were necessary, and the expenses were reasonable. See Gallentine v. Industrial Comm'n, 201 Ill.App.3d 880, 888 (2nd Dist. 1990).

Having found the opinions of Petitioner's treating physicians to be more credible than the opinions of Dr. Cherf, the Arbitrator finds Petitioner's medical treatment as documented by the treating

physicians to be reasonable, necessary, and causally related to the injury sustained on May 7, 2014.

The Arbitrator orders Respondent to pay Petitioner directly for outstanding medical services listed in Petitioner's Exhibit 13 pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act.

Further, Respondent shall be given a credit of $27,636.85 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.

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

TTD
A claimant is temporarily totally disabled from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. Westin Hotel v. Indus. Comm'n, 372 Ill.App.3d 527, 542 (1st Dist. 2007).

Petitioner was ordered off work by her treating physicians from the day of the accident on 5/7/14 and never returned to work. Dr. Hassan on 3/12/2015 released petitioner to return to work full duty at primary school only with no high school to prevent relapse and the need for future lumbar surgery. PX 4, p 26-28. Petitioner testified she was contacted by respondent after the IME by Dr. Cherf on August 25, 2014 and was directed to return back to work. She did not return to work because her motor skills were not functioning properly, she was not able to move as she would be required in high school because medication, she was taking was making her dizzy. T 40-41. Petitioner testified that she retired from respondent on 5/29/15. T 40-41. Petitioner is claiming TTD from 5/8/14 through 12/1/15. The arbitrator finds that the weight of credible evidence in this record demonstrates that petitioner was ordered off work from 5/8/14 through 12/1/15 and finds that petitioner did not work during that time.

Respondent shall pay Petitioner temporary total disability benefits of $1,336.91/week for 81 6/7 weeks, commencing 5.8.14 through 12.1.15, as provided in Section 8(b) of the Act. Respondent is given a credit in the amount of $19,289.70 for TTD paid as agreed by the parties.

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 high school teacher at the time of accident and was only released back to work in a grammar school setting. As Petitioner could not return back to work full duty per the opinions of Dr. Cherf, Petitioner retired on 5/29/15. The Arbitrator therefore gives little weight to this factor.

Under Section 8.1b(b)(iii), the age of the employee at the time of the injury, the Arbitrator notes that Petitioner was 60 years old at the time of the accident and retired in 2015. The Arbitrator gives moderate weight to this factor.

Under Section 8.1b(b)(iv), the employee's future earning capacity, the Arbitrator notes no evidence of impaired earning capacity. The Arbitrator gives little weight to this factor.

Under Section 8.1b(b)(iv), evidence of disability corroborated by the treating medical records, the Arbitrator gives great weight to this factor. Petitioner underwent a course of injections for her lumbar spine and cervical spine. She further underwent surgery to her right shoulder and carpal tunnel release to her right wrist. Medical records show that her right shoulder pain improved after surgery, but she still required a post operative injection. At hearing petitioner testified that she continues to have some pain and limitation in the function of the right shoulder. She did have a good outcome with the carpal tunnel release performed on her right wrist and reports no problems in her right hand with her activities. The medical records from Dr. Bradley dated 11/11/21 document that petitioner takes indomethacin, methocarbamol and lidocaine patches every day as a result of chronic back pain since her injury. See PX 14. With regards to her right arm, she can lift her arm over her head. She states that she has to turn her entire body rather than turning her neck because when she turns her neck it hurts.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 10% loss of use of the right hand pursuant to §8e9 of the Act as well as 20% pursuant to §8d2 of the Act for Petitioner's right shoulder, cervical spine and lumbar spine which corresponds to a total of 120.5 weeks of permanent partial disability benefits at a weekly rate of $721.66.

It is so ordered:

Arbitrator Rachael Sinnen

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC014393
Case Name	Jennifer Smalcuga v. Medix
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0252
Number of Pages of Decision	16
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Andrew Kriegel
Respondent Attorney	Tammy Paquette

DATE FILED: 6/7/2023

/s/Stephen Mathis, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jennifer Smalcuga,

Petitioner,

vs. No. 21 WC 14393

Medix,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission agrees with the Arbitrator that Petitioner has reached maximum medical improvement and requires no additional treatment. To the extent the Arbitrator found Petitioner failed to prove causal connection, the Commission clarifies that Petitioner's left ankle sprain, but not the claimed aggravation of CRPS, is causally connected to the work accident; however, Petitioner is at maximum medical improvement. The Commission modifies the Arbitrator's Decision in the following respects: (1) the date of maximum medical improvement; (2) the determination of medical benefits due to Petitioner; and (3) the analysis of permanent disability that comports with section 8.1b(b) of the Workers' Compensation Act (the Act).

The Commission relies on the opinions of Dr. Lee and Dr. Noren and finds that Petitioner was at maximum medical improvement as of August 2, 2021, when she last saw Dr. Patel. The Commission therefore awards the related medical bills in evidence that Petitioner incurred through that date. The medical bills from Premier Pain are denied.

Turning to the issue of permanent disability, the Commission considers the five factors enumerated in section 8.1b(b) of the Act: "(i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b).

Regarding factor (i), the Commission notes no impairment rating has been submitted into evidence. The Commission therefore gives no weight to this factor.

Regarding factors (ii), (iii) and (iv), at the time of the injury on February 16, 2021, Petitioner was a 40-year-old financial analyst. Petitioner testified that since November of 2021, she has been working from home for another employer. Petitioner has not sustained an impairment of earnings. These factors weigh towards a lower disability award.

Regarding factor (v), the Commission agrees with the Arbitrator that Petitioner's treating medical records do not corroborate significant disability caused by the work accident. The Commission finds most of Petitioner's problems and symptoms were preexisting. The work accident caused a left ankle sprain in an individual with longstanding pain complaints and pain management treatment.

The Commission agrees with the Arbitrator that the injuries sustained caused a 5 percent loss of use of the left foot.

All else is affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay, pursuant to §§8(a) and 8.2 of the Act, the related medical bills in evidence that Petitioner incurred through August 2, 2021. The medical bills from Premier Pain are denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $672.00 per week for a period of 8.35 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of the left foot to the extent of 5 percent thereof.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $11,000.00. 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.

SJM/sk
o-5/10/2023
44
June 7, 2023

/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	21WC014393
Case Name	Jennifer Smalcuga v. Medix
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	Andrew Kriegel
Respondent Attorney	Tammy Paquette

DATE FILED: 9/19/2022

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

/s/Charles Watts, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jennifer Smalcuga
Employee/Petitioner

v.

Medix
Employer/Respondent

Case # **21 WC 14393**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Charles Watts, Arbitrator of the Commission, in the city of **Chicago, Illinois**, on **June 17, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **February 16, 2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$58,240.00**; the average weekly wage was **$1,120.00**.

On the date of accident, Petitioner was **40** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $ **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 that Petitioner did not prove her current condition of ill-being to her left foot is causally related to the events of February 16, 2021. Based upon this filing, all medical, both incurred and prospective are hereby denied.

In light of the fact that the Arbitrator has adopted the opinions of Drs. Lee and Noren that Petitioner is at maximum medical improvement and requires no additional treatment, permanency is awarded in the amount of 5% loss of use of the left foot or 8.35 weeks at a PPD rate of $672.00, totaling $5,611.20.

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 19, 2022

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jennifer Smalcuga, Petitioner,	)	
vs.	)	No. 21 WC 14393
Medix, Respondent.	)	Arb. Charles Watts

ARBITRATOR'S FINDINGS OF FACT

Jennifer Smalcuga, hereinafter "Petitioner," was employed by Medix, hereinafter "Respondent," on February 16, 2021. Petitioner testified that while working for Medix, she was a financial analyst. (Transcript, hereinafter "T", p. 7). On February 16, 2021, she indicated that she was going from one Rush building to another and slipped on snow covered ice. She testified that in so doing, she twisted her left ankle and fell into the snow. (T. p. 8). She indicated that upon falling, she felt a pop in her left ankle and had pain. (T. p. 9).

On the date of the accident, Petitioner presented to Rush Oak Park Hospital, at which point she provided a description of the slip and fall at work indicating that her left ankle turned 360 degrees. (T. p. 9, 11). X-rays were obtained of both her left knee and left ankle, and these were negative for fracture or dislocation. (T. p. 11). On physical exam, she had pain on inversion and eversion of the left ankle and the diagnosis was acute left ankle pain. *Id.* She requested a boot to aid in ambulation which was given. (PX 5).

Petitioner then presented to Dr. Narendra Patel, a podiatrist with Barrington Orthopedics, on February 24, 2021. (T. p. 11, 12). According to this note, Petitioner had a prior history of CRPS

of the lower limb. (PX 6). At the time of this visit, she was voicing complaints of left lateral ankle pain which began on February 16, 2021, following a twisting injury. *Id.* On physical exam, Petitioner was noted to have mild ecchymotic swelling of the left ankle. *Id.* She also had tenderness to the lateral ankle, as well as the interior talofibular ligament and the calcaneal fibular ligament. *Id.* The assessment was a Grade II sprain of the left ankle. *Id.* It was noted that she was taking Gabapentin and had been treating with pain management for her CRPS that had already been diagnosed for her left knee issues. *Id.* It was recommended that she undergo an MRI of the left ankle and she was given no work restrictions at that point other than to allow for elevation of the leg and icing throughout the day. *Id.*

Petitioner testified that she had been diagnosed and been treating for CRPS in her left knee prior to the work injury with Premier Pain. (T. p. 15). She stated that she had been treating with Premier Pain since about 2016, following a total left knee replacement. (Tr. P. 15, 16). Petitioner testified that she saw Premier Pain on February 24, 2021, about a week after the work injury, and advised them of the work injury she sustained on February 16, 2021. *Id.* She explained that they examined her ankle and advised her to continue to treat with Dr. Patel and allow Dr. Patel to take the lead on the left ankle. (T. p. 17). She explained that Premier Pain prescribes all the medications that she takes and that they are the only ones who are allowed to issue her pain medications. (T. p. 16, 17).

On March 7, 2021, Petitioner underwent an MRI of the left ankle at Bright Light Medical Imaging which showed inframalleolar peroneus longus tendinopathy and mild interstitial tearing. (PX 6). After undergoing this MRI, Petitioner returned to Dr. Patel on March 17, 2021 at which point the MRI results were reviewed. (T. p. 11, 12). It was noted that her exam was consistent with a positive Tinel's over the SPN and visceral nerves and therefore, her injury was more consistent

with a nerve injury. (PX 6). An EMG was recommended at that time. *Id.* Petitioner underwent an EMG on April 2, 2021, which was normal. *Id.*

On April 21, 2021, Petitioner underwent an independent medical evaluation with Dr. Simon Lee, an orthopedic surgeon specializing in the foot and ankle, at Rush at the request of the Respondent. (RX 2). Dr. Lee opined that Petitioner sustained a left ankle sprain as a result of the work injury without evidence of significant inflammation of the ATFL or CFL ligaments. *Id.* He opined her peroneus longus tendinopathy appeared to be pre-existing and not specifically related to the injury described. *Id.* He went on to opine that the majority of her symptoms and complaints appeared to be nerve mediated and potentially related to her pre-existing chronic regional pain syndrome. *Id.* He indicated that she had not yet reached maximum medical improvement from an orthopedic standpoint but could continue to work full duty. *Id.* Also on April 21, 2021, Petitioner returned to Dr. Patel. Her physical exam was essentially unchanged at that point and it was recommended that physical therapy would be the next option for her. (PX 6). It was noted that she did not have any ligamentous issues and therefore, the goal was for a pain reduction and an attempt to reduce some of her edema. *Id.* Dr. Patel also opined that he felt the nerve injury in her knee, which was pre-existing, was exacerbating her symptoms in the left ankle. *Id.* She was referred to physical therapy two (2) times a week for four (4) weeks. *Id.*

On August 2, 2021, Petitioner returned to Dr. Patel and at that point she underwent an intra-articular lidocaine block to the ankle which completely alleviated the pain she had in her ankle, as well as the pain she had in the tendons. (PX 6). Based upon the improvement from the ankle block, it was recommended that she was a candidate for an arthroscopy of the left ankle, and it was recommended she undergo a tendon repair of the peroneus brevis tendon. *Id.* Additionally, Dr. Patel's April 21, 2021 office note reflects that he feels that the nerve injury at Petitioner's left knee

made her symptoms in her left ankle worse. *Id.* at 88. Petitioner treated with Dr. Patel until August 2021, which is also when she stopped physical therapy. (T. p. 13, 14). Premier Pain medical records state that she stopped physical therapy due to issues of cost. She testified that she still has the preexisting CRPS nerve issues in her left knee and that it continues to bother her. (T. p. 24).

Dr. Lee authored addendum reports dated June 7, 2021 and August 31, 2021. (RX 2). In those reports, Dr. Lee reviewed the MRI films from March 7, 2021, along with additional records for treatment subsequent to his exam and opined that the findings of tendinopathy of the peroneus longus tendon for chronic pre-existing changes were not consistent with her pain complaints. *Id.* He also opined that the tear that was seen appeared to be incidental and not a result of the work injury. *Id.* Finally he opined that she did not require surgical intervention and that her symptoms and complaints appeared to be nerve mediated in nature. *Id.* The evidence deposition of Dr. Lee took place on February 15, 2022. *Id.* He testified consistent with the reports he authored in connection with his exam and records reviews. *Id.* During that deposition, he did testify that Petitioner's pre-existing CRPS could have been aggravated by the work injury *Id. at* 26. Dr. Lee also testified that an aggravation could be temporary in nature and that Petitioner had no objective findings of CRPS at the time of his exam. *Id.* at 15-35. Moreover, he opined that her subjective complaints did not match what he was finding in his objective exam. *Id.* at 24-25.

Petitioner testified that she is now only treating with Premier Pain for the left ankle, while they also continue to treat her left knee. Besides pain medication, such as Norco, she has also received numerous lumbar sympathetic blocks. (T. p. 18, 19). She testified that she received these blocks prior to the work injury for her left knee CRPS pain and that they provide relief, sometimes a great deal and sometimes only to just reduce the pain slightly. *Id.* The Premier Pain medical note dated September 24, 2021 referenced that the Petitioner had a nerve block performed and that she

had significant improvement in her left lower extremity. (Pet. Ex. 7, p. 45). She testified that she could have up to 70-80% relief from these injections. *Id.* She also stated that immediately after her lumbar sympathetic shot, her left ankle would feel quite good, but after 48-72 hours the relief started to slowly wane. *Id.*

CONCLUSIONS OF LAW

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

The Petitioner bears the burden of proving every aspect of his claim by a preponderance of the evidence. *Hutson vs. Industrial Commission,* 223 Ill. App. 3d 706 (1992).

With Respect to: ISSUE (F) – Whether Petitioner's current condition is causally related to the injury, the Arbitrator finds as follows:

Petitioner had an accident that was stipulated to by the parties on February 16, 2021. The question is whether her current complaints and alleged condition of ill-being are related to that accident.

The Arbitrator takes note of the fact that Petitioner has a longstanding history of a CRPS diagnosis, dating back to November 18, 2016. (PX 7 and 7a). In fact, despite Petitioner's indication to Dr. Lee that she never had issues with CRPS of the left ankle before, her initial presentation to Premier Pain and Spine was for left knee, left hip and left foot pain. (PX 7 and T. p. 40). Moreover, when Petitioner was seen at Premier Pain and Spine on February 12, 2020, she indicated that she had a prior history of CRPS of the foot without an injury. (PX 7 and 7a, RX 2 p. 32 and T. p. 43).

Petitioner admitted on cross-examination that between November 18, 2016 and February 8, 2021, a week before this accident, she had been seen forty-four (44) times by Premier Pain and Spine for her claimed CRPS. (PX 7 and 7a and T. p. 44). The Arbitrator finds it telling that

Petitioner presented to Premier Pain and Spine, via a telemedicine visit, a week before the accident for ongoing pain complaints of the left knee that she rated as 9/10. She was being prescribed Norco at that point and was told to follow up in two (2) weeks. In addition, she was told to return for a repeat left lumbar sympathetic block. (PX 7 and 7a and T. p. 44-45). When she was seen for her two (2) week follow up on February 24, 2021, her pain complaints were the same as the week before the accident and in fact remained 9/10. She was again prescribed Norco and advised to follow up for a repeat lumbar sympathetic block. (PX 7 and 7a). The Arbitrator acknowledges that this is the same treatment plan that was in place prior to the work accident and that Petitioner's pain complaints were the same. In addition, the Arbitrator does not find Petitioner's argument that her CRPS was aggravated by the work accident persuasive as four (4) months before the accident, on October 14, 2020, she was seen at Premier Pain and Spine indicating that her pain was 10/10 and debilitating. (PX 7 and 7a and T. p. 45). Petitioner herself admitted on cross-examination that her pain complaints were never resolved prior to the work accident and that she was undergoing active treatment for alleged CRPS. (T. p. 46-47).

The Arbitrator further finds that Petitioner's testimony cannot be relied upon, not only based on the fact that she indicated to Dr. Lee she never had CRPS of the left ankle prior to this accident, which was refuted by the medical records, or the fact that both Drs. Noren and Lee opine Petitioner's subjective complaints do not match her objective findings, but also due to the fact she has presented to additional medical providers for pain complaints after the accident and based on the medical records, never advised these doctors that she was taking Norco daily, despite her testimony to the contrary. (RX 2 p. 32, RX 4, RX 5 and T. p. 36-38). Based on the records admitted by Respondent, Petitioner presented to Northwestern Memorial Hospital on May 28, 2021, three (3) months after this accident, with complaints of abdominal pain and was given morphine

injections while in the hospital. These records do not show that Petitioner indicated she was using Norco daily. (RX 4). She then presented to Alexian Brothers Medical Center on October 6, 2021, eight (8) months after the accident, with complaints of middle chest pain. Once again nowhere in these records is there an indication that she was utilizing Norco daily, along with medical marijuana. (RX 5).

Next, looking to Respondent's experts, the Arbitrator agrees that Dr. Lee, who is an orthopedist not a pain management specialist, opined that Petitioner could have aggravated her CRPS as a result of the work injury. (RX 2). The Arbitrator finds that Dr. Lee was also relying on a history from Petitioner that she had never had CRPS with the left ankle, which was not the case as established at trial. (RX 2 p. 32, PX 7 and 7a, and T. p. 40-43). The Arbitrator also finds that Dr. Lee conceded Petitioner had no objective findings of CRPS on exam. (RX 2 p. 35). Dr. Noren, who is a pain management specialist, testified credibly that the Budapest Criteria was created as a tool to more accurately diagnose CRPS. (RX 3 p. 13-15). Not only did Dr. Noren find Petitioner did not have any objective findings consistent with CRPS, her subjective complaints also did not support a CRPS diagnosis. (RX 3 pp. 18 and 35). Dr. Noren felt Petitioner met none of the criteria for a CRPS diagnosis for either her left knee or her left ankle as she had a normal sensory exam with no allodynia as supported by the fact both of her legs were shaved, and she had normal nails and skin, with no edema or temperature changes. (RX 3 p. 16-17). Both doctors found Petitioner requires no additional treatment when it comes to their respective medical expertise. (RX 2 p. 24 and RX 3 pp. 25-26)

The Arbitrator finds that Petitioner's was treating for 4 years prior to this accident and despite undergoing numerous blocks, being prescribed Norco and Tramadol, her pain complaints were never under control. In fact a week before the accident she had the same pain complaints as

she had a week after the accident. Moreover, Dr. Lee found, from an orthopedic standpoint, Petitioner required no additional treatment. Dr. Noren opined that from a pain management standpoint Petitioner did not meet the criteria for a CRPS diagnosis and was at MMI. The Arbitrator finds the opinions of these doctors both credible and persuasive. Therefore, based on a totality of the evidence presented at trial, the Arbitrator finds Petitioner failed to establish that her current complaints and alleged condition of ill-being are causally related to the events of February 16, 2021.

With Respect to: ISSUE (J) – Whether the medical services provided were reasonable, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner failed to prove her current condition of ill-being, specifically a claimed aggravation of CRPS, which she has been treating for four (4) years, is related to the accident of February 16, 2021, as set forth above. As such, the Arbitrator finds the medical submitted by Petitioner for payment at the time of trial was not necessary to cure or relieve the effects of the February 16, 2021 accident based on the evidence presented and therefore, declines to award these.

With Respect to: ISSUE (K) – Whether Petitioner is entitled to prospective medical care, the Arbitrator finds as follows:

The Arbitrator adopts his findings above concerning causal connection. The treatment that Petitioner has been recommended to undergo is treatment that was recommended prior to the work accident. Moreover, Petitioner was actively engaged in this treatment at the time of the accident and therefore, the Arbitrator finds Petitioner has failed to establish that any recommendations for treatment are necessary to cure or relieve the effects of the February 16, 2021 accident being alleged.

Moreover, the Arbitrator finds the opinions of both Drs. Lee and Noren more credible and persuasive than Petitioner and therefore, based upon a totality of the evidence presented at trial, the Arbitrator denies Petitioner's request for prospective medical care.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC029670
Case Name	John Cox v. Domino Express & IWBF
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0253
Number of Pages of Decision	28
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Mallory Zimet
Respondent Attorney	Michael Latz, Charlene Copeland

DATE FILED: 6/7/2023

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOHN COX,

Petitioner,

vs. NO: 19 WC 29670

DOMINO EXPRESS &
TREASURER OF THE STATE OF ILLINOIS 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 Respondent, Domino Express, herein and notice given to all parties, the Commission, after considering the issues of jurisdiction, employment relationship, accident, causation, notice, temporary total disability benefits, average weekly wage/benefit rate, and alleged violation of due process for refusal to grant a continuance, 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 was a long-haul truck driver living in Alaska in March of 2018. He answered a want ad for a truck driver and sent in his resume. He was called back and told the job was stationed in Illinois. He was interviewed in Alaska and given drug-screen paperwork. After receiving the drug-test results, Petitioner was sent a plane ticket to Chicago, set up in a motel, had an interview, had a road test, and was hired.

On March 18, 2019, Petitioner was driving a load in Kentucky. The tarps on his truck were frozen together. He went on the trailer to separate them. He fell, hit the side of the trailer, bounced off the trailer, and fell another four and a half feet to the ground. Petitioner testified he continued to work for two weeks even though he was hurting. On September 9, 2019, Dr. Paulson performed discectomy and arthrodesis at C3-C7 for cervical myelopathy and acquired cervical deformity.

The Arbitrator found that Petitioner sustained his burden of proving a compensable accident on March 18, 2019, which caused his current condition of ill-being. In so doing she found that Petitioner and Domino Express had an employer/employee relationship, Illinois had jurisdiction because the contract for employment was consummated in Illinois, Petitioner gave proper notice, Petitioner's average weekly wage was $1,741.59, and denied Respondent, Domino express's motion for continuance based on Respondent's presence at a pre-trial in which the arbitration date was set.

The Arbitrator awarded Petitioner medical expenses submitted into evidence, 75&5/7 weeks of temporary total disability benefits, and 225 weeks of permanent partial disability benefits representing loss of 45% of the use of the person-as-a-whole. The Commission agrees with the analysis of the Arbitrator and her findings regarding jurisdiction, employment relationship, accident, causation, notice, medical expenses, and the nature and extent of Petitioner's permanent partial disability. The Commission also agrees with the Arbitrator that the Illinois Workers' Benefit Fund is contingently liable for the award on behalf of Petitioner based on Domino Express' failure to maintain workers' compensation insurance at the time of the accident. Finally, the Commission finds that the Arbitrator did not abuse her discretion in denying Respondent's motion for continuance on the date of arbitration.

On the issue of temporary total disability. In the body of the Decision, the Arbitrator awarded such benefits from April 3, 2019 through September 13, 2020 for a total of 75&5/7 weeks. However, in the Order section, the Arbitrator incorrectly wrote that she was awarding temporary total disability benefits from March 18, 2019 (the date of the accident) to September 13, 2020, without specifying the total number of weeks being awarded. In order to dispel any possible confusion on page 3 of the Decision of the Arbitrator, in the "Order" section "Temporary Total Disability subsection, the Commission changes "March 18, 2019" to "April 3, 2019."

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated May 3, 2022 is hereby changed 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 $1,161.06 per week for a period of 75&5/7 weeks, that being the period of temporary total incapacity for work under §8(b).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the necessary and reasonable medical expenses submitted into evidence 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 the sum of $813.87 for a total of 225 weeks because the injuries sustained caused the loss of the use of 45% 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.

IT IS FURTHER ORDERED BY THE COMMISSION that the Illinois State Treasurer, *ex-officio* custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of 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 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.

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.

June 7, 2023

DLS/dw
O-4/12/23
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	19WC029670
Case Name	JOHN COX v. DOMINO EXPRESS AND THE STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	24
Decision Issued By	Raychel Wesley, Arbitrator

Petitioner Attorney	Frank Kress, Matthew Abrams
Respondent Attorney	Michael Latz, Charlene Copeland

DATE FILED: 5/3/2022

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

/s/ Raychel Wesley, 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

OPILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

John Cox Case # **19** WC **29670**
Employee/Petitioner

v.

Domino Express and the State Treasurer as ex officio-Custodia n 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 **Raychel Wesley**, Arbitrator of the Commission, in the city of **Chicago**, on **February 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 **Is the IWBF liable**

FINDINGS

On **March 18, 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 $**84,840.15**; the average weekly wage was $**1,741.59**.

On the date of accident, Petitioner was **54** 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 $**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

MEDICAL BILLS

Respondent shall pay reasonable and necessary medical services of $155.00 to East Wind Dental and $1,487.24 to Alaska Regional Hospital.

Additionally, Petitioner's remaining bills were paid by other insurance providers, including the Petitioner's Veteran's insurance and Occusure Claims Services. The medical bills from each provider were as follows and each were paid leaving no balance owed:

Oregon Health Sciences - $5,530.70; $562.00
Columbia Medical Clinic - $1,080.00
Alaska Regional Hospital - $189,333.80
VA in Alaska – No billing
Coastal Neurology - $170,113.00
East Wind Dental - $898.00

Respondent shall be responsible for any and all reimbursement requests and/or subrogation interests arising from payment of the Petitioner's related medical bills as listed above for Petitioner's injuries arising out of this accident as provided in Section 8(a) of the Act.

TEMPORARY TOTAL DISABILITY

The Arbitrator awards temporary total disability benefits for the period from March 18, 2019 through September 13, 2020.

PERMANENT PARTIAL DISABILITY

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 an over-the-road truck driver at the time of the accident and that he *is* able to return to work in his prior capacity as a result of said injury. The Arbitrator notes due to the severity of Petitioner's injury, and the fact that it involves his neck, which is extensively used in Petitioner's occupation, the Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 54 years old at the time of the accident. Because of this, the Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that the Petitioner has not suffered a diminution of earnings, the Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes due to lack of insurance, Petitioner's treatment was hindered. This Arbitrator finds credibility in Petitioner's testimony as to the extent of Petitioner's disability. Because of this, the Arbitrator therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 45% loss to the Petitioner a whole pursuant to §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.

/s/ Raychel A. Wesley

Signature of Arbitrator

MAY 3, 2022

JOHN COX v. DOMINO EXPRESS AND
STATE OF ILLINOIS TREASURER'S OFFICE AS CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
19 WC 29670

MEMORANDUM OF DECISION OF ARBITRATOR

Findings of Fact

An Application for Adjustment of Claim was filed by Petitioner, John Cox, seeking relief under the Illinois Workers' Compensation Act from Respondent-Employer, Domino Express. This action sought further relief from the Illinois Workers' Benefit Fund because Respondent did not maintain workers' compensation insurance.

The Petitioner in this matter was employed as an over-the-road truck driver by Domino Express, a Respondent in this matter (T. 22, 24-26). The Petitioner testified that he was initially hired by Domino Express on April 12, 2018 after replying to an ad on Craigslist. (T. 16, 24-26). The Petitioner explained that he first met with a person named Ace in Alaska who provided Petitioner with paperwork for a drug test. (T. 17-18; 91-92). A few weeks later after passing the drug screen, he was provided with an electronic airplane ticket to get to Chicago. (T. 19, 92). Petitioner was interviewed at Domino Express' office in Elk Grove Village, Illinois over a two-day period on April 11 and 12. (T. 20; 93). Petitioner explained that he was picked up at O'Hare airport by a Domino Express employee, Melu, who was one of the two co-owners, and driven to Domino Express' office at 2300 East Higgins Road, Elk Grove Village, IL. (T. 20). At Domino Express' office, he met with three people, Melu, Telena and Bojan (second co-owner) where he was interviewed and went through the necessary paperwork. (T. 20-21). Petitioner testified that all of the paperwork he read through and signed stated his employer as Domino Express. (T. 133-34). Petitioner further testified that he no longer possessed a copy of his written contract with Domino

Express because he left his copy in the truck when he last worked following the accident. (T. 114-15). He provided his bank information to Domino Express during his interview/hiring process in order to be paid via direct deposit for his work on behalf of Domino Express. (T. 27). Petitioner stayed in a nearby motel overnight that was paid for by Domino Express and completed the interview process by completing a road test the next day, April 12, 2018. (T. 22-23). At that time, he was hired in the State of Illinois by Domino Express and immediately dispatched on his first run that same afternoon. (T. 23).

The trucks he drove were solely owned by Domino Express and he explained that he drove three different trucks during his time working for Respondent, Domino Express. (T. 25, 28-29). Each truck contained all the necessary paperwork, registration book, insurance information and certificates which were all in the name of Domino Express as the owner of the truck. (T. 25). The outside of the cabs of each of the trucks Petitioner drove stated Domino Express on them. (T. 125, 142).

As an over-the-road truck driver, Petitioner's job duties consisted of using the flatbeds provided by Domino Express to pick up and deliver loads as instructed and directed by Domino Express. (T. 25-26). Petitioner testified he was provided all pickup and delivery information via text messages from Ben, the Domino Express dispatcher. (T. 26). Petitioner testified that he had a number to call Ben in dispatch if there were any delivery, pickup or truck related problems. (T.26). The Petitioner testified that when he picked up and delivered the freight, he received pay at the rate of .61 cents per mile plus an additional $50 for tarping (when he had to tarp loads himself). (T. 27). Petitioner's delivery and pick up schedule were pre-determined and set by Domino Express and provided to Petitioner by Ben the dispatcher. (T. 36). Petitioner recorded his miles by taking a cell phone picture of his odometer at the start of his pay period and again at the end of his pay

period and would text those odometer pictures to Ace, the gentleman he originally met in Alaska when he started the interview process for his job at Domino Express. (T. 29-30). Petitioner was not paid upon delivery, but instead, was paid via direct deposit every two-week pay period. (T. 27). Any paperwork gathered during each pay period, such as bills of lading and receipts, were kept by Petitioner and then mailed to the Domino Express office in Elk Grove Village at the end of the pay period via Fed Ex using the Fed Ex account provided by Domino Express. (T. 30-31). Petitioner testified he was never paid for his last two week pay period after the accident. (T. 39). Throughout the bills of lading provided by Respondent, the driver's company, carrier and/or agent is repeatedly indicated as Domino Express, Petitioner's employer. (Resp. Group Exh. E).

Petitioner testified that during the time he worked for Domino Express, he used Alaska USA Federal Credit Union as his bank and at trial produced his bank statements that showed the direct deposits he received as his pay from Domino Express. (T. 65; Pet. Exh. 9). Petitioner explained that all direct deposits from "Services M.A.D." ("M.A.D."). were his payments for his work for Domino Express, although he did not know what M.A.D. stood for. (T. 69). Petitioner further explained that almost all of his deposits from Domino Express as shown by the bank statements were a combination of his pay for his mileage and reimbursement for his out-of-pocket expenses except for a couple cash deposits and one payment by check. (T. 71-72). Petitioner testified in detail regarding the several payments he received that were not from M.A.D. but were instead in cash or by check. (T. 77-88).

Petitioner worked for no other employer at this time. (T.27-28). Petitioner testified that he could not work for any other employer while working for Domino Express. (T. 34). He was prohibited from hiring someone else to do his runs for him using Domino Express' truck. (T. 36-37). Domino Express could fire him at any time. (T. 36). With regard to his work-related expenses,

if he paid out of pocket, Petitioner would get reimbursed via direct deposit by sending his receipts to Ace. (T. 34-35). At times, if he did not have the money to cover expenses, such as truck repairs, he could call a gentleman at Domino Express and that person either provided Petitioner with a credit card to use for payment or that person would take care of paying the costs directly. (T. 35). He could not refuse a load as directed for pick up by Domino Express, nor could he request certain routes or assignments. (T.36).

While he was paid every two weeks, despite numerous requests, Domino Express never provided pay stubs or tax forms to Petitioner. (T. 32). He made these requests to Telena, the woman who was present during his interview at the Elk Grove Village office, but never received either a response/explanation nor the pay stubs or W-2s. (T.33-34). Petitioner further testified that he was provided a credit card for fuel by Domino Express. (T. 94).

On March 18, 2019, while completing a delivery in Kentucky and attempting to remove two tarps covering his load on the flatbed, the Petitioner was injured. (T. 40). Petitioner testified that the two tarps over the load had frozen together. (T. 40). Petitioner climbed up on his flatbed six feet off the ground to try to separate the two tarps but slipped, falling six feet to the ground first hitting his left side, his face and side of his chest on the side of the trailer as he fell. (T. 40). As he landed hard, on the ground, he landed on his right side hitting his face again and right hip. (T. 40).

Petitioner explained that he had extreme pain in his left rib cage, pain on the side of his head and then right hip where he landed. (T. 41). He testified that he first reported the accident to Ben the dispatcher the same day that he fell. (T.42). Ben told Petitioner to contact Telena, which Petitioner immediately did via text that same day. (T. 42). Telena responded that she would prepare paperwork for Petitioner so he could see a doctor and mail it to him at home. (T. 42-43). Petitioner explained that he did receive paperwork from Telena of Domino Express in the mail as

promised in early April. (T. 50). It was an Accident Injury Report which was already partially filled out and he had to fill out the rest. (T. 50; Pet. Exh. 8). The top portion, which was already filled out by Telena Stojanvic, stated Domino Express as Mr. Cox's employer. (T. 50; Pet. Exh. 8). Petitioner filled out the bottom part, signed and dated the Report on April 9, 2019. (T. 51; Pet. Exh. 8). Petitioner testified that he mailed the form back to Domino Express' office at 2300 East Higgins as instructed by Telena. (T. 51).

Petitioner testified that he did not immediately seek medical treatment because he was still on the road working for another 10 days post-accident. (T. 43). It was another two weeks before he returned to Chicago to drop off his truck so he could get to the doctor. (T. 43). Petitioner explained that he repeatedly told Ben he needed to see a doctor during this timeframe, but Ben kept giving him assignments. (T. 43). Petitioner pulled himself off the road then flew home to Portland, Oregon and immediately sought medical care. (T. 44).

On April 3, 2019, Petitioner was seen for the first time at the Oregon Health Sciences ("OHSU") Emergency Department. (Pet. Ex. 1, P. 43). The history taken at OHSU states Petitioner fell off his trailer on March 18, 2019, hitting his left chest, left side and arm as he fell. (Pet. Ex. 1, P. 43). The history noted neck pain, left leg pain and tingling and low back pain since his fall as well as worsening headaches. (Pet. Ex. 1, P. 43, 49). The history also indicates the Petitioner "notes left chest wall pain, left arm tingling and pain, left buttock and hip pain." (Pet. Ex. 1, P. 43). Because of the hit to the head and other injuries, Petitioner underwent a head CT and x-rays of his chest, pelvis, left hip and left shoulder. (Pet. Ex. 1, P. 46-48). The chest x-ray revealed a left anterior third rib fracture. (Pet. Ex. 1, P. 47). Due to the multiple injuries and symptoms, MRIs were suggested if Petitioner's symptoms did not improve. (Pet. Ex. 1, P. 49).

On April 8, 2019, Petitioner returned for treatment at Columbia Medical Clinic for follow

up because he was having "a lot of pain from his neck, splits down the center of his shoulder blades and radiates down his left arm, very painful." (Pet. Ex. 2, P. 19-20). A cervical and thoracic MRI was ordered and a new diagnosis of cervical radiculopathy was made at that time. (Pet. Ex. 2, P. 20). The cervical and thoracic MRIs were completed on April 12, 2019, and the radiologist impressions were of multiple level herniations in the cervical spine. (Pet. Ex. 1, P. 131). The MRIs were reviewed with Mr. Cox on April 18, 2019 at the Columbia Medical Clinic where the doctors explained that the MRIs demonstrated both multi-level cervical disc herniations and a thoracic herniation such that Mr. Cox was referred to a neurosurgeon for a surgical consult. (Pet. Ex. 2, P. 9, 18). Petitioner testified that surgery was discussed as the only option for treatment with the herniation he suffered in the fall. (T. 49).

Between the lack of medical insurance and Respondent not providing workers' compensation coverage, Petitioner had difficulty seeing a neurosurgeon. (T. 52). He returned to Columbia Clinic on April 25 and May 2, 2019 for further pain management while he waited to see the neurosurgeon. (T. 52; Pet. Exh. 2, P. 37-40). Ultimately, because of the lack of insurance provided by his employer, Domino Express, Petitioner had to return to his former home in Alaska to be seen at the VA in Alaska where he could get free medical treatment. (T. 52). Petitioner was treated on June 10 and again on July 1, 2019 for further pain management on both occasions. (T. 52-53; Pet. Exh. 4, P. 3-4). By that time, his neck and shoulder pain were considered chronic as he continued to wait to see a neurosurgeon. Another referral to a neurosurgeon was made by the VA doctors on July 1, 2019. (Pet. Exh. 4, P. 3-5). With this new referral from the VA, Petitioner finally was seen by neurosurgeon Dr. David Paulson at Coastal Neurology on July 23, 2019. (T. 53-54; Pet. Exh. 3).

Petitioner had an initial evaluation with Dr. Paulson on July 23, 2019, at which time he reported daily significant pain in his neck, left shoulder, left upper extremity along with numbness in the left arm and weakness in both the left arm and in his legs. (Pet. Exh. 3, P. 2). Petitioner also reported that "he is dropping things, they just fall out of his hands, he has difficulty with tying his shoes and buttoning buttons, he feels that he is unstable on his feet." (Pet. Exh. 3, P. 2). An EMG was ordered and performed that same day which demonstrated left median and left ulnar neuropathy. (Pet. Ex. 3, P. 21). Dr. Paulson reviewed the April 12, 2019 cervical and thoracic MRIs and history with Petitioner and opined in his records, "I am convinced that he will not, significantly, improve with additional conservative management and feel that he is a candidate for surgery. At this time, I am recommending anterior cervical discectomy C3-7 with use of allograft, cages, fixation plate and screws. Performance of this procedure is elective but I recommend as soon as possible given his myelopathy and failure to improve with conservative management." (Pet. Ex. 3, P. 6). Petitioner planned to schedule the 5-disc fusion surgery as soon as possible but Dr. Paulson was very busy so the surgery would not go forward for some time. (T. 54-55).

Petitioner returned to Dr. Boone at the VA on August 12, 2019 for further pain management because he was in extreme pain and could barely function at that point. (T. 55). Dr. Boone provided more pain medication at that visit. (Pet. Ex. 4, P. 3). The Petitioner returned to see Dr. Paulson on September 3, 2019 for re-evaluation. (Pet. Ex. 3, P. 7). His symptoms were unchanged and surgery was again recommended and, due to a cancellation in Dr. Paulson's surgery schedule, the fusion surgery was scheduled for September 9, 2019. (Pet. Ex. 3, P. 7, 12).

On September 9, 2019, Petitioner underwent the ACDF C3-C7 fusion surgery with Dr. Paulson at the Alaska Regional Hospital. (Pet. Exh. 3, P. 25-29; Pet. Ex. 5, P. 10-11). Petitioner returned to see Dr. Paulson on September 12, 2019 and reported reduced pain with regard to his

neck and limited symptoms with regard to the radiating upper extremity pain but with continued weakness. (Pet. Ex. 3, P. 13). He was to return in four weeks for reevaluation and had a 10-pound lifting restriction. (Pet. Exh. 3, P. 16). Petitioner returned on October 4, 2019 for reevaluation and reported continued improvement with his neck and upper extremity pain. (Pet. Exh. 3, P. 17). Dr. Paulson stated to Petitioner that he would need to remain off of work another 6 months and that Petitioner would be reevaluated again in six months. (Pet. Exh., P. 20). Petitioner returned to see Dr. Paulson for reevaluation on March 13, 2020 at which time he reported overall great improvement with his neck and upper extremity pain and overall functioning and strength. (Pet. Exh. 3, P. 34). Dr. Paulson stated that Petitioner was recovering well from the operation and could gradually increase his physical activity, but still had light duty restrictions for work. (Pet. Exh. 3, P. 37). Petitioner was to return in six more months for reevaluation and imaging review. (Pet. Exh. 3, P. 37). Petitioner was not able to return for another evaluation in September 2020 because he was forced to move away from Alaska and back to Oregon to live with family due to his financial situation and receiving no TTD benefits or income since his March 2019 injury. (T. 58).

In addition to the cervical injury, Petitioner also suffered a facial/dental injury in the accident from hitting his head on the trailer as he fell. (T. 59). Petitioner cracked his front implant teeth in the fall. (T. 60). Petitioner stated he treated at East Wind Dental with Dr. Ostovar starting on October 28, 2020 where the dentist shaved down the implant teeth because they were cutting his lips. (T. 61-62; Pet. Exh. 6, P. 1-2). Dr. Ostovar explained the only possible treatment was to replace the dental implants at a cost of $33,000. (T. 63; Pet. Exh. 6, P. 3).

CONCLUSIONS OF LAW

The Arbitrator adopts the above findings of material facts in support of the following Conclusions of Law: The Injured Workers' Benefit Fund is involved in this matter, and all issues have been disputed. The Arbitrator therefore addresses each as follows:

(A)

Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act? The Petitioner testified that on the date of the accident, he worked as an over-the-road truck driver for Domino Express. Domino Express was and is a freight company principally located in the State of Illinois that provided drivers and trucks in the business of carriage over land of various commodities. Specifically, Domino Express furnished delivery trucks to its employee drivers, who the company would then dispatch to pick up certain materials and commodities for delivery to different locations throughout the country. At or near the time of the accident, Domino Express had nearly 70 trucks which it owned or leased, and it employed an unknown number of drivers including John Cox, the Petitioner. There were also two co-owners, a Safety Director, a Dispatcher and several other employees of the company all working in the State of Illinois. The Arbitrator finds that Domino Express' operation as an entity engaged in the carriage of commodities over land by way of motorized vehicle, and its employment of at least six people plus an unknown number of drivers in the State of Illinois, is sufficient to subject it to the automatic coverage provisions of Section 3 of the Illinois Workers' Compensation Act.

(B)

Was there an employee-employer relationship? The existence of an employment relationship is a prerequisite for any award of benefits under the Act. There is no specific litmus test

for determining whether an employer-employee relationship exists. Instead, there are multiple factors to consider when assessing the nature of the relationship between the parties. *Ware v. Indus. Comm 'n.,* 318 111. App. 3d 1117, 1122 (1st Dist. 2000). Among these are: (1) whether the employer may control the manner in which the person performs the work; (2) whether the employer dictates the person's schedule; (3) whether the employer pays the person hourly; (4) whether the employer withholds income and social security taxes from the person's compensation; (5) whether the employer may discharge the person at will; (6) whether the employer supplies the person with materials and equipment; and (7) whether the employer's general business encompasses the person's work. *See Robertson v. Indus. Comm'n.,* 866 NE.2d 191, 200 (Ill. 2007). No single factor is determinative, and finding an employer-employee relationship rests upon the totality of the circumstances. *Robertson,* 866 NE.2d at 200.

Petitioner testified that on the day of accident, he worked as an over-the-road truck driver for Respondent-Employer (T. 22, 24-26). Petitioner stated that he was hired in the State of Illinois pursuant to a written contract by the owners of Domino Express on April 12, 2018. (T. 16, 24-26). Domino Express provided the trucks and trailers which Petitioner used at all times. (T. 25, 28-29). The cabs of each truck said Domino Express on the driver's side and each truck contained all the necessary paperwork, registration book, insurance information and certificates which were all in the name of Domino Express as the owner of the truck. (T. 25).

The Petitioner received his dispatch instructions via text from Ben the Dispatcher who worked for Respondent-Employer. (T. 26). These instructions would inform Petitioner where to pick up and deliver commodities for transport (T. 26). When the Petitioner was done delivering his freight, he would sign off on bills of lading that he would keep and later mail via Fed Ex to Domino Express' Elk Grove Village office at the end of every two week pay

period. (T. 30-31). Petitioner was paid .61 per mile plus $50 extra for tarping for his work. (T. 27).

The Petitioner received all of his pickup and delivery assignments and instructions from Ben, the Dispatcher via text or phone calls. (T. 26). Petitioner had to call Ben in dispatch if there were any delivery, pickup or truck related problems to get further instructions. (T.26). He could not ever refuse loads and was provided a schedule for all pick-ups and deliveries which he was required to abide by at all times. (T. 36). Petitioner worked for no other employer at this time. (T.27-28). Petitioner could not work for any other employer while working for Domino Express. (T. 34). He was prohibited from hiring someone else to do his runs for him using Domino Express' truck. (T. 36-37). Domino Express could fire him at any time. (T. 36).

Petitioner was paid via direct deposit to his bank account from an entity named Services M.A.D. which Petitioner understood to be payments from his employer because the payments roughly matched what he was due each pay period. (T. 65, 69; Pet Exh. 9). He was unaware of what amounts were specifically deducted from his pay because pay stubs and W2s were never provided to him by Domino Express despite his many requests for same to Telena at Domino Express. (T.32-34).

The Arbitrator finds that these regular deposits and the omission of Domino Express to provide Petitioner any proof of his pay and deductions remove any doubt that the Petitioner was not an independent contractor. Domino Express clearly had the power to discipline, hire and fire the Petitioner. This power, coupled with the obvious control that it had over the Petitioner's loads, assignments and schedule make it impossible for the Arbitrator to find that Domino Express lacked the requisite control of the Petitioner to refute the employee-employer relationship.

The Arbitrator notes that Respondent produced one witness, Juan Mexicano, to refute Mr. Cox's employee/employer relationship with Domino Express. The Arbitrator notes Mr. Mexicano, who is not an officer of the company, had no personal knowledge regarding Mr. Cox's hiring, no personal knowledge regarding the accident, no personal knowledge regarding Petitioner's injuries and no personal knowledge regarding Petitioner's work for Domino Express. Mr. Mexicano first became employed with Domino Express in early 2021. (T. 159-60). Despite the fact that this witness had no firsthand knowledge of anything associated with this claim, Respondent produced Mr. Mexicano to testify as to Mr. Cox's hiring process, work, pay and communication with Domino Express employees while working for Domino Express in 2018 and 2019. For the foregoing reasons, his testimony is given no weight and zero credibility.

Mr. Mexicano went on to claim that that there are presently just three employees and two co-owners of Domino Express, yet none of the drivers work for Domino Express, and that is the way he believes it has always been at Domino Express. Again, this testimony is not based on any personal knowledge of anything prior to 2021. (T.151; 158-59). These claims plus Mr. Mexicano's explanation that none of the drivers that drive Domino Express' 70+ trucks and trailers actually work for Domino Express entirely lacks any credibility. Adding to the lack of credibility for Respondent is that the co-owners of Domino Express, who were present at the hiring of Mr. Cox, live in the State of Illinois, have their corporate office in Elk Grove Village, Illinois, and continue to own Domino Express, but both failed to appear to testify to address any of the issues in this case. Given their immediate availability and personal knowledge of the issues in this case, it is hard to understand how neither was called as a witness as opposed to Mr. Mexicano and further diminishes the Respondent's position.

As a result, the Arbitrator cannot and does not give any weight to Respondent's testimony as

provided by Mr. Mexicano and gives no weight to the non-credible claims that Domino Express did not employ Mr. Cox or any other drivers and was nothing more than a middleman putting together non-employee drivers with the needs of its customers requiring deliveries of freight. The Arbitrator does not find it credible given that Domino Express currently owns and/or leases 70 trucks yet claims to have no truck driver employees. It is clear in this instance that Petitioner was working for Domino Express during his time with them.

To summarize, the Arbitrator finds that (1) Domino Express controlled the manner in which the Petitioner performed the work. This is evidenced by Domino Express' dispatcher providing all requisite information to Petitioner for all his pickups and deliveries. Furthermore Domino Express was in complete control of all information, instructions and directions that Petitioner was required to follow to perform his work; (2) Domino Express dictated the Petitioner keep copies of all bills of lading and work related paperwork till the end of each pay period and then mail all documents via Fed Ex to Domino Express' office using Domino Express' Fed Ex account; (3) Domino Express did not pay the Petitioner hourly, but rather by the mile at a rate of .61 cents plus $50 extra for tarping; (4) it is unclear because Domino Express failed to produce any evidence regarding pay whether Domino Express withheld income and social security taxes from Petitioner's compensation; (5) Domino Express had the power to discharge the Petitioner at will; (6) Domino Express supplied the Petitioner with his materials and equipment (i.e. the truck and trailer); and (7) Domino Express' general business of delivering fright encompassed the Petitioner's work of over-the-road delivery driving. The Arbitrator gives no weight or credibility to Mr. Mexicano's testimony given on behalf of the Respondent-employer.

For these reasons, the Arbitrator finds that Domino Express and the Petitioner had an employee-employer relationship.

(C)

Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? Petitioner testified that on the day of the accident, he injured himself when he fell from a height of six feet off of the flatbed trailer while trying to separate two frozen tarps covering the load he had brought to Kentucky. His testimony and the medical records are consistent with that history of injury as was the Accident Injury Report. (Pet. Exh. 8). Respondents have offered no evidence that disputes the date of accident as March 18, 2019 or Petitioner's injuries resulting from the accident. Petitioner worked in pain for about 10 days following the accident before pulling himself off the road by going back to Chicago to drop off his truck and trailer so that he could fly home for treatment. He started his medical treatment immediately upon arriving back in Oregon. (Pet. Exh. 1).

Based on the foregoing, with the Arbitrator finds that the accident arose out of and was in the course of Petitioner's employment with Respondent-Employer.

(D)

What was the date of the accident? Petitioner testified that the accident occurred on March 18, 2019. Petitioner's testimony is supported by the Accident Report, the bills of lading and the Petitioner's medical records and there is no evidence to the contrary regarding this date of accident. Petitioner explained that the bills of lading showed the delivery as Maysville, KY which is where the accident occurred on March 18, 2019. (T. 104-05; Resp Group Exh. E.). The bill of lading provided as evidence by Respondent concurs with Petitioner's testimony as to the location of the accident as the delivery in Maysville, KY. The bill of lading dated March 18, 2019 clearly shows Petitioner delivering a load from Pennsylvania to Maysville, KY and completing

his delivery on that date as testified to by Petitioner. (Resp. Ex. E).

(E)

Was timely notice of the accident given to Respondent? Petitioner testified that immediately following the accident because he knew he was hurt, he called Ben, the Dispatcher, to inform of his accident. (T. 42). Ben directed the Petitioner to text Telena to inform her about the accident which Petitioner immediately did. (T. 42). Telena responded that she would send Petitioner the necessary paperwork to his home so he could see a doctor (T. 42-43). As evidence that Domino Express was timely and properly informed of Petitioner's accident, Petitioner received the paperwork in the mail in early April 2019 as Telena had promised. (T. 50; Pet. Exh. 8). With the top half already typed in and filled out completely by Telena, Petitioner filled out his portion, signed and dated the report April 9, 2019 and mailed it back to Telena at Domino Express' Elk Grove Village office as instructed. (T. 51; Pet. Exh. 8).

There is no evidence to the contrary regarding Petitioner's reporting of the accident. The Accident Injury Report makes it clear that Petitioner reported the accident as he testified.
The Arbitrator finds that timely notice of the accident was given to Domino Express.

(F)

Is the Petitioner's current condition of ill-being causally related to the injury? Petitioner testified that he had injured himself when he fell off his trailer while making a delivery in Maysville, KY on March 18, 2019. The diagnostic studies and medical records starting from April 3, 2019 reveal the Petitioner's broken rib and immediate neck and shoulder pain. The MRIs performed on April 12, 2019 clearly demonstrate two disc herniations one in each of Petitioner's neck and mid back. (Pet. Exh 1 and Pet. Exh 2). Petitioner's medical treatment follows a very clear course of related treatment following after the April 12, 2019 MRIs wherein starting with

the April 18, 2019 review of the MRIs, fusion surgery was recommended as the necessary and only treatment option for Petitioner. (Pet. Ex. 2, P. 9, 18; T. 49). Once Petitioner was seen by his treating neurosurgeon, Dr. David Paulson, on July 23, 2019 for his initial consult, Dr. Paulson agreed with the surgical assessment and performed the fusion surgery on September 9, 2019. (T. 53-54; Pet. Exh. 3, P. 2). It is clear to the Arbitrator that the Petitioner's current state of ill being is causally related to his accident of March 18, 2019.

(G)

What were Petitioner's earnings? The Arbitrator notes that Petitioner's Exhibit 9 allows calculation of his average weekly wage and she finds that average weekly wage to be $1,741.59.

(H)

What was Petitioner's age at the time of the accident? The Application for Adjustment of Claim and all medical records indicate a date of birth of June 19, 1964. The Arbitrator finds that on the date of accident, Petitioner was 54 years old.

(I)

What was the Petitioner's marital status at the time of the accident? The Application for Adjustment of Claim indicates that the Petitioner was married as of the date of accident. Accordingly, the Arbitrator finds that on the date of accident, Petitioner was married.

(J)

Were the medical services provided to Petitioner reasonable and necessary? The Arbitrator finds that all treatment as described in Petitioner's Exhibits 1-6 including the fusion surgery and dental treatment was certainly necessary and reasonable to treat multi-level disc herniation in Petitioner's neck and his cracked implant teeth.

Respondent shall pay reasonable and necessary medical services of $155.00 to East Wind

Dental and $1,487.24 to Alaska Regional Hospital for the unpaid portion of Petitioner's related medical bills.

The remaining bills were paid by other insurance including Petitioner's Veterans insurance coverage and Occusure Claims Services. Accordingly, Domino Express is ordered to reimburse any and all requests for reimbursements and/or subrogation interests for the medical bills that were paid by Petitioner's VA coverage or any other insurance including Occusure Claims Services. The total amount of the medical bills that were paid by this other insurance are as follows:

Oregon Health Sciences - $5,530.70; $562.00
Columbia Medical Clinic - $1,080.00
Alaska Regional Hospital - $189,333.80
VA in Alaska – No billing
Coastal Neurology - $170,113.00
East Wind Dental - $898.00

(K)

What temporary benefits are in dispute - Is the Petitioner entitled to temporary total disability benefits? The Petitioner was disabled from driving a truck from April 3, 2019 through the six month return for reevaluation date that Dr. Paulson provided at what turned out to be the final visit on March 13, 2020. At the March 13, 2020 reevaluation, Dr. Paulson provided Petitioner with significant light duty restrictions such that Petitioner could not return to work as an over the road truck driver until at least the next visit in six months' time, or at least September 13, 2020. In fact, it is unclear to the Arbitrator that the Petitioner would have been fit to return to truck driving work as of September 2020 either; however, as Petitioner was unable to follow up with Dr. Paulson for this September 2020 reevaluation as a result of Respondent's failure to provide WC insurance coverage or TTD benefits, the Arbitrator will not prejudice Petitioner by limiting

the benefits awarded to him. However, since there was no further reevaluation, the Arbitrator is unable to award any temporary total disability benefits past the date of September 13, 2020. Accordingly, the Arbitrator awards the Petitioner 75 5/7 weeks of temporary total disability at a rate of $1,161.06 that accrued from April 3, 2019 through September 13, 2020.

(L)

What is the nature and extent of the injury? Pursuant to Section 8.1(b) of the Illinois Workers' Compensation Act, for accidents occurring after September 1, 2011, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability. 820 ILCS 305/8.1(b). The criteria to be considered include:

(i) the reported level of impairment pursuant to the physician's findings per the American Medical Association's "Guides to the Evaluation of Permanent Impairment"; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records.

Regarding criterion (i), no AMA Impairment Rating was rendered; therefore, this factor can be given no weight in determining the nature and extent of Petitioner's disability.

Regarding criterion (ii), at the time of the accident, Petitioner worked as an over-the-road truck driver. Testimony presented at trial suggested that following the accident, Petitioner was re-certified and obtained his Class A CDL as of October 7, 2021 so that he could return to work for a different employer as an over-the-road truck driver. The Arbitrator gives this factor some weight.

Regarding criterion (iii), at the time of the accident, Petitioner was 54 years old. The Arbitrator gives this factor some weight.

Regarding criterion (iv), as previously stated, Petitioner was re-certified to obtain his Class A

CDL as of October 7, 2021, so he can now return to work as an over-the-road truck driver for another company. Petitioner's departure from Domino Express resulted from Petitioner's inability to continue in the occupation of an over-the-road truck driver for nearly two years following the accident. The Arbitrator gives this factor some weight.

Regarding criterion (v), Petitioner's medical records establish that he suffered a multi-level disc herniation in his neck requiring a serious five (5) level fusion surgery as a result of his fall on March 18, 2019. Petitioner testified that he remained completely off of work until March 13, 2020. (Pet. Exh. 3, P. 34). He further testified that he was given light duty restrictions for an additional six months following his final visit with Dr. Paulson on March 13, 2020, and only at that point was he allowed to gradually increase his activity level, although he could still not return to his prior profession. (Pet. Exh. 3, P. 37). The records indicate that his neck and shoulder pain largely resolved by that point but that he had limited strength and lifting restrictions until September 2020. (Pet. Exh. 3, P. 37).

Upon consideration of all factors, the Arbitrator finds and concludes Petitioner sustained the permanent partial loss to the person as a whole pursuant to Section 8(d)2 to the extent of 45% thereof, or benefits of $813.87/week for 225 weeks.

(O)

Is there liability with the Injured Workers' Benefit Fund? The Petitioner provided certification from the National Council on Compensation Insurance ("NCCI") showing that Domino Express did not maintain workers' compensation insurance on March 18, 2019. (Pet. Ex. 7). The Arbitrator finds that the NCCI certification proves that on March 18, 2019, Domino Express lacked workers' compensation insurance.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC032651
Case Name	Daniel J Sullivan v. City of Chicago
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0254
Number of Pages of Decision	21
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	David Huber
Respondent Attorney	Stephanie Lipman

DATE FILED: 6/7/2023

/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

Daniel Sullivan,

Petitioner,

vs. No. 15 WC 32651

City of Chicago,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the parties herein and proper notice given, the Commission, after considering the issues of causal connection, medical expenses, temporary disability, permanent disability and "PPD credit from prior injury," 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 corrects the date of accident in the Order part of the Arbitrator's Decision to August 25, **2015**, consistently with the Findings of Fact and Conclusions of Law. The Commission notes the Arbitrator correctly determined the benefit rates. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 24, 2022 is hereby corrected, affirmed and adopted.

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

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

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

June 7, 2023
SJM/sk
o-05/10/2023
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	15WC032651
Case Name	Daniel J Sullivan v. City of Chicago
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	18
Decision Issued By	Jeffrey Huebsch, Arbitrator

Petitioner Attorney	David Huber
Respondent Attorney	Stephanie Lipman

DATE FILED: 8/24/2022

/s/ Jeffrey Huebsch, 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

Daniel Sullivan
Employee/Petitioner
v.
City of Chicago
Employer/Respondent

Case # **15** WC **032651**

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 **6/10/2021 and 1/26/2022**. 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 _____

D. Sullivan v. City of Chicago, 15 WC 032651

FINDINGS

On **8/25/2018**, 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 $**93,203.14**; the average weekly wage was $**1,899.04**.

On the date of accident, Petitioner was **58** 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 $**48,757.54** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**48,757.54**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,266.03/week for 75-3/7 weeks, for the time periods set forth below..

Respondent shall pay reasonable and necessary medical services as is set forth below, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $755.22/week for 96.75 weeks, because the injuries sustained caused the 40% loss of the left leg and 5% additional 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 08/25/2015 through 1/26/222 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 24, 2022

FINDINGS OF FACT

Petitioner testified that he was born on November 29, 1956, was 58 years old at the time of his injury and 64 years old at the time of the first hearing, June 10, 2021. He is 5'10" tall and weighs 190 pounds and is right-handed. In August of 2015, he might have weighed 200 pounds.

Petitioner testified he graduated high school and attended 5 years of trade school. His trade is a heavy equipment operator. He began working as a hoisting engineer for Respondent in the Department of Water Management, beginning in 1994. Petitioner is a member of Local 150 Midwest Operating Engineer's Labor Union. In 2015, his rate of pay was $44.80 per hour.

Petitioner testified that his job duties included maintenance, inspection and operation of a Link-Belt 160 Model Excavator, a fairly large machine which runs on tracks and must be transported from job to job on low-boy trailer. Petitioner testified that each day he would spend approximately one-half hour in the morning preparing the machine for the day's work. This included greasing the machine, which required moving the machine in different positions so that he could access various grease fittings on the machine. Access to the operating position was gained via a ladder and walking along the top of the track to access the operator's cab. Moving the machine from job to job required driving it onto the low-boy trailer and then securing the machine to the trailer. The operator was responsible for loading the machine and securing it to the trailer. Maintenance of the machine required the operator to climb on top of and under the machine.

Petitioner had previously suffered a right leg/hip injury when he had an on-the-job accident. He had his right hip resurfaced by Dr. Troy, after which he returned to work as a hoisting engineer for Respondent. He filed a Workers' Compensation case and was awarded 60% loss of use of the right leg by the Workers' Compensation Commission in Case No. 10 IWCC 0857. (RX 6)

Petitioner testified that in the 2 years before August 2015 Dr. Troy had not rendered any treatment with regard to his knees. He did not have any physical restrictions regarding his knees imposed by Dr. Troy or any other physician and had not undergone physical therapy or any other treatment to his knees. He had not had any injections of either lubricant, anti-inflammatory medication, or anesthetic to either knee. No physician had ever spoken to him or suggested anything regarding knee replacement in the 2 years prior to August 2015.

The records of Dr. Troy show that Petitioner was seen for complaints of bilateral knee pain on March 6, 2013. The history was that he had received one prior Orthovisc injection in each knee on a prior occasion, which gave him significant relief. Petitioner was seeking another injection. Dr. Troy charted that bilateral Orthovisc injections were performed. An Addendum Chart Note for March 6, 2013 says that bilateral cortisone injections were performed. Petitioner

received further Orthovisc injections in both knees on 3/27/13, 4/10/13 and 4/17/13. On April 17, 2013, Dr. Troy noted that Petitioner's knees had improved with the injections. The impression was: Degenerative Joint Disease, bilateral knees. (PX 3.1)

Dr. Troy's records do not show any treatment for Petitioner's knees after 4/17/2013, until he was seen by Dr. Troy in October of 2015, after his work accident of August 25, 2015. (PX 3.1)

Petitioner testified on cross examination that he had knee pain which was treated with an injection in approximately 2007 (might have been like in 2007). Petitioner could not specifically recall which knee was problematic or the circumstances surrounding treatment. Petitioner could not recall where the treatment occurred. He did not testify specifically regarding the 10 injections that he received in 2013. He did recall a fall on his knees in 2013 and a knee strain when he was 16. He testified that he had no subsequent knee injuries after the subject accident. Petitioner on redirect testified that in the two years prior to August 2015 he had not had any complaints or knee treatment.

On the date of accident, Petitioner was able to perform all of his usual job duties as a hoisting engineer. There was no condition of his knees that interfered with his ability to do his job.

The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of his employment by Respondent on August 25, 2015. He was trying to get off the machine. Petitioner testified he was situated at an odd angle due to traffic and location constraints. While getting off the machine, he missed a step and fell from the cab to the ground. Petitioner testified he fell 4 ½ to 5 feet, landing first on his feet and then to his hands and knees. Petitioner immediately noticed that both of his knees hurt. He reported the injury to his foreman, who instructed him to go to Respondent's designated medical provider, Mercy Works.

Petitioner reported to Mercy Works on the same day of his injury. He saw Dr. Homer Diadula. Petitioner saw Dr. Diadula the day of his injury, the following day, and 3 days after that. Dr. Diadula diagnosed Petitioner with a contusion to both knees. On August 28, 2015, Dr. Diadula order MRIs of both knees. The MRIs were obtained, and Petitioner returned to see Dr. Diadula on September 12, 2015, to discuss the findings. At that meeting, Dr. Diadula instructed Petitioner that he was discharged from care at Mercy Works because Petitioner wanted to see Dr. Daniel Troy, an orthopedic surgeon who he was familiar with.

Petitioner testified that he saw Dr. Daniel Troy on October 7, 2015, and they discussed the MRI findings. Petitioner testified that by October 2015 he was walking with a limp. Petitioner testified that before August 2015 he did not walk with a limp. Petitioner testified that Dr. Troy formed a treatment plan which involved injections in both knees begining in October 2015. Petitioner testified that the injections did not have any effect on the function of his knees.

Petitioner testified that he was experiencing swelling in his knees, which he had not suffered from before August 2015. In addition to injections, Dr. Troy sent Petitioner for physical therapy at Athletex Sport and Orthopedic Physical Therapy. Dr. Troy excused Petitioner from work. (PX 3.1, 3.3)

Petitioner returned to Dr. Troy in December 2015 and he saw Dr. Troy's colleague Dr. Karsten Oliversen. Petitioner discussed with Dr. Olversen that despite 12 sessions of physical therapy his knees were still very sore, and Petitioner was apprehensive about the coming winter, where he anticipated additional difficulties. Petitioner testified that, by mid-December 2015, he was experiencing difficulty with the function of his knees including squatting, getting up and down off the ground, crawling, playing with his grand kids or doing other activities which require the use of the legs.

Petitioner testified physical therapy did not improve the condition or function of his knees. He returned to Dr. Troy and Dr. Troy suggested a series of Supartz injections to both knees between January 13, 2016 and February 11, 2016, totaling 10 in total. Petitioner received 5 injections in each knee. By February 26, 2016, Petitioner returned to Dr. Troy to discuss the function of his knees. At this time, approximately 7 months since his fall from the machine, symptoms and function had not improved. Dr. Troy suggested total knee arthroplasties, first in the left knee and then in the right knee, because Petitioner's left knee was more symptomatic and less functional than the right. (PX 3.1)

Petitioner accepted Dr. Troy's recommendation. Respondent however, instructed Petitioner to attend a Section 12 examination with a physician it selected, Dr. Brett Levine. Dr. Levine examined Petitioner on April 4, 2016. Thereafter, on May 17, 2016, Petitioner received a letter from Respondent stating that his temporary total disability benefits had been suspended as of May 22, 2016, in reliance on Dr. Levine's report. Also, medical treatment regarding Petitioner’s knees was denied. (RX 5)

Petitioner returned to work based on Respondent's refusal of additional benefits on May 26, 2016. Petitioner testified that the pain had not gone away. Petitioner testified he found it much harder to climb in and out of the machine. In addition, sitting in one position for a long period of time caused pain in both knees. Petitioner testified that sitting in the machine after about 20 minutes or so would make his knees worse. Petitioner testified that his other work activities made his knee symptoms worse.

Petitioner returned to Dr. Troy on July 1, 2016, to discuss difficulty with pain and symptoms in his knees while working. Petitioner testified that he worked along with Dr. Troy to obtain authorization for the recommended knee replacement surgeries with Respondent’s claims handler, but was unsuccessful. Petitioner testified that specifically because of the condition of his knees and the difficulty experienced the winter after his fall from the machine, he did not believe that continuing to work was feasible. Petitioner retired from Respondent, due to the

condition of his knees on June 30, 2017. He had 25 years on the job and was vested in his pension.

Petitioner testified that before August 2015 he had not contemplated retiring. He testified that his wife had her own business as a financial adviser. Petitioner testified that as a family, he and his wife decided to both keep working. At the time of the hearing in 2021, Petitioner's wife, then age 61, was still working as a financial adviser. Petitioner testified that after his benefits were cut off, he planned to attempt to return to work for the City of Chicago. However, he found it necessary to take ibuprofen 600 mg at the end of the day and found it harder to get anything done after work because of his painful knees. Petitioner testified that as he continued working the pain in his knees worsened. Petitioner testified that but for the symptoms in his knees getting worse as he was working, he would not have retired.

After he retired from Respondent, Petitioner had his left knee replaced by Dr. Troy on November 9, 2017. Petitioner testified that the period of rehabilitation after his knee replacement was much harder than the rehabilitation he went through when he had his hip resurfaced in 2008 by Dr. Troy. Petitioner testified that after about 4 ½ months of rehabilitation the knee began to feel good. He testified that within a year, it felt really good. Petitioner testified he went back to work off the Local 150 Labor Union retiree out- of-work list and worked for a time. Petitioner testified that he worked for 10 to 20 days at a time here and there. He wanted to see if he could do the work. He wanted to get to 40 years of service with his union. Petitioner's Exhibit 6 shows that Petitioner worked a total of 340 hours between September 17, 2017 and September 19, 2019. Petitioner did not work during that time for Respondent. However, he worked for Western Utility Contractors Inc., C.R. Leonard Plumbing & Heating Inc., Secehin Plumbing & Heating and Bechstein/Klatt. All those jobs involved operating an excavator.

Petitioner testified that after his left knee was replaced it felt much better and much stronger. He experienced less fatigue and pain at the end of the day as compared to his right, unreplaced, knee. Petitioner returned to Dr. Troy to discuss right knee replacement. In October, 2018, Petitioner underwent right knee replacement by Dr. Troy. Petitioner testified that he placed the medical bills for the left and right knee replacements through his Health & Welfare plan at Local 150's Retirees' Medical Benefit Plan. Petitioner testified that he has a reimbursement agreement with Local 150 to pay back medical bills paid by the retirees' medical benefit plan in the event of recovery of those medical bills.

Petitioner's Exhibit 2 is a medical subrogation acknowledgment executed by Petitioner. The acknowledgment states that Petitioner acknowledges that payments have been made covered medical expenses incurred because of injuries he suffered on August 25, 2020. The subrogation acknowledgment states that Petitioner agrees to reimburse the Trustees of the Welfare Fund as the result of making any claim which results in recovery of those bills.

Petitioner's Exhibit 1 is a printout of medical bills paid by Midwest Operating Engineer's Retirees' Benefit Fund for medical care incurred as a result of Petitioner's knee injuries. Also contained within Petitioner's Exhibit 1 are health insurance claim forms corresponding to the printout of the medical bills paid by Local 150. The total bills paid by Local 150 on behalf of Petitioner reflects that $179,031.40 was billed and $65,341.32 was paid by the fund for medical bills allegedly incurred as a result of Petitioner's knee injuries after August 25, 2015.

Petitioner's Exhibit 4 is a medical bill itemization, containing sub-parts corresponding to medical bills incurred as a result of Petitioner's knee injuries. The bills summarized on Exhibit 4 are from Advanced Orthopedic and Spine Care, Dr. Troy's medical group, Advocate Health and Hospital Corporation, the hospital where Petitioner's surgeries were conducted, Athletex Sport and Orthopedic Physical Therapy, where Petitioner underwent physical therapy, Interim Healthcare, dba PSG Services, a physical therapy provider, ACL Services, which conducted blood work and other necessary testing related to Petitioner's surgeries, Aurora Advocate Health and Dr. Warren Robinson, Petitioner's Primary Care Physician, Jacobson Medical Services, performed blood work and laboratory services related to Petitioner's surgeries and Midwest Diagnostics, which provided laboratory services related to Petitioner's surgeries.

Petitioner testified that his right knee feels good after replacement. He experienced a similar rehabilitation regimen as he did with the left knee and, at the time of hearing, he testified his knees felt “pretty good”, with no swelling, or pain, with day to day activities.

Petitioner testified that he enjoyed his job working for Respondent as a hoisting engineer. He testified he liked being part of the regular crew that he worked with and that he did not intend to retire. His wife is self-employed and he, through his position at Respondent, carried the health insurance for his family. Petitioner testified that he felt he was in a corner because he could not continue to work for the Respondent with his knee injuries, but needed to retire in order to keep his health insurance for his family. Petitioner testified that he made more money working for Respondent than he did after he retired. Petitioner’s last visit with Dr. Troy regarding his knees was in 2019.

Petitioner's Exhibit 5 is the Evidence Deposition of Dr. Daniel Troy, MD, taken on March 28, 2017. Dr. Troy testified that he is a medical doctor licensed in Illinois and is Board Certified in sports medicine, orthopedics, and spinal surgery. He is fellowship trained in shoulder, knee and spinal surgery. He testified that the kinds of ailments he treated Daniel Sullivan for since October of 2015 are the kinds of ailments that he treats in other patients day to day. Dr. Troy saw Petitioner in relation to an unrelated shoulder and a hip injury before 2013. In 2013, Dr. Troy saw Petitioner and treated both knees with a cortisone injection and hyaluronic injections. Dr. Troy did not see Petitioner from the time of the last injections in April of 2013, until October 7, 2015. Between 2013 and 2015 Dr. Troy did not impose any work restrictions on Petitioner and did not prescribe any medication or treatment. In 2013, Dr. Troy did not make any surgical recommendation, including knee replacement surgery, for

Petitioner regarding either knee. Dr. Troy stated that Petitioner did not walk with a limp in 2013. (PX 5)

Dr. Troy testified that when he saw Petitioner on October 2015 Petitioner reported that on or about August 25, 2015 he fell off a machine while working and landed on his feet. Thereafter he reported having an acute onset of pain to both knees. Petitioner described to Dr. Troy that since his injuries he had symptoms in his knees including pain. Dr. Troy diagnosed a Grade II sprain based on MRI interpretation by the radiologist. Dr. Troy testified that the radiologist's interpretation identified edema, or swelling, and fluid around the collateral ligament. Dr. Troy's assessment of the MRI was consistent with the radiologist's interpretation. Dr. Troy testified that his notes reflect that Petitioner was walking with an antalgic gait, but was not using any assistive aid. Based on his examination of Petitioner and his MRI results, Dr. Troy formulated a treatment plan, including cortisone injections to both knees, which he performed on October 7, 2015. Dr. Troy continued to keep Petitioner off work and prescribed home physical therapy. Petitioner was instructed to take anti-inflammatory medication. The assessment was Exacerbation of preexisting degenerative condition. (PX 5)

On October 27, 2015, Petitioner returned to Dr. Troy's practice and saw his colleague Jason Fink, a Physician's Assistant who works under Dr. Troy's supervision. Petitioner's record from that day reflects that the cortisone injections yielded minimal relief of symptoms. Dr. Troy decided to proceed with hyaluronic injections to the knee. The injections Dr. Troy administered were of an injectable lubricant of the brand name Supartz. Dr. Troy prescribed a course of physical therapy which he oversaw. Physical therapy was conducted at Athletex Sport and Ortho Physical Therapy. Petitioner underwent physical therapy twice a week for 4 weeks. On December 16, 2015, Petitioner returned to see Dr. Troy's colleague Dr. Karsten Oliversen a physician in Dr. Troy's medical practice group. Dr. Oliversen's notes reflect very minimal relief after physical therapy. She scheduled continued Supartz injections. Dr. Oliversen noted that Petitioner's left knee appeared more symptomatic than his right. Stairs were problematic for Petitioner at that time. Dr. Troy noted that the symptoms in Petitioner's knees caused him to be unable to perform his work duties and also recreational activities including moving about. Dr. Troy continued to keep Petitioner off work. Dr. Troy opined that restricting Petitioner from work since October 7, 2015 when he first saw him after his knee injuries was reasonable and necessary. Dr. Troy testified that Petitioner underwent 5 Supartz injections to each knee, 10 total injections between January, 2016 and February, 2016. Dr. Troy testified that Petitioner did not realize any relief from the Supartz injections. (PX 5)

On March 29, 2016, Dr. Troy and Petitioner discussed, for the first time, surgical intervention, including knee replacements beginning with his left knee, which was more symptomatic. Dr. Troy testified that since October 2015 when first saw him after the August 25, 2015, injury Petitioner's symptoms had not gone away despite conservative treatment including cortisone injections, physical therapy and Supartz injections. Dr. Troy testified that it was his impression that Petitioner suffered an aggravation of a long- standing pre-existing arthritic

condition in his knees, left worse than right. Dr. Troy opined that failing appropriate relief with injections, he felt that keeping Petitioner off work and recommending left total knee replacement was reasonable and necessary. (PX 5)

Dr. Troy testified that in May 2016 he received a letter from Petitioner's employer denying the proposed knee replacement. Dr. Troy attempted to obtain approval for the surgery from Petitioner's insurance carrier but was ultimately unsuccessful. Dr. Troy testified that when he next saw Petitioner on August 16, 2016, he reported that he was in a significant pain in both knees and was taking ibuprofen on an intermittent basis, as well as Tylenol. Petitioner discussed with Dr. Troy that he was trying to stay away from narcotics. Dr. Troy next saw Petitioner December 20, 2016, when he continued to report difficulty with work. Petitioner indicated he had no option but to work and, thus, continued, while complaining of symptoms to both knees. Dr. Troy advised Petitioner about ibuprofen and Tylenol and staying away from narcotics and scheduled Petitioner to return after several months while he awaited approval for Petitioner's knee surgery. (PX 5)

Dr. Troy testified that his recommendation based on Petitioner's onset of pain in both knees after his injury and aggravation of his underlying osteoarthritis that he should undergo bilateral knee replacement beginning with the left knee which was more symptomatic followed by the right knee. Dr. Troy testified that Petitioner's complaints of increasing pain and disability in both knees worsened. Those symptoms had persisted from the injury, despite extensive conservative treatment including injections, physical therapy, lubricant injections, and medication to control pain and inflammation. Dr. Troy testified that Petitioner never returned to his pre-August 2015 level of symptoms since he began treating. Dr. Troy testified that he was recommending surgical intervention consisting of bilateral knee replacements in part because of the fall and injury in August, 2015. Dr. Troy testified that Petitioner's treatment was reasonable and necessary including physical therapy, injections and recommendations for total knee replacements. Dr. Troy testified that the work restrictions he placed on Petitioner were reasonable and necessary in his view and that, while Petitioner was working because he stated that he had to, if asked, Dr. Troy would impose work restrictions on Petitioner. Dr. Troy contemplated those reasonable restrictions would include minimal walking, minimal standing, desk work only. Dr. Troy stated that he would advise Petitioner to avoid operating heavy equipment or walking on a construction site since those are the activities that were making his knee have increased pain symptoms. (PX 5)

On cross examination Dr. Troy testified that he has served as a Section 12 examining physician on behalf of Respondent on various occasions. He testified that he received a copy of the Section 12 report authored by Dr. Brett Levine. Dr. Troy testified that when he saw Petitioner in 2013, his diagnosis was advanced end stage degenerative changes of bilateral knees which he explained the joint space that separates the 2 bones of the knee is remarkably narrowed with bone having secondary changes such as cyst formations and bone spurs. Dr. Troy explained that the condition he diagnosed Petitioner with in 2013 was a chronic condition

which happens over time. In 2013, Dr. Troy treated Petitioner with injections to both knees. He testified that the injections administered in 2013 were hyaluronic acid injections under the brand name Orthovisc. Dr. Troy testified that the injections in 2013 were a series of 4 injections. After the administration of the injections to Petitioner's knees in 2013, Dr. Troy did not see Petitioner again until after his work accident of August 25, 2015. Dr. Troy testified on cross examination that Petitioner sustained an aggravation of preexisting conditions in both knees from the fall from the machine in August, 2015. He explained that the condition of Petitioner's knees, which was asymptomatic before the injury, was rendered symptomatic by Petitioner's the fall from the machine. Dr. Troy testified on cross examination that in his experience as an orthopedic surgeon, osteoarthritis can be rendered symptomatic while suffering an axial load such as falling off an excavator. Dr. Troy testified that he first made a recommendation for a left knee replacement on December 16, 2015. He testified that in his opinion, a total knee replacement is warranted for a patient when the patient themself states that they can no longer live with the symptoms. Dr. Troy reiterated that Petitioner's symptoms did not return back to their pre-injury level after the August 2015 accident. Dr. Troy testified that he agreed with Dr. Levine's diagnosis, which included a history of injury and preexisting conditions. He agreed with Dr. Levine that Petitioner could proceed with knee replacement surgery in the future depending on his symptoms. Dr. Troy testified that he recognized that Petitioner had substantial osteoarthritis in both knees prior to 2015, but he specifically disagreed with Dr. Levine in that he noted that Petitioner reported an increased amount of pain in his knees after the 2015 event. He agreed that Petitioner would have needed total knee replacement in his left knee regardless of the work accident, however the timing of that knee replacement would be based on Petitioner's tolerance for the symptoms that he experienced. (PX 5)

Dr. Troy went on to explain arthritis is, generally speaking, a progressive condition which is not always symptomatic. He testified that activities of daily living could aggravate symptoms of arthritis. It would be atypical for a patient with end stage OA to be asymptomatic. Dr. Troy opined that based on his understanding of Petitioner's work duties that he was engaged in a vigorous occupation which includes climbing in and out of a machine and maintaining the machine requiring bending, stooping and crawling under the machine. Dr. Troy testified that those are the kinds of activities that could aggravate symptoms in Petitioner's knees. (PX 5)

Respondent's Exhibit 4 is the Evidence Deposition of Dr. Brett Levine, M.D., taken on April 28, 2021. Dr. Levine is a medical doctor licensed in Illinois and is a Board-Certified orthopedic surgeon. Dr. Levine conducted a Section 12 examination of Petitioner at the request of Respondent. Dr. Levine issued a Section 12 examination report, attached to his deposition as Exhibit 2, dated April 4, 2016. Dr. Levine's report states that Petitioner sustained a fall from an excavator of about 4 – 5 feet in August 2015, landing on his feet and then falling onto his hands and knees. At the time of the examination, he was complaining of pain on the insides of his knees, getting worse. He reported that the left knee more symptomatic than the right. He reported that the pain was constant, sharp and throbbing. Petitioner reported pain with walking, sitting or standing, which gets as bad as 9 out of 10 on the left and 8 out of 10 on the right. The

pain was mostly aggravated by activities. He reported stiffness, swelling and weakness and a moderate limp. He was able to walk significant distances without a cane. Petitioner had not been back to work, uses the banister to go up and down stairs, taking one step at a time on the stairs. Petitioner had difficulty putting on shoes and socks and can sit comfortably in a chair for about 1 hour. He has difficulty arising from a chair even using the arms. Petitioner had tried Tylenol and aspirin for the pain, as well as multiple injections which helped for only a short time but no longer work. Petitioner had attended physical therapy. Dr. Levine testified that Petitioner reported being an avid bicyclist, which Dr. Levine opined might be good overall exercise but under certain circumstances might gradually lead to arthritic changes in the knee in a patient is susceptible to it. Dr. Levine noted the Petitioner reported a sensation of something floating around in his right knee, which Dr. Levine thought might be a cartilage from a tear or a loose body within the knee. (RX 4)

The physical examination of Petitioner showed that he was 5'10" tall and weighed 200 pounds, well developed and well nourished. Dr. Levine reported that Petitioner's lower extremities had a varus alignment, meaning his legs were bowed in to both sides, with left being worse than the right. He had a range of motion less than full extension. Petitioner had medial joint line tenderness. Dr. Levine reviewed x-rays from March 2013, which showed a hip resurfacing and mild to moderate degenerative changes in his right knee and left knee showing some pseudo subluxation with significant bone on bone arthritis in the medial compartment and fragmentation of the medial proximal tibia. Dr. Levine noted that the lateral radiograph on the left side shows significant osteoarthritis formation in the anterior compartment, as well as posteriorly and the right side showed similar findings to a lesser degree. Dr. Levine compared those radiographs to October 2015 radiographs, which he opined showed appropriate progression of osteoarthritis worsening on the right knee in the medial compartment and left knee showing a slightly greater pseudo subluxation and osteoarthritis. (RX 4)

Dr. Levine reported that on the day of his examination he discussed with Respondent's case manager that Petitioner had significant arthritis in both knees, with the left being worse than the right. He opined that Petitioner had a natural progression of arthritis from 2013 to 2015, based on his review of the radiographs. Dr. Levine testified that Petitioner's injury was a contusion to the knee, maybe a light sprain, that should get better within 6 – 8 weeks after an injury like that. Dr. Levine opined that certainly by 3 months, he should be back at maximum medical improvement for an injury at that level. Dr. Levine opined that Petitioner's bigger issue would have been his underlying arthritis. He recommended a functional capacity evaluation to determine whether he could work. (RX 4)

Dr. Levine testified that in addition to examining Petitioner and his radiographs and he conducted a record review, which showed that in August 2015 Petitioner walked with a limp. Dr. Levine reviewed the MRIs obtained in 2015, which he stated showed a tremendous amount of findings including significant osteoarthritis, complex tears of the ACL and degenerative

meniscal tears. Dr. Levine reviewed Dr. Troy's records including anti-inflammatory medication and corticosteroid injection and visco supplementation injections. (RX 4)

Dr. Levine stated that Petitioner had a preexisting condition of osteoarthritis. He characterized it as substantial. He characterized the current injury [August, 2015] as a contusion to the knee. He opined that at this point [April, 2016], Petitioner should be back to maximum medical improvement from that type of injury. (RX 4)

Dr. Levine opined that he did not believe the medical documentation supports a causal relationship between the August 2015 accident and the Petitioner's current condition of ill-being. He opined that Petitioner's arthritis from 2013 progressed normally to 2015, where radiographs in 2015 were typical for a candidate for total knee replacements, left worse than right. Dr. Levine testified that further testing of Petitioner's knees was not warranted, since they were arthritic. He testified that essentially, it is a waiting game for when the patient feels like the arthritis is bad enough that they are willing go through an elective surgery, such as knee replacement, to try to improve their quality of life. Dr. Levine testified that in order to determine whether or not he could opine Petitioner could return to work, a functional capacity exam was warranted. (RX 4)

Dr. Levine issued an Addendum to his Section 12 examination report on April 4, 2016, attached to his deposition as Exhibit 3. In the Addendum, Dr. Levine opined that Petitioner has chronic osteoarthritis in both knees, his injury in August 2015 was just a contusion or maybe a sprain at worst and Petitioner has substantial pre-existing disease that progressed normally over time. Petitioner could elect to have a knee replacement. Dr. Levine testified that his opinions encompassed Petitioner being a candidate for bilateral knee replacements. Dr. Levine testified that he believes that the need for knee replacements was more in relation to Petitioner's chronic osteoarthritis, as opposed to his August 2015 work injury. (RX 4)

On cross examination Dr. Levine testified that he had the same opinion as Dr. Troy that Petitioner had osteoarthritis in both knees prior to 2015. Dr. Levine never reviewed any record from Dr. Troy's treatment in 2013 of Petitioner. Neither of his reports reference Petitioner's medical records prior to 2015. Dr. Levine testified he never asked Petitioner what his anti-inflammatory regimen was like before August 2015. He did not ask Petitioner whether he experienced swelling in either knee before August, 2015. Dr. Levine testified that he was unaware of any discussion by any physician about knee replacement recommendations prior to August 2015. Dr. Levine testified that he unaware of what injections were performed by any physician prior to August of 2015.

Dr. Levine mentions in his report Petitioner had undergone physical therapy in the past, before 2015, but he had no idea whether it was more than 2 years prior to 2015 or not, because he did not ask. Dr. Levine testified that he never asked Petitioner when the problems in his knees really became significant. He did not ask him about a specific date or event. He did not

ask Petitioner whether his symptoms became significant before or after August 2015. Dr. Levine agreed that the decision of when the patient eventually undergoes a knee replacement surgery depends on the symptoms, the quality of life and the factors important to the individual patient. He explained, "It's really a matter of when we run out of options and feel that this is the best time for them to have surgery with all the factors being weighed". The options are measures such as medication, injections, creams, braces and eventually surgery. Dr. Levine did not know at the time of his deposition or at the time he made his examination of Petitioner whether Petitioner had any limitations of his ability to work, including climbing on or off heavy equipment or crawling under heavy equipment prior to August, 2015. Dr. Levine did not know what Petitioner does for a living. (RX 4)

Dr. Levine did not know whether Petitioner had had any injections to his knees between 2013 and 2015. He opined that Petitioner was "dodging those questions". Despite Dr. Levine's suspicions he did not make any effort to determine what treatment, if any, Petitioner had to his knee between 2013 to 2015. (RX 4, pg. 37) Dr. Levine did not know whether or not Petitioner had a limp before 2015. Dr. Levine testified Petitioner had a limp when he saw him in 2016. However, upon questioning, Dr. Levine testified that he did not note whether he observed a limp one way or another, but assumed Petitioner did have a limp because Petitioner checked off a box on a questionnaire that Dr. Levine administered when Petitioner arrived at his office for the Section 12 examination. Dr Levine testified that he did not talk to Petitioner about whether he had a limp. Dr. Levine testified that Petitioner stated that he had a constant sharp throbbing pain in the knees when he saw Dr. Levine in April, 2016. Dr. Levine testified that he did not document when this pain began.

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. He wasn't 100% certain about his 2013 treatment by Dr, Troy, but the Arbitrator does not attribute this as an attempt to deceive the finder of fact. He had x-rays, several injections and continued to work as a heavy equipment operator.

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

Petitioner's current condition of ill-being regarding his left and right knees, to wit: preexisting OA to a significant degree, aggravated, exacerbated and accelerated by the work- related fall of August 25, 2015 resulting in bilateral total knee arthroplasty procedures, is causally related to the work accident of August 25, 2015.

This finding is based upon the credible testimony of Petitioner, the medical records and the persuasive testimony of Dr. Troy.

Petitioner obviously had significant OA in his knees prior to the accident. His testimony that he was able to perform his job duties as a heavy equipment operator without interference from his knees stands unrebutted. The medical records do not show any knee treatment or complaints for two years preceding the August 25, 2015 accident. The accident aggravated or accelerated Petitioner's preexisting OA condition, such that the Arbitrator finds that his current condition of ill-being is causally connected to the work injury and is not simply the result of a normal degenerative process of the preexisting condition. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205 (2003)

The work injury is a causative factor leading to the TKA procedures. Dr. Troy's opinions are persuasive and are consistent with the evidence adduced. The Arbitrator is not persuaded by Dr. Levine's opinions.

The bottom line is that Petitioner was working full duty, not under any active treatment for his knees and functioning well before the accident. After the accident, he became symptomatic and embarked on a course of treatment that eventually led to the TKA procedures. There was no evidence of any subsequent knee injury and no evidence that he returned to baseline, which Dr. Levine thought should have occurred no later than 3 months later. Yes, Petitioner returned to work as a heavy equipment operator for a while post-accident and pre-surgery, but he remained in pain and had difficulty doing his job. Yes, Petitioner would have certainly been offered at least a left TKA procedure at some point, but Dr. Troy offered the procedure after non-operative options failed to resolve the pain and symptoms that Petitioner experienced after the August 25, 2015 work accident. There is a causal relationship between the August 25, 2015 work accident and the bilateral TKA procedures that Petitioner had in 2017 and 2018.

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 medical services that were provided to Petitioner regarding his left and right knees were reasonable and necessary to cure or relieve the effects of Petitioner's injuries. This finding is based upon the Arbitrator's findings on the issue of causation, above and the opinions of Doctors Troy and Levine.

Accordingly, Respondent shall pay the medical providers listed in PX 4 according to the bills contained in PX 4.1-4.8, in accordance with the applicable fee schedule or negotiated rate, in accordance with §§8(a) and 8.2 of the Act. Additionally, Respondent will pay the bills reflected in PX 1 directly to Petitioner, pursuant to PX 2. Petitioner shall, of course honor his agreement with the Local 150 Welfare Fund.

Respondent is entitled to a credit for all awarded medical expenses that it has paid or compromised.

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

Respondent stipulated that Petitioner was entitled to TTD benefits from August 26, 2015 through May 22, 2016 (38-4/7 weeks). The TTD rate is $1,266.03/week. The TTD owed for the stipulated period is $48,832.04. Respondent is entitled to a credit for $48,757.54 that it has paid in TTD.

Petitioner retired June 30, 2017 after returning to work in May of 2016 and working full duty through his retirement date. Dr. Troy's testimony that he would have provided work restrictions if Petitioner requested them is of no consequence. He was working full duty until he retired. He was not medically authorized off work after he retired and there is no evidence that he would not have continued working if he did not retire, other than his testimony that he was in pain while working.

Petitioner is entitled to TTD when he was recovering from his TKA procedures, when he was obviously temporarily and totally disabled from work, due to recovery from major orthopedic surgeries. The Arbitrator calculates the appropriate post-surgery TTD periods to be:11/9/2017 (date of surgery) through 3/20/2018 (post-op visit, through with PT) [20 weeks] and 10/18/2018 (date of surgery) through 2/12/2019 (post-op visit, through with PT, doing well, extremely happy with the results) [16-6/7 weeks].

Accordingly, Respondent shall pay Petitioner TTD benefits of $1,266.03/week for 75-3/7 weeks for the time periods set forth above. Respondent is entitled to a credit of $48,757.54 for TTD paid.

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

As Petitioner's accident occurred after September 1, 2011, the Arbitrator must consider the factors set forth in §8.1b(b) of the Act in determining PPD. The five factors are:

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.

1. The reported level of impairment
   An AMA impairment rating was not done in this case. This does not preclude an award for partial permanent disability. This factor is given no weight in determining PPD.
2. Petitioner's Occupation
   On the date of the accident, Petitioner was a Heavy Equipment Operator. He returned to work some 9 months after the accident and subsequently retired, claiming one of the reasons he retired was due to symptoms of bilateral OA in his knees that he continued to experience after returning to work. This factor is given substantial weight in determining PPD.
3. Petitioner's age at the time of injury
   Petitioner was 58 years old at the time of injury, and he is 64 years old at the time of the hearing. Accordingly, Petitioner is nearing the end of his work life. This is relevant and should receive some weight in determining PPD.
4. Petitioner's future earning capacity
   Petitioner has retired and is found to have no loss of earnings. Appropriate weight is placed on this factor in determining PPD.
5. Petitioner's evidence of disability corroborated by medical records

As a result of the work injury, Petitioner underwent TKA surgery to his left and right knees.

At the hearing, Petitioner testified that he had not sought any additional treatment since 2019. He subsequently worked as a heavy equipment operator under his union's retiree-out of work program. He testified that his knees felt good after surgery. Dr. Troy's records support the conclusion that Petitioner has a good result from the TKA procedures. This factor is given appropriate weight in determining PPD

After considering the above, and the Record as a whole, including that there is a credit of 60% loss of use of Petitioner's right leg for the hip injury/prior award, the Arbitrator finds that the injuries sustained caused Petitioner to suffer the 40% loss of use of his left leg and the 5% additional loss of use of the right leg, in accordance with Section 8(e) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC018397
Case Name	Joseph Blazek v. ADT Security Services
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0255
Number of Pages of Decision	30
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Pro Se
Respondent Attorney	Rich Lenkov

DATE FILED: 6/9/2023

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOSEPH BLAZEK,

Petitioner,

vs. NO: 16 WC 18397

ADT SECURITY SERVICES,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of whether Petitioner suffered an accident arising out of and in the course of his employment with Respondent on December 1, 2015, whether Petitioner's current condition of ill-being is causally related to the December 1, 2015 accident, whether medical expenses incurred by Petitioner were reasonable and necessary, Petitioner's entitlement to prospective medical care, entitlement to temporary disability benefits, and the nature and extent of Petitioner's permanent disability, and being advised of the facts and law, modifies the Decision as stated below but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

PROCEDURAL HISTORY

This case was consolidated for hearing with case numbers 16 WC 18398 and 16 WC 18396. Case number 16 WC 18398 involves an alleged accident on March 9, 2016 and a right knee injury. Case number 16 WC 18396 involves an alleged accident on April 23, 2016, and an injury to the left knee. The claims proceeded to arbitration before Arbitrator Frank Soto on November 30, 2021. The Request for Hearing form submitted by the parties (only one Request For Hearing Form was submitted for all three cases) identifies the following issues in dispute: 1) whether Petitioner sustained an accidental injury arising out of and occurring in the course of his employment (on December 1, 2015); 2) whether Petitioner's current conditions are causally related to the claimed

accident; 3) Petitioner's average weekly wage; 4) entitlement to medical expenses as well as Respondent's entitlement to credit; 5) Petitioner's entitlement to temporary disability benefits; 6) the nature and extent of Petitioner's permanent disability; and 7) entitlement to §19 (k) penalties, §19(l) penalties, and §16 attorney fees. Arb.'s Ex. 1.

On February 22, 2022, Arbitrator Soto issued separate decisions for each case number. In the instant case, the Arbitrator found Petitioner sustained accidental injuries on December 1, 2015, and his current right knee and left knee conditions are causally related to this work accident. The Arbitrator awarded medical expenses for the right knee, left knee, and left wrist as listed in Petitioner's Exhibit 17; ordered Respondent to hold Petitioner harmless of any medical bills for which Respondent is seeking a credit pursuant to §8(j); awarded Temporary Total Disability ("TTD") benefits from December 2, 2015 through December 7, 2016 and from March 10, 2016 through April 14, 2016; found Petitioner lost the use of 35% of the person as a whole; and awarded penalties in the amount of $10,000.00 pursuant to §19(l). In case number 16 WC 18398 (March 9, 2016 accident date), the Arbitrator found Petitioner proved a compensable work accident but failed to prove causation. In case number 16 WC 18396 (April 23, 2016 accident date), the Arbitrator found Petitioner failed to prove a compensable work accident.

Respondent filed a Petition For Review in the instant case. Respondent's Petition for Review identifies the following issues on Review: whether Petitioner sustained an accidental injury arising out of and occurring in the course of his employment, whether Petitioner's current condition is causally related to the alleged accident, entitlement to medical expenses, entitlement to prospective medical care, entitlement to temporary disability benefits, the nature and extent of Petitioner's permanent disability, and entitlement to §19(l) penalties.

CONCLUSIONS OF LAW

At the outset, the Commission observes Respondent did not advance an argument on the issue of accident in its Statement of Exceptions or during oral arguments, and thus the Commission views the issue as forfeited. The Arbitrator found Petitioner's current conditions of ill-being to the left and right knees are causally related to the December 1, 2015 work accident. The Commission's analysis of the evidence yields the same result. However, the Commission writes additionally to address Respondent's argument as to intervening accidents, clarify the award of medical expenses, and modify the TTD award.

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. *See Vogel v. Industrial Commission*, 354 Ill. App. 3d 780, 787 (2d. Dist. 2005). An aggravation injury does not break the causal connection between the original work injury and the present condition when: (a) the original injury has not resolved, and (b) "but for" the work injury, the aggravation injury would have been tolerated. *Vogel*, 354 Ill. App. 3d at 788 (2d. Dist. 2005). Likewise, the fact that other incidents, whether work related or not, may aggravate a condition further are irrelevant as long as they do not constitute intervening causes. *Mendota Township High School v. Industrial Comm'n*, 243 Ill. App. 3d 834, 837 (4th Dist. 1993). A claimant need only prove that some act or phase of his or her employment was *a* causative factor in the ensuing injury in order to recover benefits under the Act.

Id. A claimant need not prove it was the sole causative factor, nor even that it was the principal causative factor of his injury. *Id*. A nonemployment-related factor which is a contributing cause with the compensable injury in an ensuing injury or disability does not constitute an intervening cause sufficient to break the causal connection between the employment and claimant's condition of ill-being. *Id*.

I. Causal Connection to the December 1, 2015, Work Accident

Petitioner testified that while at work on December 1, 2015, he was taking boxes to the dumpster and he stepped into a pothole, falling on his knee. The Application For Adjustment of Claim that Petitioner filed for the instant accident alleges injuries to the right knee and left wrist. Petitioner received medical treatment and returned to work with light duty restrictions per Dr. Kevin F. Walsh. On February 15, 2016, Petitioner followed up with Dr. Walsh and reported that his symptoms had resolved. Dr. Walsh noted Petitioner could return to work without restrictions within one week and should follow up as needed. Dr. Walsh noted that Petitioner may require a knee replacement at some point in the future. Petitioner testified that he returned to full duty work.

Of note, in his June 27, 2016 report, Dr. Tonino, Respondent's section 12 examining physician, opined that both the right and left knee conditions were related to the December 1, 2015 accident. In his October 2, 2017 and May 18, 2020 section 12 examination reports, Dr. Tonino reiterated his opinion that Petitioner's bilateral knee conditions were casually related to the December 1, 2015 accident.

II. The March 9, 2016, Incident

Petitioner testified that on March 9, 2016, his knee gave out and he fell on some stairs at a customer's house. The Application For Adjustment of Claim that Petitioner filed for this incident alleges injuries to the right knee. Petitioner indicated that he went to the emergency room initially. On March 24, 2016, Petitioner followed up with his treating physician Dr. Walsh and indicated that while working on March 9, 2016, he was walking up the stairs at a customer's house when his "knee gave out" and he suffered increased right knee pain and a "twisted left wrist." Petitioner testified that his supervisor transported him to the emergency room, then brought him back to his truck so he could drive home. By the March 24, 2016 visit, Petitioner no longer had wrist pain and a physical examination revealed excellent range of motion and strength. Additionally, Petitioner had no right knee effusion or instability. Dr. Walsh placed Petitioner on permanent light duty to prevent him from falling, and recommended steroid injections if pain persisted. He also noted that eventually a knee replacement may be necessary. Petitioner's diagnoses remained the same.

The Commission finds that while the March 9, 2016 incident may have exacerbated Petitioner's right knee condition this exacerbation was temporary and did not rise to the level of an intervening cause that broke the chain of causation between the December 1, 2015 work accident and his right knee condition. Here, the evidence supports a finding that Petitioner's right knee condition after the December 1, 2015 accident was ongoing and had not fully resolved at the time of the March 9, 2016 fall at a customer's house. Although Petitioner self-diagnosed that his right knee issues had resolved on February 15, 2016, the Commission notes that this was while he had been medically placed on light duty, and thus, he was not using his right knee in its full capacity

when he claimed his symptoms had resolved. Only a few weeks after being medically returned to full duty, Petitioner suffered the incident at the customer's house where his right knee gave out. The Commission finds that this temporary exacerbation occurring an approximately mere two weeks after Petitioner was cleared for regular duty makes it more likely than not that his right knee condition had never resolved after the December 1, 2015 accident. Further, the March 9, 2016 did not alter Petitioner's ongoing diagnosis, as corroborated by Dr. Walsh's March 24, 2016 office note. The Commission finds that the March 9, 2016 fall would not have occurred but for the December 1, 2015 work injury as the December 1, 2015 injury weakened and permanently aggravated Petitioner's previously asymptomatic right knee osteoarthritis, thereby further predisposing Petitioner's right knee to "giving out." The Commission finds it significant and persuasive that Dr. Tonino, Respondent's section 12 examining physician, repeatedly opined that Petitioner's right knee injury was related to the December 1, 2015 accident.

III. The April 23, 2016, Incident

Petitioner testified that on April 23, 2016, while at somebody's house, his right knee "gave out" again and he fell. The Application For Adjustment of Claim that Petitioner filed for this incident alleges injuries to the left knee. Petitioner testified he was off work for two days and then was terminated from Respondent's employment on the third day. On May 2, 2016, Petitioner followed up with Dr. Walsh who noted that on April 23, 2016, while at a friend's house, Petitioner's right knee buckled causing him to fall on both of his knees, but predominantly the left knee. Dr. Walsh noted that Petitioner had some soft tissue swelling in the left leg and left knee and he recommended Petitioner undergo an MRI and prescribed a knee immobilizer. On May 19, 2016, Dr. Walsh examined Petitioner and noted residual, resolving swelling and ecchymosis in the left lower leg; diffuse tenderness in the left knee; full extension; and stable ligaments. Dr. Walsh reviewed the MRI with Petitioner and diagnosed left knee mild to moderate osteoarthritis and left leg and knee contusion with posttraumatic hemorrhagic bursitis. Dr. Walsh recommended Petitioner attend physical therapy, prescribed Mobic and Norco, and kept Petitioner off work until June 3, 2016. Petitioner followed up with Dr. Walsh on June 16, 2016. At that visit, Petitioner reported that he was no longer taking medications and was "doing much better." On examination of the left leg, Petitioner was minimally tender anteriorly, there was no more effusion, and he had adequate motion. Dr. Walsh diagnosed Petitioner with "status post left knee mild-to-moderate osteoarthritis with contusion and posttraumatic hemorrhagic bursitis" and recommended that Petitioner complete his physical therapy, continue with a home exercise program, resume taking Meloxicam for one more month, and follow up as needed.

In his June 27, 2016 report, Dr. Tonino, Respondent's section 12 examining physician, diagnosed Petitioner with left knee degenerative arthritis and opined that both the right and left knee conditions were related to the December 1, 2015 accident. With respect to the right knee, Dr. Tonino opined: "a right knee injury is related to a fall he sustained in 2015, while at a parking lot at work. He continues to have problems with the right knee, which has not resolved since that date…." Regarding the left knee, Dr. Tonino opined: "the left knee condition is indirectly related based on the fact that he fell on his right knee because of recurrent giving way of his right knee, injuring his left knee." In his October 2, 2017 and May 18, 2020 section 12 examination reports, Dr. Tonino reiterated his opinion that Petitioner's bilateral knee conditions were casually related to the December 1, 2015 accident. In his May 18, 2020, report, Dr. Tonino opined: "It continues

to be my opinion within a reasonable degree of medical and surgical certainty that the patient's current knee conditions are related to the work accident in question as noted in my prior reports. No intervening injuries have occurred. The patient continues to complain of some discomfort in both of his knees." Dr. Tonino recommended that Petitioner undergo a Functional Capacity Evaluation (FCE) to assess Petitioner's current physical capabilities.

The Commission finds that Petitioner's fall on April 23, 2016, resulted in a temporary exacerbation of Petitioner's preexisting work-related right knee condition. The Commission finds further that Petitioner's left knee condition from the April 23, 2016 fall was a direct sequela of his right knee exacerbation rather than an intervening accident. Here, it is clear that Petitioner's fall at his friend's house does not rise to the level of intervening cause when the *Vogel* test is applied. The original right knee injury had not resolved as he was still undergoing treatment with Dr. Walsh and "but for" the December 1, 2015 accident, there is no indication the left knee aggravation injury would have occurred, as the evidence supports a finding that his left knee was asymptomatic, or at a minimum did not require medical care prior to this sequence of events. The Commission finds that had it not been for the December 1, 2015 accident, in all probability Petitioner's right knee condition would not have reached the stage it did in such a short period of time. Petitioner's right knee condition was triggered by the December 1, 2015 accident and continued to escalate in the subsequent months per Dr. Tonino's initial section 12 report, which indicated Petitioner's right knee had persistently been giving way since 2015. The fact that it was a non-work-related fall which exacerbated Petitioner's right knee condition and led to the ensuing left knee aggravation injury is irrelevant for the purposes of causation to the left knee condition, as the non-work-related condition was not an intervening cause. See *Mendota Township,* 243 Ill. App. 3d at 837 ("A nonemployment-related factor which is a contributing cause with the compensable injury in an ensuing injury or disability does not constitute an intervening cause sufficient to break the causal connection between the employment and claimant's condition of ill-being).

Based on the above, the Commission finds that Petitioner's right knee and left knee conditions remain causally related to the December 1, 2015 work accident. Having found no intervening accident, the Commission hereby affirms the Arbitrator's causation findings regarding Petitioner's right and left knee conditions.

IV. Medical Expenses

The Arbitrator found that all treatment provided at DuPage Medical Center for Petitioner's right knee, left knee, and left wrist were necessary to cure or relieve Petitioner's symptoms. The Arbitrator awarded all such reasonable and necessary expenses in Petitioner's Exhibit 17. The Commission writes additionally to clarify the award.

The Commission observes that Dr. Tonino found Petitioner to have reached maximum medical improvement as of May 18, 2020, but also notes that Dr. Tonino recommended a Functional Capacity Evaluation ("FCE"), which was not performed until August 3, 2020. Although the Arbitrator awarded all reasonable and necessary medical expenses in relation to Petitioner's bilateral knee and left wrist conditions, the Commission writes additionally to clarify that the termination date on the reasonableness and necessity of treatment is September 3, 2020. Petitioner received permanent restrictions in 2016, and underwent an FCE on August 3, 2020. However,

Petitioner followed up with treating physician Dr. Walsh for his right knee on September 3, 2020. On that date, Petitioner wanted to know if he was able to return to work in relation to his right knee. The Commission finds this medical visit and all reasonable and necessary related expenses through September 3, 2020 were reasonably required to cure or relieve the effects of Petitioner's accidental injury, and are thus causally related to the instant accident, but no medical expenses subsequent to this date shall be causally related.

Accordingly, the Commission clarifies that all reasonable and necessary medical treatment for the right and left knees is awarded through September 3, 2020. The Commission also clarifies that Petitioner's left wrist condition appears to have resolved over time, however, any reasonable and necessary medical expenses for the left wrist are also awarded through September 3, 2020.

V. Temporary Disability

The Arbitrator awarded TTD benefits from December 2, 2015 through December 7, 2016, and March 10, 2016 through April 14, 2016. While the Commission agrees with the Arbitrator that Petitioner is entitled to temporary disability benefits, we note the award must be changed to correct a scrivener's error in the dates of the award. It is clear from the award that the Arbitrator intended to award TTD benefits from December 2, 2015 through December 7, **2015**, rather than December 7, **2016**.

Further, the Commission also corrects the second book-end of TTD dates by awarding benefits from March 10, 2016 through **April 13**, 2016 instead of **April 14**, 2016. The evidence supports a finding that Petitioner was in fact offered a job within his restrictions, which he turned down on April 13, 2016. Accordingly, the Commission terminates TTD benefits on that date. In keeping with the evidence in the record, the Commission corrects the TTD award so that benefits are granted from December 2, 2015 through December 7, 2015, and March 10, 2016 through April 13, 2016.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 22, 2022, as modified above, is hereby affirmed and adopted.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner sustained an accidental work injury arising out of and in the course of his employment with Respondent on December 1, 2015.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner's current right and left knee conditions are causally related to the December 1, 2015 accidental work injury.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner temporary disability benefits from December 2, 2015 through December 7, 2015, and March 10, 2016 through April 13, 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 shall pay reasonable and necessary medical expenses provided by DuPage Medical Group related to Petitioner's right and left knee and left wrist conditions, as identified in Petitioner's Exhibit 17, but only through September 3, 2020, pursuant to section 8(a) and section 8.2 of the Act, subject to the fee schedule. Respondent shall hold Petitioner harmless from medical bills which Respondent claims a credit pursuant to section 8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner permanent partial disability benefits for a period of 175 weeks for an injury resulting in a loss of trade, as provided in section 8(d)(2) of the Act, for the reasons that the injuries caused a 35% loss of use of the person as a whole.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner compensation that has accrued from December 1, 2015 through November 30, 2021, and shall pay the remainder of the award, if any, in weekly payments.

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.

June 9, 2023

/s/ *Deborah J. Baker*

DJB/wde

O: 4/12/23

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/s/ *Stephen Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC018397
Case Name	BLAZEK, JOSEPH v. ADT SECURITY SERVICES
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	22
Decision Issued By	Frank Soto, Arbitrator

Pro Se Petitioner	Joseph Blazek
Respondent Attorney	Robert Kroeger

DATE FILED: 2/22/2022

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 15, 2022 0.77%

/s/Frank Soto, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Joseph Blazek Case # **16** WC **018397**
Employee/Petitioner

v.

ADT Security Services
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Soto**, Arbitrator of the Commission, in the city of **Wheaton**, on **11/30/21**. 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [x] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **12/1/2015** Respondent ***was*** operating under and subject to the provisions of the Act.

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

On **12/1/2015** Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

On 12/1/2015, 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 **12/1/15** accidents.

In the year preceding the injury, Petitioner earned $**69,319.10**; the average weekly wage was $**1,270.70**.

On the date of accident, Petitioner was **65** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

Petitioner sustained an accidental injury that arose out of and in the course of his employment on December 1, 2015, as set forth in the Conclusion of Law attached hereto and incorporated herein;

Petitioner's right and left knee conditions are causally related to his work accident of December 1, 2015, as set forth in the Conclusion of Law attached hereto and incorporated herein;

Respondent shall pay Petitioner TTD benefits from December 2, 2015 through December 7, 2016 and from March 10, 2016 through April 14, 2016, as provided in Section 8(b) of the Act, as set forth in the Conclusion of Law attached hereto and incorporated herein;

Respondent shall pay reasonable and necessary medical expenses provided by DuPage Medical Group related to only Petitioner's left and right knees and left wrist, as identified in Petitioner's Exhibit number 17, pursuant to Sections 8.2 and 8 (a) of the Act, and subject to the fee schedule. Respondent shall hold Petitioner harmless of medical bills which Respondent claims a credit pursuant to Section 8(j) of the Act, as set forth in the Conclusion of Law attached hereto and incorporated herein;

Respondent shall pay Petitioner permanent partial disability benefits for 175 weeks because the injuries sustained caused 35% loss of the person as a whole, as provided in §8(d)(2) of the Act, for an injury resulting in a loss trade, as set forth in the Conclusion of Law attached hereto and incorporated herein;

Respondent shall pay Petitioner penalties in the sum of $10,000.00 pursuant to Section 19(l) of the Act, as set forth in the Conclusion of Law attached hereto and incorporated herein;

Respondent shall pay Petitioner compensation that has accrued from December 1, 2015 through November 30. 2021 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* **FEBRUARY 22, 2022**
Arbitrator

Procedural History

This case was tried on November 20, 2021. Petitioner was not represented by counsel. Petitioner filed three Applications For Adjustment of Claims. Case number 16 WC 18397 alleges an injury to the right knee and left wrist occurring on December 1, 2015. (Ax. 2). Case number 16 WC 18398 alleges an injury to the right knee occurring on March 9, 2016. (Ax. 3). Case number 16 WC 18396 alleges an injury to the left knee occurring on April 23, 2016. (Ax. 1).

For all three cases Petitioner was employed by ADT Security Services and the disputed issues were whether Petitioner sustained an accidental injury which arose out of and in the course of employment, whether Petitioner's current condition of ill-being is causally connected to his injury, average weekly wage, whether Respondent is liable for unpaid medical bills, whether Petitioner is entitled to TTD benefits and the nature and extent of Petitioner's injury. Petitioner also seeks penalties and attorney's fees pursuant to Sections 19(k), 19(l) and 16 of the Act. (Arb. Ex. #1).

Findings of Fact

Testimony of Petitioner

Joseph Blazek (hereinafter referred to as "Petitioner") testified he was injured on December 1, 2015, when he stepped into a pothole falling onto his knee. (T. 20). [1] Petitioner filed an Adjustment of Claim alleging injuries to his right knee and left wrist. (*i.e.* 16 WC 18397). (Ax. 2). Petitioner testified two co-workers, Kenny Bobak and Ron Fiege, came from the office and helped him back into the office. Petitioner testified he was taken to the emergency room by Kenny Bobak. (T. 22).[2] Petitioner testified after being released from the emergency room, he returned to the office and his wife picked him up and took him home. (T. 23).

Petitioner testified he returned to work on December 8, 2015 and performed light duty work. (T. 23). At some point, Petitioner was cleared to return to his regular duties. (T. 24). Petitioner testified, on March 9, 2016, he was walking down stairs at a customer's home when his knee gave out causing him to fall. Petitioner filed an Application for Adjustment of Claim alleging an injury to his right knee occurring on March 9, 2016. (*i.e.* 16 WC 18398), (Ax. 3).

[1] A Workers Compensation First Report of Injury was completed which states Petitioner worked as an installer who was injured at work on December 1, 2015. (Px. 2).

[2] The Workers Compensation First Report of Injury indicates Petitioner was taken to Elmhurst Memorial Hospital.

Petitioner testified his supervisor picked him up and took him to an emergency room at a hospital in Chicago. (T. 24). Petitioner testified after being released from the emergency room, he followed up with his doctor on March 24, 2016 who placed him on light duty. [3] (T. 25).

On March 23, 2016, the day before Petitioner was examined by his doctor, Petitioner testified his knee gave out while at a friend's house which caused him to fall and injure his knee. (T. 28). Petitioner filed an Application for Adjustment of Claim alleging an injury to his left knee occurring on March 23, 2016. *(i.e*. 16 WC 18396), (Ax. 1). Petitioner testified when he fell, he was a friend's house so the injury was not work related. (T. 53, 54). Petitioner testified his employment was terminated two days following this accident. (T. 28).

Petitioner acknowledged that Respondent offered him a job in April of 2016 during a meeting he attended with Mr. Miller and Mr. Roberts. (T. 50). Petitioner testified Mr. Miller is familiar with the types of jobs Respondent has available. (T. 76). Regarding the job offered, Petitioner was asked whether he was offered a job which he responded, "*Not technically the way you would offer a job*". (T. 52). Petitioner was asked whether Respondent offered him a job within his restrictions which he responded, "*I take it as no*". (T. 53). Regarding the job offered to Petitioner, he testified as follows:

> "*When you consider a sales job, a sales job is not just sitting at a desk…when come to your house…the customer wants to know where are you going to drill the holes? How are you going to do this? …does the customer have a basement? Is it a finished basement? Does he have an attic? You got to be able to crawl through these things so that I can give the customer the idea, okay…being an installer you just don't walk in blind and not know what you're doing…there's a lot of the crawling, sometimes a ladder. You got to see if there an attic? … so a salesperson is not a person that sits behind a desk or doesn't even move…when I was an installer, I loved it…The salesman would say, oh, gee, there's no basement. Okay, I got to figure out how I'm going to get a wire from here to there or something like that. So being a salesman is not just sitting at a desk and not moving."* (T. 73-74).

Petitioner testified he started working for a company called Tasko in the beginning of 2020 but he was laid off due to Covid. (T. 32, 56-57). Tosko is a non-profit company. Petitioner testified he earns $10.00 per hour and works, on average, 20 hours per week. (T. 58-60). Petitioner testified he returned to work for Tasko in September of 2021. (T. 56, 57).

[3] Dr. Walsh issued permanent light duty work restrictions on March 24, 2016. (Px. 17).

Petitioner testified his job duties include delivering groceries or taking people to doctors or stores. (T. 58).

Regarding his current condition, Petitioner testified before falling on his knee, he was fine and he had no problems but, after falling, he started to experience a lot of knee pain and his knee became swollen. (T. 46). Petitioner testified, prior to his work accident, he was fine but after falling he couldn't hardly walk and that his knee kept getting worse. (T. 45).

Petitioner testified prior to his operation, his knee never got better and would give out all the time. (T. 47). Petitioner testified since the operation his knee doesn't give out anymore but it occasionally swells. (T. 46-47). Petitioner testified although his knee doesn't go out anymore but he still experiences some pain. (T. 48). Petitioner testified he still has problems sitting and standing for long periods of time as well as kneeling. (T. 48). Petitioner testified he has problems go up and down stairs. (T. 48).

The Arbitrator found the testimony of Petitioner to be credible in all areas except for whether Respondent offered him a job.

Testimony of Travis Miller

Travis Miller testified he worked for Respondent over 20 years and had worked as a sales representative, sales manager, operations manager, and vice-president for the Chicagoland area. Mr. Miller testified in April of 2016, he was the general manager responsible for installations, servicing, and warehouse operations. (T. 79)

Mr. Miller testified he participated in a meeting with Petitioner on April 13, 2016. Mr. Miller testified after the meeting he prepared a summary of the meeting which Petitioner signed. The meeting was held after receiving Petitioner's permanent work restrictions. (T. 81).

Mr. Miller testified at the meeting the parties discussed jobs Petitioner could perform within his work restrictions since Petitioner was unable to return to work as a technician based upon his restrictions. The jobs offered Petitioner involved sales positions. (T. 82). Mr. Miller testified the jobs offered Petitioner were not like-for-like salary because sales jobs are based on a commission-based structure but was commensurate compensation as Petitioner's prior job. (T. 83). Mr. Miller testified more than one job was offered to Petitioner which he refused. (T. 83). Mr. Miller testified Petitioner was told he was eligible to apply for any other open position within his restrictions but that he declined saying that he was not interested in those other positions. (T. 84).

Regarding whether a sale representative position would require one to climb ladders or crawl in attics or crawlspaces, Mr. Miller testified sales representatives do not climb ladders or crawl in attics or crawlspaces due, in part, of OSHA regulations. (T. 84).

The Arbitrator found the testimony of Mr. Miller credible.

Medical Records from DuPage Medical Group

On December 14, 2016, Petitioner presented to Dr. Kevin Walsh of DuPage Medical Group. The medical records indicate Petitioner suffered a work-related right knee and left wrist injury after tripping in a pothole and striking his right knee and left wrist on concrete. At that time, Petitioner reported horseshoe pain across the anterior aspect of the right knee. The examination noted a light effusion and pain with forced flexion. Dr. Walsh wrote in his records "*I told the patient that the fall aggravated his osteoarthritis. Hopefully, it will settle down."* Dr. Wash prescribed anti-inflammatory medication and took Petitioner off work. (Px. 17).

Petitioner returned to Dr. Walsh on January 11, 2016. Dr. Walsh's records state Petitioner's right knee and left wrist injury were caused by tripping in a pothole which aggravated his pre-existing right knee osteoarthritis. At that time, Petitioner was kept off work. (Px. 17).

On February 15, 2016 Petitioner followed up with Dr. Walsh reporting resolved symptoms. The examination noted excellent motion and strength with no residual weakness in the wrist or leg. Dr. Walsh diagnosed a right knee contusion with an aggravation of pre-existing osteoarthritis and a left wrist sprain. At that time, Petitioner was discharged from care with no work restrictions. (Px. 17).

Petitioner returned to Dr. Walsh on March 24, 2016 reporting a second work injury occurring on March 9, 2016. The records state Petitioner's knee gave out which caused him to fall down stairs injuring his right knee. At that time, Petitioner reported increase pain in the right knee. Dr. Walsh noted the knee showed some narrowing of the joint space and Petitioner had osteoarthritic disease. At that time, Dr. Walsh placed Petitioner on permanent light duty to keep Petitioner from falling on stairs since his work involved going up and down stairs. Dr. Walsh recommended corticosteroid injections and indicated Petitioner may need future knee replacement surgery. (Px. 17).

On May 2, 2016, Petitioner presented to PA, Vincent Walsh, at DuPage Medical Group reporting his right knee gave out walking down stairs at a friend's house which caused him to

fall on his left knee. The records states Petitioner had been struggling with multiple injuries to his right knee and that Dr. Walsh issued permanent work restrictions. Petitioner was diagnosed with a diffused contusion, severe osteoarthritis of the left knee and possible quadriceps injury. Petitioner's left knee was placed in a knee immobilizer and MRI was ordered. (Px. 17).

On June 16, 2016, Petitioner followed up with Dr. Walsh who noted Petitioner has mild to moderate left knee osteoarthritis and post traumatic hemorrhagic bursitis on the ipsilateral side. At that time, Petitioner reported that "*he is doing much better and he has officially retired from work"*. Petitioner was prescribed Meloxicam and told to complete physical therapy. (Px. 17).

Petitioner returned to Dr. Walsh on March 5, 2018 due to right knee pain. At that time, Petitioner reported his right knee injury had been denied and that "*he quit*" work. The records show that Petitioner expressed concern whether Medicare would not pay for his injury because it was work related. Dr. Walsh noted Petitioner had end-staged osteoarthritis involving the left knee and Dr. Walsh prescribed viscosupplement injections. (Px 17).

On May 16, 2019, Petitioner returned to Dr. Walsh who noted Petitioner injured his right knee in a parking lot at work when he stepped in a pothole and fell striking his knee on the concrete. Dr. Walsh indicated when he saw Petitioner, he has a horseshow area of pain across the anterior aspect of the knee and the x-ray showed bilateral osteoarthritic disease in the medical compartment as well as patellofemoral joint. The medical records state that Dr. Walsh told Petitioner the fall aggravated his osteoarthritis. Dr. Walsh further indicated in February of 2016 Petitioner's symptoms resolved but he returned in March of 2016 due to a second work related fall. At that time, Dr. Walsh believed Petitioner would eventually need knee replacement surgery because of Petitioner's arthritis, obesity, and falls. (Px 17)

Petitioner returned to Dr. Walsh in 2018 for bilateral knee pain worse in the right than the left and, at that time, Dr. Walsh recommended knee replacement surgery. Before proceeding with the surgery, Petitioner desired to try PRP injections. After the PRP injections, Petitioner returned to Dr. Walsh who scheduled the right knee replacement surgery for May 31, 2019 at Edwards Hospital. (Px. 17).

After the right knee replacement surgery, Petitioner returned to Dr. Walsh on September 3, 2020 reporting that his right knee was pain free post right knee replacement surgery. Dr. Walsh noted the knee was doing well and had full extension and 126 degrees of flexion. The

exam noted good motion and strength. At that time, Dr. Walsh released Petitioner from care without any work restrictions. (Px 17).

Section 12 Examiner, Dr. Pietro Tonino

Report dated June 27, 2015: (Px 10, Rx. 2).

Dr. Tonino examined Petitioner on June 27, 2016. The report states Petitioner was 65-year-old gentlemen who reported a history of injury to the right knee while walking in a parking lot at work in 2015. Petitioner was seen at Elmhurst Hospital, received an injection, and underwent physical therapy. Petitioner reported persistent giving way of his right knee since 2015. Petitioner suffered another injury on March 9, 2016, while going up stairs when his right knee gave way.

Petitioner reported on April 23, 2016, his right knee gave out causing him to fall on his left knee. After that injury x-rays were taken of the left knee which showed near bone-on-bone changed of the medial compartment. Dr. Tonino noted a medical record dated May 2, 2016 states that Petitioner's right knee buckled while walking down stairs at a friend's house. An MRI of the left knee, taken on May 19, 2016, showed prepatellar bursitis with postoperative changes of the medical meniscus without additional tears. Dr. Tonino noted Petitioner's past medical history was remarkable for an arthroscopy of the left knee in 2012 and injections in 2013.

The examination noted range of motion in both knees of 0-120, medial joint line tenderness in the right knee with equivocal McMurray's. The x-ray of the right knee did not show significant arthritis while the x-ray of the left knee showed mild medial compartment degeneration.

Dr. Tonino diagnosed possible medial meniscus tear of the right knee and degenerative arthritis for the left knee. For the right knee, Dr. Tonino opined Petitioner's right knee condition was related to the 2015 fall while in the parking lot at work. Dr. Tonino further opined that Petitioner continued to experience problems with the right knee which had not resolved. At that time, Dr. Tonino recommended an arthroscopic procedure of the right knee for possible medial meniscectomy. For the left knee, Dr. Tonino opined Petitioner continues to suffer a temporary aggravation of his preexisting degenerative condition but that until Petitioner undergoes injections and therapy it was premature to opine as to the permanency of the left knee injury. (Px 10, Rx. 2).

Addendum report dated October 2, 2017: (Px. 11, Rx. 3).

Dr. Tonino examined Petitioner on October 2, 2017. Dr. Tonino reviewed additional medical records from Drs. Choudry and Walsh. In his report Dr. Tonino indicated Petitioner was a 65-year old male reporting right and left knee pain. Dr. Tonino diagnosed degenerative arthritis of the left knee and a questionable medial meniscus tear of the right knee. In his report, Dr. Tonino wrote:

> "*I thought his condition was causally connected for both knees, directly for the right knee and indirectly for the left knee because his right knee gave way leading him to injury his left knee. I recommended an injection and physical therapy for the left knee and possible arthroscopic intervention for the right knee. Since my last examination, the patient has had no injections for physical therapy for the left knee and no surgery for the right knee. He was seen on October 24, 2016 by Dr. Walsh who recommended left total knee arthroplasty. The patient reports that his insurance company did not want to pay for any physical therapy and essentially he says his symptoms are similar to when he saw me the last time with pain and intermittent giving away of the right knee and pain of the left knee.* "

During the examination, Dr. Tonino noted 0-120 range of motion bilaterally, mild effusion of the left knee, medial joint line tenderness of the right knee with equivocal McMurray's for both knees. The left knee showed medical join line tenderness. Dr. Tonino indicated x-rays of the knee showed progression of Petitioner's arthritis since the last examination with almost bone-on-bone changes in the medical compartment of the left knee and some narrowing of the medical compartment of the right knee.

Dr. Tonino opined there was a causal connection between Petitioner's current knee conditions and Petitioner's current conditions continue to be causally connected based upon the fact that Petitioner had no treatment since his last examination. For the right knee, Dr. Tonino r opined Petitioner was not at maximal medial improvement and he recommended an MRI and possible arthroscopic surgery. For the left knee, Dr. Tonino opined Petitioner was not at maximal medical improvement and he recommended intraarticular injection and physical therapy.

In his report Dr. Tonino also said Petitioner could be a candidate for a total knee arthroplasty if he does not improve with conservative care. Dr. Tonino opined if Petitioner needs the total knee arthroplasty, it would be causally connected to Petitioner's work injury. Dr. Tonino issued work with restrictions of no squatting, twisting, climbing, or lifting more than 20

pounds. In the report, Dr. Tonino opined that Petitioner's work restrictions were causally connected to his work injury. (Px. 11, Rx. 3).

Report dated May 18, 2020 (Px 12, Rx. 4)

Dr. Tonino examined Petitioner on May 18, 2018. In his report, Dr. Tonino stated he had previously examined Petitioner on June 27, 2016 and October 2, 2017 and, since that time, Petitioner underwent a right total knee arthroplasty in May of 2019. Petitioner reported occasional pain since the surgery but his knee was much better. For the left knee, Petitioner reported occasional discomfort but not enough to undergo a total knee replacement. Dr. Tonino noted that Petitioner had not seen any doctor since May of 2019. Dr. Tonino diagnosed status right knee post total knee arthroplasty and left knee degenerative arthritis.

Dr. Tonino opined Petitioner's current knee conditions were related to his work accident. Dr. Tonino also opined that Petitioner reached maximal medical improvement for both the right and left knees based upon the lack of treatment since May of 2019. Dr. Tonino recommended a functional capacity examination to address Petitioner's current physical capabilities. (Px. 12, Rx. 4)

Addendum Report dated August 3, 2020 (Px. 13, Rx. 5).

Dr. Tonino authored the addendum report after reviewing additional records including a factional capacity test performed by Athletico on August 3, 2020. Dr. Tonino opined Petitioner's current bilateral knee conditions are related to his work accident. Dr. Tonino further opined Petitioner reached maximal medical improvement for both knees. Dr. Tonino opined that the functional capacity test showed a consistent effort and was, therefore, a reliable indicator of Petitioner's current work capabilities which consisted of medium physical demand work level. Dr. Tonino opined Petitioner was unable to meet the physical capabilities of his prior job and, therefore, Petitioner was unable to return to his normal job. Dr. Tonino also opined Petitioner's restrictions, as noted in the functional capacity examination, were permanent. (Px. 13, Rx. 5).

Addendum Report dated November 3, 2020 (Rx. 6).

In his report, Dr. Tonino referred to a note authored by Dr. Walsh which said, "patients with knee replacement can return to work unrestricted". Dr. Tonino opined the functional capacity test was a more reliable indicator of patient's functional capabilities, particularly with a patient who had undergone a total knee arthroplasty but still had some symptoms in his contralateral knee. (Rx. 6).

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 (C), Whether an accident occur that arose out of and in the course of Petitioner's employment, the Arbitrator Finds as follows:

The claimant has the burden of establishing by a preponderance of the evidence that her injury arose out of and in the course of her employment. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253, 403 N.E.2d 221, 38 Ill. Dec. 133 (1980); *Edward Don Co. v. Industrial Comm'n*, 344 Ill. App. 3d 643, 654, 801 N.E.2d 18, 279 Ill. Dec. 726 (2003). The phrase "in the course of employment" refers to the time, place, and circumstances of the injury. *Scheffler Greenhouses, Inc., v. Industrial Comm'n,* 66 Ill. 2d 361, 366-67 (1977). "A compensable injury occurs 'in the course of' employment when it is sustained while a claimant is at work or while he performs reasonable activities in conjunction with his employment." *Wise, v. Industrial Comm'n*, 54 Ill. 2d 138, 142 (1973). "The 'arising out of' component is primarily concerned with causal connection. To satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro Inc. v. Industrial Comm'n*, 207 Ill. 2d 193 (2003) Citing Caterpillar Tractor, 129 Ill. 2d at 58.

An injury "arises out of one's" employment if it originates from a risk connected with, or incidental to the employment, involving a causal connection between the employment and the accidental injury. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38 (1987). A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his or her job duties. *Orsini,* 117 Ill. 2d at 45. Injuries resulting from a risk distinctly associated with employment are deemed to arise out of the claimant's employment and are compensable under the Act. *Steak 'n Shake*, 2016 IL App.(3d), 150500WC, Par. 34. 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 be reasonable be expected to perform incident o her or her assigned duties. *Caterpillar Tractor*, 129 Ill. 2d at 58,

see also *The Venture-Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n,* 2013 IL 115728, Par 18, *Sisbro*, 207 Ill. 2d. at 204. Risk incident to employment are those acts the employer might reasonably expect the employee to perform in fulfilling is assigned job duties. *McAllister v. v. Illinois Workers' Compensation Comm'n*, 2020 IL 124848 (2020), citing *Orsini,* 117 Ill. App. 2d. at 45, *Ace Pest Control, Inc. v. Industrial Comm'n*, 32 Ill. 2d 386, 388 (1965). The Act is a remedial statute, which should be liberally construed to effectuate its main purpose of providing financial protection for injured workers. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n,* 236 Ill. 2d 132, 149 (2010).

The Arbitrator finds Petitioner proved by the preponderance of the evidence he sustained an accidental injury that arose out of and in the course of his employment on December 1, 2015. As stated above, the Arbitrator found the testimony of Petitioner to be credible. Petitioner testified he was injured on December 1, 2015, when he stepped into a pothole at work and fell onto his knee and wrist. Petitioner reported a similar history to Drs. Walsh and Tonino, who performed several Section 12 examinations. The Arbitrator finds Petitioner's testimony to be consistent with the history reported to the physicians and to the First Report of Injury dated December 1, 2015. (Px. 2). Respondent failed to proffer testimony contradicting Petitioner's testimony. The testimony of an employee, if not impeached or rebutted, is sufficient to support an award. *Phoell Manufacturing Co. v. Industrial Comm'n*, 54 Ill.2d 119, 295 N.E.2d 469 (1973); *Shahara Coal Co. v. Industrial Comm'n*, 66 Ill.2d 353, 362, 362 N.E.2d 343 (1977). The

With Respect to Issue (F), Whether the Petitioner's Current Condition of Ill-being is Causally Related to the 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). When an employee with a preexisting condition is injured in the course and of his employment the Commission must decide whether there was an accidental injury which arose out of the employment, whether the

accidental injury aggravated or accelerated the preexisting condition or whether the preexisting condition alone was the cause of the injury. *Sisbro, Inc. Industrial Comm'n*, 207 Ill.2d 193, 278 Ill.Dec. 70,797 N.E.2d 665, (2003). 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). "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 has carefully reviewed and considered all medical evidence along with all testimony. The Arbitrator concludes Petitioner has proven by the preponderance of the credible evidence that his current right and left knee conditions are causally related to his work accident of December 1, 2015, as set forth more fully below.

The Arbitrator found the opinions of Dr. Tonino persuasive. The Arbitrator finds the opinions of Dr. Tonino consistent with the findings and opinions of Dr. Walsh. In his report, Dr. Tonino wrote:

> "*I thought his condition was causally connected for both knees, directly for the right knee and indirectly for the left knee because his right knee gave way leading him to injury his left knee. I recommended an injection and physical therapy for the left knee and possible arthroscopic intervention for the right knee. Since my last examination, the patient has had no injections for physical therapy for the left knee and no surgery for the right knee. He was seen on October 24, 2016 by Dr. Walsh who recommended left total knee arthroplasty. The patient reports that his insurance company did not want to pay for any physical therapy and essentially he says his symptoms are similar to when he saw me the last time with pain and intermittent giving away of the right knee and pain of the left knee.* " (Px. 11, Rx. 3).

In is Addendum Report dated August 3, 2020 Dr. Tonino opined that Petitioner's current bilateral knee conditions were related to his work accident. In his October 2, 2017 report Dr. Tonino wrote that if Petitioner needs the total knee arthroplasty, it would be causally connected to Petitioner's work injury. Dr. Tonino also opined the functional capacity test showed Petitioner was unable to return to his normal job. (Px. 13, Rx. 5). In his Addendum Report dated November 3, 2020, Dr. Tonino opined the functional capacity test was more reliable indicator of

a patient's functional capabilities particularly when the patient had undergone a total knee arthroplasty and still experiences some symptoms in his contralateral knee. (Rx. 6).

With Respect to issue (G), what was Petitioner's earnings, the Arbitrator finds as follows:

Petitioner claimed his average weekly wage was $1,386.08 while Respondent claimed Petitioner's average weekly wage was $1,270.70. (Arb. Ex. 1). Petitioner failed to proffer evidence regarding his average weekly wage. Therefore, based upon Respondent's stipulation the Arbitrator finds that Petitioner's average weekly wage pursuant to Section 10 of the Act is $1,270.70.

With Respect to Issue (J), Whether Respondent is liable for Medical Expenses, the Arbitrator Finds as Follows:

Section 8(a) of the Act states a Respondent is responsible "…*for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury*…" A claimant has the burden of proving that the medical services were necessary, and the expenses were reasonable. See *Gallentine v. Industrial Comm'n*, 201 Ill.App.3d 880, 888 (2nd Dist. 1990).

The Arbitrator finds Petitioner proved by the preponderance of the evidence the medical treatment for the treatment rendered from DuPage Medical Group related to his left and right knees and left wrist were necessary and the expenses reasonable to cure and alleviate Petitioner's conditions. Petitioner submitted into evidence medical bills from only DuPage Medical Center. (Px. 17). As such, Respondent shall pay reasonable and necessary medical expenses from DuPage Medical Group related to only Petitioner's left and right knees and left wrist, as identified in Petitioner's Exhibit number 17, pursuant to Sections 8.2 and 8 (a) of the Act, and subject to the fee schedule. Respondent shall hold Petitioner harmless of medical bills which Respondent claims a credit pursuant to Section 8(j) of the Act.

With respect to issue (L) whether Petitioner is entitled to TTD benefits, 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 further finds Petitioner failed to prove by the preponderance of the evidence that he is entitled to temporary total disability benefits after April 13, 2016 because he failed to accept employment within his work restrictions. On March 24, 2016, Dr. Walsh issued Petitioner permanent work restrictions. On April 13, 2016 Petitioner attended a meeting with Mr. Miller after Respondent received Petitioner's work restrictions. Mr. Miller testified the parties discussed jobs Petitioner could perform within his work restrictions including sales positions. (T. 82). Mr. Miller testified more than one job was offered to Petitioner which he refused. (T. 83).

The Arbitrator finds Petitioner's testimony that he was not offered a job within his restrictions not to be credible. Petitioner's testimony regarding whether he received a job offer was inconsistent. Petitioner acknowledged receiving a job offer within his restrictions but also denied receiving a job offer within his restrictions. Petitioner testified that he didn't believe he was physically capable of performing the duties of a sales representative, one of the positions offered to Petitioner. The Arbitrator finds it a reasonable assumption that Petitioner declined the sales position based upon an incorrect assumption that the job required crawling and climbing. Mr. Miller testified the job did not require crawling and climbing. If Petitioner believed the position required crawling and climbing, Petitioner could had addressed his concerns during the April 13, 2016 meeting, which he did not. The Arbitrator finds that Petitioner declined work offered to him within his work restrictions. In support of the Arbitrator's finding, the Arbitrator notes Petitioner told Dr. Walsh, on June 16, 2016, he retired and, on March 5, 2018, that he quit his job. (Px. 17). A claimant's refusal of modified work within a treating physician's physical restrictions can form the basis for termination or suspension of temporary total disability benefits. *Otto Baum Co. v. Illinois Workers' Compensation Comm'n,* 2011 IL App. (4th) 100959WC, 960 N.E.2d. 583, 355 Ill.Dec. 701.

The Arbitrator finds Petitioner proved by the preponderance of the evidence he is entitled to temporary total disability benefits from December 2, 2015 through December 7, 2015 and from March 10, 2016 through April 14, 2016. Petitioner testified he was injured and taken off work on December 1, 2015. Petitioner remained off work until December 8, 2016, when he returned to light duty work. Petitioner testified he continued to work until March 9, 2016, the date of his second accident. On March 24, 2016, Dr. Walsh issued permanent light duty restrictions which prohibited Petitioner from returning to his prior occupation. On April 13, 2016, Petitioner was offered work within his restrictions which he declined. As such, Respondent shall pay Petitioner TTD benefits from December 2, 2015 through December 7, 2016 and from March 10, 2016 through April 14, 2016, as provided in Section 8(b) of the Act.

With respect to issue "L," the nature and extent of Petitioner's injuries, the Arbitrator makes the following conclusions:

Section 8.lb of the Illinois Workers' Compensation Act ("Act") addresses the factors that must be considered in determining the extent of permanent partial disability for accidents occurring on or after September 1, 2011. 820 ILCS 305/8.1b (LEXIS 2011). Specifically, Section 8.1b states:

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:
>
> (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.
>
> (b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:
>
> (i) the reported level of impairment pursuant to subsection (a);
>
> (ii) the occupation of the injured employee;

(iii) the age of the employee at the time of the injury;

(iv) the employee's future earning capacity; and

(v) evidence of disability corroborated by the treating medical records.

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. *Id.*

Considering these factors in light of the evidence submitted at trial, the Arbitrator addresses the factors delineated in the Act for determining permanent partial disability.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report was submitted into evidence and, therefore, the Arbitrator gives no weight to this factor in determining permanent partial disability.

With regard to subsection (ii) of §8.lb(b), the occupation of the employee. Petitioner was employed as a technician. Petitioner was unable to return to his prior occupation. Prior to his knee replacement surgery, Petitioner's treating physician, Dr. Walsh, issued permanent work restrictions which Mr. Miller acknowledged prohibited Petitioner from returning to work as a technician. After undergoing knee replacement surgery, Dr. Tonino, the Section 12 examiner, believed Petitioner had permanent work restrictions consistent with an FCE which prohibited Petitioner from returning to work as technician. As such, the Arbitrator gives significant weight to this factor in determining permanent partial disability.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 65 years old at the time of the accident. The Arbitrator views Petitioner as an older individual near the end of his work life and, therefore, would not need to continue working with the effects of this injury for as long as those not near the end of their work life. As such, the Arbitrator gives some weight to this factor in determining permanent partial disability.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity. Petitioner was unable to return to work as a technician due to his permanent work restrictions. Petitioner is currently employed as a driver earing significantly less money than he did as a technician. Petitioner's future earning capacity is adversely affected by his permanent restrictions. As such, the Arbitrator gives significant weight to this factor in determining permanent partial disability.

With regard to subsection (v) of §8.lb(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner's pain levels greatly improved after

undergoing the left total knee arthroplasty. Petitioner continues to report residual pain and discomfort in both knees. The FCE and opinions of Dr. Tonino corroborate the level of disability Petitioner experienced because of his injuries. The Arbitrator notes that Petitioner has not returned to treatment after undergoing the left total knee arthroplasty. As such, the Arbitrator gives some weight to this factor in determining permanent partial disability.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 35% loss of use of the person, pursuant to §8(d)(2) of the Act, for an injury resulting in a loss trade.

With respect to issue (M) penalties and fees, the Arbitrator finds as follows:

Illinois courts have refused to assess penalties under sections 19(k) and (l) of the Act where the evidence indicates that the employer reasonably could have believed that the employee was not entitled to the compensation withheld. *See, Board of Education v. Industrial Commission*, 93 Ill.2d 1, 442 N.E.2d 861 (1982); S*ee also, Avon Products, Inc. v. Industrial Commission,* 82 Ill. 2d 297 (1980) and *Brinkmann v. Industrial Commission*, 82 Ill. 2d 462 (1980). "Where a delay has occurred in payment of workmen's compensation benefits, the employer bears the burden of justifying the delay, and the standard we hold him to is one of objective reasonableness in his belief." *Id. See also, City of Chicago v. Industrial Commission*, 63 Ill. 2d 99 (1976). An employer's reasonable and good faith challenge to liability ordinarily will not subject it to penalties under the Act. *Matlock v. Industrial Commission*, 321 Ill.App.3d 167 (1st D. 2001). Further, penalties are generally not imposed when there are conflicting medical opinions or when an employer acts in reliance upon responsible medical opinion. *Matlock v. Industrial Commission*, 321 Ill.App.3d at 173.

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.

Section 19(l) of the Act states that "[i]f 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 $30.00 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000.00. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay.

Respondent paid no TTD benefits and the Arbitrator found that Petitioner was entitled to TTD benefits from December 2, 2015 through December 7, 2016 and from March 10, 2016 through April 14, 2016. The Arbitrator also notes that Respondent failed to pay reasonable and necessary medical expenses due DuPage Medical Group, as identified in Petitioner's Exhibit number 17.

Petitioner filed a Petition for Penalties and Respondent filed a Response to the Petition for Penalties denying owning any benefits. (Px. 31). Respondent's Section 12 examiner, Dr. Tonino, opined Petitioner's condition of ill-being was causally related his work injury, confirmed Petitioner's work restrictions were appropriate, and the medical treatment was related and necessary. Dr. Tonino authored numerous consistent reports which opined that Petitioner's condition was causally related to his work accident, need for additional medical treatment, and Petitioner's work restrictions. Despite the opinions of their own Section 12 examiner, Respondent failed to pay or cure the failure to pay TTD benefits and related medical expenses from DuPage Medical Group. As such, the Arbitrator finds that Respondent violated Section 8(b) of the Act. As such, Respondent shall pay Petitioner penalties in the sum of $10,000.00 pursuant to Section 19(l) of the Act.

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. The Arbitrator finds that Petitioner failed to prove deliberate delay, bad faith, or improper purpose to justify penalties under Sections 19(k) and 16. Based upon the failure to prove deliberate delay, bad faith or improper purpose, the Arbitrator finds no need to address the issue of whether or not a pro se petitioner could be entitled to attorney fees under the Act.

By: /s/ *Frank J. Soto* February 22, 2022
Arbitrator Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC014592
Case Name	Roman Westenholz v. Good Year Truck & tire
Consolidated Cases	
Proceeding Type	Petition for Review Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0256
Number of Pages of Decision	15
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Patrick Shifley
Respondent Attorney	Deborah Benzing

DATE FILED: 6/12/2023

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROMAN WESTENHOLTZ,

Petitioner,

vs. NO: 17 WC 14592

GOOD YEAR TRUCK & TIRE,

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[1] of whether Petitioner's left knee condition is causally related to his undisputed March 31, 2017 accident, entitlement to medical expenses, and entitlement to maintenance benefits and vocational rehabilitation under §8(a), and being advised of the facts and law, reverses the Decision of the Arbitrator. The Commission finds Petitioner's current condition of ill-being is causally related to the work injury. The Commission remands this case to the Arbitrator for further proceedings consistent with this Decision.

FINDINGS OF FACT

Petitioner was a pick-up and delivery driver for Respondent. He drove to various sites and loaded new and used tires onto the truck, and once the truck was full, he drove back to the shop to unload. T. 11. Petitioner explained the tires were from large vehicles and machines: "anything from tractor-trailer to garbage truck tires"; the tires weighed 125-135 pounds new and 100 pounds used, and he loaded them by hand onto the truck. T. 12.

The parties stipulated that Petitioner sustained an accidental injury on March 31, 2017. Arb.'s Ex. 1. Petitioner described the incident: "I was picking up tires...And I had put the tire on the truck and, you know, trucks don't sit even, and I turned my back on the tire, and it hit me in

[1] Petitioner's Petition for Review also identifies permanent disability as an issue on Review; the Commission observes this was an alternative theory only to be addressed in the event vocational rehabilitation was not awarded.

the corner of the back of the [left] leg." T. 12-13. Following the undisputed accident, Petitioner commenced a course of care, ultimately coming under the care of Dr. Sanjay Patari at The Center for Sports Orthopaedics. T. 14.

On April 26, 2017, Petitioner presented to Dr. Patari and gave a history left knee pain following a March 29, 2017 [*sic*] injury while loading tires. On examination, Dr. Patari noted medial and lateral joint line tenderness, effusion, and a positive McMurray's test. Dr. Patari ordered a left knee MRI, provided a knee brace, and imposed work restrictions. Pet.'s Ex. 1.

The recommended MRI was completed on May 8, 2017. The radiologist's impression was: 1) Early degenerative disease of the knee; 2) Mild knee joint effusion; 3) Grave IV chondromalacia at the anterior aspect of the lateral femoral condyle and medial tibial plateau; 4) Grade I sprain of anterior cruciate ligament ("ACL"); 5) Grade I sprain of medial collateral ligament ("MCL"); and 6) Grade II degeneration in posterior horn of medial meniscus. Pet.'s Ex. 1.

Dr. Patari reviewed the MRI at the May 10, 2017 follow-up visit, and noted it revealed a medial meniscus tear, MCL sprain, and degenerative changes. Dr. Patari's assessment was left knee degenerative joint disease, exacerbation of left knee arthritis due to current injury causing probable meniscal tear and MCL sprain which is work-related; the arthritis is pre-existing. Dr. Patari administered a corticosteroid injection and maintained Petitioner's modified duty status. Pet.'s Ex. 1.

Petitioner thereafter underwent conservative care with physical therapy and an additional corticosteroid injection, but his symptoms did not resolve. Pet.'s Ex. 1. When Petitioner was re-evaluated by Dr. Patari on July 19, 2017, he reported clicking along the medial aspect of his knee as well as instability. Noting the unsuccessful four-month trial of non-operative treatment, Dr. Patari recommended surgical repair. Pet.'s Ex. 1.

On August 15, 2017, Petitioner underwent surgery. The operative report reflects Dr. Patari performed: 1) Left knee arthroscopy, partial medial meniscectomy with resection of loose fragments of meniscus; 2) Microfracture through medial femoral condyle; 3) Partial lateral meniscectomy involving posterior horn; and 4) Extensive synovectomy of medial and lateral patellar joint compartments. The post-operative diagnoses were: 1) Left knee complex tear with bucket handle component which is flipped, medial meniscus; 2) Grade III chondromalacia of the medial femoral condyle; 3) Small posterior horn tear of the lateral meniscus; and 4) Kissing lesion with grade II to III chondromalacia of the medial tibial plateau. Pet.'s Ex. 1.

On August 29, 2017, Petitioner commenced physical therapy. For the next three months, Petitioner remained off work while undergoing post-operative rehabilitation. When Petitioner was re-evaluated by Dr. Patari on November 30, 2017, the doctor directed that Petitioner transition to work hardening, which Petitioner began in December. Pet.'s Ex. 1. The record reflects that in January 2018, Petitioner brought a tire to one of his work hardening sessions to demonstrate the weights and body mechanics required by his job, and this "seemed to flare his symptoms a bit" temporarily. Pet.'s Ex. 1. On January 31, 2018, Dr. Patari directed Petitioner to complete one more week of work hardening then return to full duty on February 9, 2018; Petitioner was to follow-up in two weeks to discuss the trial return to work. Pet.'s Ex. 1.

When Dr. Patari re-evaluated Petitioner on February 22, 2018, the doctor noted Petitioner was overall doing better but had "been doing some heavy lifting at work and reports pain with that and when standing too long." Pet.'s Ex. 1. Dr. Patari indicated Petitioner could continue working regular duty, though he should also exercise on a treadmill with high incline to strengthen his quadriceps, and released Petitioner to follow-up as needed. Pet.'s Ex. 1.

Petitioner testified that when he returned to work in February 2018, his knee was still weak and had not completely recovered. T. 17. He explained Respondent initially gave him lighter assignments but when one of the drivers no-showed for work, Respondent sent Petitioner on a heavy route to Grayslake and Niles (T. 32-33); while Petitioner was at the Niles job, he had another incident with a tire hitting his knee:

> …I ended up doing some heavy tire work, heavy tire pickups that had rims in them, truck tire rims. And when they are blown out, trying to roll them or get them on the truck, it's like falling back and forth, and one had fell. And a couple days later the middle of my knee started hurting again. T. 16-17.

Petitioner reported the incident but was unsure if an accident report was completed. T. 29. Presented with Respondent's Exhibit 2, Petitioner testified it was an accident report for a different incident where he "banged [his] shin, and eventually it become infected." T. 31.

On April 4, 2018, Petitioner returned to Dr. Patari and reported having a lot of pain for the prior three weeks after he resumed full duty at work and was moving heavy truck tires. Petitioner advised his knee was so painful and swollen that he was sent to Concentra, where he was given a brace and placed on restricted duty. Dr. Patari also documented that Petitioner had a bump on his left ankle with swelling and redness, which Petitioner reported happened after he bumped into an instrument at work. Dr. Patari's examination revealed patellofemoral crepitus; X-rays demonstrated irregular changes at the fibular head as well as mild joint space narrowing at the medial compartment. Dr. Patari directed Petitioner to remain on modified duty while "waiting it out for it to heal by itself, meanwhile medial unloader brace has been ordered." Pet.'s Ex. 1. The doctor also recommended heat and elevation for the ankle infection. Pet.'s Ex. 1. The parties stipulated that Petitioner was entitled to maintenance benefits as of April 4, 2018. Arb.'s Ex. 1.

Petitioner's knee symptoms had not improved by the April 18, 2018 re-evaluation, and Dr. Patari ordered an MRI. Pet.'s Ex. 1. The scan was completed on May 1, 2018, and the radiologist's impression was: 1) Truncation of the medial meniscus which may relate to prior meniscectomy; undersurface oblique tear of the remnant is seen at the posterior horn body junction with surrounding intermediate grade chondromalacia and synovitis; and 2) Intermediate to advanced patellofemoral chondromalacia most prominent laterally. Pet.'s Ex. 1.

On May 2, 2018, Petitioner followed up with Dr. Patari and reported his symptoms were unchanged. On review of the MRI, Dr. Patari indicated he had no further treatment recommendations; Dr. Patari imposed permanent restrictions of 50-pound maximum lifting, pushing, and pulling, no bending, squatting, or kneeling, and directed Petitioner to follow-up in one month. Pet.'s Ex. 1.

Petitioner testified he was terminated when he informed Respondent of Dr. Patari's findings and restrictions: "The last time I saw the doctor and he gave me the results of my MRI. As soon as I walked in and said they believe I might have another tear in the middle of my knee, they told me go home, you're done." T. 34. Petitioner felt he left Respondent on good terms. T. 34. He denied that anything unusual happened on his last day. T. 35.

On June 13, 2018, Petitioner was re-evaluated by Dr. Patari. Petitioner reported persistent pain while walking, and his knee had started buckling and giving way; Petitioner was wearing the unloader brace and this was helpful to a degree, but it tended to slip down his leg. Petitioner further advised he had been "laid off due to employer not have a job with his work restrictions." Pet.'s Ex. 1. The record reflects Dr. Patari's impression was as follows: "recommend continued unloader brace. Reduce work restrictions. Patient may not be able to go to previous employment. Follow up PRN. Recommend career change." Pet.'s Ex. 1.

No vocational rehabilitation assessment was conducted after Dr. Patari's imposition of permanent restrictions. Instead, on June 14, 2018, Petitioner began a self-directed job search. T. 22. Petitioner was never counseled as to what jobs he should be applying for or what wages he should consider, so he proceeded based on the understanding that he was replacing his pre-accident job and income. T. 22, 44-45. He identified Petitioner's Exhibit 2 as his job search logs:

> If the job said that I had weight restrictions of what I couldn't do, I just put down weight restrictions, that I couldn't apply. I did get interviews. And discussing my conditions with the employer, if he didn't have it stated in his ad, I would tell him these are my conditions, what's going on with my knee, and they wouldn't hire me. And basically what I have been through through the whole thing. I got names and numbers of people that I contacted. I went to interviews and stuff like that. One guy told me, come on in for an interview. Someone else interviewed me. When he heard about my knee he said, I can't use you. I mean, that's been the story of my life since then. T. 22-23.

Petitioner testified the reason he did not apply for the majority of positions was the job's physical demands: "It was mostly weight restrictions. I cannot even get a job at Amazon because they go up and down stairs, and they are a good company." T. 45. Petitioner agreed there were some jobs he did not apply for because of the pay rate: "Correct. But I made $17.00 an hour. I wasn't going to make $12.00 an hour. I got bills." T. 36. He did not apply for any positions that paid less than his wage at Respondent: "No, I did not. I have a mortgage." T. 37. Petitioner's job search continued through the date of arbitration; he has had "lots of phone interviews" and in-person interviews, but he has not been offered a job within the permanent restrictions imposed by Dr. Patari. T. 35-36, 26. Petitioner would "absolutely" accept professional job placement assistance. T. 26.

On April 4, 2019, Petitioner returned to Dr. Patari, who re-examined Petitioner and thereafter authored a narrative report. Dr. Patari's April 7, 2019 report reflects that, since the June 13, 2018 office visit, Petitioner continued to have intermittent pain, particularly with descending stairs and heavy lifting; Petitioner reported two episodes of "knife-like pain" while descending stairs as well as episodes of instability. Examination findings included decreased range of motion, positive medial joint line tenderness, and tenderness at the inferior pole of the patella as well as the quadriceps; X-rays of the left knee showed mild to moderate arthritis of the left knee. Dr. Patari

opined, "[w]ith a reasonable degree of medical certainty, Mr. Westenholtz did sustain a permanent exacerbation of a pre-existing chondromalacia of the trochlea and medial compartment due to the twisting injury. He also sustained a bucket handle tear of the medial meniscus as a result of the injury of 3/29/17 [*sic*]." Pet.'s Ex. 4. Dr. Patari further opined it was likely that Petitioner would eventually require a left total knee arthroplasty, but as of April 2019, that was not necessary; Dr. Patari indicated Petitioner should remain under the previously imposed permanent restrictions of no lifting, pushing, or pulling greater than 50 pounds, no kneeling on the left knee, no bending or squatting with the left knee, and "I would also recommend an additional restriction of no ladder climbing." Pet.'s Ex. 4.

On August 27, 2020, Dr. M. Bryan Neal conducted a §12 examination and record review at Respondent's request. On examination, Dr. Neal noted left knee swelling and effusion, decreased extension, decreased and painful flexion, tenderness to palpation, and significant lateral joint line tenderness. X-rays of the bilateral knees showed "arthritis, slightly worse on the left than on the right judged to be moderate on the left but not severe on the left radiographically." Resp.'s Ex. 4, Dep. Ex. 2. Dr. Neal's diagnoses included morbid obesity and variable left knee pain with pre-existing femoral joint arthritis. Responding to the posed questions, Dr. Neal first opined Petitioner was not a candidate for total knee replacement; Dr. Neal observed there was no current recommendation for total knee arthroplasty from Petitioner's treating orthopedist, and it was speculative as to whether or not Petitioner's symptoms would progress to the point such surgery was necessary. Dr. Neal then opined Petitioner had "significant left knee osteoarthritis prior to March 29, 2017 [*sic*]," which indicates that "prior to March 29, 2017 [*sic*], there was a reasonable probability" Petitioner would have needed a total knee arthroplasty in his lifetime; Dr. Neal did not believe the work accident "either changed his probability for knee replacement in the future significantly or materially changed his clinical rate of deterioration (which was one of a slow deterioration over time.)" Resp.'s Ex. 4, Dep. Ex. 2. Dr. Neal further indicated he did not believe Petitioner's denial of pre-accident symptoms or problems:

> I will interject that I do not find his history of a perfectly asymptomatic and painless knee prior to March 29, 2017 [*sic*], to be plausible, but that a review of the primary care records of Dr. Ramos for the five-year time frame before March 29, 2017 [*sic*], would elevate the certitude of truly understanding the degree of left knee symptomatology prior to March 29, 2017 [*sic*]. Resp.'s Ex. 4, Dep. Ex. 2.

Dr. Neal concluded Petitioner did not require any lifting restrictions, was at maximum medical improvement, and his ongoing symptoms were related solely to his pre-existing degenerative arthritis. Resp.'s Ex. 4, Dep. Ex. 2.

Emil Lockett ("Lockett") testified on Respondent's behalf. Lockett has worked for Respondent for 18 years; in 2017, Lockett was service manager and Petitioner was one of the drivers. T. 47-49. Lockett testified Petitioner was a good employee. T. 49. Lockett further stated Petitioner did not have any performance or behavior issues "at first." T. 49

Lockett testified that when Petitioner returned to work after knee surgery, Respondent scheduled Petitioner around his physical therapy and doctor's appointments and accommodated his restrictions by having him assist with light tasks and sweep around the shop. T. 54. While Petitioner was on restricted duty, Lockett witnessed an incident with Petitioner that "didn't make

sense" to him: "[Petitioner] was walking directly in front of me and he tripped his self…He put one foot in front of the other and tripped his self on the floor walking from the offices to the warehouse to the shop area." T. 58. Lockett asked Petitioner what he was thinking, and Petitioner "just said, oh, and got up. I don't know if he knew I was behind him or not, but that's what happened." T. 59. Lockett testified that shortly thereafter, Petitioner walked off the job and has not returned to work:

> He was giving, he was still on light duty, and I asked him to do something, and he blew up at me. I mean, just loud, just verbal attack, real loud. Everybody there, everybody in the shop heard it, everything. And he left and I hadn't seen him since until today…I believe I had him unloading a truck. He had certain weight restrictions. We were unloading trucks in the shop. Roll them onto a lift gate. The lift gate goes down and they roll them over and put them in a line. That's all he was doing. And it was something, I don't remember exactly what his words were, but that he did. T. 60.

Lockett is not aware why Petitioner has not returned to work; he testified Petitioner remains on Respondent's time roll sheet, has not been terminated, and was not disciplined for any reason. T. 62, 64.

Presented with Respondent's Exhibit 3, Locket identified it as the job description for a route driver and for Petitioner's position – pick-up and delivery driver. T. 61. Lockett confirmed the job description is incomplete and does not document the job's weight requirements. T. 65.

The February 25, 2021 evidence deposition of Dr. Sanjay Patari was admitted as Petitioner's Exhibit 3. Dr. Patari is board certified and has a general orthopedic surgery practice; approximately 40 percent of his practice involves lower extremity care. Pet.'s Ex. 3, p. 6, Dep. Ex. 1. Dr. Patari testified consistent with his treating records.

Dr. Patari evaluated Petitioner for the first time on April 26, 2017; Petitioner had been referred by his primary care physician. Pet.'s Ex. 3, p. 10-11. Petitioner gave a history of a left knee injury when he was loading truck tires and a tire fell off the back of the truck and hit his knee. Pet.'s Ex. 3, p. 10. Dr. Patari testified his examination findings were suggestive of meniscus pathology; the doctor ordered an MRI, provided a knee brace, and imposed restrictions of no kneeling or squatting. Pet.'s Ex. 3, p. 10, 12.

The MRI was completed on May 8, 2017, and Dr. Patari reviewed the films at Petitioner's May 10, 2017 re-evaluation. Pet.'s Ex. 3, p. 13. Dr. Patari testified the "key findings" were "Grade 2 linear signal abnormality in the posterior horn of the meniscus. There was a mild knee joint [effusion], there was Grade 4 chondromalacia of the anterior aspect of the lateral femoral condyle, and there was a sprain of the anterior cruciate ligament and the medial collateral ligament." Pet.'s Ex. 3, p. 13. Dr. Patari diagnosed "an exacerbation of a left knee arthritis resulting in the probable meniscal tear and an MCL sprain, which was work-related. I also reported that the arthritis was preexisting. Additional diagnosis was complex tear of the medial meniscus." Pet.'s Ex. 3, p. 14. Dr. Patari explained the meniscal tear and the MCL sprain were related to the work injury, but the arthritis itself was not work-related. Pet.'s Ex. 3, p. 15.

Dr. Patari testified he initially recommended conservative treatment; he administered a corticosteroid injection, ordered physical therapy, and maintained Petitioner's restrictions. Pet.'s Ex. 3, p. 15. Over the next several weeks, Petitioner underwent physical therapy and received a second corticosteroid injection, but his symptoms persisted and worsened. Pet.'s Ex. 3, p. 16-17. Dr. Patari testified that when Petitioner followed-up on July 19, 2017, his symptoms included clicking on the inside aspect of the knee as well as the knee giving out; Dr. Patari recommended arthroscopy. Pet.'s Ex. 3, p. 18.

On August 15, 2017, Dr. Patari performed left knee arthroscopy. Pet.'s Ex. 3, p. 18. Dr. Patari summarized his operative findings:

> …he had a complex bucket-handled – what's called a flipped tear of medial meniscus involving the back half. And then, he had arthritis, or what we call chondromalacia of the medial femoral condyle. He also had corresponding arthritis at the medial tibial plateau, that's called the kissing lesion. The ACL ligament and the PCL ligament were intact. He also had Grade 4, which is the severe arthritis of the front part of the knee underneath the kneecap called the trochlea, and he had just a little bit of arthritis, Grade 1, of the patella itself. Pet.'s Ex. 3, p. 19.

Dr. Patari agreed Petitioned had pre-existing arthritis, but there is no history of Petitioner having left knee pain prior to the March 2017 injury. Pet.'s Ex. 3, p. 50, 65. Dr. Patari confirmed the need for surgery was related to the work injury. Pet.'s Ex. 3, p. 50, 20.

Dr. Patari testified that over the next several months, Petitioner remained off work while undergoing physical therapy followed by work conditioning. Pet.'s Ex. 3, p. 20-26. Dr. Patari directs his patients to "bring your stuff or whatever to the therapist so they understand your job," so Petitioner brought a tire to work conditioning and demonstrated his work duties. Pet.'s Ex. 3, p. 27-28. On January 31, 2018, Dr. Patari recommended Petitioner complete a final week of work conditioning and returned him to work as of February 9, 2018. Pet.'s Ex. 3, p. 29.

Dr. Patari next saw Petitioner on February 22, 2018, and Petitioner reported he was doing heavy lifting at work and was having pain with that as well as with standing too long. Pet.'s Ex. 3, p. 29. Dr. Patari did not believe anything new materially happened and instead believed it to be residual pain related to the March 2017 injury: "I attributed it to weakness of quadriceps muscle, and that has a tendency to cause pain under the kneecap, and also pain with standing and whatnot." Pet.'s Ex. 3, p. 30. He recommended a treadmill program to strengthen Petitioner's quadriceps muscle and directed Petitioner to return as needed. Pet.'s Ex. 3, p. 30.

Dr. Patari testified Petitioner returned on April 4, 2018:

> He said for the three weeks prior to April 4th, he had had increased pain after he had started full-duty work, and when he was trying - - when he was moving the heavy truck tires, he developed swelling of the knee, and as a result he reported he was in severe pain. He ended up going to the Concentra medical center urgent care for evaluation, and he said X-rays were taken. He was told that X-rays showed something abnormal. So, he was put on light duty at work with a brace. Pet.'s Ex. 3, p. 30-31.

Dr. Patari concluded Petitioner was likely having arthritis-related pain and "probably did not have 100 percent strength in which to support himself in lifting these tires resulting in pain of the knee." Pet.'s Ex. 3, p. 31. Dr. Patari imposed restrictions, ordered an unloader brace, and recommended waiting to see if the pain improved on its own. Pet.'s Ex. 3, p. 31-32.

On April 18, 2018, Dr. Patari re-evaluated Petitioner, and Petitioner's symptoms and physical examination were unchanged. Pet.'s Ex. 3, p. 32. Dr. Patari obtained a repeat MRI, which he reviewed on May 2, 2018, and it demonstrated "advanced arthritis at the patellofemoral joint, which is underneath the kneecap. Mostly on the outside of Kneecap Number 1 [*sic*], and there was also a possible new tear of the medial meniscus." Pet.'s Ex. 3, p. 33. Dr. Patari testified his diagnosis was "arthritis of the kneecap or patellofemoral arthritis, or exacerbation of such." Pet.'s Ex. 3, p. 34. Dr. Patari further testified the exacerbation was work-related: "I think the mechanism of bouncing tires off your knee can certainly cause repeated impact to the kneecap that can result in that." Pet.'s Ex. 3, p. 34. Dr. Patari imposed permanent restrictions of maximum 50 pound lift, pull, and push and no bending, squatting, or kneeling. Pet.'s Ex. 3, p. 34. Dr. Patari confirmed the permanent restrictions were "related to the exacerbation of the arthritis as a result of the work injury from 2017." Pet.'s Ex. 3, p. 35. Dr. Patari then reiterated his opinion: "The reason for the permanent restrictions is the advanced arthritis under his kneecap as well as the previous meniscus tear, and as a result, he is not able to do those job duties without restriction when [*sic*] it's related to the injury of March 29th, 2017 [*sic*]." Pet.'s Ex. 3, p. 36.

Dr. Patari next saw Petitioner on April 4, 2019; this was for an examination associated with a narrative report. Pet.'s Ex. 3, p. 37. Dr. Patari testified consistent with his April 2019 narrative report, opining that Petitioner sustained "a permanent exacerbation of the preexisting chondromalacia of the trochlea and medial compartment due to the twisting injury. He also sustained a bucket-handle tear of the medial meniscus, all as a result of the injury of March 29, 2017 [*sic*]." Pet.'s Ex. 3, p. 42. Dr. Patari confirmed he did not believe Petitioner was a candidate for total knee replacement as of April 4, 2019. Pet.'s Ex. 3, p. 57. Dr. Patari further agreed Petitioner's ongoing buckling and pain relate to his arthritis, which was rendered symptomatic by the work accident. Pet.'s Ex. 3, p. 58, 64. Dr. Patari reiterated his opinion is the March 2017 accident permanently exacerbated Petitioner's pre-existing arthritis. Pet.'s Ex. 3, p. 64.

The January 19, 2021 evidence deposition of Dr. M. Bryan Neal was admitted as Respondent's Exhibit 4. Dr. Neal is board certified and has a general orthopedic surgery practice; knee injuries are in the top three joints he sees. Resp.'s Ex. 4, p. 5, 7, 8. On August 24, 2020, Dr. Neal performed a §12 examination and record review at Respondent's request. Resp.'s Ex. 4, p. 10. Dr. Neal testified consistent with his report.

Dr. Neal summarized his impression of the medical records:

> Overall, the medical records I reviewed revealed that he did have left knee osteoarthritis, and this would have been my opinion preexisting to March 29, 2017 [*sic*]. The records suggested he did injure his knee while working with MRI imaging revealing meniscus abnormalities, as well as degenerative joint disease or arthritis.

> The records indicated that he had continued knee pain, which led to surgery. The surgery addressed the meniscus tearing, which was observed at surgery, and attempted to address the arthritis, which was observed at surgery.
> The records indicated that following surgery, at times he was doing well with no acute distress notations, a normal gait, and at times no pain, or which at one time he was - - around six months following the surgery, he was allowed to return on an as-needed basis, and he was allowed to return to work, but then returned to the same orthopedic surgeon with continued knee symptoms for which he had repeat MRI imaging in May of 2018, and had continued intermittent symptomatology without the medical records documenting any discrete second injury after surgery. Resp.'s Ex. 4, p. 11-12.

Dr. Neal obtained bilateral knee X-rays during the examination:

> Now, the left knee X-rays did show arthritis. The patellofemoral joint was reasonable with no patella spurring superiorly on the lateral view, and a small one that has spur inferiorly…there was some diminished radial joint space, but there was still complete cartilage. There was no bone-on-bone articulation, and the comparison to the contralateral knee, which was never injured, which sort of serves as a control, if you will, was they were very close. Resp.'s Ex. 4, p. 13.

Dr. Neal diagnosed Petitioner with obesity or morbid obesity and "left knee pain which was daily, variable, and static, that was mostly interior, and it was due to his arthritis of the knee joint, something that I found was preexisting." Resp.'s Ex. 4, p. 19. Dr. Neal confirmed he was not provided with any information showing Petitioner had any left knee treatment prior to the accident, nor any information showing Petitioner had restrictions prior to the accident. Resp.'s Ex. 4, p. 32. Asked to confirm that he was not provided with medical history showing left knee symptoms prior to the accident, Dr. Neal refused:

> I would not agree with that statement, in totality of both the medical records and his history to me, because it is true, he personally told me there was no treatment or symptoms to the left knee.
> So there is some evidence that there was none based upon him, but it is true that the medical records are - - there are no medical records prior to March 29, 2017 [*sic*], and the records after that are silent on that issue. Resp.'s Ex. 4, p. 38.

CONCLUSIONS OF LAW

I. Accident Date

The Request for Hearing form reflects the parties' stipulation that Petitioner sustained an accidental injury arising out of and occurring in the course of his employment on March 31, 2017, although the evidence indicates that the accident may have occurred on March 29, 2017. Arb.'s Ex. 1. Thus, the Commission affirms the stipulated March 31, 2017 date of accident. *See Walker v. Industrial Commission*, 345 Ill. App. 3d 1084, 1088 (4th Dist. 2004).

II. Causal Connection

In concluding that Petitioner's current left knee condition is not causally related to the work accident, the Arbitrator found Petitioner's credibility was compromised as to his alleged second and third accidents, and further found the medical experts agreed Petitioner's current complaints are related to his pre-existing arthritis which was not aggravated or accelerated by the accident. The Commission views the evidence differently.

A. Credibility

The Arbitrator found Petitioner "was less than truthful in regards to the second accident" and failed to present evidence to establish a causal connection to the unwitnessed "second and/or third reported accident." Arb.'s Dec., p. 14. The Commission disagrees with these negative inferences. Initially, the Commission emphasizes that Petitioner does not claim a causal connection to any event other than the March 31, 2017 accident. Petitioner has not filed any other Applications for Adjustment of Claim and this is not a consolidated claim, so there are no alleged second and third work accidents. Further, the Commission finds the medical records corroborate Petitioner's testimony as to the minor infection he developed after hitting his shin on a rack as well as the return of knee pain after a heavy tire pickup route. Specifically, Dr. Sanjay Patari's April 4, 2018 office note reflects that within three weeks of resuming full duty Petitioner had a recurrence of severe pain and swelling after "moving heavy truck tires," and was sent to Concentra for evaluation. Dr. Patari also documented that Petitioner had a bump on his ankle with swelling and redness, which Petitioner reported happened after he bumped into an instrument at work. Pet.'s Ex. 1. 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.")

B. Medical Evidence

Having found Petitioner was credible, our analysis then turns to the evidence specific to the causal connection issue. It is well established that an accident need not be the sole or primary cause—as long as employment is a cause—of a claimant's condition. *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 205 (2003). Furthermore, an employer takes its employees as it finds them (*St. Elizabeth's Hospital v. Illinois Workers' Compensation Commission*, 371 Ill. App. 3d 882, 888 (5th Dist. 2007)), and a claimant with a pre-existing condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Commission*, 92 Ill. 2d 30, 36 (1982). As the Appellate Court held in *Schroeder v. Illinois Workers' Compensation Commission*, 2017 IL App (4th) 160192WC, the inquiry focuses on whether there has been a deterioration in the claimant's condition:

> That is, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition; it is the resulting deterioration from whatever the previous condition had been. *Schroeder* at ¶ 26.

With this standard in mind, we turn to consideration of the competing causal connection opinions.

Initially, the Commission observes that, contrary to the finding in the Decision of the Arbitrator, the experts do not "agree" that Petitioner's current symptoms are unrelated to the March 31, 2017 work accident. To be clear, Petitioner's treating orthopedist, Dr. Sanjay Patari, consistently opined that the work accident permanently aggravated Petitioner's pre-existing arthritis. The May 10, 2017 office note reflects Dr. Patari's assessment was "Left knee [degenerative joint disease]. Story: Exacerbation of his left knee arthritis due to current injury causing probable meniscal tear and MCL sprain which is work-related. The arthritis is pre-existing." Pet.'s Ex. 1. Additionally, in his April 7, 2019 narrative report, Dr. Patari opined the work-related aggravation was permanent: "With a reasonable degree of medical certainty, Mr. Westenholtz did sustain a permanent exacerbation of a pre-existing chondromalacia of the trochlea and medial compartment due to the twisting injury. He also sustained a bucket handle tear of the medial meniscus as a result of the injury of 3/29/17 [*sic*]." Pet.'s Ex. 4 (Emphasis added). During his deposition, Dr. Patari reiterated his causation opinion. Pet.'s Ex. 3, p. 30. Dr. Patari directed Petitioner to perform a home strengthening exercise and return as needed, but Petitioner returned for a re-evaluation only five weeks later, on April 4, 2018, with complaints of increasing pain with full-duty work: "He said for the three weeks prior to April 4th, he had had increased pain after he had started full-duty work, and when he was trying - when he was moving the heavy truck tires, he developed swelling of the knee, and as a result he reported he was in severe pain." Pet.'s Ex. 3, p. 30. Dr. Patari concluded Petitioner was likely having arthritis-related pain and still had residual weakness; he imposed restrictions, ordered an unloader brace, and recommended waiting to see if the pain improved on its own. Pet.'s Ex. 3, p. 31-32. Dr. Patari testified that Petitioner's symptoms and examination did not improve and after a repeat MRI, he diagnosed "arthritis of the kneecap or patellofemoral arthritis, or exacerbation of such." Pet.'s Ex. 3, p. 34 (Emphasis added). Dr. Patari imposed permanent restrictions of 50-pound maximum lifting, pulling, and pushing and no bending, squatting, or kneeling, which he stated were "related to the exacerbation of the arthritis as a result of the work injury from 2017." Pet.'s Ex. 3, p. 35 (Emphasis added). Dr. Patari then reaffirmed his opinion: "The reason for the permanent restrictions is the advanced arthritis under his kneecap as well as the previous meniscus tear, and as a result, he is not able to do those job duties without restriction when [*sic*] it's related to the injury of March 29th, 2017 [*sic*]." Pet.'s Ex. 3, p. 36.

Respondent's expert, in turn, disagreed that the accident caused Petitioner's arthritis to become symptomatic. In his August 27, 2020 §12 report, Dr. M. Bryan Neal acknowledged there is no history of pre-accident symptoms or treatment, but nonetheless claimed the records from Petitioner's primary care physician would likely prove Petitioner had longstanding symptoms. Resp.'s Ex. 4, Dep. Ex. 2. During his deposition, Dr. Neal emphasized that Petitioner had pre-existing arthritis and opined the work injury did not "change[] his probability for knee replacement in the future significantly or materially change[] his clinical rate of deterioration (which was one of a slow deterioration over time)." Resp.'s Ex. 4, Dep. Ex. 2. Dr. Neal further testified the absence of a medical history showing pre-accident symptoms was insignificant, as the medical records are incomplete:

> …because it is true, he personally told me there was no treatment or symptoms to the left knee. So there is some evidence that there was none based upon him, but it

> is true that the medical records are -- there are no medical records prior to March 29, 2017 [*sic*], and the records after that are silent on that issue. Resp.'s Ex. 4, p. 38.

The Commission finds Dr. Neal's opinions are neither credible nor persuasive, and are largely speculative. Initially, the Commission observes an accident does not have to "materially" change the pre-existing disease. Therefore, Dr. Neal's denial that the accident aggravated or accelerated Petitioner's arthritis is based on an improperly elevated standard. We further note Dr. Neal denied that the accident caused Petitioner's previously asymptomatic left knee arthritis to become symptomatic, yet the doctor had no evidence of any pre-accident symptoms or treatment. See *Sunny Hill of Will County v. Illinois Workers' Compensation Commission*, 2014 IL App (3d) 130028WC, ¶ 36 (Expert opinions must be supported by facts and are only as valid as the facts underlying them.)

The Commission finds Dr. Patari's opinions are persuasive and we adopt same. The Commission notes the doctor's conclusions are supported by the absence of any evidence showing Petitioner was symptomatic prior to the work accident. The Commission further finds Dr. Patari's causal connection opinions are most consistent with the chain of events, as the evidence demonstrates Petitioner never returned to his pre-accident asymptomatic baseline. There is no doubt that Petitioner had pre-existing arthritis; however, there is no evidence that Petitioner had any symptoms or treatment until the March 31, 2017 accident, when a 100-pound truck tire hit his left knee. After an initial attempt at conservative care, Dr. Patari performed surgery on August 15, 2017, and post-operatively, Petitioner underwent extensive physical therapy and work hardening. Petitioner returned to full duty in February 2018 but immediately reported pain with "heavy lifting at work" (Pet.'s Ex. 1); Petitioner was only able to work for a month before his knee complaints significantly worsened. Dr. Patari re-evaluated Petitioner after this failed attempt to return to work and ultimately imposed permanent restrictions and recommended a career change. The Commission finds Petitioner's current left knee condition of ill-being remains causally related to the work accident.

II. Temporary Disability Benefits and Vocational Rehabilitation

On the Request for Hearing, the parties stipulated that Petitioner was entitled to Temporary Total Disability ("TTD") benefits from March 31, 2017 through February 22, 2018 and maintenance benefits from April 4, 2018 through September 2, 2020, with Respondent entitled to a credit for benefits previously paid. Arb.'s Ex. 1. In dispute was Petitioner's entitlement to maintenance benefits from September 3, 2020 through the hearing date as well as Petitioner's claim for vocational rehabilitation.

A. Maintenance Benefits

Finding Petitioner artificially "limited his job search without justification," the Arbitrator found Petitioner failed to prove entitlement to maintenance benefits after September 2, 2020. Arb.'s Dec., p. 18. The Commission disagrees.

Initially, the Commission notes there is conflicting testimony about the circumstances of Petitioner's last day working for Respondent. Petitioner testified he was terminated by Respondent after his last appointment with Dr. Patari; he commenced a self-directed job search on June 14,

2018 and had continued to look for work through the hearing. T. 22, 35. Lockett, in turn, testified that Respondent was accommodating Petitioner's restrictions without issue, then one day Petitioner "blew up" at him, made a scene, and walked off the job, never to return. T. 60. Lockett stated he does not know why Petitioner has not returned to work and testified that Petitioner remains on Respondent's time roll sheets. T. 62. The Commission finds Lockett's testimony that Petitioner abandoned an accommodated job in 2018 is inconsistent with the fact that Respondent stipulated to liability for two-and-a-half years of maintenance benefits while Petitioner performed a self-directed job search. We further find the timing of Petitioner's work cessation correlates with Petitioner receiving permanent work restrictions rather than a random job abandonment.

The Commission further finds Petitioner performed a good faith job search. We emphasize that Petitioner credibly testified he received no guidance as to what positions or wage rates were appropriate. T. 22. As such, his job application criteria was predicated on his belief that he had to secure a position that was not only within Dr. Patari's permanent restrictions but also matched his pre-accident income. T. 44-45. The Commission will not punish a claimant who was not advised of the expanded wage parameters acceptable under the Act. Petitioner conducted a diligent job search under the circumstances; he secured numerous interviews but no job offers. The Commission finds Petitioner established entitlement to maintenance benefits from September 3, 2020 through the August 30, 2021 arbitration hearing.

B. Vocational Rehabilitation

Petitioner requests an award of vocational rehabilitation. The Commission is unable to resolve this issue, however, as the parties failed to obtain a vocational rehabilitation assessment as required by Commission Rule 9110.10(a). The Commission orders the parties to obtain the requisite vocational assessment and any periodic assessments as detailed in Rule 9110.10.

III. Incurred Medical Expenses

Petitioner's Exhibit 5 contains the medical bills incurred for treatment of Petitioner's left knee. The Commission finds these charges are reasonable, necessary, and causally related to the undisputed work accident, and Respondent is liable for same.

IV. Permanent Disability

Given our causal connection finding and order directing that a vocational rehabilitation assessment be performed, the Commission finds Petitioner's permanent disability is not ripe for adjudication. *Supra,* note 1. The Commission vacates the award of 10% loss of use of the left leg and remands this matter to the Arbitrator for further proceedings consistent with this Decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 3, 2022 is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $481.76 per week for a period of 47 weeks, representing March 31, 2017 through February 22, 2018, that being the stipulated period of temporary total incapacity for work under §8(b) of the Act. Respondent shall have credit for TTD benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner maintenance benefits in the amount of $481.76 per week for a period of 177 6/7 weeks, representing April 4, 2018 through August 30, 2021, as provided in §8(a) of the Act. Respondent shall have credit for maintenance benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that the parties obtain a vocational rehabilitation assessment and any periodic assessments as required by Commission Rule 9110.10. Respondent shall pay the cost of the vocational rehabilitation assessment, as provided in §8(a).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable, necessary and causally related medical expenses detailed in Petitioner's Exhibit 5, as provided in §8(a), subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of 10% loss of use of the left leg is hereby 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 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.

June 12, 2023

/s/ *Deborah J. Baker*

DJB/mck

O: 04/12/23

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC005677
Case Name	Richard Boyden v. Mechanical Inc
Consolidated Cases	
Proceeding Type	Remand From Circuit Court Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0257
Number of Pages of Decision	25
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Tracy Jones
Respondent Attorney	Stuart Pellish

DATE FILED: 6/12/2023

/s/ Deborah Baker, Commissioner

Signature

23IWCC0257

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Richard Boyden,

Petitioner,

vs. NO: 19 WC 5677

Mechanical Inc.,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission following the remand order of Judge John C. Redington of the Circuit Court of the Fifteenth Judicial Circuit overturning the November 18, 2021, Commission Decision (20 IWCC 0570) in its entirety. The Commission, after considering the remaining issues of notice, causal connection, medical expenses, prospective medical treatment, temporary total disability ("TTD") benefits, and penalties and fees, modifies the March 9, 2020, Decision of the Arbitrator. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Procedural History

In February 2019, Petitioner filed an Application for Adjustment of Claim alleging he sustained work-related injuries on May 8, 2018. On November 11, 2019, the case proceeded to hearing pursuant to Section 19(b) of the Act. The disputed issues were accident, notice, causal connection, medical expenses, prospective medical treatment, TTD benefits, and penalties and fees. In the March 9, 2020, Decision of the Arbitrator, the Arbitrator determined Petitioner was a traveling employee at the time of the accident and that he sustained injuries arising out of and in the course of his employment. The Arbitrator also found the issues of notice, causal connection, medical expenses, prospective medical treatment, and TTD benefits in Petitioner's favor.

Respondent filed a Petition for Review and in its November 18, 2021, Decision, the Commission reversed the Decision of the Arbitrator in its entirety, with one Commissioner dissenting. Petitioner then filed for administrative review of the Commission Decision in the Circuit Court of the Fifteenth Judicial Circuit. On September 15, 2022, after conducting a de novo

review of the issues, Judge Redington issued an order overturning the Commission Decision. Judge Redington made the following findings:

> 1. The Court finds that under the facts and circumstances of this case the employee was **A TRAVELING EMPLOYEE** at the time of the accident and therefore **DID** sustain an injury that arose out of and in the course of employment. (Emphasis in original).
>
> 2. The Court further finds that the Commission erred as a matter of law in not awarding temporary total disability benefits, medical benefits and prospective medical treatment based upon this being a compensable event.

Respondent filed a motion to amend the court's September 15, 2022, order. On December 6, 2022, Judge Redington granted Respondent's motion and remanded the matter to the Commission with instructions to find Petitioner was a traveling employee. The judge further instructed the Commission to address the issues of TTD benefits, medical expenses, and prospective medical treatment, and to set the bond pursuant to Section 19 of the Act. Petitioner filed the court orders with the Commission and this matter was set for discussion on April 18, 2023.

Findings of Fact

While there were numerous issues in dispute at the arbitration hearing, the parties agreed that the question of whether Petitioner was a traveling employee at the time of his injury was the primary dispute. Respondent disputed causal connection, TTD benefits, and medical expenses solely due to the dispute regarding the compensability of Petitioner's claim. The Commission notes that in general, the facts are not in dispute.

In the March 9, 2020, Decision of the Arbitrator, the Arbitrator thoroughly addressed the facts regarding the compensability of Petitioner's injury. In the interest of efficiency, the Commission primarily relies on the Arbitrator's recitation of facts except as stated below. The Commission makes the following findings relating to the issue of prospective medical treatment.

On May 8, 2018, Petitioner was involved in a serious motor vehicle accident while driving to his assigned job site. He sustained numerous significant injuries and was hospitalized from the date of accident until May 29, 2018. He sustained numerous fractures throughout his body and has undergone several surgeries relating to the work accident. While hospitalized, Petitioner underwent surgeries to repair a fracture of the left hip socket, left femur, right tibial plateau, and left forearm. Petitioner developed a pulmonary embolism during his recovery. Petitioner also developed an infection in the right tibia. In December 2018, Petitioner's surgeon removed the hardware from the medial and lateral right tibia. Petitioner eventually underwent multiple debridement procedures as well as a right tibia corticotomy and the insertion of antibiotic beads due to his chronic right tibia osteomyelitis. Petitioner began treatment with Dr. Goodspeed in early June 2019. The nurse practitioner in Dr. Goodspeed's office identified three issues that needed to

be addressed in the future—the right tibia infection, malalignment across the right tibial plateau, and stiffness at the level of the right hip. In July 2019, Dr. Goodspeed performed a right complex tibia bone debridement, sinus excision, and removal of the antibiotic beads in an attempt to finally cure Petitioner's chronic right tibia infection.

The last office visit notes in evidence are dated September 19, 2019. That day, Petitioner returned to Dr. Goodspeed's office. The doctor noted that certain issues would need to be addressed in the future including the heterotopic ossification in the left hip, left knee flexion contracture, malalignment across the right tibia and left femur, and an acute right tibia fracture. Petitioner identified the restricted movement of his left hip as his primary concern. Dr. Goodspeed determined Petitioner would need an extensive HO resection of the left hip to restore its motion. The surgery was to take place in approximately six weeks. Dr. Maki, Petitioner's infectious disease doctor, also examined Petitioner on September 19, 2019. Dr. Maki wrote that all anti-infective and antimicrobial therapy ended three weeks earlier and that Petitioner continued to improve. Dr. Maki believed Petitioner's infection was most likely controlled; however, the doctor wrote that there is a low risk of recurrence. Petitioner was discharged from Dr. Maki's care.

Although the operative report is not in evidence, Petitioner testified that Dr. Goodspeed performed the recommended left hip heterotopic ossification resection with removal of some hardware on October 14, 2019. He testified that he continues to attend physical therapy. Petitioner testified that he is unable to walk without assistance and has not been cleared to return to work in any capacity since the date of accident. Dr. Neal, Respondent's Section 12 examiner, agreed that Petitioner was unable to return to work.

Conclusions of Law

Pursuant to the explicit mandate of the Circuit Court, the Commission must find Petitioner was a traveling employee who sustained injuries arising out of and in the course of his employment on May 8, 2018. After considering the totality of the evidence, the Commission vacates the Arbitrator's award of prospective medical treatment and corrects certain errors. The Commission affirms the Arbitrator's conclusions regarding all other issues.

The Arbitrator wrote that Respondent disputed causal connection, medical expenses, TTD benefits, and prospective medical treatment solely based on its argument regarding the compensability of Petitioner's accident. Due to this assessment of the disputed issues, the Arbitrator ordered Respondent to authorize and pay for "…prospective ongoing medical treatment with Dr. Goodspeed and Petitioner's other treating physicians." (Arb. Dec. Form). After reviewing the Request for Hearing as well as the stipulations the parties agreed to on the record, the Commission finds Respondent did not dispute the issue of prospective medical treatment solely due to its dispute of the compensability of the May 8, 2018, accident. On the Request for Hearing, Respondent indicated that if the Arbitrator found Respondent liable for Petitioner's accident, it stipulated to the issues of causal connection, medical expenses, and TTD benefits. There is no corresponding stipulation regarding the issue of prospective medical treatment. Likewise, the parties confirmed on the record that Respondent disputed causal connection, medical expenses, and TTD benefits based solely on the question of its liability for the accident. The parties did not include the disputed issue of prospective medical treatment as part of the stipulations.

Pursuant to Section 8(a) of the Act, an employer must pay for "…all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred…" that are reasonably required to cure or relieve the claimant's injuries. When interpreting this provision, Illinois courts have determined that specific procedures or treatments that have been prescribed by a medical provider are "incurred." *See e.g., Plantation Mfg. Co. v. Indus. Comm'n*, 691 N.E.2d 13, 17 (1997). There is no evidence that any of Petitioner's treating doctors prescribed medical treatment that remained pending Respondent's authorization on the date of hearing. In the final office visit notes, Dr. Maki discharged Petitioner from his care. While Dr. Goodspeed recommended the left hip heterotopic ossification resection surgery during the September 19, 2019, visit, it is undisputed that Petitioner underwent the procedure prior to the date of hearing. Petitioner testified that he continues to attend physical therapy following the recent surgery. The Commission notes that Petitioner did not testify that he had any pending prescriptions for treatment. While Dr. Goodspeed identified several issues that would need to be addressed in the future, he did not make any additional treatment recommendations.

While Petitioner's ongoing medical issues are indeed complex, that complexity does not alter the requirement that he meets his burden of proving an entitlement to prospective medical treatment. The Commission only has authority to award specific treatment that has been prescribed by a physician. Thus, the Commission vacates the Arbitrator's award of prospective medical care.

On the final page of the Decision (page 28), the Arbitrator wrote: "Arbitrator orders Respondent to authorize and pay for prospective and/or ongoing medical care with Dr. Goodspeed and Petitioner's other treating physicians for reasonable and necessary medical treatment causally related to the May 18, 2018 accident." The Commission hereby strikes this sentence in its entirety from the Decision.

Finally, the Commission corrects certain errors in the Decision. On the Decision Form and on the final page of the Arbitration Decision (page 28), the Arbitrator mistakenly calculated the award of TTD benefits as $1,280.00 a week for 79-6/7 weeks for a total of $102,217.14. The Commission notes that the Arbitrator correctly awarded TTD benefits from May 9, 2018, through November 19, 2019. However, this calculates to a period of 80 weeks for a total of $102,400.00. The Commission hereby modifies the Decision Form and the final page of the Decision to read as follows:

> Arbitrator orders Respondent to pay temporary total disability benefits from 5/9/2018 to 11/19/2019 for **80** weeks at a weekly rate of $1,280.00 for a total of **$102,400.00**. (Decision Form)
>
> The Arbitrator orders Respondent to pay TTD benefits of $1,280.00 a week for **80** weeks for a total of **$102,400.00**. (page 28).

The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on March 9, 2020, is modified as stated herein.

IT IS FURTHER ORDERED that Petitioner sustained an accident arising out of and in the course of his employment on May 8, 2018.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary total disability benefits of $1,280.00/week for 80 weeks, commencing May 9, 2018, through November 19, 2019, as provided in Section 8(b) of the Act. Respondent shall receive a credit in the amount of $5,120.00 for TTD benefits previously paid to Petitioner.

IT IS FURTHER ORDERED that Respondent shall pay for reasonable and necessary medical services identified in Petitioner's Exhibit 15 in the amount of $583,383.49 subject to the medical fee schedule, 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 shall hold Petitioner harmless from any claims by Plumbers and Pipefitters Local 23 UA Health and Welfare Fund for payments identified in Petitioner's Exhibit 10, for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

IT IS FURTHER ORDERED that Respondent pay to Petitioner interest under §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.

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.

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.

June 12, 2023

d: 4/18/23
DJB/jds
43

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

23IWCC0257

BOYDEN, RICHARD
Employee/Petitioner

Case# **19WC005677**

MECHANICAL INC
Employer/Respondent

On 3/9/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.01% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2489 BLACK & JONES ATTYS AT LAW
TRACY JONES
308 W STATE SUITE 300
ROCKFORD, IL 61101

2965 KEEFE CAMPBELL BIERY & ASSOC
EUGENE F KEEFE
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

STATE OF ILLINOIS)
)SS.
COUNTY OF Lake)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Richard Boyden
Employee/Petitioner
v.
Mechanical Inc.
Employer/Respondent

Case # 19 WC 5677

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 **Glaub**, Arbitrator of the Commission, in the city of **Waukegan**, on **11/19/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **5/8/18**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$99,840.00**; the average weekly wage was **$1,920.00**.

On the date of accident, Petitioner was **45** 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 **$5,120.00** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$5,120.00**.

Respondent is entitled to a credit of **$312,116.37** under Section 8(j) of the Act.

ORDER

Arbitrator finds that the petitioner is a traveling employee and suffered an accidental injury on 5/8/18 while traveling to a job site which is causally related to several medical conditions.

Arbitrator orders Respondent to pay temporary total disability benefits from 5/9/18 to 11/19/19 for 79 6/7 weeks at a weekly rate of $1,280.00 for a total to trial date of $102,217.14.

Arbitrator orders Respondent to pay for medical bills pursuant to Section 8(a) and the Illinois Medical Fee Schedule as outlined in Petitioner's exhibit 15 in the amount of $583,383.49 and orders Respondent to hold Petitioner harmless for payments made by Plumbers and Pipefitters Local 23 UA Health and Welfare Fund pursuant to Petitioner's Exhibit 10.

Arbitrator orders Respondent to authorize and pay for prospective ongoing medical treatment with Dr. Goodspeed and Petitioner's other treating physicians.

Petitioner's Motion for Penalties and Attorney Fees is denied.

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

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

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

Signature of Arbitrator

March 6, 2020
Date

ICArbDec19(b)

MAR 9 - 2020

STATEMENT OF FACTS

The facts are undisputed in this case. The crucial issue was whether the Petitioner was a traveling employee at the time of the motor vehicle accident or not. If he was, then the claim is compensable. If not, then it is not compensable.

Petitioner is a member journeyman for the Plumbers and Pipefitters Union. He originally worked out of Local 597 in Chicago. While working out of Local 597, he was approached by Justin Lindeman asking if he wanted to work for Respondent, Mechanical Inc. out of Local 23's jurisdiction which is the Northwestern Illinois area. Petitioner then met with Justin at Local 23's office in Rockford, IL to discuss the job and fill out employment paperwork. TR 13.

They discussed that he would be working solely for Respondent Mechanical Inc. but that he would not be working at Respondent's physical location or premise. In fact, Petitioner testified that during the 19 months he worked there, Petitioner never went to Respondent's office location. Petitioner testified that he understood that the job would involve Respondent sending him to different job sites where Respondent was contracted to do work. He would go directly to each job site and would not first report to Respondent's location. He was not hired to work solely at one or two specific job sites but, instead, would be sent to any job site Respondent directed him to. TR 19. The nature of the work is such that Petitioner would be sent to whatever job site Respondent needed him to go to day to day. He would be told by a foreman each day what job site to report to the next morning and that he may spend several days or a couple weeks at each or he could go to a different site every day. TR 14.

At the meeting with Justin, Petitioner was directed to report for work November 21, 2016, at a job site in Stockton, IL called Pearl Valley Eggs. TR 15. Respondent had a contract to perform work at Pearl Valley Eggs. Petitioner testified he reported to Pearl Valley Eggs for work. From that point forward, he was told by a foreman at the end of each workday what job site he was to report to the next day. TR 16-18. In March of 2017, Petitioner transferred from Local 597 to Local 23 at the request of Respondent. Respondent had Petitioner working at job sites only within Local 23's jurisdiction. Petitioner testified

that between November 21, 2016 and May 8, 2018, he never once reported to or went to Respondent's business location. He reported directly to job sites directed by Respondent.

Petitioner testified that he drove his personal vehicle from his home, to the job site directed by the foreman, and back to his home. TR 21. He chose the safest and quickest route to each job site. TR 28. He was not compensated for travel to the job sites. TR 21. Petitioner testified that he had no control over where he was sent for work. He testified that if he refused work, he would have been laid off or terminated. TR 23. This was confirmed by Respondent's witness Justin Lindeman.

On May 8, 2018, Petitioner was on his way in his personal vehicle from his home to a job site at Berner Foods in Stockton, IL when he was involved in a head-on collision after another vehicle crossed the center lane hitting him. TD 28. PX 1, 2. He was alone in the vehicle. He lived about an hour from this job site. TR 29. This was not the first time he had reported to Berner Foods job site. See RX 1 and PX 16, 17. However, he was not working permanently at that location and he did not report to Respondent's location first. The driver who hit him died at the scene. Petitioner had to be extricated from the vehicle which took over an hour. He was then flown by Lifeline to Rockford Memorial Hospital. PX 2.

Petitioner suffered significant physical injuries which resulted in multiple surgeries. He has been limited to a wheelchair since the accident and has been unable to work. Respondent did not dispute the significance of the medical injuries, the reasonableness and necessity of treatment, the need for ongoing treatment, nor even his inability to work. Dr. Bryan Neal did a Section 12 exam and his report was admitted as RX 2. Briefly, Petitioner suffered right femur impaction and comminuted fracture of the tibial plateau, fracture of the right superior pubic ramus, right lateral meniscal tear, L1 vertebra fracture, C6-7 end plate fracture, nasal bone fractures, right rib fractures, multiple internal lacerations, intubation, left arm comminuted fracture to the proximal to mid-shaft of the radius and ulna with rotation and displacement of the distal fragment, right foot metatarsal fracture, left scapula fracture, left femur comminuted fracture of the shaft with angulation, impaction fracture to the midportion of the left

acetabulum, and comminuted fracture of the distal shaft of the left femur with displacement. He has undergone several surgeries to both legs, his arm, right hip, and left hip. He has been through extensive rehabilitation and has been hospitalized with pulmonary embolisms and severe infections with long term IV antibiotics. At the time of trial, he was still undergoing treatment and had a surgery to his left hip scheduled to take place.

Respondent denied benefits claiming Petitioner was not a traveling employee at the time of accident as he was traveling in his personal vehicle directly from his home to a job site. Petitioner argues he was a traveling employee from the moment he left his door because he was required by Respondent to travel to different job sites that are not Respondent's location, he was required to travel to different job sites each day, he never reported to work at the Respondent's location, he had no control where he was sent day to day, and he was not hired to work at only one location permanently. Both parties rely on the same undisputed facts.

CONCLUSIONS OF LAW

A. DID PETITIONER SUSTAIN AN ACCIDENTAL INJURY THAT AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITH RESPONDENT ON MAY 8, 2018?

The crucial issue in this case is whether Petitioner was a traveling employee when driving from his residence to a job site not owned or operated by Respondent, as directed, when he was involved in a motor vehicle accident. "The general rule is that an injury incurred by an employee in going to or returning from the place of employment does not arise out of or in the course of the employment and, hence, is not compensable." Commonwealth Edison Co. v. Industrial Comm'n, 86 Ill. 3d 534, 537 (1981). This is because an "employee's trip to and from work is the product of *his own decision* as to where he wants to live, a matter in which his employer ordinarily has no interest." Sjostrom v. Sproule, 33 Ill. 2d 40, 43 (1981).

An exception to the general rule applies, however, if the employee is a traveling employee. "Courts generally regard employees whose duties require them to travel away from their employer's premises

(traveling employees) differently from other employees when considering whether an injury arose out of and in the course of employment." Wright v. Industrial Comm'n., 62 Ill. 2d 65, 68 (1985). If a traveling employee is injured, the court then considers whether the employee's activity was compensable. Id. at 69. An injury to a traveling employee is compensable if 1) he is performing an act the employer instructs him to, 2) he is performing an act that he has a common law or statutory duty to perform while performing duties for the employer, or 3) he is performing acts which might be reasonably expected incident to his assigned duties. Venture-Newberg-Perini v. Ill. Workers' Comp. Comm'n, 2013 IL 115728; 1 N.E.3d 535, 540 (2013).

The first issue to be decided in the instant case is whether Petitioner was a traveling employee when he was driving from his home to Berner Foods in Stockton, IL to perform contract work for Respondent, Mechanical Inc., at the Berner Foods job site. Respondent argues that Petitioner was not a traveling employee because he was on his way to a job site where he had been before and knew he would be returning to at various times but concedes that the job site was not owned or maintained by the Respondent and was not a permanent job site. Petitioner argues that since he was not traveling to Respondent's location but was instead driving to a customer's location to perform work for Respondent, he was a traveling employee from the time he left his home until he returned home. There are several cases that are instructive on this issue and will be set forth below.

The primary case Respondent relies on is Venture-Newberg-Perini v. Ill. Workers' Comp. Comm'n [hereinafter referred to as "Venture-Newberg"]. Id. In Venture-Newberg, the Supreme Court held that the claimant was not a traveling employee. Claimant was a member of the Plumber and Pipefitter Union Local 137. Due to lack of work, claimant accepted a position outside of Local 137's territory at a job site 200 miles away for Venture-Newberg at the Cordova Nuclear plant. Id. at 537. Claimant voluntarily chose to relocate to a motel near the job site. Claimant and Venture-Newberg were clear that the work Venture-Newberg would have him do would take place solely at the Cordova Nuclear plant and that he was not going to be working at any other job sites. Id. at 538. While commuting from the motel to the

Cordova Plant, claimant was in a motor vehicle accident and injured. The Supreme Court in Venture-Newberg analyzed several cases addressing the traveling employee doctrine. After analyzing the case law and after careful consideration, the Supreme Court held that claimant was not a traveling employee. The primary reasons they found him to not be a traveling employee were:

> 1. Claimant took a position with Venture-Newberg at a single job site in Cordova, IL more than 200 miles from his home. Id at 538.
> 2. Claimant's "position with the Cordova plant was to be temporary"...and he would be "terminated at the completion of the job." Id. at 538.
> 3. Claimant was not working for Venture-Newberg on a long-term exclusive basis. Id. at 541.
> 4. Claimant was not required to take the job at the Cordova Plant for Venture-Newberg. Id. at 541.
> 5. Claimant had worked on four short term projects for Venture-Newberg in 2004 and 2006 and was laid off after each individual project and not considered an employee of Venture-Newberg between projects. Id. at 541.
> 6. Claimant was not directed to travel to different locations during each employment by Venture-Newburg. Id. at 541. In fact, Claimant worked only at a specific location and was not directed by Venture-Newberg to travel away from that work site to another location. Id. at 541.

Petitioner in the instant case argues that the facts here are distinguishable from Venture-Newberg. In the instant case, Petitioner did not voluntarily take a job assignment from Respondent to work in only one location hundreds of miles away. More significantly, Petitioner did not take a job where he worked at only one location nor could he choose where to live relative to that single location. None of the 28 job sites that Petitioner was sent to were permanent jobs lasting several months or year. Petitioner was never to be working at one single address or location like the employee in Venture-Newberg did. Furthermore, all witnesses confirmed that Petitioner could have been sent to different job sites throughout the day occasionally, but that he was in fact directed on what job site to which he had to report on a day by day basis. This is extremely different from the facts in Venture-Newberg where claimant was agreeing to work at only one location day after day. Petitioner relies on a multitude of other Supreme Court, Appellate Court, and Illinois Workers' Compensation Commission decisions in support of his position that he was a traveling employee from the time he left his home to travel to a job site that was not the Respondent's business location until such time as he returned home. What follows is a lengthy review of several of those cases.

In Wright v. Industrial Comm'n., the Supreme Court found claimant to be a traveling employee. 62 Ill. 2d 65 (1985). Claimant was a field erection supervisor who traveled out of state where he would stay for months at a time. The Court found claimant was a traveling employee because he was a permanent employee of and worked exclusively for the employer. Id. at 541. Furthermore, claimant had no choice as to where he was sent for work by the employer. He had to go where the employer directed him to. Id. Wright was distinguished from Venture-Newberg because Wright was a permanent employee and was required by the employer to travel to other locations; it was not voluntary to take the assignments. The instant case is similar because Petitioner worked exclusively for Respondent from November of 2016 until the accident. Petitioner never reported to Respondent's work location. Instead, Petitioner was told on a day by day basis what remote job site for customers that he was to report to. Respondent's witness confirmed that Petitioner could be disciplined or terminated if he refused to go to a location directed. There was nothing voluntary about Petitioner's agreement to report to the job sites. If he refused, he would likely have had to find work for another employer.

Similarly, in Chicago Bridge, the 5th District Appellate Court found claimant to be a traveling employee. 248 Ill. App. 3d at 688 (5th Dist. 1993). Claimant worked exclusively for employer for 19 years despite not being a permanent employee. He was required to travel to various job sites out of state where he would work for a period of time, staying in a motel, at a single location that was not owned by the employer. Claimant would be terminated upon completion of each job and then was rehired when a new job assignment from employer would come available. It was not voluntary as to whether Claimant traveled to various job sites. If he turned them down, he did not work for the employer. Additionally, he was compensated for mileage when traveling to job sites. The instant case is similar with the exception of the reimbursement for travel expenses. The evidence at trial suggested Petitioner was compensated only for 10 minutes before the start of the workday to 10 minutes after. He was not paid for travel to and from job sites. However, that is not the deciding factor. The courts clearly put more emphasis on 1) was the location owned by the employer and therefore their work premise, 2) did the employee work exclusively

for employer or could he work elsewhere as well, and 3) was it voluntary on where employee traveled for the work. These factors all point to the conclusion that Petitioner was a traveling employee from when he left his home until he returned.

The Supreme Court found a traveling salesman was to be a traveling employee in Urban v. Indust. Comm'n, 34 Ill. 2d 159 (1996). In that case, the court found it significant that claimant was regularly employed with the employer and he was directed to and required by his employer to travel to remote locations. Therefore, he was found to be a traveling employee. Again, this is the same as in the instant case.

The Supreme Court discussed in detail in the Venture-Newberg decision several other cases where they found claimants were traveling employees where they worked regularly for the employer and were required to or directed by the employer to travel to remote locations, sometimes daily or multiple times a day and sometimes for days, week, or even months at a time.. A field mechanic who traveled daily to work on equipment at customer's locations was a traveling employee in Howell Tractor & Equipment Co. v Indust. Comm'n. 78 Ill 3d 567 (1980). A union representative who traveled to meetings and hearings was a traveling employee in District 141 Int'l Ass'n of Machinists & Aerospace Workers v. Indust. Comm'n. 79 Ill. 2d 544 (1980). An employee of health services who traveled to different schools each day was a traveling employee in Hoffman v. Indust. Comm'n. 109 Ill. 3d 194 (1985). The 2nd District Appellate Court held that a bank manager who traveled to different bank branches daily was a traveling employee in Kertis v Ill. Workers' Comp. Comm'n, 2013 IL App. 2d 120252WC (2nd Dist. 2013). A truck driver was also found to be a traveling employee by the 1st Dist. Appellate Court in Potenzo v. Ill. Workers' Comp. Comm'n, 378 Ill. App. 3d 113 (1st Dist. 2007).

A further review of case law finds other relevant cases on point. Although the Arbitrator finds no case with the exact same factual scenario, the Arbitrator finds the following cases important to compare or distinguish from the instant case.

The 3rd Dist. Appellate Court found an employee was not a traveling employee in Allenbaugh v Ill. Workers' Comp. Comm'n. 2016 IL App. 3d 150284WC (3rd Sit. 2016). That case involved a police officer who, rather than being on patrol in his district, had to report to the police headquarters for mandatory training. On his way to the station, he was in an accident. The Court correctly stated that the "work related trip at issue must be more than a regular commute from the employee's home to the employer's premises." Id. at 15. At the time of the accident, claimant was driving to the employer's premises, police headquarters. Since he was traveling to employer's location and not a remote location, he was not a traveling employee. It is true that he was supposed to later travel to a remote location and had the accident happened on his way there, the result would have been different. However, this was nothing more than a regular commute to employer's premise. Allenbaugh is distinguishable from the instant case because Petitioner was not on his way to Respondent's premises or location. He was on his way to a job site for a customer of Respondent. Yes, he was going from his home to the job site, but that isn't the most important factor. The most important factor is where he was directed to go by the Respondent, and that was a remote location. Therefore, Allenbaugh supports the conclusion that Petitioner was a traveling employee.

Another case Respondent would try to rely upon is United Airlines Inc. v Ill. Workers' Comp. Comm'n. 2016 Ill App. (1st) 151693WC (1st Dist. 2016). That case involved a flight attendant who operated out of United Airline's domicile located in New York. The flight attendant chose to reside in Colorado and could have transferred her work domicile to Denver. However, the employee chose to keep working out of the New York work site. Therefore, when she reported to work, she had to travel to the employer's work location or work premises or work domicile in New York before she began her work assignment. As such, her voluntary choice to reside in Colorado and travel to New York to report for work meant that she was not a traveling employee until she reached her work location in New York. Once she arrived in New York and reported for work, she became a traveling employee wherever she was sent until she returned to New York. But the trip to New York was considered no different than a

police officer commuting to police headquarters. Id. 24, 32. This case is distinguishable from the instant matter because Petitioner never reported to the employer's location for work. He went from his home to a different job site which was not the employer's location each day. For the same reasons as stated in Allenbaugh above, United Airlines is distinguishable from the instant case.

The 2nd District Appellate Court considered the issue of door to door extensively in Pryor v Ill. Workers' Comp. Comm'n. 2015 IL. App. 2d (2nd) 130874WC (2nd Dist. 2015). Pryor involved a truck driver who drove over the road for work. He left his home (with his suitcase in hand) and fell getting into his car in his own driveway. Normally he would leave his home and drive to the employer's premises where he would get into the truck he was assigned and then travel to various locations delivering and picking up vehicles. Id. at 5, 22. The Appellate Court held he was not a traveling employee when he left his home because he first had to report to the employer's premises before he began work. He was not paid for the drive from his home to the employer's location. He also had to return after each trip to the employer's location before he could get into his personal vehicle and commute home. The court found it significant that he had to start and end at the employer's location, not at his home. Therefore, the court found that he was not a traveling employee until he got to the employer's location. Id. at 29. Pryor is very distinguishable from the instant case. In the instant case, Petitioner did not report each day to Respondent's location or business. He drove directly from his home to the job site and that job site could and did change daily. Therefore, he was a traveling employee from his door until he returned to his door after work.

In the Pryor decision, the Court took a hard look at the 3rd Dist. Appellate Court's decision in Mlynarczyk v. Ill. Workers' Comp. Comm'n. 2013 IL App. (3d) 120411WC (3rd Dist. 2013). That case also involved a claimant who had an injury leaving their home and getting into a company vehicle on their property. Claimant went home on lunch and when she went to leave, she slipped on the sidewalk getting into her work van. Id. at 6. The Court found that claimant did not work at a fixed job site but was required to travel to various locations. Therefore, the court found that she was a traveling employee from

the time she left her home until she returned. Id. at 16. This is identical to the instant case. Petitioner did not have a central job location. Petitioner's work for Respondent required him to travel to various job sites. Petitioner was injured while traveling to one of those job sites. Therefore, Mlynarczyk supports a finding that Petitioner was a traveling employee. As a side note, an important thing to note in this case is the Court's mention in a footnote that "Respondent concedes that claimant does not have a central job location and that claimant's work for respondent requires her to travel to various job sites. Respondent contends, however, that claimant's travel "is analogous to that of a "construction worker" and that "construction workers routinely travel to and from work sites and injuries that occur in that travel are not compensable because construction workers are not traveling employees. Respondent cites no authority for this proposition and we therefore do not address it." Id. at 16. As it is a footnote, it is not precedential. However, the Arbitrator notes that a thorough review of the case law shows no support for that position at all. In so far as Respondent, Mechanical Inc. argues a similar position, the Arbitrator finds there is no case law to support such a position and there are several other cases which would tend to draw the opposite conclusion to that position. Therefore, the Arbitrator finds there is no such legal preclusion of the application of the traveling employee doctrine to construction workers.

The Arbitrator also did a thorough review of IWCC decisions to see if there are any similar cases on point already decided by our Commission. The Arbitrator finds no case directly on point, but there are several that are persuasive that must be considered. In Masters v IL Dept. of Healthcare and Family Services, in addition to some time spent in her office on employer's premises, claimant was required to travel to different courthouses and circuit clerk's offices for research. 2018 Ill. Wrk. Comp. LEXIS 835 at 2 (2018). She did not travel away from her office every day, but on at least 11 days a month she would travel to courthouses or circuit clerks' offices. When going to a courthouse, she tripped on grass walking to her car. Id. at 3. The IWCC found that she was a traveling employee. Id. at 12. The IWCC held that since her duties required travel "away from her employer's premises to various locations...travel was an essential element of [her] employment and [she] is a traveling employee." Id. at 13. This case is

analogous to the instant matter. Petitioner in the instant case was required to travel away from Respondent's office to various locations. Therefore, travel was an essential element of his employment. This case supports a finding that Petitioner was a traveling employee when involved in the accident on the way to a job site.

This is contrasted against the IWCC's decision in Brustin v Brustin & Lundblad, LTD. 2019 Ill. Wrk. Comp. LEXIS 417 (2019). In that case, an attorney was called by his office about an early appointment he had forgotten. He was rushing to get ready at home and get to the office for that meeting when he was injured. The Commission found that he was not a traveling employee as he was traveling to the employer's location or premises. It doesn't matter if he was rushing to get there because of a work related emergent situation. Since he was going to the employer's office, he was just in his normal commute to work and was not a traveling employee. Again, this case is different than the instant matter. In the instant case, Petitioner was not traveling to the employer's location. He never went to the Respondent's location. He was traveling to a job site as required by the Respondent that was not their location. This case supports a finding that Petitioner was a traveling employee.

Another IWCC decision that supports a finding in favor of Petitioner is Rivera v County of Lake, 2015 Ill. Wrk. Comp. LEXIS 480 (2015). In Rivera, the IWCC found the employee to be a traveling employee. He worked as a special investigator for the state's attorney's office. He drove a state owned vehicle and was loading state owned equipment into the vehicle at his home when he slipped on ice. Since his job required him to spend the day traveling to various places to serve warrants and summons on individuals and, on that day, he was going to travel from his home to a location away from the employer's location, he was a traveling employee from the time he left the door of his home until he returned. This case is also similar to the instant case. Petitioner was driving to other locations and not to the Respondent's location from his home. The only difference is that he was driving to only one location and not several like the claimant in Rivera. But that difference, in light of the cases cited above, is not important. Petitioner was clearly a traveling employee.

One IWCC decision deals with a union plumber who worked for a single employer for several years just as the Petitioner in the instant case. In Dileonardi v City of Chicago, the claimant worked for the city but his job required him to, normally, report first to Respondent's office each day. 2017 Ill. Wrk. Comp. LEXIS 598 (2017). From there he would go out into the field where he would supervise and direct 5 or 6 work crews at various job sites throughout the area. Id. at 2. He would spend about 6 hours a day away from the office driving between locations. He was injured when he slipped on a curb at one such location away from the office. The IWCC found that from the time he left the office until he returned, he was a traveling employee. Id. at 45, 50.

In his thorough review of the case law, the Arbitrator did find a 1st District Appellate Court case that is almost directly on point to the instant case. Kenaga v. Ill. Workers' Comp. Comm'n, RULE 23, 2017 IL App. (1st) 161859WC (1st Dist. 2017). However, the case is a Rule 23 decision. The Arbitrator recognizes that Rule 23 decisions are not binding as precedential and the Arbitrator reviewed it with that understanding. However, it is important in so far as understanding that the IWCC's decision, which he can cite to and rely on, in the earlier proceeding was reversed and remanded for a finding that the employee was a traveling employee. The Appellate Court found that a police officer having to drive his personal vehicle to a courthouse on his day off for a mandatory court appearance associated with his work was a traveling employee since he was not on his way to his employer's location. Because of the Appellate Court's reversal, any citation to or reliance on the IWCC's original decision would be inaccurate. The Commission, on several occasions in the past, has acknowledged affirmations and reversals of their holdings where those decisions were Rule 23 holdings. See: Esposito v. Fleetwood Systems, Inc. 2000 Ill. Wrk. Comp. LEXIS 87 (2000); Bays v. Bermingham Steel Corp., 2001 Ill. Wrk. Comp. LEXIS 415 (2001); Kapanowski v Village of Merrionette Park Police Department, 2019 Ill. Wrk. Comp. LEXIS 366 (2019); Matlock v AMR-American Airlines, 1999 Ill. Wrk. Comp. LEXIS 18 (1999); Crackel v SIH Memorial Hospital of Carbondale, 2017 Ill. Wrk. Comp. LEXIS 309 (2017). Given that the Rule 23 decision of Kenega v. Ill. Wrk. Comp Comm'n so closely parallels the facts in the instant

case, the Arbitrator would be remiss to not acknowledge that the Commission's finding that claimant was not a traveling employee was reversed for sound reasoning. This just further supports the conclusion the Arbitrator had already reached that Petitioner, Michael Boyden, was a traveling employee at the time of the motor vehicle accident.

After the extensive review of case law, the Arbitrator finds that Petitioner was a traveling employee from the time he left his home traveling to the remote job site on 5/8/18. Petitioner was exclusively employed by Respondent. Petitioner did not report to Respondent's location or premises before going to a job site. Respondent did not hire Petitioner to work at only one location. It was understood by both Respondent and Petitioner that Petitioner would be sent to different locations, not owned or maintained by Respondent, each day. Respondent directed Petitioner what job site to report for work each day and that location changed daily. It was understood that although he may be told to report to one location for several days in a row, at the end of each and every workday, the location he was to report to the next day could change. Respondent had exclusive control over where Petitioner worked. Respondent could have had Petitioner work at a single location, but they did not. Although it was Petitioner's choice where to reside, he had no control day to day where he would be driving to for work. That was exclusively in the control of the Respondent. The day of the accident, Petitioner was driving the most direct route to the Berner Foods job site. Petitioner had been on that job site at various times during his employment but was not at that site exclusively. In fact, Petitioner testified he never started a job site and then worked exclusively on it until finished for Respondent. He was always moved around from one place to another day to day. Petitioner worked at a total of 29 different job sites between November of 2016 and May 8, 2018 all for Respondent. Petitioner was never guaranteed to work the same site day after day; therefore, he was unable to make plans based on specific locations since he never knew where he would be sent day after day. Petitioner was not able to make a personal choice on where his residence is located based on a location he would be working unlike the claimant in Venture-Newberg. Petitioner was sent to more than one location in a single day at times. If he refused to report to a specific job site, he would be disciplined

or terminated. The Berner Foods job site was not the closest job site to Petitioner's home and his home address did not change during the time he worked for Respondent. All of these facts support overwhelmingly that Petitioner was a traveling employee at the time of the accident on 5/8/18.

The second issue to be analyzed in determining whether the accident arose out of and in the course of the employment is whether the activity the employee was engaged in at the time of the injury was reasonable and foreseeable. Wright at 62 Ill. 2d 65 at 69. Only those which arise out of acts which the employee is instructed to perform, acts which he has a common law or statutory duty to perform, or acts which the employee might be reasonably expected to perform incident to his duties are compensable. Id. It is entirely reasonable and foreseeable that Petitioner would be driving from his home to the job site on the most direct route available. It is entirely reasonable and foreseeable that he may be in a motor vehicle accident on his way which was caused by the negligence of another party. The Supreme Court found in Wright that a motor vehicle accident while driving to a job site is both reasonable and foreseeable. Id. at 67.

As such, the arbitrator finds that the petitioner was engaged in an activity that was reasonable and foreseeable while traveling to a job site. Therefore, the Arbitrator finds that Petitioner suffered an accidental injury that arose out of and in the course of his traveling employment for Respondent on May 8, 2018 and awards benefits consistent therewith.

B. DID PETITIONER GIVE NOTICE TO RESPONDENT OF THE ACCIDENT?

The facts regarding notice are not in dispute. Petitioner was in a motor vehicle accident on May 8, 2018 on his way to a job site at Berner Foods at the direction of the Respondent. Respondent was made aware of the accident the same day as confirmed by Respondent's witness Chris Loring. Petitioner was not able to come into work nor return to work after the accident due to the injuries. Respondent was aware of the accident and injuries on May 8, 2018. Respondent argues that it was not notified that petitioner was alleging it was a work-related injury until January of 2019 when one of the supervisors, Steve Peterson, mentioned it to Chris Loring. It is undisputed that Petitioner filed an Application for

Adjustment of Claim on February 25, 2019. Arb. X 2. Respondent argues that actual notice of the accident, without indicating that he intended on pursuing it as a work-related injury within 45 days of May 8, 2018 does not meet the requirements of statutory notice. The Arbitrator disagrees. Section 6 of the Act requires notice of an injury within 45 days of the accident but Section 6(c)(2) mandates a liberal construction of the issue of notice. Atl. & Pac. Tea Co. v Indus. Comm'n, 67 Ill. 3d 137 (1977). "Where there was no evidence that a claim was fraudulent, nor was there any indication that the alleged insufficiency of notice prejudiced the employer by preventing disclosure of facts which might otherwise have been discovered or by causing aggravation of the claimant's injury due to lack of proper medical treatment, under these circumstances a liberal construction of the statutory notice provision was justified." United States Steel Corp. v. Industrial Comm'n, 32 Ill. 2d 68 (1964). This section does not require the notice to an employer of injury to an employee be in any precise or technical form. A. T. Willett Co. v. Industrial Comm'n, 287 Ill. 487, (1919).

It is undisputed that Respondent knew about the accident the day it happened. And Petitioner filed the Application for Adjustment of Claim well within the 3-year statute of limitations. Respondent failed to present any evidence at all to suggest they were prejudiced in any way by the delayed filing of the Application for 8 months. Furthermore, the Arbitrator notes Petitioner was unresponsive and intubated in the ICU followed by a lengthy stay at the hospital and then in a rehab facility for several months which would prevent him going to the Respondent to discuss it. Therefore, the Arbitrator finds that Petitioner gave timely notice of the accident as required by section 6 of the Act.

C. IS PETITIONER ENTITLED TO BENEFITS INCLUDING MEDICAL BILLS, PROSPECTIVE MEDICAL TREATMENT, AND TTD BENEFITS?

Respondent disputed causal connection, payment of medical bills, approval of prospective treatment, and payment of temporary total disability benefits based on liability for accident and notice only. Having found that Petitioner sustained a compensable injury at work on May 8, 2018, the Arbitrator finds that Petitioner is entitled to such benefits.

The Arbitrator orders Respondent to pay TTD benefits of $1,280.00 a week for 79 6/7 weeks for a total through the date of trial owed of $102,217.14. Respondent is entitled to a credit for $5,120.00 in TTD paid prior to trial.

The Arbitrator orders Respondent to pay for medical bills pursuant to Section 8(a) and the Illinois Medical Fee Schedule as outlined in PX 15 in the amount of $583,383.49 and orders Respondent to hold Petitioner harmless for payments made by Plumbers and Pipefitters Local 23 UA Health and Welfare Fund pursuant to Petitioner's Exhibit 10.

Arbitrator orders Respondent to authorize and pay for prospective and/or ongoing medical care with Dr. Goodspeed and Petitioner's other treating physicians for reasonable and necessary medical treatment causally related to the May 18, 2018 accident.

D. SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT?

After careful consideration of the facts and case law, the Arbitrator finds that Respondent had a reasonable legal basis in disputing the compensability of this claim. Specifically, the Arbitrator finds that both parties tendered strong legal arguments in support of their respective legal positions on the issue of whether the petitioner was a travelling employee. Therefore, the petitioner's attorney Motion for Penalties and Attorney's Fees is denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC006284
Case Name	Delores Vaughn v. HEI Hospitality/Marriott International Inc
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0258
Number of Pages of Decision	31
Decision Issued By	Deborah Simpson, Commissioner, Deborah Baker, Commissioner

Petitioner Attorney	Brien DiNella
Respondent Attorney	Aukse Grigaliunas

DATE FILED: 6/12/2023

/s/ Deborah Simpson, Commissioner

Signature

DISSENT: /s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with 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

DELORES VAUGHN,

Petitioner,

vs. NO: 19 WC 6284

HEI HOSPITALITY/MARRIOT INTERNATIONAL,

Respondent.

DECISION AND OPINION ON REVIEW

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

Findings of Fact - Testimony

Petitioner testified that her highest level of education was freshman year in high school. On August 17, 2018 she worked for a Respondent hotel as a housekeeper and had been so employed for 18 years. For six years prior to that she worked at another hotel, also as a housekeeper. Her job was "to clean the guest rooms and make sure everything is sparkly, shiny, clean." Her job included cleaning the bathrooms, tripping the linen on the beds, and taking towels out of the bathroom. Typically, she would clean 14 to 15 rooms a day. She was on her feet most of the day and had to push the cart with all the linen which weighs at least 200 pounds.

On August 17, 2018, she was taking the duvet off, stepped back, and twisted her knee. She hobbled to the phone and called her manager. She could not walk and they had to call an

ambulance to get her out and take her to Northwestern Hospital. She filled out an accident report, but was not sure if it was on the same day.

After the ER visit, Respondent sent her for treatment to Concentra, where she came under the care of Dr. Nam. She had treated with Dr. Nam for a year previously for her left knee. He just gave her an injection in the "right knee and that's it." Insurance would not allow treatment for the right knee. Petitioner began to treat with Dr. Rhode, who ordered an MRI. She also saw Dr. Karlsson, Respondent's Section 12 medical examiner. Eventually, Dr. Rhode performed a knee replacement.

She last saw Dr. Rhode in August of 2020. At that time he put what appeared to be permanent restrictions on her of 50 pounds lifting, no bending, no climbing, "and pushing, no, not too much." Petitioner testified that the injury changed her life for the worse, she can no longer ride a bicycle, she no longer took long walks, she can no longer do laundry because she cannot use the stairs, and she could not sit/stand for prolonged periods. After Dr. Rhode imposed restrictions on her, she was not able to return to work at her prior job. She had not been able to look for another job due to the pandemic. Currently, she took Acetaminophen for pain.

Petitioner acknowledged some pain/ailment in her knee before the accident, but "it was because [she] had been limping so long on [her] left knee that it was affecting [her] right knee." Dr. Rhode told her all he could do for the right knee was administer an injection. Her condition changed after the accident.

On cross examination, Petitioner agreed that it was important to be truthful with her doctors. She told the truth to her doctors at Northwestern, Rush, and at Concentra, as well as to Dr. Karlsson, whom she saw twice. She agreed that Dr. Rhode performed an arthroplasty on September 25, 2018. She agreed that she reported falling down some stairs and striking both her knees on concrete in November of 2017. Finally, she agreed that she had an injection in her right knee in July of 2018.

On redirect examination, Petitioner testified she recalled being treated at Concentra, she testified she was truthful with the doctors at Concentra, and that was shortly after the accident.

Findings of Fact – Medical Records

An MRI of the right knee taken on December 16, 2017 for right knee pain of unspecified chronicity, showed focal areas of full-thickness cartilage loss in the mid trochlear and patellar apex with a small effusion.

On January 12, 2018, Petitioner presented to Mr. Shinsako, PA, at Rush Orthopedics for evaluation of pain/swelling in her knees, worse on the left. The right knee pain was in the anterolateral area. She reported the onset of knee pain in October of 2017 without acute injury, but it could be associated with the onset of right-sided back spasms She had an injection a month

earlier which provided a day of relief. She was not currently working at her job in housekeeping. Mr. Shinsako noted that an MRI of the right knee taken on December 16, 2017 showed mild medial arthritis, likely two-three thinning of the articular surface, and some edema in the ACL. There was no signal within the medial or lateral meniscus, major ligaments were intact, and there were no subchondral changes.

On July 30, 2018, Petitioner returned to Rush and presented to Dr. Cole following up after left-knee arthroscopy, synovectomy, and debridement of articular cartilage on May 2, 2018. Petitioner also reported she was required to use a cane because of the pain in her left knee. She was now getting pain in her right knee, which she attributed to compensation due to the antalgic gait. Dr. Cole noted that during the arthroscopy, he found grade four medical femoral condyle and trochlea arthritis. He referred Petitioner to Dr. Nam for consideration of arthroplasty and administered an injection in the right knee.

On August 16, 2018, Petitioner presented to Dr. Nam for evaluation of bilateral knee pain, left worse than right, for about a year. She had arthroscopic surgery with Dr. Cole, in which he found more arthritis than expected. Petitioner reported the arthroscopy did not provide relief. She had left-knee injection six weeks previously and in the right knee three weeks previously, both of which provided minimal relief. Dr. Nam's diagnosis was bilateral arthritis of the knees, left more symptomatic that day and recommended a left-knee arthroplasty which was scheduled for September 25, 2018.

On August 17, 2018, Petitioner presented to the Northwestern Hospital ER. She was twisting to put a duvet cover on a bed, felt an acute pop/severe pain in her right knee, and fell unto her knee. She had severe arthritis in the left knee but reported no prior issues with the right knee. Range of motion was limited by pain, distal neurovascular was intact, and negative gross crepitence to limited range. X-rays showed no definite acute fracture but did show a 1.7 cm fragment which might represent an age-indeterminant fracture fragment, or may relate to prior trauma and small joint effusion. Dr. Lee provided crutches, an ace wrap, and light duty note. She was going to follow up with Rush, where she was treating for her left-knee arthritis.

On August 21, 2018, Petitioner presented to Dr. Al-Saraf at Concentra and reported injury to her right knee 18 when she twisted her knee stripping a bed. She was 5 foot 6 inches and 240 pounds. She went to an ER and was prescribed Meloxicam and Tramadol. She had arthritis in the left knee, had an arthroscopic exam, and was planning on a replacement of the left knee. Dr. Al-Saraf diagnosed right knee strain, ordered x-rays, placed work restrictions on her, and referred Petitioner to physical therapy. X-rays of the right knee showed minimal osteoarthritis with joint effusion.

On December 4, 2018, Petitioner returned to Dr. Nam at Rush 10 weeks after her left-knee arthroplasty. She reported her right knee was severely painful and limited her ability to rehab. She tried an injection in the right knee without relief. Dr. Nam advised Petitioner that they should

consider manipulation under anesthesia for the left knee which was getting progressively stiffer. He was worried that her right knee condition would inhibit her recovery.

Petitioner continued to treat at Concentra. On February 15, 2019, Petitioner returned and Dr. Al-Saraf noted her knee locked up and the pain worsened to 8/10. She was in physical therapy and taking Meloxicam once a day. Dr. Al-Saraf thought her current symptoms were related to arthritis and Petitioner had "restrictions for a condition unrelated to the present work injury." A week later, Petitioner returned still reporting 8/10 pain. Dr. Al-Saraf referred her to orthopedics.

On March 1, 2019, Petitioner presented to Mark Bordick, PA, at Orland Park Orthopedics for consultation for right knee pain, catching, and periodic locking secondary to an injury at work on August 17, 2019. She reported changing sheets on a bed, stepping back, her right knee buckled, and she fell. She had significant pain, could not walk, and was taken to the Northwestern ER. A company doctor told her it was just arthritis and there was nothing that could be done. She reported no discomfort to the right knee prior to the accident. Mr. Bordick ordered an MRI due to her mechanical symptoms and took her off work.

An MRI of the right knee taken on March 11, 2019 showed mild degenerative joint disease predominantly in the medial compartment with joint effusion, grade IV chondromalacia, grade I sprains of the ACL/MCL, grade III vertical tear in the posterior root of the medial meniscus with resultant medial extrusion of the body of the meniscus, and subcutaneous soft tissue swelling on the anterior aspect of the knee. She reported changing sheets, stepping back, her right knee buckled, and she fell. She had significant pain, could not walk, and was taken to the Northwestern ER. A company doctor told her it was "just arthritis and there was nothing that could be done." Mr. Bordick diagnosed knee pain and possible meniscus tear, ordered an MRI, and took Petitioner off work.

On April 10, 2019, Petitioner saw Dr. Rhode who noted that "she was stripping Duvet when she pulled it backwards. It gave way and twisted her right knee." She complained of popping/locking. Dr. Rhode administered an injection in the right knee, prescribed Meloxicam, and kept her off work.

Two weeks later, Petitioner reported the injection provided temporary relief and she continued to have mechanical symptoms. She denied any prior issues with her right knee. Dr. Rhode noted than a Section 12 medical examiner felt the mechanism of injury was not an appropriate causation mechanism. He understood "there is an element of pre-existing pathology but that does not suggest a pre-existing symptomatic meniscal tear. Her mechanism in (*sic*) not classic but her symptoms onset is." He kept her off work.

On July 30, 2019, Dr. Rhode performed right knee partial medial meniscectomy for right medial meniscus tear. Petitioner returned a week after partial medial meniscectomy. She was stable. Dr. Rhode noted he had her prior medical records. She was treated for bilateral anterior knee pain, left greater than right. Her treatment concentrated on the left knee and she had an

injection in the right knee three weeks prior to the accident. She had MRIs of her knees which did not show any torn medial meniscus.

On January 10, 2020, Dr. Rhode performed right-knee arthroplasty for right knee osteoarthritis. Petitioner presented to Mr. Bordick two weeks post arthroplasty. He noted she was stable and had increasing calf tenderness. He ordered a Doppler to rule out DVT and she would return in a week for removal of sutures if the Doppler was negative. Petitioner last saw Dr. Rhode on August 7, 2020, at which time Dr. Rhode noted that Petitioner had not been accommodated. He reiterated his permanent restrictions and released her from treatment *prn*.

Findings of Fact – Doctor Depositions

Dr. Rhode testified by deposition on September 17, 2020 that he was board-certified in both orthopedic surgery and sports medicine. Between himself and "physician extenders" he saw 300-350 patients a week and performed between 500 and 700 surgeries annually. He first saw Petitioner on March 1, 2019 and she reported a work-related injury to her right knee on August 18, 2018. At that time she was changing sheets on a bed, she stepped back, and her right knee buckled, and she fell. She had significate pain and was unable to walk. She treated with a company doctor who told her "it was just arthritis and nothing could be done."

Petitioner denied prior right knee pain prior to the fall. On examination, she exhibited tenderness in the medial joint line and a positive McMurry test suggesting medial meniscal pathology. She also reported mechanical complaints of catching/locking which is also indicative of a meniscus tear. The typical cause of a medical meniscus tear "is a turn or a twist while applying a compressive load." Such mechanism could also accelerate or aggravate a tear.

Dr. Rhode opined that at the time of his initial examination, Petitioner's condition of ill-being of her right knee was caused, accelerated, or aggravated by her work accident. Whatever treatment she received prior to her visiting him did not alleviate her symptoms. She still had similar symptoms that she reported initially. He ordered an MRI which showed evidence of a medial meniscus tear and chondromalacia, primarily medial as well. He started her on a home exercise program, took her off work, and administered an injection on her next visit on April 10, 2019.

Dr. Rhode reviewed a medical report from Dr. Karlsson who diagnosed Petitioner with medial compartment arthritis with a degenerative meniscus tear. Dr. Rhode did not agree with that diagnosis. He thought Petitioner had underlying degenerative joint disease and that Petitioner "had a symptomatic medial meniscus tear causally related to the patient's work-related injury."

Dr. Rhode also disagreed with Dr. Karlsson's opinion that the mechanism of injury Petitioner reported was not appropriate for a medial meniscus tear. She reported her knee gave way and twisted, which is a competent cause for this type of tear. He also noted that she denied any prior right-knee complaints.

Based on his clinical examination and Petitioner's temporary relief from the injection, Dr. Rhode believed it was reasonable to proceed with an arthroscopic surgery. She had the arthroscopy and eventually right knee arthroplasty. He last saw Petitioner on August 7, 2020 at which time he released her to medium duty with no squatting. He reiterated that Petitioner's work injury either caused the meniscus tear and/or aggravated her underlying degenerative condition. He again noted that she did not report any prior right-knee symptoms.

On cross, Dr. Rhode testified he understood that Petitioner was treated in an ER and then by a company doctor, but he did not review those records or know what treatment was rendered. About 20 to 30% of his patients are treated for knee problems and he performed between 50 and 100 knee surgeries annually. He estimated that over 50% of his patients are either workers' compensation or personal injury patients. Dr. Rhode acknowledged that in March of 2011 he was reprimanded by the Illinois Department of Finance and Professional Regulation for not performing a thorough initial examination of a patient.

Dr. Rhode agreed that his PA noted a history in which Petitioner was changing sheets, stepping back, her right knee buckled, and she fell. That note does not mention a twisting motion. He agreed that Petitioner's statement that she did not have any prior right-knee pain was incorrect. He noted a twisting motion in his initial treatment note on April 10, 2020, but he would not characterize this statement as different from the prior statement; it was "more complete."

Dr. Rhode agreed that Petitioner had pre-existing degenerative joint disease at the time of the accident and that he believed her meniscus tear and mechanical complaints were caused by the accident but the degenerative joint disease was not. If he were shown that Petitioner had mechanical complaints prior to the accident, that might change his opinion on causation. He saw no records of any prior mechanical symptoms.

Dr. Rhode then testified he received records from Dr. Nam around August of 2019, who performed the left knee arthroplasty. These records, as well as Dr. Karlsson's report were the first references he saw to prior right knee complaints. Injections would typically be administered for pain and inflammation and could be associated with many diagnoses including knee arthritis.

Dr. Rhode has administered injections for a medial meniscus tear. He administered an injection because Petitioner still had knee pain three months after the arthroscopic surgery. However, postop she did not have the positive McMurray and wasn't having mechanical problems. He believed she improved after the arthroscopic surgery.

Dr. Rhode agreed that intraoperatively he noted loss of cartilage due to degenerative joint disease and a complete loss of cartilage on the medical femoral condyle; "it's exposed bone." He disagreed with Dr. Karlsson's assessment because Petitioner had little to no degenerative joint disease in the lateral compartment. After the arthroscopy, Dr. Rhode recommended arthroplasty.

By June 12, 2020, Petitioner had good range of motion but noted she would need medium physical demand level work restrictions. He thought such restriction was appropriate after a knee replacement. There were not "any positive exam findings" between June 12, 2020 and August 7, 2020 when he placed her at maximum medical improvement. He agreed that Petitioner's noting a twisting motion was only documented on one of his treatment notes. Dr. Rhode noted that Petitioner had some prior complaints of right knee pain, but there was no report of medial right knee pain. She was not bone-on-bone, because that means there's exposed bone on both sides and the tibia was relatively unscathed. He did not believe that the grade IV chondromalacia was caused by the accident.

On redirect examination, Dr. Rhode testified he reviewed a prior MRI which did not demonstrate and medical meniscus tear. It was still his opinion that the meniscal tear was caused by the work accident.

Dr. Karlsson testified by deposition on April 26, 2021 that he was a board-certified orthopedic surgeon. His practice is general orthopedics, about 40% of his practice involves treatment of knees, and he performed well over 300 knee surgeries annually, about 200 to 250 of which were arthroplasties. He saw Petitioner for a Section 12 medical examination of her right knee and issued a report.

Petitioner reported she was stripping a cover off a duvet, stepped back, felt a pop in her knee, and fell to the floor. She was taken to an ER and told she had a muscle strain. She went to Concentra where she was treated with some physical therapy, and was referred to Dr. Rhode by her lawyer. She was going to first see Dr. Rhode the day after Dr. Rhode's examination. She had an MRI and the plan was for injections and there had not been any discussion of surgery.

Petitioner complained of constant 8/10 pain. She also reported popping in the knee and locking after sitting for more than 10 minutes or standing for more than an hour. She used a cane whenever she was out of the house.

On examination, Petitioner had some decreased range of motion with some pain at the extremes, tenderness on the medial/lateral joint lines, and pain on palpitation of the patella. He took x-rays which showed tricompartmental arthritis in the right knee, mild behind the kneecap and moderate-to-severe on the medial aspect of the knee.

Dr. Karlsson was asked whether any prior medical records stood out to him, he referenced a visit to Dr. Nam the day prior to the accident in which she complained of pain in both knees, tenderness in the right knee, and history of an injection in the right knee. Records from Rush indicated she reported pain in both knees since October of 2017, which worsened when she fell down steps in November of 2017. Petitioner did not report any prior knee symptoms during his examination, which was not consistent with the records he reviewed.

Dr. Karlsson diagnosed moderate-to-severe tricompartmental osteoarthritis of the right knee and degenerative medial meniscus tear. He did not believe the accident was a cause of the condition or caused any permanent aggravation of the condition. There was no evidence of an acute worsening of the condition and her mechanism of injury of stepping back and feeling a pop would not be consistent with causing a meniscal tear, which usually involves "some weightbearing on a flexed knee and some twisting while the knee is flexed."

Dr. Karlsson did not believe Petitioner needed any work restrictions noting that she was able to work full duty before her left knee replacement. She was not at maximum medical improvement for her degenerative condition. He recommended injections and if that was not successful, she would probably need a knee replacement. He did not believe arthroscopy was indicated because of the degree of arthritis she had in the knee.

Dr. Karlsson issued another report dated November 1, 2019 after review of additional records. The new records included Dr. Rhode's operative report of his arthroscopic surgery on July 30, 2019. Dr. Rhode reiterated that if he recommended any surgery, it would have been knee replacement. The new records not only supported his prior opinions, they confirmed that she had severe tricompartmental arthritis and a degenerative meniscal tear. He disagreed with Dr. Rhode's opinion that Petitioner's condition changed after the work injury; she had pain before the work injury, she had no acute change of her arthritis, and the mechanism of injury was not consistent with a meniscal tear. He noted that she had grade two to four degeneration in the patellofemoral joint and grade three to four degeneration of the medial portion of the joint. "In other words, she had areas down to bare bone on bone on both the medial portion of the joint and behind the kneecap."

Dr. Karlsson issued a second report dated July 6, 2020 after another examination of Petitioner and review of additional records. Petitioner reported she was not doing any better since the arthroscopic surgery and was told she needed a total knee replacement, which was performed in January of 2020. She had not improved with postop physical therapy but noted that the other knee took up to a year to improve after replacement. After his review of the new records and his examination, Dr. Karlsson's opinions remained the same. He noted that her history was not consistent with a meniscal tear and despite her meniscal tear, her overlying problems was grade four degenerative arthritis with areas of bare bone. "There was nothing about her work activities that caused this [condition]. There was no traumatic portion of this arthritis. There was no piece of cartilage that had been knocked off the bone. But, rather, this was a wear of cartilage that had occurred throughout her lifetime."

Dr. Karlsson thought the treatment she received was appropriate except for the initial arthroscopy, but none of the treatment was for her work injury. She did not need prospective treatment. He believed she could return to work without restrictions.

On cross examination, Dr. Karlsson agreed that Petitioner reported to him that she had no problems, diagnostic, or any treatment of her right knee prior to the accident. Petitioner also could

not recall the details of her treatment. He agreed that degenerative changes can become symptomatic with trauma. Noting a statement from Dr. Rhode that hyperextension of the knee could cause a tear, Dr. Karlsson testified "it can cause a tear in the anterior horn of the meniscus. It shouldn't cause a posterior meniscal tear." Dr. Karlsson believed that nearly 100% of his Section 12 examinations/reports involve workers' compensation matters and at least 95% of those are for employers.

Conclusions of Law

The Arbitrator found Petitioner sustained her burden of proving she sustained a work-related accident on August 17, 2018 which caused the current condition of ill-being of her right knee. He relied on her unrebutted testimony about the accident. Although he did not make a specific finding regarding credibility, the Arbitrator clearly found her to be credible. On the issue of causation, the Arbitrator found Dr. Rhode more persuasive than Dr. Karlsson. He stressed that Dr. Karlsson relied on Petitioner's lack or history to him of the knee twisting. However, in both her initial ER visit to Northwestern and at Concentra, Petitioner reported she injured her right knee when she twisted it. He also noted that while she had prior right knee pain, prior treatment concentrated on the left knee, and the work accident/injury caused an immediate and permanent change in her condition.

Respondent argues the Arbitrator erred in finding accident and causation noting that there were no witnesses and Petitioner's mechanism of injury, stepping back, does not constitute an accident. It notes inconsistencies in her histories to different providers as well as her denial of prior right knee problems to attack her credibility. On the issue of causation, Respondent argues that the alleged accident did not change Petitioner's condition and Dr. Karlsson was more persuasive than Dr. Rhode.

The Commission affirms the Decision of the Arbitrator on the issue of accident. We agree that Petitioner's testimony about the accident was unrebutted and she immediately sought medical treatment reporting the accident. We also agree that the accident caused some condition of ill-being. The Commission acknowledges that the MRIs taken before and after the accident appear to show new pathology in the torn meniscus in the post-accident MRI. However, the Commission finds that the work-related accident did not cause the necessity for the total knee arthroplasty. In arriving at that conclusion, we are persuaded by Petitioner prior treatment records and Dr. Karlsson's opinions.

The Commission notes that the day before the accident she returned to Dr. Nam for bilateral knee pain in which it was noted she was scheduled for left-knee replacement and had already had several injections in her right knee. Dr. Karlsson also noted that she reported bilateral knee pain from at least October of 2017. Dr. Karlsson concluded that Petitioner needed total knee replacement based on the extent of her knee. He also noted that there was no evidence that the accident in any way changed her underlying arthritis. Finally, the Commission adopts the opinion of Dr. Karlsson that: "There was nothing about her work activities that caused this. There was no

traumatic portion of this arthritis. There was no piece of cartilage that had been knocked off the bone. But, rather, this was a wear of cartilage that had occurred throughout her lifetime."

The Commission finds that the work-related accident caused Petitioner's torn meniscus. However, the Commission also finds that the need for Petitioner's right knee arthroplasty was not caused by the work injuries but rather was necessitated by her underlying arthritis. Although the efficacy of the arthroscopic surgery was questionable due to the extent of her arthritis, we are not going to second guess Dr. Rhode in recommending and performing the arthroscopic surgery. Therefore, the Commission awards the medical expenses through January 9, 2010, but not including the arthroplasty on January 10, 2020. Similarly, the Commission awards temporary total disability benefits through January 9, 2020 because after that date her partial permanent disability would be caused by the nonwork-related arthroplasty and not her work-related torn meniscus.

The Arbitrator awarded Petitioner 200 weeks or permanent partial disability benefits representing loss of 40% of the person-as-a-whole. Obviously, he based that permanency award on his finding that the work-accident necessitated her right knee arthroplasty. Because the Commission reversed that finding and found that only the arthroscopy was necessitated by the work-accident the Commission has to modify the permanent partial disability award. The Commission has to assess what portion of Petitioner's impairment is caused by the torn meniscus and what portion is caused by the knee replacement. In this regard the Arbitrator awarded Petitioner permanency based on her need to change occupations due to the knee replacement. The Commission does not deem that appropriate here because Petitioner was not precluded from performing her normal occupation due to the arthroscopic surgery.

In looking at the statutory factors in assessing a permanency award, there was no impairment assessment under AMA Guides. Therefore, that factor is given no weight. The Commission gives substantial weight to the occupation of Petitioner which requires physical abilities which she no longer has. However, the majority of that impairment is based on her underlying knee arthritis and not her meniscus injury. The Commission also gives substantial weight to her age, 53 at the time of the accident, which indicates that she had at least another 10 to 15 years left in the labor market with her impairment. On the issue of possible reduction in future earning potential, the Commission gives that factor some weight (less than the greater weight given by the Arbitrator) because the Commission finds that her inability to return to her prior occupation was not caused by her work injury but rather her underlying arthritis. Similarly, the Commission gives some weight to the evidence of impairment corroborated by the medical records (less than the substantial weight given by the Arbitrator) because while there is evidence of considerable impairment the majority of that impairment is caused by her underlying nonwork-related osteoarthritis and the need for arthroplasty rather than the work-related injury requiring meniscus repair. In analyzing all of the statutory factors in assessing permanent partial disability, the Commission awards Petitioner 21.5 weeks of permanent partial disability benefits representing loss of the use of 10% of the right leg.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated July 27, 2022 is 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 $459.63 per week for a period of 40&1/7 weeks, that being the period of temporary total incapacity for work under §8(b).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay for all medical expenses incurred between April 15, 2019 through January 9, 2020 pursuant to §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to the Petitioner the sum of $417.85 per week for a total of 21.5 weeks because the injuries sustained caused the loss of the use of 10% of the right 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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $50,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

June 12, 2023

DLS/dw
O-4/12/23
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/s/*Deborah L. Simpson*
Deborah L. Simpson

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

DISSENT (IN PART)

I agree with the majority's decision to affirm the Decision of the Arbitrator with respect to finding that Petitioner sustained accidental injuries arising out of and in the course of her employment with Respondent on August 17, 2018, based on *McAllister v. Illinois Workers' Compensation Commission*, 220 IL 124848, ¶ 36. However, I disagree with the majority's decision to reverse causal connection. I agree with the Arbitrator's finding that Petitioner proved by a

preponderance of the evidence that her current right knee condition of ill-being is causally related to the August 17, 2018 work accident.

It is well established that an accident need not be the sole or primary cause—as long as employment is a cause – of a claimant's condition. *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 205 (2003). Furthermore, an employer takes its employees as it finds them (*St. Elizabeth's Hospital v. Illinois Workers' Compensation Commission*, 371 Ill. App. 3d 882, 888 (5th Dist. 2007)), and a claimant with a pre-existing condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Commission*, 92 Ill. 2d 30, 36 (1982). As the Appellate Court held in *Schroeder v. Illinois Workers' Compensation Commission*, 2017 IL App (4th) 160192WC, the inquiry focuses on whether there has been a deterioration in the claimant's condition:

> That is, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition; it is the resulting deterioration from whatever the previous condition had been. *Schroeder* at ¶ 26.

It is undisputed that Petitioner had bilateral knee problems prior to the August 17, 2018, work accident. Despite having some right knee treatment prior to August 17, 2018, Petitioner was able to work full duty before the work accident. However, following the instant work accident, Petitioner could not return to full duty work, and she had consistent complaints of right knee symptoms. Significantly, the right knee MRI performed on December 16, 2017, before the work accident, did not show a meniscus tear. However, the March 11, 2019 right knee MRI showed a vertical tear of the medial meniscus. I agree with the Arbitrator that Dr. Rhode's opinions are more persuasive and reliable than Dr. Karlsson' opinions. Based on the chain of events and the opinions of Dr. Rhode, it is clear that the August 17, 2018, work accident either aggravated or accelerated Petitioner's preexisting right knee condition, which led to a deterioration of the right knee and a need for a right knee arthroplasty sooner than expected had the work accident not occurred.

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	19WC006284
Case Name	Delores Vaughn v. HEI Hospitality/Marriott International Inc.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	18
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Brien DiNella
Respondent Attorney	Aukse Grigaliunas

DATE FILED: 7/27/2022

THE INTEREST RATE FOR THE WEEK OF JULY 26, 2022 2.92%

/s/Charles Watts, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Delores Vaughn
Employee/Petitioner

v.

HEI Hospitality/ Marriot International Inc.
Employer/Respondent

Case # **19** WC **06284**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts**, Arbitrator of the Commission, in the city of **Chicago**, on **August 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 _____

FINDINGS

On **August 17, 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 $**29,249.77**; the average weekly wage was $**696.42**.

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

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

Respondent shall be given a credit of $**2,822.41** for TTD, $**521.04** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**3,343.45**.

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

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services of $**83,533.86** as provided in Section 8(a) of the Act.
Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of **$60,722.46** to Orland Park Orthopedics Center for Sports Medicine Professional services, and **$22,831.40** to Chicago Surgical Solutions

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of **$459.63** week for **68.571** weeks commencing **April 15, 2019** through **August 7, 2020** as provided in Section 8(b) of the Act.

Permanent Partial Disability with 8.1b Language (For injuries after 9/1/11)

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that 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 hotel housekeeper. The petitioner testified that she worked at her current employer for 18 years. Her job duties included cleaning the guest rooms , cleaning, bathrooms, stripping the linen on the beds, and taking the towels out of the bathroom. The petitioner testified that she had a 9th grade education. The petitioner was released with permanent restrictions for medium work with occasional stairs, no climbing ladders, no squatting or kneeling, and limited bending. She was limited to carry a maximum 50 pounds. The petitioner testified that she was constantly on her feet and was pushing up to 150 pounds. When she presented this to her employer, they were unable to accommodate these restrictions. The arbitrator gives substantial weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 53 years old at the time of the accident. Petitioner had only worked as a housekeeper in the 24 years prior to the accident. The Arbitrator finds that the likelihood of Petitioner finding suitable employment with another company given her age, restrictions, and education level is low. The petitioner would be very limited in finding a job in the housekeeping field with her age and current restrictions. The arbitrator gives greater weight to this factor

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the arbitrator notes that the petitioner has a 9th grade education and has worked as a housekeeper for the 24 years prior to the accident. With her current restrictions not being accommodated by the respondent and being limiting in her bending and lifting she will be unlikely to find a job similar to the one she has been working. The arbitrator gives more weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner's medical records document a consistent course of medical care and consistent complaints from Petitioner. The petitioner had limited and non-mechanical complaints prior to the date of accident. The review of MRI performed on March 2019 demonstrated a grade 3 signal with a vertical tear to the medical meniscus. Based upon the fact that the tear pattern was a grade 3 vertical tear and not the typical complex tear seen in degenerative meniscus tears. The petitioner underwent a knee arthroscopy and a complete knee replacement after the injury and was discharged with permanent restrictions as it relates to the right knee including restrictions for medium work with occasional stairs, no climbing ladders, no squatting or kneeling, and limited bending. She was limited to carry a maximum 50 pounds. Petitioner's credible testimony shows her limits in her daily life, including being unable to perform household chores, being unable to go up and down stairs, and is unable to walk for long periods of time. Petitioner noted that this changes all occurred after the August 17, 2018 accident. The arbitrator gives substantial weight to this factor.

There are three circumstances where a claimant may be awarded benefits under Section 8(d)(2) of the Act: 1) where the claimant suffers injuries which are covered by Section 8(c) or Section 8(e); 2) where a claimant covered by Section 8(c) or Section 8(e) also sustains other injuries which are not covered by those two sections and such injuries do not incapacitate him from pursuing his employment but would disable him from pursuing other suitable occupations, or which otherwise have resulted in physical impairment; or, 3) where he suffers injuries which partially incapacitate him from pursing the duties of his customary employment but do not result in an impairment of earning capacity. Gallianetti v. Industrial Comm 'n., 315 Ill. App. 3d 721, 728 (3d Dist. 2000) The third situation is applicable in this case.

The petitioner has shown that with her current restrictions for medium work with occasional stairs, no climbing ladders, no squatting or kneeling, limited bending, and being limited to carry a maximum 50 pounds occasionally and 25 pounds frequently. She has been unable to be accommodated by her employer with these restrictions. She has indicated that she has trouble standing for periods and meeting her duties that were competently testified to at trial.

Therefore she is unable to perform her duties and 8(d)2 applies.

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 40% loss of use of the person as a whole pursuant to §8(d)2 of the Act.

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

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

JULY 27, 2022

Signature of Arbitrator

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Delores Vaughn	)	
Petitioner,	)	
	)	Case No.: 19 WC 06284
v.	)	
	)	
	)	
HEI Hospitality/ Marriot International Inc.	)	
Respondent.	)	

STATEMENT OF FACTS

Petitioner, Delores Vaughn (hereinafter referred to as the "Petitioner") is a 56 year-old woman who worked for Respondent, HEI Hospitality/ Marriot International Inc (hereinafter referred to as the "Respondent"), as a housekeeper. Recorded transcript of Arbitration August 16, 2021 (hereinafter referred to as "R.") at 8. Petitioner testified that her highest education level was 9th grade. In that capacity, the petitioner testified that her job duties would consist of cleaning bathrooms, stripping the linen on beds, and taking the towels out of bathrooms. *Id*. She would do on average 14-15 rooms a day and would be required to lift 100 lbs and push up to 150 lbs. *Id*. at 9. The petitioner testified that she entered her their room of the day (room 1114) on August 16, 2021 and was stripping a bed. While she was taking the duvet off and twisted her knee while stepping back. *Id* at 10. She noticed that she could not walk on it and she had to hobble to the phone to call her supervisor Annabelle. *Id.* at 10-11. She was then taken by ambulance to Northwestern Medicine. *Id.*

Northwestern Memorial Emergency department notes that works in housekeeping and twisted to put duvet cover on bed and felt a pop on her knee. P Ex. 2 at 25.

Petitioner then testified that she was sent to Concentra by her employer on August 21, 2018 where she was diagnosed with a strain of the right knee and given restrictions of squat and kneeling on occasion, no climbing stairs or ladders. P EX 1 at 16. 8/27/18, Concentra notes "right knee pain is over the anterior aspect of the knee most notably over the lateral joint line and over the superior patellar pole with end range knee flexion and petitioner was performing home exercise program daily. Petitioner was given lifting restrictions of 10 lbs. and may push/pull 20 lbs. *Id.* Petitioner was seen 9/10/18, continued restrictions and stated " still has difficulty bending knee after prolonged sitting. *Id*. at 49. The petitioner continued treatment with Concentra with at home exercises, her restrictions where then changed to "standing, walking, and squatting occasionally." *Id*. at 60. The petitioner was seen on 2/15/19 and reported that her knee pain had become worse after left knee replacement and continued with the previous restrictions. *Id*. at 70-71. She continued with those restrictions when she had her final appointment with Concentra on 2/22/19, continues to have trouble meeting the requirements of her job received referral to orthopedic and was referred to orthopedic. *Id*. at 74.

Petitioner testified that prior to the accident she was treating with Midwest Orthopedics at Rush and Dr. Dennis Nam. R at 14. On the petitioner was given her 12/16/2017 MRI of the right knee which showed "Mild medial osteoarthritis, No significant signal within the medial or lateral meniscus. Major ligaments are intact. No subchondral changes. No hardware, fracture or dislocation." P Ex 3 at 102. Petitioner had an evaluation on 01/12/2018 of her bi-lateral knees and reported left knee being in extreme pain. R Ex 2. The petitioner had a series of injections and then surgery on the left knee prior on 05/02/2018, prior to her work injury. *Id.* 8/16/18, it is noted that she may have to have a left knee replacement. *Id.* It is also noted that she has pain in her right knee which she believes is compensating the left, resulting in an injection for relief, but

still able to work full duty. *Id.* The petitioner followed up with Dr. Nam after the accident regarding her right knee and it was noted that on 12/04/18 that the right knee is restricting her in PT for the left knee. *Id.*

Petitioner then testified that she began seeing Dr. Blair Rhode. R at 15. First visit with Dr. Rohde and Mark Bordick PA, it was noted a mild effusion with evidence of fluid wave, pain with patellofemoral compression, patient has medial joint line tenderness, a positive McMurray along the medial joint line with a negative McMurray along the lateral joint line. P. Ex. 3 at 43. Needs as MRI and will follow up after MRI and to remain off duty. Id. Petitioner presented to Chicago medical imaging which showed "mild degenerative disease, mainly in medial compartment with joint effusion. Grave IV chondromalacia at the medial femoral condyle and medial tibial plateau. Grade I sprain of the anterior cruciate ligament. Grade I sprain of the medical collateral ligament. Grade III vertical tear in the posterior root of the medical meniscus with resultant medical extrusion of the body of the meniscus." *Id.* at 49., April 9. 2019 Petitioner had an injection to the right knee which provided petitioner temporary relief and was to remain off work. *Id.* at 37-39.

Petitioner presented for IME with Dr. Troy Karlsson on April 9, 2019. R. Ex 1. Dr. Karlsson notes that petitioner did not state that she twisted her knee at the IME. *Id.* Dr. Karlsson then denies causation because a twist or trip is not described. *Id.* He notes that she likely requires a total knee arthroplasty, but denies this is related to a work accident. *Id.*

Dr. Blair Rhode reviewed the IME report of Dr. Karlson and noted "based upon the fact that the tear pattern was a grade 3 vertical tear and not the typical complex tear seen in degenerative meniscus tears … this would not support that the medical meniscus tear is a pre-existing degenerative meniscus tear that arose out of her pre-exiting medial compartment joint

disease". P ex 3 at 35-37. Dr. Rhode would go on to state "as her knee went into extension, she experienced sudden onset medial knee pain" and noted that he believed the petitioner to be sincere in her description of her mechanism of injury." He mentions that, " I would not find it unlikely that the patient did experience right knee pain on occasions due to medial compartment degenerative changes. " *Id*. He goes on to state that while the mechanism of injury of hyperextension is a less common cause of medical meniscal pathology, but the symptoms timeline supports a causative association with the hyperextension event. *Id.*

Petitioner underwent a Right knee partial medial meniscectomy with Dr. Rhode on 7/30/19 with South Suburban surgical solutions, pre-op and post-op diagnosis showed right knee medial meniscal tear. Id. at 45. Examination showed grade 2 to 4 changes in the patellofemoral joint. Id. There was a flap tear of the medial meniscus and 50% of the posterior horn of the medial meniscus was debrided. Id. There were grade 3 to 4 chondral changes in the central weightbearing partial of femoral condyle. Lateral compartment had no meniscal tear and no evidence of articular damage. Id. Dr. Rhode notes on August 9, 2019 that there are distinctions on her MRIs before and after her date of accident that are consistent with her work injury. *Id.* at 29.

On November 1, 2019, Dr. Troy Karlsson creates an IME addendum after reviewing Dr. Rhode's updated records. R. Ex 1. In this report his opinions remain unchanged regarding causation but does note that he has not seen any MRI reports pre-dating the date of accident. Additionally, he notes, "Dr. Rhode lists a twisting injury to her knee, this is different than the history she gave me that she was stripping a cover off a duvet, stepped back and felt a pop in her knee, then fell to the ground. Certainly, a history of a twist could be a competent cause for a right knee meniscal tear.." *Id.*

Petitioner notes to Dr. Rhode that she continues to ambulate with a can and her pain is continuing, wishes to proceed with Total knee replacement. *P. Ex 3.* at 19. Continues to remain off work and her medial pain continues. January 10, 2020, Dr. Rhode performs a total knee arthroplasty. *Id* at 47. Post surgery, petitioner continued to follow up with Dr. Rhode and remain off duty until she was released to restrictions that became permeant restrictions on August 10, 2020. *Id*. 3-10.

Petitioner testified that after the surgery she was not able to return back to work for the respondent. R at 19. She notes that she cannot go on long walks, ride a bike, or do the laundry. She states that she requires her husband to assist her with chores around the house and cannot go up and down the stairs like she used to. *Id.*

CONCLUSIONS OF LAW

C. WITH REGARD TO ITEM (C), WHETHER AN ACCIDENT OCCURRED THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY RESPONDENT, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Arbitrator finds that the accident arose out of and in the course and scope of the Petitioner's employment with the Respondent. In order to obtain compensation under the Act, a claimant must show by a preponderance of the evidence that he has suffered a disabling injury arising out of and in the course of his employment. Both elements must be present at the time of the claimant's injury in order to justify compensation. IL Bell Telephone Co. v. Indust. Comm'n., 131 Ill.2d 478, 483 (1989). Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work, are generally deemed to have been received "in the course" of the employment. Caterpillar Tractor Co. v. Indust. Comm'n., 129 Ill.2d 52, 57 (1989). The "arising

out of" component refers to the origin of case of the claimant's injury and requires that the risk be connected with, or incidental to, the employment so as to create connection between the employment and the accidental injury. *Id.* at 58.

Here, both elements have been met. The petitioner testified at the time she was injured she was within the premise of her place of employment in room 1114 of the hotel she worked in. R at 10. She testified at the time she was performing her job duties of cleaning the hotel room and taking the sheets off of a bed. *Id.* at 8-10. The petitioner's testimony shows that she was on the employer's premise and was performing her job duties, this meets the "in the course" of employment requirement. The petitioner testified that she was replacing sheets when she injured her leg. *Id.* She would do this in multiple rooms a day. This would be a risk directly connected to her employment.

Therefore, the Arbitrator finds that the August 17, 2018 accident arose out of and was in the course of Petitioner's employment.

F. WITH REGARD TO ITEM (F), WHETHER THE PETITIONER'S CURRENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE WORK INJURY, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Arbitrator finds that the Petitioner's current condition of ill-being is causally related to her August 17, 2018 work accident. A causal connection between work duties and a condition may be established by a chain of events including Petitioner's ability to perform the duties before the date of the accident, and inability to perform the same duties following that date. Pulliam Masonry v. Industrial Comm'n., 77 Ill.2d 469, 471 (1979). The Supreme court has determined that even though a workers' compensation claimant may have 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. Sisbro, Inc. v. Industrial Commission, 207 Ill., 2d 193 (2003). A chain of events showing a prior condition of good health, followed by a sudden change after a work injury can establish causation. Illinois Power Co Industrial Commission, 278 Ill.App.3d 848,854 (4th Dist. 1996).

Petitioner testified that on August 17, 2018, she was stripping a bed and twisted her knee after pulling the duvet cover. R at 8-11. The Concentra records on that same date indicate that the mechanism of injury was that Petitioner "twisted her right knee when she was making a bed." P Ex. 1 at 17. She noted that she was unable to stand and had to crawl over to the phone to call her manager. R at 8-11. She stated an ambulance took her from the scene to Northwestern Hospital. The petitioner testified that prior to the accident her work duties consisted of standing most of the day and pushing 100–150-pound carts during the day. Following the accident, the Petitioner had consistent complaints of her right knee while she treated with Northwestern and Concentra. These facts alone are sufficient to support a finding of causation.

The Records of Rush University and Northwestern medicine show that while there was medical treatment previously done to the bilateral knees, it was concentrated in the left knee rather than the right. The 12/16/2017 MRI of the right knee showed "Mild medial osteoarthritis, No significant signal within the medial or lateral meniscus. Major ligaments are intact. No subchondral changes. No hardware, fracture or dislocation." P. Ex 3 at 102. The Northwestern Medicine Emergency room records note that the Petitioner the petitioner was twisting to put a duvet cover on and felt an acute pop and severe pain in her right knee after the 8/17/18 accident. (P. Ex 2). The Concentra records of 8/21/18 continue to note the right knee twisting during the accident, after which she was put on light duty restrictions. P. Ex1. After the accident an MRI was performed on 3/11/2019 which shows changes with a "grade 3 vertical tear in the posterior

root of the medial meniscus with medial extrusion." P. Ex 3 at 49. Dr. Rhode noted "based upon the fact that the tear pattern was a grade 3 vertical tear and not the typical complex tear seen in degenerative meniscus tears … this would not support that the medical meniscus tear is a pre-existing degenerative meniscus tear that arose out of her pre-exiting medial compartment joint disease". *Id*. At 37. After reviewing the initial medial in addition to his own treatment records would later note Dr. Rhode "as her knee went into extension, she experienced sudden onset medial knee pain" and noted that he believed the petitioner to be sincere in her description of her mechanism of injury." *Id.* He goes on to state that while the mechanism of injury of hyperextension is a less common cause of medical meniscal pathology, but the symptoms timeline supports a causative association with the hyperextension event. *Id*. While Dr. Karlsson's report disputed causation as a of the twisting of the knee was not mentioned during the IME examination, after reviewing Dr. Rhode's notes he stated in his November 1 , 2019 exam that " Certainly a history of a twist could be a competent cause for a right knee meniscal tear." R Ex 1 at 31-32. Dr. Karlsson later confirmed that a twist of the knee was an adequate mechanism of injury to cause a medial meniscus tear. *Id*. Additionally, the arbitrator notes the Dr. Karlsson did not review any MRI films performed prior to the accident before making his determinations. *Id.* at 15.

The arbitrator finds the opinions of Dr. Rhode to be more persuasive than Dr. Karlsson, the respondent's section 12 examiner. While the petitioner did have an underlying condition, her unrebutted testimony showed that there was a sudden and immediate change in her ability do her regular work duties. The depositions and reports of both Dr. Rhode and Dr. Karlsson show that the twisting motion described by Petitioner in her initial treatment records would be sufficient to cause her current condition of ill-being.

Therefore, the arbitrator finds that Petitioner's current condition of ill-being is causally related to the accident of August 17, 2018.

J. WITH REGARD TO ITEM (J), WHETHER THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER WERE REASONABLE AND NECESSARY AND WHETHER THE RESPONDENT PAID ALL APPROPRIATE CHARGES, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Arbitrator finds that the Petitioner's medical care has been reasonable and necessary and Respondent had not paid all appropriate charges. Due to Petitioner's work-related injuries, he has required treatment in the form of doctor visits, injections, diagnostic testing, medication, physical therapy, and surgical intervention.

Here the doctors agree that the treatment for a total knee replacement has been reasonable and necessary based on the evidence presented. Dr. Karlsson in his deposition and in his IME addendum found that a total knee replacement of the right knee to be the appropriate treatment for the petitioner's medical condition. R. Ex 1 at 27.

The Arbitrator find the following medical charges for reasonable and necessary treatment have not been paid by the Respondent.

1. Orland Park Orthopedics Center for Sports Medicine Professional balance: $60,722.46
2. Chicago Surgical Solutions: $22,831.40

The Arbitrator awards $83,553.86 in medical bills to be paid by respondent, pursuant to the fee schedule, directly to Petitioner pursuant to the Act.

K. WITH REGARD TO ITEM (K), WHAT TEMPORARY BENEFITS ARE IN DISPUTE, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Arbitrator find that the petitioner was placed off work then was put on permanent restrictions which were not accommodated by the respondent. Therefore, the arbitrator awards temporary total disability benefits from April 15, 2019-August 7, 2020 representing 68.571 weeks at a rate of $459.63 per week.

L. WITH REGARD TO ITEM (L), WHAT IS THE NATURE AND EXTEND OF THE INJURY, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

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

a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors;

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator 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 hotel housekeeper. The petitioner testified that she worked at her current employer for 18 years. Her job duties included cleaning the guest rooms, cleaning, bathrooms, stripping the linen on the beds, and taking the towels out of the bathroom. The petitioner testified that she had a 9th grade education. The petitioner was released with permanent restrictions for medium work with occasional stairs, no climbing ladders, no squatting or kneeling, and limited bending. She was limited to carry a maximum 50 pounds. The petitioner testified that she was constantly on her feet and was pushing up to 150 pounds. When she presented this to her employer, they were unable to accommodate these restrictions. The arbitrator gives substantial weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 53 years old at the time of the accident. Petitioner had only worked as a housekeeper in the 24 years prior to the accident. The Arbitrator finds that the likelihood of Petitioner finding suitable employment with another company given her age, restrictions, and education level is low. The petitioner would be very limited in finding a job in the housekeeping field with her age and current restrictions. The arbitrator gives greater weight to this factor

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the arbitrator notes that the petitioner has a 9th grade education and has worked as a housekeeper for the 24 years prior to the accident. With her current restrictions not being accommodated by the

respondent and being limiting in her bending and lifting she will be unlikely to find a job similar to the one she has been working. The arbitrator gives more weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner's medical records document a consistent course of medical care and consistent complaints from Petitioner. The petitioner had limited and non-mechanical complaints prior to the date of accident. The review of MRI performed on March 2019 demonstrated a grade 3 signal with a vertical tear to the medical meniscus. Based upon the fact that the tear pattern was a grade 3 vertical tear and not the typical complex tear seen in degenerative meniscus tears. The petitioner underwent a knee arthroscopy and a complete knee replacement after the injury and was discharged with permanent restrictions as it relates to the right knee including restrictions for medium work with occasional stairs, no climbing ladders, no squatting or kneeling, and limited bending. She was limited to carry a maximum 50 pounds. Petitioner's credible testimony shows her limits in her daily life, including being unable to perform household chores, being unable to go up and down stairs, and is unable to walk for long periods of time. Petitioner noted that this changes all occurred after the August 17, 2018 accident. The arbitrator gives substantial weight to this factor.

There are three circumstances where a claimant may be awarded benefits under Section 8(d)(2) of the Act: 1) where the claimant suffers injuries which are covered by Section 8(c) or Section 8(e); 2) where a claimant covered by Section 8(c) or Section 8(e) also sustains other injuries which are not covered by those two sections and such injuries do not incapacitate him from pursuing his employment but would disable him from pursuing other suitable occupations, or which otherwise have resulted in physical impairment; or, 3) where he suffers injuries which partially incapacitate him from pursing the duties of his customary employment but do not result

in an impairment of earning capacity. Gallianetti v. Industrial Comm 'n., 315 Ill. App. 3d 721, 728 (3d Dist. 2000) The third situation is applicable in this case

Petitioner has shown that with her current restrictions for medium work with occasional stairs, no climbing ladders, no squatting or kneeling, limited bending, and being limited to carry a maximum 50 pounds occasionally and 25 pounds frequently. She has been unable to be accommodated by her employer with these restrictions. She has indicated that she has trouble standing for periods and meeting her duties that were competently testified to at trial. Therefore she is unable to perform her duties and 8(d)2 applies.

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 40% loss of use of the person as a whole pursuant to §8(d)2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC008031
Case Name	Ricardo Lemus v. Pace Bus
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0259
Number of Pages of Decision	15
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Brad Antonacci

DATE FILED: 6/12/2023

/s/ Deborah Baker, Commissioner

Signature

23IWCC0259

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	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICARDO LEMUS,

Petitioner,

vs. NO: 20 WC 08031

PACE BUS,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of whether Petitioner's current conditions are causally related to the undisputed December 30, 2019 work accident[1], Petitioner's entitlement to incurred medical expenses, Petitioner's entitlement to future medical treatment, temporary disability benefits, the calculation of benefit rates and wages, and Petitioner's entitlement to penalties pursuant to §19(k) and §19(l) as well as attorney fees pursuant to §16, and being advised of the facts and law, reverses the Decision of the Arbitrator and makes the following findings of fact and conclusions of law consistent with the record. 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).

PROCEDURAL HISTORY

On May 6, 2021, the matter proceeded to hearing before Arbitrator Steffenson. The Request for Hearing form submitted by the parties identifies the following issues in dispute: 1) whether Petitioner's current condition is causally related to the stipulated December 30, 2019 accident; 2) Petitioner's average weekly wage; 3) entitlement to medical expenses as well as Respondent's entitlement to credit; 4) entitlement to prospective medical care; 5) Petitioner's

[1] The Commission notes that while accident was listed as an issue on review on Petitioner's Petition for Review, accident was stipulated to on the Request for Hearing form.

entitlement to temporary disability benefits as well as Respondent's entitlement to credit; 6) entitlement to §19(k) penalties, §19(l) penalties, and §16 attorney fees; 7) Respondent's reimbursement of group insurance; and 8) medical records subpoena responses. Arb.'s Ex. 1. At the conclusion of all testimony, the Arbitrator bifurcated the trial and proofs remained open to allow for the procurement of certain medical records.

On August 27, 2021, Arbitrator Watts resumed the arbitration hearing. No testimony was taken, but relevant and outstanding exhibits were admitted into evidence. In particular, the Parties agreed to allow the Arbitrator to review voluminous records from Northwestern Medical Center that predated the undisputed work accident and determine whether any of the records were relevant to the instant case. The Parties disputed whether Respondent was entitled to the records from Northwestern Medical Center that predated the undisputed work accident, which Petitioner claimed were unrelated to the conditions at issue in this case. The Parties agreed if the Arbitrator found records that were relevant to the instant case, he would admit them into evidence as a separate exhibit *sua sponte*. Arbitrator Watts closed proofs at the conclusion of the August 27, 2021 proceeding.

The Arbitrator found Petitioner suffered accidental work-related injuries to his right ring finger and eyes that were no longer causally related to the undisputed work accident. The Arbitrator found further that Petitioner did not sustain an injury to his left shoulder at the time of the undisputed work accident. The Arbitrator denied Petitioner's claims for prospective medical care, additional temporary disability benefits, additional medical expenses and denied Petitioner's request for penalties and fees. The Arbitrator found Respondent entitled to credit for temporary disability benefits paid in the amount of $8,955.50 and medical expenses paid in the amount of $8,749.68.

Petitioner filed a Petition for Review, identifying the following issues on Review: whether Petitioner sustained an accidental injury arising out of and occurring in the course of his employment, whether the average weekly wage calculation was correct, whether Petitioner's current condition is causally related to the stipulated accident, entitlement to medical expenses, entitlement to prospective medical care, entitlement to temporary disability benefits, and entitlement to §19(k) penalties, §19(l) penalties, and §16 attorney fees.

FINDINGS OF FACT

Petitioner testified that he was employed as a bus driver for Respondent, Pace Bus. The parties stipulated that Petitioner sustained an accidental injury on December 30, 2019. Arb.'s Ex. 1. Petitioner explained that the accident happened while driving on I-90 on his last run of the day. While driving, he noticed a pickup truck in his mirror coming up on his left side. While trying to pass Petitioner's bus, the pickup truck crossed the middle wall and bounced into Petitioner's bus at the drivers' side window, fishtailing so the rear end of the truck hit the bus. When Petitioner saw the truck coming he tightly grabbed the steering wheel so he would be able to control the bus in case the tires were hit. After impact he kept steering the bus straight because they were in traffic. Petitioner was able to park the bus and await emergency personnel. He had glass all over him and informed emergency personnel of stiffness between his shoulder and neck. He was worried about his eyes and had glass in his mouth, on his face, in his scalp and on his hands. He had little cuts on

his hands as well, but was most worried about his eyes. He acknowledged that nothing struck his left shoulder at the time of the accident. He was then taken to the hospital. No passengers reported any injuries.

A Rosemont Public Safety Police Report noted the drivers' side window had been completely shattered, with tempered glass scattered on the drivers' seat and floor. Crew found Petitioner standing in the aisle in no distress. The report indicated Petitioner denied any pain, nausea, headache, blurred vision, or shortness of breath, but did have complaints of irritation to his left eye and slight dizziness. Small cuts to Petitioner's hands and redness to the face were noted. Glass shards and dust were all over his clothing. En route to Amita Resurrection emergency room, Petitioner developed 2 out of 10 back pain and slight neck cramping. PX 8.

After leaving the emergency room, Petitioner returned to Respondent's facility to complete an Employee Report of Injury. RX 7. He described a consistent mechanism of injury and indicated he suffered an eye injury, but did not note any left shoulder symptoms or injury in the report as he testified that his eyes were his main concern. Tr. 37-38.

Petitioner testified that since the accident, he has been unable to perform general home maintenance or yardwork. He cannot ride a bike, has difficulty sleeping, and he cannot lift his left arm over his shoulder. His left shoulder symptoms have never resolved since the instant accident.

Surveillance Video ("Ramp" view or "Rear to Front" view for audio)

In the beginning of the first video file, in the "Front Door" frame, Petitioner can be seen looking to his left (presumably at the oncoming pickup truck). The truck then fishtails into Petitioner's bus and Petitioner can be seen jerking to is right while glass flies. He then pulls the bus over. Throughout the video, Petitioner can be seen using his left arm in various ways, including brushing glass off of his person, holding a cell phone and reaching away from his body. In the "Front to Rear" frame at 18:18:27 Petitioner is speaking with emergency personnel and can be seen motioning to his left shoulder a few times. In the "Ramp" frame at this same time stamp, Petitioner was asked about any pain on his sides or arms. He appears to reply "a little pain." RX 5.

Medical Records

On December 30, 2019, at Amita Resurrection emergency room, Petitioner reiterated he was involved in a motor vehicle accident where a vehicle struck the driver side window of the bus he was driving and shattered the window. Petitioner indicated that glass flew into his face, and he complained of "all over stiffness." He was worried that glass may have gotten into his eyes, as both were itchy, but not painful. He also *complained of left shoulder pain* and back stiffness. PX 4, pg.9. He was diagnosed with irritation of both eyes, injury from broken glass, and motor vehicle collision. He was prescribed medication and Lidoderm patches, was discharged, and told to return for any new or worsening symptoms. He was returned to work with no restrictions. PX 4.

On January 11, 2020, Petitioner presented at Northwestern Medical with *left shoulder* and right ring finger pain ongoing for 10 days since a motor vehicle accident. He had been taking

muscle relaxers, but the pain was not going away. Examination *findings revealed left shoulder tenderness and pain* with normal range of motion and no crepitus, swelling, effusion, deformity, or weakness. He also had right hand tenderness. On a pain diagram Petitioner indicated *left shoulder and right ring finger symptoms*. His right ring finger and left shoulder X-rays were normal. He was *diagnosed with acute left shoulder pain*, a motor vehicle accident, and pain in a finger of the right hand. Petitioner was advised to treat with an orthopedist, perform home left shoulder exercises, and continue taking medication. PX 5.

On January 16, 2020, Petitioner presented to Dr. Jayesh V. Thakkar, his primary care physician, at WestGate Family Medicine, and described a consistent mechanism of injury. After a physical examination he was *diagnosed with acute left shoulder pain* and was referred for physical therapy. PX 6.

On January 27, 2020, Petitioner reported a consistent mechanism of injury to orthopedist Dr. Craig M. Torosian at Fox Valley Orthopaedics, informing Dr. Torosian that his wounds were not cleaned at the emergency room after the accident. Petitioner complained of right ring finger joint sensitivity to pressure, and felt there may be something under the skin. Dr. Torosian diagnosed a possible foreign body in the right ring finger. He recommended surgery and excision of a possible foreign body. PX 2.

Petitioner underwent physical therapy at ATI Physical Therapy from January 28, 2020 through March 5, 2020. Throughout therapy Petitioner *consistently complained of left shoulder pain*. PX 3. Petitioner testified physical therapy made his shoulder pain worse.

On February 11, 2020, Petitioner underwent surgery with Dr. Torosian to remove glass from his right ring finger. He was returned to full duty on February 17, 2020. On February 18, 2020, Petitioner followed up with Dr. Thakkar for his unrelated vertigo. *The record references Petitioner's left shoulder pain* and notes that he had not treated with the chiropractor yet, but had treated with Dr. Atkins, his orthopedist, in the past. On February 24, 2020, Petitioner presented to Physicians Assistant Evangeline M. Taylor at Fox Valley Orthopaedics for post-op follow up. He had mild pain and swelling, improved range of motion, no concerns at that time, and was working full duty. PX 2. Petitioner testified he received no further ring finger treatment.

Also on February 24, 2020, Petitioner followed up with Dr. Thakkar. Petitioner indicated his finger stitches had been take out and his pain was better. He indicated *he was still unable to sleep on his left shoulder due to pain*. He was diagnosed with acute left shoulder pain and was recommended to continue physical therapy. PX 6.

On March 11, 2020, Petitioner presented to Dr. Vishal M. Mehta at Fox Valley Orthopaedics with left shoulder pain after indicating he injured it during the accident in question. *He complained of left shoulder pain with motion, weakness, popping, and significant tenderness at the anterior aspect of the shoulder.* Dr. Mehta noted Petitioner had been treating with physical therapy, pain patches and muscle relaxers. Physical examination revealed no tenderness at the AC joint, tenderness in the biceps, positive impingement signs, and no evidence of instability. Left shoulder X-rays revealed type II acromion and AC degenerative joint disease. Dr. Mehta noted indications of rotator cuff, labral and bicipital pathologies. He noted that due to Petitioner's

occupation there were a number of possible injuries. An MR arthrogram was recommended, and Petitioner was told to use narcotics and anti-inflammatories. Petitioner was released to restricted duty of sitting/desk work, no operating heavy machinery, and no driving. PX 2. Petitioner testified Respondent would not allow him to drive while taking narcotics.

On March 30, 2020, Petitioner followed up virtually for his MRI results. His complaints remained the same. Dr. Mehta reviewed the images of the left shoulder MR arthrogram, and agreed with the radiologists findings of infraspinatus tendinosis with a low grade partial thickness tear near the footprint, anterosuperior labral fraying and trace subacromial subdeltoid bursitis. Dr. Mehta *diagnosed a left shoulder low grade partial thickness rotator cuff tear*. Activity modification and a subacromial injection were recommended. PX 2.

On April 23, 2020, Petitioner followed up with Physicians Assistant Cassie L. Mandala at Fox Valley Orthopaedics for his left shoulder, complaining that it had gotten slightly worse. He had stopped going to therapy due to pain, and presented for a subacromial injection on this date. Ms. Mandala diagnosed a left shoulder low grade partial thickness rotator cuff tear and performed the injection. Petitioner was taken off work. PX 2.

On May 21, 2020, Petitioner followed up with Dr. Mehta for his left shoulder, noting minimal relief from the April 23, 2020 injection and continued discomfort with activity. He indicated his inflammation was better, but still had pain while sleeping. Petitioner noted he was painting his house recently, and that doing the same repetitive movement may have aggravated his shoulder. Petitioner testified he was actually painting his mounted front door with a roller. The door was normal size, approximately 7 feet by 3 feet. Petitioner demonstrated his painting style at trial, motioning up and down, but his left hand never went above shoulder level. Physical examination again revealed no tenderness at the AC joint, tenderness in the biceps, positive impingement signs, and no evidence of instability. Dr. Mehta diagnosed a left shoulder low grade partial thickness rotator cuff tear, and now added impingement, and AC degenerative joint disease. Dr. Mehta noted no relief from the injection, home therapy, pain medication or activity modification. A left shoulder arthroscopic subacromial decompression and distal clavicle resection was discussed, which Petitioner agreed to. Petitioner was kept off work. PX 2. Petitioner testified this was a temporary aggravation which soon reverted back to his post-accident pain.

On June 17, 2020, Petitioner underwent a section 12 examination with Dr. M. Bryan Neal at Respondent's request. Dr. Neal reviewed post-accident medical records, including the Employee First Report of Injury, Amita Resurrection records, WestGate Family Medicine records, Fox Valley Orthopaedics records and ATI Physical Therapy records. Dr. Neal noted Petitioner last worked on February 10, 2020, as he received left shoulder restrictions the following day on February 11, 2020.[2] RX 3.

Petitioner reported a consistent mechanism of injury to Dr. Neal, adding more detail in that it was snowing on the date of accident, and the pickup truck involved "struck the wall between the expressways and then came back and hit the driver's side of his bus." Petitioner indicated the bus was going 40mph. Petitioner stated he was struggling with the steering wheel after impact, but

[2] Petitioner likely misspoke here. Medical records and his testimony indicate this occurred on March 11, 2020.

eventually was able to pull the bus over. He indicated he was at home the next seven days and started having pain. RX 3.

Petitioner informed Dr. Neal that he had *no prior left shoulder issues, but now his left shoulder is "always in pain.*," and that he had weakness and limited range of motion. He indicated he could not carry garbage, cut grass due to the vibration, sleep on his left side, or relax due to the painful stretching type sensation in his left shoulder. The pain was superior and anterior, with anterior being greater. Petitioner indicated moving around made his pain better, while relaxing made it worse. RX 3.

Upon physical examination, Dr. Neal noted subjective pressure or sensation with abduction with full and symmetric range of motion. However, he noted internal rotation behind Petitioner's back was slightly limited and mildly uncomfortable. External rotation and isolated supraspinatus testing also produced discomfort. O'Brien's test was mildly positive with greater pain when pronated. He also noted mild positive Hawkins sign and impingement test. Petitioner was tender to palpation at the biceps tendon with discomfort at the AC joint. *Dr. Neal opined Petitioner's left shoulder was stable with possible labral pathoanatomy and impingement*. RX 3.

Dr. Neal took X-rays, which he opined were normal. He reviewed the MRI, and opined there was no significant rotator cuff tearing and no obvious labral tearing. He found fluid in the subacromial space which may be consistent with impingement. He *diagnosed left shoulder pain possibly secondary to rotator cuff impingement and possible underlying labral pathoanatomy*. RX 3.

Dr. Neal opined Petitioner's condition was not causally related to the work accident, as the mechanism of injury was not a competent cause of significant shoulder pathoanatomy in a 40-year-old. Dr. Neal found no evidence of shoulder injury in contemporaneous emergency room records. However, he admitted that he was unsure if he had seen all the emergency room records. He also found that Petitioner's failure to receive relief from a subacromial injection spoke against a rotator cuff impingement process. He found Petitioner to be significantly symptomatic for someone of his age and could not explain all of Petitioner's symptoms with his own diagnosis.

Dr. Neal opined treatment to date had not been unreasonable based on Petitioner's complaints. He recommended anti-inflammatories, an additional injection, but noted surgery would not be unreasonable, but would not be related to the instant accident. He noted the correlation between subjective complaints and objective findings were not so abnormal to be considered disproportionate, but he did state subjective complaints did not correlate as well as he usually observes. He then stated the subjective complaints seemed to be excessive or disproportionate. RX 3. Dr. Neal opined Petitioner could return to full duty no restrictions, and that if he declined additional treatment, he will have reached maximum medical improvement. RX 3.

On June 26, 2020, Respondent's claims adjuster sent Petitioner a letter informing him that no further benefits would be provided under workers' compensation and that Petitioner should submit all future medical bills through his group insurance. RX 4. Petitioner testified he has not received any temporary total disability benefits since June 2020.

Petitioner continued treating with Dr. Mehta through January 20, 2021. During his treatment Petitioner continued having pain at the anterolateral aspect of the shoulder, worse when reaching away from his body. Dr. Mehta noted Petitioner's continued significant impingement symptoms which failed to improve with injections, pain medications, and activity modification. Dr. Mehta still believed left shoulder surgery was necessary and his diagnosis remained the same.

Deposition Testimony

Dr. Neal-Respondent's Section 12 Examiner - September 2, 2020

Dr. Neal is a board-certified orthopedic surgeon. He performed eight to ten shoulder surgeries annually. He testified consistent with his section 12 examination report. He reiterated that in the portion of the Amita Resurrection records he saw from December 30, 2019, he saw no reference to any left shoulder injury. He noted no significant structural abnormalities in the left shoulder MRI, and did not find the low grade partial thickness tear to be abnormal. He also opined that the medical records he reviewed were not conclusive of the absence of left shoulder symptoms prior to the instant accident.

Dr. Neal noted that Petitioner informed him he held the steering wheel during the accident. Dr. Neal characterized the accident as a "low level event" that did not show the left shoulder to be in a compromising position, thus he did not see how the accident would have caused a significant shoulder condition. However, he also admitted that he did not know where Petitioner's hands were located on the steering wheel at the time of accident. Dr. Neal also opined that Petitioner's complaints of pain while mowing grass were disproportionate because the shoulder is stationary while mowing and "people with impingement labrums don't complain of that."

Dr. Vishal Mehta-Treating Physician- March 24, 2021

Dr. Mehta is an orthopedic surgeon. He first saw Petitioner March 11, 2020. He testified consistent with his medical records. Upon treating Petitioner, he ultimately diagnosed impingement syndrome and asymptomatic AC joint with acromioclavicular degenerative joint disease. After conservative treatment failed, Dr. Mehta recommended surgical intervention. He opined that Petitioner's left shoulder injury was causally related to the bus accident. He noted Petitioner had no prior left shoulder issues, and opined that the mechanism of injury of a sudden impact in a jerky type motion can certainly aggravate the rotator cuff and the AC joint and cause impingement syndrome. He noted Petitioner had an immediate onset of pain, which had continued ever since.

Moreover, Dr. Mehta opined his physical examination pointed towards the rotator cuff and AC joint being the source of Petitioner's pain. Based on the temporal relationship, the physical exam, and the mechanism of injury, Dr. Mehta opined the left shoulder injury and his recommended shoulder surgery are causally related to the instant accident. Dr. Mehta opined Petitioner's prognosis for recovery was very good, and he anticipated 100 percent recovery and Petitioner's ability to return to full duty.

On cross examination, Dr. Mehta agreed that obtaining an accurate history is important in understanding the cause of an injury, especially if the patient has had prior treatment. An inaccurate history could change his opinions regarding causation. Dr. Mehta did not know the speed of the pickup truck when it struck the bus, the nature of the impact or the position of Petitioner's left arm at that time. However, he testified the position of the left arm would not change his opinion because any type of jerking can aggravate a rotator cuff.

Dr. Mehta does not recall if he reviewed emergency room records from the date of accident. However, he stated he would not be surprised if the ER did not take any left shoulder X-rays or make any left shoulder diagnosis even if left shoulder complaints were made. He stated that while fractures get noticed right away, injuries such as rotator cuff, whiplash, and other injuries more tendinous or muscular in nature don't always present immediately. Sometimes they take a couple of days to pop up.

Dr. Mehta did not examine Petitioner's right shoulder. He did acknowledge that painting is a good way to aggravate a rotator cuff. However, he opined that the painting only temporarily aggravated his condition, and that this did not change his causation opinion. Dr. Mehta agreed that he was already working towards the failure of conservative measures at that time, thus the painting (nor any other event) materially changed the course of Petitioner's treatment. He noted Petitioner's left shoulder MRI findings of tendonitis and low grade partial thickness tear could be degenerative, but likely is not due to Petitioner's relatively young age. He clarified that "low grade" is a less than 30 percent tear in the rotator cuff. Dr. Mehta admitted that the labral fraying was likely not related to the accident and was degenerative. He also admitted that degenerative joint disease pre-dated the accident, but opined that the accident aggravated the disease.

Dr. Mehta disagreed with Dr. Neal's opinion that there was no low grade rotator cuff tear. He also was not aware that Petitioner's position as bus driver was considered sedentary, which is the type of work he released Petitioner to on March 11, 2020. That being said, if Dr. Mehta believed Petitioner was capable of driving a bus at that time, he would have allowed it, but the impression he got from Petitioner is that Petitioner was having real shoulder problems.

Dr. Mehta would have preferred much more relief from the injection to Petitioner's left shoulder, with a temporary decrease in symptoms in order to suggest a proper diagnosis. However, he stated the human body "doesn't always follow the rule book exactly," and that he was confident in his diagnosis of Petitioner.

CONCLUSIONS OF LAW

I. Credibility

It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. *O'Dette v. Industrial Commission*, 79 Ill. 2d 249, 253 (1980). It is also well within the purview of the Commission to re-assess a petitioner's credibility. See *R & D Thiel v. Illinois Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 866 (1st Dist. 2010) ("the Commission exercises original [] jurisdiction and is not bound by an arbitrator's findings" and "[w]hen 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.").

In the instant case, the Commission strikes the Arbitrator's assessment of Petitioner's credibility from the analysis, which states that Petitioner's body language and pace of speaking markedly changed between direct and cross examination, and that Petitioner was evasive during cross examination and seemed to be searching for words as if recalling rehearsed testimony. The Commission notes that the Arbitrator who issued the decision in this case was not present during the May 6, 2021 hearing, and thus was unable to evaluate the demeanor, behavior, and conduct of the Petitioner.

Regarding any inconsistencies in Petitioner's testimony, the Commission views the evidence differently than the Arbitrator. Having viewed the surveillance video of the accident, we note that the impact of the accident was significant enough to completely shatter a tempered glass window on the bus and cause Petitioner's body to jerk to the right while his hands were still on the steering wheel. Additionally, the Commission finds the post-accident surveillance footage supports a finding of a left shoulder injury, as Petitioner indicated he had "a little pain" when asked if he had any pain on his sides or arms. The persuasiveness of the post-accident footage showing Petitioner's left arm/shoulder activity is minimized by the testimony of treating physician Dr. Mehta, who testified that injuries to the rotator cuff, which is more tendinous or muscular in nature, don't always present immediately. Dr. Mehta went further to state that sometimes they take a couple of days to pop up. Taken in conjunction with the surveillance audio wherein Petitioner indicated he had "a little pain," the Commission reasonably infers that Petitioner's apparent ability to move his left arm/shoulder after the accident was a product of the type of injury suffered, rather than a referendum on whether he suffered an injury at all. Further, the Commission notes that the characterization of the pain as "little" is not significant as the accident had just occurred and did not reflect any actual injury or pathology to the left shoulder as would be determined by a physician. In resolving questions of fact, it is within the province of the Commission 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. *Johnson v. Industrial Commission*, 278 Ill. App. 3d 59, 63 (3d Dist. 1996).

In its brief, Respondent indicates the decision-rendering Arbitrator found Petitioner less than credible based on the Arbitrator's assessment of the transcript and the record. However, the Commission's review of the Decision of the Arbitrator indicates otherwise. The Arbitrator indicated his impression of Petitioner was based on Petitioner's body language and pace of speech, neither of which could have been gleaned without physically observing Petitioner at trial. The Arbitrator did not indicate his impression was based on his reading of the transcript. Accordingly, the Commission finds that the damage done to the bus during the accident, in conjunction with Petitioner's subsequent indication of pain, and Dr. Mehta's opinion regarding the manifestation timeline of symptoms all work together to dismiss any indices of inconsistency between Petitioner's behavior and testimony. The Commission finds Petitioner was a credible witness.

II. Causal Connection

The Arbitrator found that Petitioner's eye and right ring finger injuries were causally related to the accident, but that those conditions have since resolved. Regarding Petitioner's left shoulder condition, the Arbitrator denied causation. Petitioner advances no argument regarding his eye and ring finger injuries. However, Petitioner does argue that the Arbitrator erred in denying causation to his current left shoulder condition. We agree.

Determinative of this issue is whether Petitioner's stipulated December 30, 2019 work accident aggravated his pre-existing left shoulder condition. The applicable standard legal standard in such a case is as follows: It is well established that an accident need not be the sole or primary cause—as long as employment is a cause—of a claimant's condition. *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 205 (2003). Furthermore, an employer takes its employees as it finds them (*St. Elizabeth's Hospital v. Illinois Workers' Compensation Commission*, 371 Ill. App. 3d 882, 888 (5th Dist. 2007)), and a claimant with a pre-existing condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Commission*, 92 Ill. 2d 30, 36 (1982). As the Appellate Court held in *Schroeder v. Illinois Workers' Compensation Commission*, 2017 IL App (4th) 160192WC, the inquiry focuses on whether there has been a deterioration in the claimant's condition:

> That is, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition; it is the resulting deterioration from whatever the previous condition had been. *Schroeder* at ¶ 26.

Here, Dr. Mehta acknowledged Petitioner had preexisting degenerative joint disease which pre-dated the accident. However, the record indicates that at least for the year prior to the accident, Petitioner consistently worked full duty with no evidence of left shoulder complaints leading up to the December 30, 2019 accident. After the accident, Petitioner consistently complained of left shoulder pain to medical providers, and received conservative treatment including pain medication, Lidoderm patches, muscle relaxers and physical therapy. Eventually Petitioner was placed on restricted duty, including no driving. As supporting evidence, the Commission highlights the fact that immediately after the accident, Petitioner indicated he had "a little pain" when asked if there was pain in his sides or arms. Further, in the initial emergency room record on the date of accident, Petitioner complained of left shoulder pain and was prescribed Lidoderm patches. The Commission finds it more likely than not that these patches were prescribed for his left shoulder, as the March 11, 2020 visit with Dr. Mehta indicated he had previously been prescribed pain patches for his left shoulder among other recommended treatments. Further, the Commission finds significant Dr. Mehta's opinion that the position of Petitioner's left arm at the time of accident would not change his opinion because any type of jerking can aggravate a rotator cuff. We find the opinions of section 12 examiner Dr. Neal to be unpersuasive as Dr. Neal based his negative causation opinion in part on a belief that Petitioner had no immediate left shoulder complaints after the accident. The record contradicts Dr. Neal's belief, as there is evidence of such complaints which has been discussed above.

The Commission also observes that there was a significant deterioration in Petitioner's condition following the work accident. There is no indication that Petitioner had been recommended for a left shoulder arthroscopic subacromial decompression and distal clavicle resection prior to the work accident. However, after a bout of unsuccessful conservative treatment, Dr. Mehta recommended said surgery for Petitioner. Medical records and the opinion of Dr. Mehta also support a finding that Petitioner's condition never returned to baseline after the accident. Petitioner consistently complained of left shoulder pain after the accident, leading to an MR arthrogram, a diagnosis of a left shoulder low grade partial thickness rotator cuff tear, impingement, and AC degenerative joint disease, as well as, being placed on work restrictions. In addition to noting the absence of any prior left shoulder issues, Dr. Mehta opined the mechanism of injury involving a sudden impact and "jerky type motion" could certainly aggravate the rotator cuff and AC joint and cause impingement syndrome. Dr. Mehta also opined his physical examination findings, including tenderness at the left shoulder AC joint and biceps, positive impingement signs, and positive cross arm adduction, were indicative of the rotator cuff and AC joint being the cause of Petitioner's pain. He quantified his opinion, stating that the mechanism of injury, temporal relationship between the injury and Petitioner's symptoms, and his examination findings led him to the opinion that Petitioner's left shoulder injury was causally related to the instant accident. Thus, the Commission finds the instant work accident either aggravated or accelerated any preexisting condition, which led to a deterioration of the left shoulder condition.

The Commission also disagrees with Respondent's argument that Petitioner's left shoulder injury while painting his front door was an intervening cause of his current condition breaking the causal chain between the accident and Petitioner's current condition. Petitioner testified that this was a temporary exacerbation which soon reverted back to his post-accident baseline. Dr. Mehta's testimony echoes these sentiments, as he opined that the painting only temporarily aggravated Petitioner's condition, and that this activity did not change his causation opinion. Dr. Mehta testified Petitioner was already working towards the failure of conservative measures at that time, thus neither the painting (nor any other event) materially changed the course of Petitioner's treatment. Based on the evidence in the record, the Commission finds that Petitioner's left shoulder condition remains causally related to the stipulated December 30, 2019 work accident.

III. Average Weekly Wage

The Arbitrator found that in the 52 weeks prior to the accident, excluding December 22, 2019 through January 10, 2020, Petitioner earned $42,219.63 in regular wages. This equals an average weekly wage of $811.92. Petitioner argues that his overtime wages should be included in this calculation. The Commission declines to include Petitioner's overtime wages in the calculation of wages, as no testimony was offered indicating his overtime was mandatory. See *Edward Hines Lumber Co. v. Industrial Commission*, 215 Ill. App. 3d 659, 666 (1st Dist. 1990). Accordingly, the Commission affirms the arbitrator's average weekly wage calculation.

IV. Medical Expenses

Consistent with our finding of causal connection to Petitioner's left shoulder condition, the Commission finds that all expenses incurred in relation to Petitioner's left shoulder were reasonable, necessary and causally related to the accidental work injury. As such, the Commission

finds Respondent liable for all incurred medical expenses related to Petitioner's left shoulder, including those incurred for treatment at Fox Valley Orthopaedics.

V. Prospective Medical Care

In accordance with the above findings, the Commission also finds that the surgery recommended by Dr. Mehta is the best course of action to relieve or cure the effects of Petitioner's injury. See *Gallentine v. Industrial Commission*, 201 Ill. App. 3d 880, 888 (2d Dist. 1990). Having found Dr. Mehta's opinions to be persuasive, the Commission relies on his opinion in awarding the prospective surgery he recommends. The Commission notes that Respondent's section 12 examiner Dr. Neal acknowledged that surgery would not be an unreasonable next step.

VI. Temporary Total Disability

Having found causation with respect to Petitioner's left shoulder condition, the Commission has reviewed the evidence and finds Petitioner is also entitled to temporary disability benefits. Petitioner was placed on restricted duty for his left shoulder by Dr. Mehta on March 11, 2020, which included no driving, effectively taking Petitioner off work. Petitioner's condition has not resolved since then, nor has any medical professional opined that he has reached maximum medical improvement ("MMI"). Dr. Neal opined that Petitioner would be at MMI if he refused additional conservative treatment, but we find no evidence that Petitioner refused such.

Accordingly, the Commission awards temporary total disability benefits from March 11, 2020 through May 6, 2021[3], or 60 & 2/7ths weeks. Respondent paid temporary total disability benefits through June 23, 2020, and is thus entitled to credit for the same. However, benefits from June 24, 2020 through May 6, 2021 are still due and owing to Petitioner. Additionally, the Commission notes that the correct amount for temporary total disability credit is $8,944.50.

VII. Penalties and Fees

Petitioner argues that penalties and fees are in order as Respondent relied on the section 12 examination report of Dr. Neal in error, as it was obvious Dr. Neal was unaware of when Petitioner's left shoulder complaints began. The Commission has reviewed the evidence and disagrees. Although the Commission has ultimately found Respondent's reliance on the opinions of Dr. Neal to be in error, it also finds that such reliance does not rise to the level of being unreasonable nor vexatious, given the issues raised in the medical records and surveillance videos.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner's current left shoulder condition of ill-being is causally related to the undisputed December 30, 2019 accident.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner's average weekly wage equals $811.92.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's assessment of Petitioner's credibility be stricken from the analysis.

3 On the Request for Hearing form, these are the dates Petitioner claimed entitlement to TTD benefits.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses incurred in the care and treatment of Petitioner's left shoulder injury, including treatment rendered by Fox Valley Orthopaedics, pursuant to section 8(a) and subject to section 8.2 of the Act. Respondent shall receive credit for medical expenses paid in the amount of $8,749.68.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay for the left shoulder surgery recommended by Dr. Mehta, as provided in section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $541.28 per week for a period of 60 & 2/7ths weeks, representing March 11, 220 through May 6, 2021, that being the period of temporary total incapacity for work under §8(b) of the Act, and that as provided in section 19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any. Respondent shall have a credit of $8,944.50 for TTD benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is not liable for penalties under section 19(k) or 19(l) of the Act, nor is Respondent liable for attorney fees under section 16 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 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 $57,000.00. 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.

June 12, 2023

/s/ *Deborah J. Baker*

DJB/wde

O: 4/12/23

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/s/ *Stephen Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC003143
Case Name	Oscar Canas v. IFH Group Inc
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0260
Number of Pages of Decision	30
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Jason Lawrence
Respondent Attorney	Francis O'Byrne

DATE FILED: 6/15/2023

/s/ Deborah Baker, Commissioner

Signature

23IWCC0260

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Oscar Canas,

Petitioner,

vs. NO: 19 WC 3143

IFH Group, Inc.,

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. The Commission otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms the Arbitrator's conclusions regarding the issues of accident, date of accident, notice, causal connection, medical expenses, and nature and extent. However, the Commission modifies the awards of temporary total disability ("TTD") and temporary partial disability ("TPD") benefits. The Commission also clarifies the credit Respondent is due for medical expenses it paid prior to the date of hearing. Finally, the Commission vacates the Arbitrator's award of penalties and fees pursuant to Sections 16, 19(k), and 19(l) of the Act, and modifies the Arbitrator's conclusions regarding Respondent's motion seeking penalties pursuant to Section 25.5 of the Act.

Temporary Disability Benefits

The Arbitrator concluded Petitioner met his burden of proving an entitlement to TTD benefits from July 11, 2018, until October 14, 2018, a period of 13-4/7 weeks. The Commission notes that Respondent did not submit any evidence disputing the period during which Petitioner was off work following his right shoulder surgery. After considering the evidence, the Commission affirms the Arbitrator's award of TTD benefits from July 11, 2018, until October 14, 2018. However, the Commission must correct the Arbitrator's calculation of the amount of TTD benefits owed to Petitioner. The Commission finds the correct TTD period is from July 11, 2018, until October 14, 2018, a period of 13-5/7 weeks. The Commission further finds this period of TTD calculates to $7,623.20 in TTD benefits.

Similarly, the Commission modifies the Arbitrator's award of TPD benefits to reflect the correct period and calculation of benefits. The Arbitrator concluded Petitioner met his burden of proving an entitlement to TPD benefits from October 15, 2018, until February 4, 2019, totaling $416.59.[1] Respondent did not submit any evidence disputing Petitioner's claim that he earned less than his normal average wages when he worked with restrictions from October 15, 2018, until February 4, 2019. Thus, the Commission affirms the Arbitrator's conclusion that Petitioner was entitled to TPD benefits from October 15, 2018, until February 4, 2019. However, after reviewing the evidence, the Commission modifies the Arbitrator's calculation of the value of the TPD benefits.

Pursuant to Section 8(a) of the Act, TPD benefits are equal to two-thirds of the difference between the average amount Petitioner would have been able to earn if working full duty in his normal position and the gross amount he earned in the modified job. Petitioner's average weekly wage is $833.80. The credible evidence shows that from October 15, 2018, through February 4, 2019, Petitioner's gross earnings totaled $12,568.31. The difference between Petitioner's gross earnings and the average amount he would have earned while working full duty during this period is $772.49. Thus, the Commission finds from October 15, 2018, through February 4, 2019, Petitioner was entitled to TPD benefits in the amount of $514.99.

Credit Due to Respondent

In the Order section of the Arbitration Decision Form, the Arbitrator wrote that Respondent "…shall receive a credit for payments made up until 4/17/18, if adequate proof is submitted." Similarly, on page twenty (20), of the Decision, the Arbitrator wrote, "…unless proof of medical expenses paid up until 4/17/18 is provided, the Arbitrator finds that the Respondent is not due any credit for payments made." After reviewing the evidence, the Commission clarifies the credit Respondent is due for medical expenses it paid relating to the February 13, 2018, work accident.

The parties agreed that Respondent paid some medicals bills relating to Petitioner's work injury. While Respondent did not know the amount of expenses paid through its workers' compensation insurance, two of Petitioner's exhibits detail these payments. Petitioner's Exhibits 6 and 7 clearly itemize medical expenses paid through Respondent's workers' compensation insurance. The information in these exhibits is credible evidence regarding the expenses for which Respondent is due a credit pursuant to Section 8(j) of the Act. Therefore, the Commission finds Respondent is due a credit pursuant to Section 8(j) of the Act for any bills paid through its workers' compensation insurance. The Commission agrees that Respondent is not entitled to a credit for any payments paid through Petitioner's group insurance because Petitioner obtained health insurance through his wife's employment benefits. (Tr. at 87).

Penalties and Fees

The Arbitrator concluded that Respondent's continued denial of Petitioner's claim was vexatious and unreasonable and awarded penalties and attorney fees pursuant to Sections 16, 19(k),

[1] The Commission notes that in the Order section of the Arbitration Decision Form, the Arbitrator mistakenly identified the TPD period as October 18, 2018, through February 7, 2019. This is a clerical error that has been corrected by the Commission's modifications to the Arbitrator's award of TPD benefits.

and 19(l) of the Act. The Commission views the evidence differently and finds Respondent's continued denial of Petitioner's claim was neither unreasonable, frivolous, nor vexatious. Thus, the Commission vacates the Arbitrator's award of penalties and fees.

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.

After carefully considering the totality of the evidence, the Commission finds Respondent's failure to pay benefits to Petitioner was not unreasonable, vexatious, or frivolous. The Commission notes that one of Respondent's reasons for denying Petitioner's claim was its defense that Petitioner did not sustain injuries due to a compensable accident. Respondent's denial of accident was largely based on evidence it believed proved Petitioner's reports regarding his mechanism of injury were not credible. While the Commission agrees with the Arbitrator's conclusion that Petitioner met his burden proving he sustained injuries due to an accident arising out of and in the course of his employment, this does not mean Respondent's denial of accident was unreasonable or vexatious. Respondent's defense regarding the issue of accident was based on conflicting statements and/or actions by Petitioner relating to his work accident.

Petitioner timely provided Respondent notice of the February 13, 2018, work accident pursuant to Section 6(c) of the Act. However, it is undisputed that Petitioner did not notify Respondent of his injury immediately. Petitioner admitted that he did not tell anyone about the injury until February 19, 2018. Petitioner also admitted that he completed the remaining several hours of his shift on the date of accident. Petitioner's injury occurred at 10:00 a.m. on the date of accident, and Petitioner did not leave work until 3:40 p.m. Petitioner even completed his work on the heavy 448 tank that caused his injury. The evidence also shows that Petitioner worked his normal shifts and performed his normal job duties without complaint on February 14, 2018, February 15, 2018, and February 16, 2018. Petitioner also did not seek any medical treatment until February 19, 2018. Given Petitioner's job duties and the significance of his shoulder injury, the Commission does not find Respondent's doubts regarding the credibility of Petitioner's reported work accident and mechanism of injury unreasonable or vexatious.

Inconsistencies between Petitioner's testimony and the information contained in certain medical records also support the Commission's finding that Respondent's accident defense was not unreasonable. Petitioner testified that he never lifted the 448 tanks overhead and further testified that he never told any medical providers that his injury occurred while lifting a 448 tank overhead. He testified that when giving a history of his injury to medical providers, he accurately described his injury as occurring when he stood the tank up end over end. Similarly, Petitioner testified that he immediately felt pain in his right shoulder after the work accident, and denied telling any providers that he did not immediately feel pain. However, the histories recorded in several medical records contradict Petitioner's testimony. For example, on February 19, 2018, the clinic physician assistant wrote that Petitioner stated his injury occurred while lifting a tank

"…over the level of his shoulder." (PX 1). On March 19, 2018, Petitioner's physical therapist wrote that Petitioner stated his injury occurred "…when he…lifted a heavy item overhead at work. He did not have pain immediately but noticed it later." (PX 2). On July 27, 2018, a physical therapist wrote that Petitioner reported injuring his shoulder "…while lifting heavy objects overhead at work…" (PX 2). The Commission does not find these inconsistencies persuasive, but Respondent's continued denial of this claim due to these inconsistencies was not unreasonable.

Respondent also relied on the opinions of Dr. Foad, its Section 12 examiner, to validate its denial of Petitioner's claim. The Commission notes that although Respondent may have questioned the credibility of Petitioner's claim, it paid medical expenses through the date of Dr. Foad's examination. In his narrative report, Dr. Foad opined the work accident caused a temporary aggravation of Petitioner's preexisting chronic rotator cuff tear and age-related tendinopathy. He further opined that the work injury did not aggravate Petitioner's preexisting right shoulder condition beyond its normal age-related progression. In his addendum, Dr. Foad opined that Dr. Thormeyer's surgical findings in the operative report from Petitioner's right shoulder surgery proved that Petitioner's rotator cuff tear was longstanding. The Commission agrees that Dr. Foad's deposition testimony was less than precise. During cross-examination, Dr. Foad testified that the work accident was a contributing factor to Petitioner's need for right shoulder surgery. However, toward the end of the deposition, Dr. Foad seemed to clarify his opinions and reaffirmed his opinion that the work accident did not contribute to Petitioner's need for surgery.

Dr. Foad testified that his opinions were based on his professional experience and relevant medical literature regarding how asymptomatic rotator cuff tears can naturally become symptomatic over time. Perhaps most importantly, Dr. Foad testified that he continued to believe the work accident at most caused a temporary exacerbation or aggravation of Petitioner's preexisting condition. He further testified that Petitioner's right shoulder would have returned to its pre-accident baseline if Petitioner had allowed sufficient time before proceeding with surgery.

The threshold for an award of penalties and fees pursuant to Sections 16 and 19(k) of the Act is not whether the Commission finds Respondent's reasoning persuasive. Instead, Illinois courts have determined the test is whether Respondent's reasoning is objectively reasonable. *See e.g., Zitzka v. Indus. Comm'n,* 328 Ill. App. 3d 844, 849 (2002). After considering the totality of the evidence, the Commission finds Respondent's continued denial of benefits based on Dr. Foad's expert opinions and Respondent's accident defense was objectively reasonable. As such, the Commission finds Petitioner failed to meet his burden of proving an entitlement to penalties and fees pursuant to Sections 16, 19(k), and 19(l) of the Act. Thus, the Commission vacates the Arbitrator's award of penalties and fees.

Respondent's Motion Pursuant to Section 25.5 of the Act

The Arbitrator denied Respondent's motion seeking penalties pursuant to Section 25.5 of the Act. After considering the evidence, the Commission affirms the Arbitrator's denial of Respondent's motion. However, the Commission modifies the Arbitrator's conclusions. In the final paragraph on page twenty (20) of the Decision, the Arbitrator wrote: "The Arbitrator finds that the Respondent's unfounded frivolous, arbitrary and capricious allegations of fraud support an award for maximum penalty pursuant to Sections 19(k), 19(l), and 16 of the Act…" The

Commission hereby strikes this paragraph in its entirety.

The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on March 7, 2022, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary total disability benefits of $555.87/week for 13-5/7 weeks commencing July 11, 2018, through October 14, 2018, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary partial disability benefits in the amount of $514.99 for the period of October 15, 2018, through February 4, 2019, as provided in Section 8(a) of the Act.

IT IS FURTHER ORDERED that Respondent shall pay reasonable and necessary medical services identified in Petitioner's Exhibits 6, 7, 8, 9, 10, and 12, pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for any medical benefits that have been paid through its workers' compensation insurance pursuant to Section 8(j) of the Act. These payments are detailed in Petitioner's Exhibits 6 and 7. Respondent is not entitled to a credit for any payments made by Petitioner or through Petitioner's group health insurance as Petitioner obtained health insurance through his wife's employment benefits.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner permanent partial disability benefits of $500.28/week for 112.5 weeks, because the injuries sustained caused the 22.5% loss of use of the whole person, as provided in Section 8(d)2 of the Act.

IT IS FURTHER ORDERED that the Arbitrator's award of penalties and fees pursuant to Sections 16, 19(k), and 19(l) of the Act is hereby vacated.

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

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

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.

d: 4/18/23
DJB/jds
43
June 15, 2023

/s/ Deborah J. Baker
Deborah J. Baker

/s/ Maria E. Portela
Maria E. Portela

/s/ Kathryn A. Doerries
Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC003143
Case Name	CANAS, OSCAR v. IFH GROUP, INC
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	23
Decision Issued By	Bradley Gillespie, Arbitrator

Petitioner Attorney	Jason Lawrence
Respondent Attorney	Francis O'Byrne

DATE FILED: 3/7/2022

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

/s/Bradley Gillespie, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **Rock Island**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Oscar Canas
Employee/Petitioner

v.

IFH Group, Inc.
Employer/Respondent

Case # **19** WC **003143**

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 **Bradley Gillespie**, Arbitrator of the Commission, in the city of **Peoria**, on **6/15/2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☒ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☒ Other **Penalties under section 25.5**

FINDINGS

On **2/13/2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**43,357.76**; the average weekly wage was $**833.80**.

On the date of accident, Petitioner was **57** years of age, ***married*** with **0** dependent children.

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

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

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

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

ORDER

Respondent shall pay Petitioner TTD benefits of $555.87/week for 13-4/7 weeks, commencing 7/11/18 through 10/14/18, as provided in Sections 8(a) and 8(b) of the Act.

Respondent shall pay Petitioner TPD benefits provided in PX 14 in the amount of $416.59 for benefits that have accrued from 10/18/18 through 2/7/19, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner reasonable and necessary medical services as provided in PX 6, 7, 8, 9 and 10, and additionally provided in an HCFA format in PX 12, as provided in Sections 8(a) and 8.2 of the Act.
Respondent shall receive a credit for payments made up until 4/17/18, if adequate proof is submitted.
Respondent shall pay the award of medical expenses as compensation directly to Petitioner.

Respondent shall pay Petitioner penalties pursuant to Section 19(k) in the amount of $54,796.19 as provided in Section 19(k) of the Act, and $10,000.00 as provided in Section 19(l) of the Act.

Respondent shall pay Petitioner PPD benefits of $500.28/week for 112.5 weeks, because of injuries sustained which caused 22.5% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner penalties of $46,134.01, as provided in Section 16 of the Act.

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

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

Bradley D. Gillespie **MARCH 7, 2022**

Signature of Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

OSCAR CANAS	)	
Petitioner,	)	
	)	
v.	)	**Case No.: 19 WC 003143**
	)	
IFH GROUP, INC.	)	
Respondent.	)	

DECISION OF THE ARBITRATOR

This matter proceeded to hearing on June 15, 2021 in Peoria, Illinois (Arb. 1). The following issues were in dispute:

- Accident
- Notice
- Causal Connection
- Medical Bills
- 8(j) Credit
- TTD/TPD
- Nature & Extent
- Penalties/attorney's fees under §19(k), §19(l) and §16.
- Other: Penalties under Section 25.5

FINDINGS OF FACT

On February 13, 2018, Oscar Canas [hereinafter "Petitioner"], was 57 years of age and worked for IFH Group, Inc. [hereinafter "Respondent"]. Petitioner testified that his job title was "TIG Welder" and he had been so employed for approximately 13 years. (Tr. p. 12) He described his job duties as checking tanks after they were MIG welded to find leaks. (*Id.*) Petitioner explained that a welder would weld a tank behind a curtain, Petitioner would then pull the tank off a roller table, place onto a table, plug all of the holes, and attach an air line to pressurize the tank to a specific pressure to test for leaks. (Tr. p. 13) His principal responsibility was to identify leaks in the tank left by the MIG welder and fix the leaks. (Tr. p. 14)

Petitioner identified a picture of a "448, which was one of the heavier tanks" involved in the accident in question. (Tr. p. 14, PX #19-1) He indicated that the tank weighed 114 pounds. (*Id.*) Petitioner testified that the tanks come to him on the rollers behind the curtain depicted in PX #19-2. (Tr. p. 14) He stated that he would adjust his table to the height of the rollers, slide the tank over onto the table and move his table into his workstation. (Tr. pp. 14-15) Petitioner estimated that his workstation is approximately four foot by four foot. (Tr. p. 15) After the tank is plugged and pressurized, Petitioner used a spray bottle to spray each of the welds with soapy water to identify and mark any leaks in the tank. (Tr. p. 16) Petitioner was asked whether the dunk tank depicted in PX #19-3 was used in his job and he replied, "Sometimes, but not on

448s." (*Id.*) Petitioner specifically denied using the dunk tank on the type of tank involved in this accident. (*Id.*)

Petitioner testified that inspecting the tank required him to manipulate or maneuver the tank. (Tr. p. 17) He denied having to lift the tank over his head. (Tr. p. 18) Petitioner described standing the tank up on its end on the worktable. (Tr. pp. 18-21) Petitioner testified that he was injured on February 13, 2018. (Tr. p. 20) He affirmed that he had no problems with his right shoulder prior to the date of accident, had received no medical treatment to his right shoulder, and had not lost any work related to the right shoulder prior to the work incident. (Tr. p. 21) Petitioner testified that he had been working on other types of tanks earlier in the day before starting to work on the 448 tanks. (Tr. p. 25) He indicated that he had already completed one of the 448 tanks and placed it onto a pallet like that pictured in PX #19-5. *Id.* Petitioner described moving the table over to the rollers, pulling a tank onto the table, moving it over to his work area, plugging all of the holes and placing the air line in the tank. *Id.* He then lowered the table, bent down, and stood the tank up end over end, and felt a pop in his shoulder with pain. *Id.* Petitioner said that he stepped back and rubbed his shoulder for a short time. (Tr. p. 26) He stated that he thought he pulled a muscle and went back to work. *Id.* Petitioner testified that he was able to complete his day by modifying the way he went about his work. (Tr. p. 34) He continued working over the rest of his work week but continued to experience pain with certain movements. (Tr. p. 37)

Over the following weekend, Petitioner said that he had trouble with his right shoulder doing activities such as putting away groceries overhead, taking a shower, washing his hair, and other overhead activities. (Tr. pp. 40-41). He stated that he took Ibuprofen, iced his shoulder every night after work, and purchased over-the-counter Lidocaine patches because he thought it was a pulled muscle. (Tr. p. 41-42). Petitioner testified that he did not reinjure or separately injure his shoulder during the rest of his work week or over the weekend. (Tr. p. 42).

On Monday, 2/19/2018, Petitioner testified that his shoulder was still bothering him and he reported the injury to his supervisor, Troy Bruder. (Tr. p. 44). On 2/19/2018, he verbally reported the accident, was given a swab drug test that was negative, and filled out an incident report (*See* PX #11 & Tr. p. 44-45). Petitioner testified that he completed the second page of the accident report (PX #11) and gave the report to Troy Bruder. He reported that the accident occurred at his workstation the prior week while working on 448 tanks and that he injured his right shoulder. He was having right shoulder pain and having trouble moving it. The cause of the injury was lifting and moving large 448 tanks. (Tr. p. 48; PX #11).

Petitioner testified that he knows the accident occurred on 2/13/2018 because that was when they were testing the 448 tanks. And it was when he lifted up the 448 tank, that he felt the pop and the pain in his shoulder. (Tr. p. 50). Further, Respondent's witness, Kate Brown, the human resources manager for IFH Group, testified and verified that the 448 tanks ran the prior week on 2/13/2018. (Tr. pp. 154-155).

Respondent sent Petitioner to Physicians Immediate Care on 2/19/2018 for injury to his right shoulder. (PX #1 p. 2). He reported a history of injuring his right shoulder when lifting a tank at work last week. *Id.* He described the severity pain as 7/10, that he had constant pain in his right shoulder since Tuesday, 2/13/2018. *Id.* Petitioner denied similar problems in the past, denied any non-work related events or injury that possibly contributed to or related to the development of his symptoms. (PX #1 p. 2) The records noted he was a 57 year old male welder that last week while he was lifting a tank over the level of his shoulder when he developed sharp right anterior shoulder pain. *Id.* Petitioner reported his pain was worse with reaching overhead, reaching across his body, or behind his back. *Id.* He has weakness in the right arm with lifting, has been taking Motrin, and reports muscle pain. (PX #1 p.2). Physical exam noted multiple abnormalities and positive findings on orthopedic shoulder tests. *Id.* Initial diagnosis was sprain of the shoulder joint, he was given a prescription, documents regarding cryotherapy, placed on restriction of no lifting over shoulder greater than 1 pound using the right arm, and scheduled for follow up. (PX #1 pp. 3-5 & Tr. pp.53-56).

Petitioner testified that following his appointment at Physicians Immediate Care, he returned to work and gave his employer his work restrictions. (Tr. p. 58). He stated that Respondent did not honor those restrictions and returned him to his regular job. (Tr. p. 58). He continued to perform his regular job all the way up until surgery. (Tr. p. 57). Petitioner returned to Physicians Immediate Care on 3/1/2018 for a two week follow up of his right shoulder injury. (Tr. p. 59 & PX #1 pp. 16-32). His shoulder continued to demonstrate crepitus, reduced range of motion, and pain. (PX #1 p. 16) He was sent for an MRI of the right shoulder, ordered to start physical therapy, continue with Prednisone and with his lifting restrictions. (*Id*.)

Petitioner had a physical therapy evaluation on 3/19/2018 at CGH Medical Center Physical Therapy. (PX #2). Thereafter, Petitioner had six physical therapy sessions beginning 3/21/2018 - 4/9/2018. (PX #2 p. 97). He testified that the therapy was painful and really hurt his shoulder. (Tr. p.59).

On 3/19/2018, Petitioner returned to Physicians Immediate Care for follow up. He continued to have pain with internal rotation, flexion/abduction of the shoulder associated with decreased range of motion. (PX #1 pp. 33-46) He reported that he started therapy and the therapist was concerned about scapular displacement. *Id.* He was scheduled for right shoulder MRI, PT was continued, and he was continued with restriction of no lifting over the shoulder greater than one pound with his right arm. (PX #1 pp. 33-46).

Petitioner underwent an MRI of the right shoulder on 3/29/2018 at CGH Medical Center. (PX #3) The MRI report disclosed: (1) full thickness tear of the supraspinatus with retraction; (2) normal acromial clavicular joint; (3) abnormal appearance of the infraspinatus muscle with fatty atrophy. Likely associated with spinoglenoid notch cyst is present. This is approximately 2 cm in size; (4) subchondral cyst formation along the inferior aspects of the glenoid; (5) changes compatible with the superior glenoid labral slap tear. (PX #3 p. 155).

Petitioner testified after his MRI, he again reported to his employer his 1# lifting restriction, but he was still required to continue to do his regular job and they were not honoring his restriction.

(Tr. p. 61). Petitioner testified that while he continued to do the same job as before, he modified the overhead work portion. (Tr. p.62)

On 4/2/2018, Petitioner returned to Physicians Immediate Care for five week follow up and MRI review. (PX #1 p. 47) He had continued decreased abduction and internal rotation of his shoulder. *Id* at 48. Physical therapy had not improved in his range of motion. *Id.* His diagnosis was changed to unspecified rotator cuff tear or rupture of the right shoulder, superior glenoid labrum lesion of the right shoulder. (PX #1 p.49) Physical therapy was placed on hold after his next visit, restrictions of no lifting over the shoulder greater than one pound using the right arm were continued, and he was referred for orthopedic surgeon. (PX #1, 47-61).

On 4/17/2018, Petitioner was sent to Dr. Abdul Foad to perform an independent medical evaluation and author a report. Dr. Foad's report dated 4/17/2018, can be found attached to his evidence deposition transcript as an exhibit. (PX #16 p. 634).

On 4/25/2018, Petitioner came under the care of Dr. Jeffrey Thormeyer and was seen by D. Ethan Brooks, P.A. (PX #2 p. 64). On examination, Petitioner was noted to have reduced range of motion, positive Speed's, positive Yergason's, positive O'Brien's test, positive Hawkins and Near impingement test, positive cross arm abduction, and 4/5 strength with internal and external rotation of the shoulder.(PX #2 p. 65) Supraspinatus test was also noted to be positive. *Id.* MRI was interpreted to show a full thickness retracted rotator cuff tear, proximal biceps tendon tear as well as degenerative changes. Assessment was complete rotator cuff tear/rupture of the right shoulder. Surgical options were discussed and Petitioner indicated he would like to proceed with surgery. (PX #2 pp. 64-67; Tr. p. 64).

On 6/21/2018-6/26/2018, Petitioner had x-rays and pre-operative clearance through CGH Medical Center and as well as a visit with Dr. Thormeyer. (PX #2 pp. 68-71). Petitioner testified that from the time of his injury of 2/13/2018 until his surgery on 7/11/2018, he continued to work his regular job. (Tr. p. 65). Petitioner reported that certain aspects of his job caused shoulder pain which was consistent through surgery. (Tr. p. 66). Petitioner testified that he continued to do his regular job with his own modifications up until the surgery. (Tr. p.57).

On 7/11/2018, Petitioner underwent right shoulder surgery. (PX #4; Tr. pp. 64-65). Dr. Thormeyer performed the surgery and was assisted by Ethan Brooks, P.A., (PX #4) The pre-operative diagnosis was right shoulder arthroscopy with arthroscopic rotator cuff repair, subpectoral biceps tendinosis, cuff debridement, subacromial decompression with acromioplasty and spinoglenoid cyst decompression. (PX #4 pp. 180-181). His post-operative diagnosis was upgraded from the pre-operative diagnosis to right shoulder massive, retracted rotator cuff tear with Type 2 slap tear with extension posteriorly, spinoglenoid cyst, partial articular subscapularis tear and subacromial impingement. (PX #4 p. 180). Post-operatively, Petitioner was restricted from all work activity. (PX #4).

Following surgery, Petitioner testified he was taken completely off work and his doctors wanted him off work for six months, but he went back to work after three months because he was not receiving any kind of benefits from Respondent. (TT p.67). Petitioner testified and the parties

agree he was off work from 7/11/18 - 10/15/18, when he returned to work. The parties have stipulated that he did not receive any TTD payments during his off work period. (AX #1).

Petitioner testified he continued to follow up with Dr. Thormeyer. (Tr. p. 69) Medical records reflect his next visit was on 7/25/2018. (PX #2 p. 72). Petitioner underwent post-operative physical therapy at CGH Medical Center from 7/27/2018 through 10/19/2018. (PX #2 pp. 108-149; Tr. pp. 70-71).

On 8/22/2018, Petitioner followed up with Dr. Thormeyer for his six week post-operative visit. Records note he is still having a lot of trouble with motion on his own, continued with physical therapy, and continued to have swelling in the medial aspect of his arm. (PX #2 pp. 76-78) The sling was discontinued at that time, and medication changed to Tramadol with Percocet for breakthrough pain. He received a pulley system to use for at home physical therapy and was kept off work with a plan re-evaluate in six weeks. (PX #2 pp. 76-78).

On 10/26/2018, Petitioner followed up with Dr. Thormeyer. (PX #2 pp. 79-82). He was noted to be doing fairly well and making progress in physical therapy. His range of motion was restricted, and his pain complaints were 3/10. Petitioner's forward elevation was 115 degrees, internal rotation was 45 degrees actively; passively the shoulder could get to 140 degrees, and internal rotation was noted to be 75-80 degrees. He expressed concerns about his internal rotation behind his back, and Dr. Thormeyer explained that this motion is usually the last and most difficult to deal with after any type of shoulder surgery and will to take time to recover. (PX #2 p. 36).

On October 15, 2018, Petitioner returned to work. Petitioner testified that he called the president of the company to ask if he could come back doing light duty and perform the verification job. (Tr. p.72). At that time, he was not receiving any compensation while he was off work. Originally, the plan was for him to be off work completely for six months, but he was able to return to light duty performing a verifying position. (Tr. p. 73). He continued the light duty job for three more months during which time he earned less money than he normally would have earned because he was not allowed to work overtime while on light duty. (Tr. p. 74). Petitioner reviewed his wage record and confirmed during the period of light duty he earned $624.89 less while on light duty. (PX #14).

On 12/4/2018, Petitioner returned for his five month post-op follow up with Dr. Thormeyer. (PX #2) He reported continuing to do well with mild pain of 2/10. He had returned to work in a restricted manner and had a 10 pound weight limit at this point. He didn't feel capable full duty but wanted some adjustments and increase to his weight restriction to 25 pounds. His weight restriction was advanced to 25 pounds. He was to return in one month for review of possibly returning him to full duty. (PX #2 pp. 83-85). On 1/3/2019, Petitioner followed up with Dr. Thormeyer stating the pain comes and goes, he has some continued limitations in terms of strength and range of motion. He continued his home exercise program every day and Ibuprofen. His current pain complaint was 3/10. His work restrictions were continued at 25 pounds for at least another 6-8 weeks. Dr. Thormeyer indicated, if he was still having difficulty, they would consider ordering an FCE vs. lessening some of his restrictions. He weas instructed to continue anti-inflammatories and his home exercise program. (PX # 2 pp. 86-88).

On 2/5/2019, Petitioner returned for a seven month post-op visit with Dr. Thormeyer. He reported occasional slight pain with overhead use and was feeling 90 percent better since surgery. He continued to have tightness at the end-points of motion, pressure with some decreased internal rotation. He was continued on a home exercise program. It was noted that he had done this diligently. At this point, Petitioner was released without any restrictions to return to work full duty. He was to take anti-inflammatories as needed, and return in 3-4 months. Petitioner testified that he went back to work full duty and he had difficulty. He testified he was not ready to do full duty as the shoulder was still bothering him, and he went back to the same job he had before and that he has done the whole 13 years he worked for Respondent. (Tr. p.74-75). Upon returning to work, Petitioner testified he modified how he did the work, especially with the 448 tanks. He would use the crane even though it could not reach the rollers, he would put some chains on it, put them on the hooks around the top of the 448 tanks, try to lift and pull it, and then slide it off the rollers. It would hit the table and move the table a bit, and he would push it to where it needed to be and then could stand it up. (Tr. p. 76). He testified that when doing the 448 tanks, he no longer lifted them up end over end, he would lay them flat like they are on a pallet. (Tr. p. 78).

Petitioner returned to Dr. Thormeyer on June 6, 2019. (PX 2, 92-94). At his eleven month post-op visit, he noted his shoulder continued to hurt when he does certain activities such as wrenching at work and noted limitations in terms of his range of motion. He described pain at a 3/10. A cortisone injection was discussed and provided at this visit. (PX #2 pp. 92-94).

On 6/21/2019, Petitioner was sent for a functional capacity evaluation at KSB Hospital. (PX #5). Petitioner gave maximal effort on all tests. Petitioner had most difficulty performing activities from waist to crown lifting and elevated work. (PX #5 p. 346) From waist to crown he is limited to 22.5 pounds, on elevated work he is limited to occasionally *Id*. He lacked range of motion, strength, and stability in the involved shoulder which limits his performance for these activities. He performed chest level and below well without difficulty and up to his stated physical demand level. He reported that he continued to perform his prescribed home exercise program. His limitations were for overhead work and waist to crown lifting and placed at a medium/heavy US Department of Labor physical demand level. (PX #5).

Petitioner's last visit with Dr. Thormeyer regarding his right shoulder was on 9/11/2019. (PX #2 pp. 95-97). He reported that the cortisone shot three months prior did not help much. In terms of his symptoms, he reported pain at 2/10, had some decreased passive and active range of motion which is fairly stable. Assessment was status post cuff repair of a massive, retracted cuff. He has returned to work. He still has issues with overhead lifting and some motion. Treatment options were discussed to include consideration of a capsular release and shoulder scope, and Petitioner was not interested in more surgery at this time. It was discussed that the tightness in his shoulder may be more related to tension of the repair and shortness of tissue available rather than scarring and he was offered to revisit this at any time, continue anti-inflammatories as needed, and return on an as needed basis. (PX #2 pp. 95-97). Petitioner testified after his 9/11/2019 appointment and FCE, he was released with permanent restrictions pursuant to the FCE. (Tr. p. 81). He testified to continued problems with his shoulder and that he could not do things he was able to do before. He couldn't lift his arm all the way up, couldn't straighten his arm all the way out, and is unable to throw a football or play horseshoes as he did before. (Tr. p.82).

Petitioner reviewed his medical bills, PX #6, PX #7, PX #8, PX #9 and PX #10, and confirmed they were for treatment related to his injury. All medical bills that have been paid, were paid either through his wife's insurance or by the Petitioner personally. (Tr. pp.87-88). He did not have group insurance through IFH. (Tr. p.87). Petitioner no longer works for respondent, IFH Group, Inc., because they laid him off during COVID and have never called him back. (Tr. p.13). He currently works at Duragrind in Sterling, IL, where he loads parts into a robot and the heaviest thing he lifts is 35 pounds with nothing overhead. (Tr. p.89-90).

He testified that it has been over two years since he had the right shoulder surgery and he noticed that he still cannot extend his arm like he can with the opposite arm. He stated that he can't move his right arm up and down like the opposite arm. Petitioner demonstrated to the Arbitrator that he cannot put his arm behind his back up to his belt level. He has difficulty going over shoulder height and demonstrated the height he was able to reach upwards, and that he has trouble bending the arm. (Tr. p.90-91). He stated that he doesn't have as much strength as he used to on the right side and his right side used to be his strong side. He reported that his arm is stable as long as he doesn't have to do anything over the shoulder. He stated that above the shoulder it is rough. Petitioner noted that his arm will get numb and he has to lower the arm for the numbness to go away. He has permanent overhead restrictions, and permanent waist to crown restrictions. (Tr. pp.91-92). There are some things he can no longer do that he did before the injury such as throw a football, throw a Frisbee, play horseshoes, and work out by lifting weights. There are some things he still does but has more problems doing, including riding his bike, because his arm gets numb and tingling. (Tr. pp.94-95). He continues to do his home exercise program and described in detail the type of stretches he does. (Tr. p.95). He stretches and exercises the shoulder every day. (Tr. pp.96-97).

Petitioner testified he told his employer that he was working full duty and not the light duty he was supposed to, and his supervisor just blew it off. (Tr. p.120). He gave his restrictions to Troy and does not recall direct communications with Ms. Brown about his restrictions. He might have talked to her but does not recall. (Tr. pp. 122-123).

Petitioner does not know Dr. Thormeyer outside of his professional capacity and neither does his wife. (Tr. p.141). His referral was from Physicians Immediate Care and had to be approved through his wife's group insurance to make sure he was in network. (Tr. p.141). Dr. Thormeyer advised him that he had some pre-existing cysts and arthritis in the shoulder, but there was also pathology, a torn rotator cuff that was an acute injury caused by the accident. (Tr. p.143).

Respondent called Ms. Kate Brown, the human resource manager at IFH. (Tr. p.151). Kate Brown indicated that Petitioner's supervisor, Troy Bruder, brought notified her of Petitioner's injury on February 19, 2017. (Tr. p.152). She testified with Petitioner and he described that he had been working on a 448 tank and he injured his shoulder in the previous week. (Tr. p.154). She testified that he wasn't sure of the date other than what he had indicated to Troy, and they found the date that those tanks had been worked on was actually February 13, 2018. (Tr. pp.154-155). They looked it up and provided that information to Petitioner. (Tr. p.155). Ms. Brown indicated that Petitioner described to her what he was doing on 2/13/2018 when he hurt his shoulder. Ms. Brown indicated Petitioner was testing a 448 tank in his station, that he lifted the tank (she believed) into the dunk tank, but she is not 100 percent certain if the dunk tank was used or not.

She would have to look at their customer specifications. (Tr. p.156). Petitioner told her that he was lifting the tank without a crane or hoist and that he was lifting it himself. (Tr. p.157). Ms. Brown stated that when Petitioner returned to work on 2/19/2018, she was not aware that he had returned to full duty. She stated that she received his work status note from Physicians Immediate Care via fax and that Petitioner also provided a copy when he returned to work. *Id.* The weight restrictions were no lifting over 1 pound with his right arm and that was provided to his supervisor, Troy (Tr. pp. 157-158). She testified that IFH has a long list of light duty type jobs, depending on what restrictions an employee is given when they have a work injury. (Tr. p. 158) . She was not aware of any complaints that he was still doing full duty. (Tr. p. 159) She did not have communication with Petitioner between February 19, 2018 and the date of his surgery. (Tr. pp.159-160). If complaints were made that an employee is working full duty rather than within restrictions and light duty, those complaints should have come to her so that she could address it with a supervisor. (Tr. p. 159) She did not have knowledge that Petitioner was required to work outside of his restrictions. (Tr. p. 159). Medical bills would have been paid up until his examination with Dr. Foad. After that his medical would have been picked through his group insurance, and it is correct that he did not have group insurance through the company. (Tr. pp. 161-162). She took a video that is marked as Respondent's Exhibit #9, and that video does not show an employee working on a 448 tank, it shows a different tank. (Tr. p.163). The video does show the same station where Petitioner worked, just not the same tank as when he was injured. (Tr. p.163). She does not know the weight of the tank that was depicted in the video. (Tr. p. 165). She agrees 448 tanks are at least 110#. She verified Petitioner's Exhibit #11, confirmed that was her signature at the bottom, and agrees it states that he was injured working on a tank 448. (Tr. p.167). She notes there are hundreds of tanks that go through their facility and probably 50 different tanks that go through the light line. She believes he worked on 448 tanks maybe as little as once a month, but it changed at different times depending on what customers want. (Tr. p.168). She was able to independently verify that on 2/13/2018, he was working on tank 448 that day by asking Troy. (Tr. p. 168).

EVIDENCE DEPOSITIONS

The evidence deposition of Respondent's independent medical examiner, Dr. Abdullah Foad, was taken on February 19, 2020. (PX #16). Dr. Foad testified he conducted a 45 minute examination of Petitioner and generated an initial report within 24 hours. Dr. Foad testified that he charged initially $4,350.00 and was charging an additional $4,850.00 for his deposition (PX #16, p. 576). Dr. Foad testified that Petitioner had pre-existing conditions in his shoulder and that there were multiple factors involved in the development of a rotator cuff tear. He broke it down into intrinsic and extrinsic factors. Intrinsic factors include age and obesity, degenerative changes, etc. Extrinsic factors include trauma, bony impingement, cortisone injections, cyst formation, chronic weakness and that there's a combination of both intrinsic and extrinsic factors that over time create an environment for a rotator cuff to enlarge and become symptomatic. (PX #16 p. 562). Dr. Foad agrees that the work injury may have been a temporary aggravation, and it's fair to state that the work injury was a temporary aggravation (PX #16 p. 563). Dr. Foad agreed with the treatment that Petitioner received. He agreed that the Petitioner was symptomatic and had reason to be symptomatic as he had a full thickness tear large enough to warrant surgical intervention (PX #16 p. 566).

Dr. Foad testified that Petitioner was forthright and did not exhibit any pain behaviors. He found Petitioner to be credible and not providing wrong information. (PX #16 p. 572). Dr. Foad testified that he had not seen any prior medical records where Petitioner had complained of shoulder problems or treated for shoulder problems prior to February 13, 2018. (PX #16 p. 597). He agreed Petitioner has not indicated any prior problem ((PX #16 p. 597) and Mr. Canas had actually denied any prior problem before the work accident on February 13, 2018. (PX #16 p. 586). Dr. Foad agreed, that depending on the trauma, trauma to an asymptomatic degenerative shoulder can accelerate the need for treatment that otherwise would not have been needed. (PX #16 p. 595). Dr. Foad does not dispute the fact that Petitioner was lifting or pushing a tank at work on February 13, 2018 and does not dispute that Petitioner had complaints after that. (PX #16 p. 595). He agrees that Petitioner had symptomatic complaints after the work incident on February 13, 2018 (PX #16 p. 596). Dr. Foad believes that Petitioner had a temporary aggravation of his right shoulder as a result of that accident (PX #16 p. 596). While Dr. Foad would agree that the work accident was not a substantial contributing factor of the need for surgical repair, it was a contributing factor for the surgery (PX #16 p. 596). The work injury was a factor, just not the main factor in Dr. Foad's opinion (PX #16 p. 596). Dr. Foad beleived that the surgery for the torn rotator cuff and decompression was appropriate (PX #16 p. 597).

Based on Dr. Foad's review of medical records, Petitioner did not receive any medical treatment between February 13, 2018 and February 19, 2018. Petitioner reported to him that he did not report his injury right away because he thought the pain would go away (PX #16 p. 601). The medical report Dr. Foad reviewed from February 19 at Physician's Immediate Care states that Petitioner suffered an injury on February 13, 2018, states the pain severity was 7/10 (607 to 608), and confirms this was a work related incident that happened and had a sudden onset (PX #16 pp. 607-609).

Dr. Foad provided inconsistent testimony about Petitioner's ability to lift tanks after the injury. He gave the opinion that if he had a massive tear – if he tore the three tendons that were described in the operative report by Dr. Thormeyer, he would not be able to work. He would not be able to lift a carton of milk, let alone a 75 pound tank. (PX #16 p. 612). Dr. Foad then confirmed that Petitioner had a pretty large rotator cuff tear, but that he believed it happened prior to February 13, 2018. (PX #16 p. 613). As to how he would have been able to lift tanks prior to February 13, Dr. Foad indicated there are many, many people out there that can have a massive rotator cuff tear and can compensate and are able to compensate. (PX #16 p. 612 Dr. Foad that the accident was a contributing factor to Mr. Canas' need for surgery. (PX #16 p. 614).

Dr. Foad agreed that Petitioner suffered some type of trauma due to the work injury, a temporary exacerbation of his underlying degenerative condition and that he was not necessarily back to his pre-injury state after the temporary exacerbation. (PX #16 p.618). Whether it was a main or substantial factor, Dr. Foad agreed that it was a temporary exacerbation of his pre-existing problem, and the temporary exacerbation of the pre-existing problem contributed to his need for surgery (PX #16 p. 620).

The evidence deposition of Dr. Jeffrey Thormeyer was taken on October 31, 2019**.** (PX# 15). Dr. Thormeyer was Petitioner's treating physician/orthopedic surgeon from April 25, 2018 to September 11, 2019 (PX #2). Dr. Thormeyer is a board certified general orthopedic surgeon (PX

15 p. 433). Dr. Thormeyer testified that Petitioner presented with a history of having sustained a lifting type injury at work, with no prior history of shoulder issues, development of an acute onset of pain and some weakness, which essentially did not get better with initial conservative measures. He presented with an MRI that demonstrated some rotator cuff and labral pathology. (PX #15 p. 435).

On July 11, 2018, Dr. Thormeyer performed a rotator cuff tear repair, biceps, tenodesis, cuff debridement of a partial cuff tear of a subscapularis, decompression, acromioplasty, and spinal glenoid cyst decompression. (PX #15 pp. 437-438). Dr. Thormeyer testified that, within a reasonable degree of medical certainly, based on the history of no prior surgical complaints, a reported injury and mechanism involving the heavy tank, along with the immediate onset of pain and the disfunction, the February 13, 2018 injury, notably his rotator cuff tear, is related to this incident. (PX #15 p. 442). Dr. Thormeyer reviewed the reports authored by Respondent's expert, Dr. Foad, and opined that he disagreed with Foad's statements, because Dr. Thormeyer believed that the tear of his supraspinatus, was not related to any type of pre-existing condition. *Id.* Dr. Thormeyer testified that the cyst and the atrophy of the infraspinatus are without a doubt chronic conditions. (PX #15 p. 445) However, Dr. Thormeyer did not feel that in and of itself does not put the other tendon concern for a tear. He never had any prior complaints of pain or issues with the shoulder that he was aware of. The prior conditions would not lead someone to treatment unless it caused symptoms, and I have no history here that made any pre-existing complaints of the shoulder issue. While he agreed that some of the components of what was found in the MRI, and some of the components that were in the shoulder may very well be chronic and pre-existing, Dr. Thormeyer did not see how any of that plays a role of his supraspinatus tear (PX #15 pp. 445-446). Dr. Thormeyer's understanding of the mechanism of the injury was not that Petitioner was lifting a 110 pound tank straight up over his head, but that he was lifting a significant weight and his hands were above his shoulder height, so he was technically lifting (PX #15 pp. 484-485). Dr. Thormeyer opined that there were objective findings of an acute injury, including no complaints of shoulder pain or dysfunction or range of motion issues, and then a reported history event with the development of pain, decreased motion weakness, coupled with objective findings on an MRI of a supraspinatus retracted tear (PX #15 p. 494).

Dr. Thormeyer opines that the treatment rendered to the Petitioner is related to the work accident of February 13, 2018 (PX #15 p. 450). Dr. Thormeyer testified that Petitioner underwent a Functional Capacity Evaluation on June 21, 2019, and was seen by Dr. Thormeyer for a final time on September 11, 2019. (PX #15 p. 456). Dr. Thormeyer opined that he has reviewed the FCE restrictions and abilities and agrees with the restrictions and that those restrictions are permanent, including that he rarely lifts 65 pounds, occasional lift 50 pounds, lifts 30 pounds frequently, and from waist and above 22.5 pounds in terms of a straight lift. (PX #15 p. 457). Dr. Thormeyer opined that all of his medical treatment had been reasonable and necessary. (PX #15 p. 585) He stated that all of the medical treatment is related to the work accident of 2/13/18. (PX #15 p. 458). Dr. Thormeyer confirmed his opinion to a reasonable degree of medical certainty that the right shoulder conditions was caused by the 2/13/18 work accident. *Id.*

CONCLUSIONS OF LAW

With respect to Issues (C), (D), and (E), whether the Petitioner had an accident that occurred and arose out of and in the course of Petitioner's employment by Respondent, date of the accident, and whether timely notice of the accident was given to Respondent, the Arbitrator finds as follows:

The Arbitrator adopts and incorporates all of the above findings of fact into these findings and conclusions of law.

Based on the totality of the evidence, the credible and unrebutted testimony of the Petitioner, the medical records, the written Incident Report dated 2/19/18 (PX #11), even the testimony of Respondent's sole witness, Human Resource Manager, Kate Brown, the Arbitrator finds that the Petitioner did sustain an accident on February 13, 2018, which arose out and in the course of his employment, injuring his right shoulder. Further, the Arbitrator finds that the Petitioner did give timely notice of the accident both verbally and in writing to Respondent based on the unrebutted testimony of the Petitioner, the written Incident Report dated 2/19/18, and testimony by both Petitioner and Respondent's sole witness, their Human Resource Manager, Kate Brown.

The Arbitrator finds no basis whatsoever for the Respondent to have disputed the claim. Petitioner's unrebutted testimony was that on 2/19/18, notice was given to Petitioner supervisor, Troy Bruder, and Human Resource Manager, Kate Brown, both verbally and in writing. This is supported by the in person testimony of Kate Brown and the accident report.

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

The Arbitrator adopts and incorporates all of the above findings of fact into these findings and conclusions of law.

On February 13, 2018, Petitioner experienced an immediate onset of pain in his right shoulder when lifting and standing up end over end a 448 tank. Petitioner denied any prior injuries or treatment to his right shoulder. Respondent provided no evidence to show any medical treatment or complaint made by Petitioner regarding his right shoulder prior to the work accident injury of 2/13/18. Petitioner described the job activities that he performed for approximately 13 years. Petitioner had not missed any work and was able to perform the full function of his job, as well as many hobbies involving use of the right shoulder prior to the accident without any difficulty. The Arbitrator finds the Petitioner's testimony credible. This finding is consistent with findings of the Functional Capacity Evaluator that the Petitioner gave maximum effort on all test items (PX #5). Dr. Thormeyer's testimony (PX #15, 515-516), and even Respondent's independent medical evaluator, Dr. Foad. (PX #16). He found Petitioner to be credible and was not giving wrong information (PX #16 p. 572). The Arbitrator finds Petitioner's testimony and explanation about his initial report of injury credible. It is reasonable that Petitioner did not know how serious his injury was and did not want to be placed on light duty.

The Arbitrator notes that Dr. Foad opined that the 2/13/18 work injury was a temporary aggravation of his right shoulder and that the work accident was a contributing factor, even if not a substantial factor, in Petitioner's need for surgery. (PX #16 p. 596). Dr. Foad agreed regardless of causation that all the treatment received, including the surgery for a torn rotator cuff and decompression was appropriate, reasonable and necessary treatment.

Dr. Jeffery Thormeyer's, rendered opinions that Petitioner's right shoulder conditions are causally related to the work accident of 2/13/18 and that Petitioner sustained an acute injury and tear to the supraspinatus tendon, requiring the treatment and the surgical procedure that he performed. Dr. Thormeyer also testified that all Petitioner's treatment was reasonable and necessary and related to the work accident of 2/13/18. The Arbitrator finds that the opinions of Dr. Thormeyer are credible and more persuasive than those offered by Dr. Foad.

Having considered the totality of the evidence, given the chain of events, as well as the persuasive testimony of Petitioner's treating surgeon, Dr. Thormeyer, the Arbitrator finds that the Petitioner's condition of ill-being to his right shoulder causally related to the work accident of February 13, 2018.

With respect to Issue (J), whether the medical services that were provided to Petitioner were reasonable and necessary, and whether Respondent has paid all appropriate charges for reasonable and necessary medical services, the Arbitrator finds as follows:

The Arbitrator adopts and incorporates all of the above findings of fact into these findings and conclusions of law.

The Arbitrator finds that there is no credible dispute as to whether the medical services that were provided to Petitioner were reasonable and necessary. Even the Respondent's own Section 12 examiner testified that all medical treatment was reasonable, necessary, and appropriate for the conditions of ill-being for which Petitioner was diagnosed.

Based on the Arbitrator's findings on the issue of causation, the Arbitrator finds that the Respondent shall pay Petitioner for medical expenses incurred by Petitioner for the care and treatment of his causally related injuries to his right shoulder, pursuant to Section 8 and 8.2 of the Act. The Arbitrator finds that the Respondent is responsible for the charges set forth in Petitioner's PX #6, PX #7, PX #8, PX #9, and PX #10, and further provided in a HCFA format in Petitioner's Exhibit 12 (PX #12). Respondent is allowed credit for medical expenses already paid. However, the Arbitrator notes the Respondent's sole witness, Human Resource Manager, Kate Brown's testimony that any medical bills paid would have only been paid up until Petitioner's examination with Respondent's physician, Dr. Foad on 4/17/18, and that the Petitioner did not have group insurance through Respondent IFH group.

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

The Arbitrator adopts and incorporates all of the above findings of fact into these findings and conclusions of law.

Arbitrator's Exhibit 1 reflects, pursuant to paragraph 9, that Respondent claims it paid zero in TTD and zero in TPD benefits. Thus, Respondent receives no credit for any such benefits. Arbitrator's Exhibit 1 reflects that the Petitioner claims to be entitled to temporary total disability benefits from 7/11/18 (date of surgery) through 10/14/18 representing 13-4/7 weeks. Petitioner also claims to be entitled to temporary partial disability for a period from 10/15/18 through 2/4/19 representing 16 weeks while the Petitioner was on light duty restrictions. The Arbitrator notes that the Respondent did not present any evidence disputing Petitioner's claim for temporary total disability and temporary partial disability benefits. Petitioner's testimony and the medical records reflect that the Petitioner was taken off of work by Dr. Thormeyer beginning from the date of surgery, 7/11/18, and remained restricted from all work duties through 10/14/18. Petitioner's testimony as to the circumstances of his return to work on October 15, 2018, were unrebutted by the Respondent. Petitioner testified that he was off work and not receiving any compensation while off work, as supported by his testimony and Respondent's acknowledgement, pursuant to Arbitrator's Exhibit 1. While Petitioner originally planned to be off work for a full six months, he contacted the president of the company and asked to return to work light duty to perform a verifying position. Petitioner remained on light duty through 2/4/19 for 16 weeks, during which time he testified he earned less money than he normally would have earned because he was not allowed to work overtime while on light duty.

The Arbitrator notes that the Petitioner's evidence was unrebutted. The Arbitrator adopts his findings heretofore stated and finds, based on Petitioner's testimony, the treatment records, the Petitioner's Exhibit #13, the average weekly wage calculation with supporting wage information, and the Petitioner's Exhibit #14, his TPD calculation with supporting wage information, that the Petitioner was temporary and totally disabled from 7/11/18 through 10/14/18 representing 13-4/7 weeks, and further he was on light duty and earning less pay, entitled to TPD for the period of 10/15/18 through 2/4/19 representing 16 weeks. The Arbitrator, based on the stipulation of an average weekly wage of $833.80, Petitioner's Exhibit 13, the average weekly wage calculation with supporting wage information, and Petitioner's Exhibit #14, the TPD calculation with supporting wage information, find the Petitioner's TTD rate of $555.87 and further finds a total of $7,543.95 due in temporary total disability benefits to be paid to the Petitioner by Respondent. The Respondent is allowed no credit for TTD benefits as no TTD benefits have been paid.

Further, the Arbitrator finds as evidenced in Petitioner's Exhibit #14, TPD calculation with supporting wage information that during the period from 10/15/18 through 2/4/19, Petitioner earned $416.59 less than his pre-injury average weekly wage and finds a total of $416.59 in temporary partial disability benefits to be paid to Petitioner by the Respondent. Respondent is allowed no credit for payment of TPD benefits as no TPD benefits have been paid.

The Arbitrator finds that no credible evidence has been presented by the Respondent to justify nonpayment of TTD and TPD.

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

The Arbitrator adopts and incorporates all of the above findings of facts and conclusions of law into these findings.

In considering permanent disability in this matter, the Arbitrator shall base the determination on the following factors pursuant to Section 8.1(b) of the Act.

(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 injury;
(iv) The employee's future earning capacity; and
(v) The evidence of disability corroborated by the treating medical records.

No single factor shall be the sole determinate of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician are explained below. The enumerated factors were considered as follows:

With regard to subsection (i) of Section 8.1(b), the Arbitrator notes that no impairment report and/or an opinion was submitted into evidence. The Arbitrator, therefore, gives no weight to this factor.

With regard to subsection (ii) of the Section 8.1(b), the occupation of the employee, the Arbitrator notes that the Petitioner for over 13 years was working in a heavy, physically demanding job as a Tig Welder for the Respondent. He was required to constantly manipulate and maneuver up to 50 types of tanks that needed to be sealed, water and airtight, some weighing at least as much as 114#. After returning to work, Petitioner was restricted and limited to performing waist to crown work at 22.5 pounds, limited to elevated work occasionally. Range of motion, strength, and stability in the involved right shoulder which limits his performance from waist to crown and overhead activities. (PX #5). Permanent restrictions were verified by Dr. Thormeyer. Upon his return to work, Petitioner testified that he was required to modify his duties, especially with the number 448 tanks by using a crane and chain, and no longer lifting them up end over end. After the Petitioner was laid off by the Respondent, he found new employment where he lifts no more than 35# and requires no overhead or waist to crown work. Despite the less physical nature of his current job, he continues to experience weakness, loss of range of motion, cannot lift his arm all the way up, cannot straighten his arm all the way up, cannot bend his forearm forward, and cannot move his arm behind his back, even to his belt level. He has difficulty going over the shoulder height which was demonstrated during the Arbitration. He has reduced strength. His right side is weak which used to be his dominant and strong side. Therefore, the Arbitrator gives more weight to this factor.

The Arbitrator further finds that Petitioner is unable to return to his normal and usual occupation as a Tig Welder because of his unrebutted lifting restrictions.

With regard to subsection (iii) of the Section 8.1(b), the age of the employee at the time of injury, the Arbitrator notes that the Petitioner was 57 years old at the time of the accident. Because of the Petitioner's age and his ability to heal is slower from doing certain activities, the impact on Petitioner's dominant right shoulder, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (iv) of the Section 8.1(b), the Petitioner's future earning capacity, the Arbitrator notes that Petitioner has not returned to his former position with the Respondent, and has obtained new employment that is less physically demanding. The Arbitrator further finds that Petitioner is unable to return to his normal and usual occupation as a Tig Welder because of his unrebutted lifting restrictions. The Arbitrator notes that no evidence was presented specifically that Petitioner's future earning capacity has or has not been diminished. Therefore, the Arbitrator gives little weight to this factor.

With regard to subsection (v) of the Section 8.1(b), the evidence of disability corroborated by the treating medical records, the Arbitrator finds that Petitioner suffered a massive, retracted rotator cuff tear which included a full thickness tear of the supraspinatus with retraction. Dr. Thormeyer testified that the supraspinatus was the main tendon torn and was not a pre-existing condition (PX # 15 p. 445). Petitioner's medical treatment consisted of failing conservative treatment and the need for surgery. Petitioner returned to work on completion of his medical treatment with permanent restrictions to his right shoulder. Based on a valid Functional Capacity Evaluation (PX #5), Petitioner was placed under permanent restrictions, including limitations for overhead work, occasionally, and waist to crown lifting. Prior to being released by Dr. Thormeyer post-surgery, he required a cortisone injection that provided no relief in terms of his symptoms. Additional surgical treatment options were discussed with him as of his last 9/11/19 visit (PX #2 pp. 95-97). Treatment options discussed include consideration of a capsular release or shoulder scope. At Arbitration, Petitioner testified regarding his continuing problems and limitations with the shoulder. He still cannot extend his arm as he can the opposite arm; he cannot move it up and down as he can with the opposite arm; he cannot bend his forearm forward and demonstrated to the Arbitrator that he cannot move it behind his back, even up to his belt level. He has difficulty going over his shoulder height and has less strength. His arm gets numb; has a tingling sensation as if it's falling asleep. He has permanent overhead restrictions and permanent waist to crown restrictions.

Petitioner testified that he was a very active individual prior to this injury. He can no longer do things that he did before the injury, such as throw a football, throw a Frisbee, play horseshoes, and work out by lifting weights. There are some things he still does but has more problems, including riding his bike, because his arm gets numb and starts tingling. Petitioner describes his continued performance of his home exercise program, including use of the pulley provided in physical therapy. He continues his home exercises every day, performing 50 reps one way with the arm; 50 reps with the stretch, and bands in the door. He uses the pulley and ropes and does 50 reps stretch to keep the arm in its current condition. The Arbitrator, therefore, gives more weight to this factor.

The Arbitrator notes that determination of permanent disability is not simply a calculation, but a valuation of all five factors as stated in the Act. In making this evaluation of permanent partial disability, consideration is not given to any single enumerated factor as the sole determinant.

Therefore, having considered the factors enumerated in Section 8.1(b) of the Act, 820 ILCS 305/8.1(b), the Arbitrator finds that as result of the accidental injuries, the Petitioner has sustained permanent partial disability to the extent of 22.5% person as a whole, pursuant to Section 8(d)(2) of the Act.

With respect to Issue (M), whether penalties or fees should be imposed upon Respondent, the Arbitrator finds as follows:

The Arbitrator adopts and incorporates all of the above findings of fact into these findings and conclusions of law.

820 ILCS 305/19(k) holds, "In case[s] where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under the Act equal to 50% of the amount payable at the time of such award."

The intent of Sections 16, 19(k) and 19(l) of the Illinois Workers' Compensation Act is to implement the Act's purpose to expedite the compensation of injured workers and to penalize an employer who unreasonably delays or withholds compensation due an employee. *Avon Products, Inc. v. Indus. Comm'n*, 82 Ill.2d 297, 412 N.E.2d 468, 45 Ill. Dec. 117 (1980).

The Illinois Supreme Court has established a test of "objective reasonableness" to determine whether Section 19(k) penalties should be awarded. *Board of Education of the City of Chicago v. Industrial Commission*, 93 Ill.2d 1, 442 N.E.2d 861, 66 Ill.Dec. 300 (1982). The "objective reasonableness" of the Respondent's conduct is a factual question for the Commission to resolve and should not be disturbed unless it is against the manifest weight of the evidence. *Id*. at p.304. The burden of proving reasonableness of its conduct is upon the Respondent. See *City of Chicago v. Industrial Commission*, 63 Ill.2d 99, 345 N.E.2d 477 (1976).

Petitioner suffered an injury to his right upper extremity on February 13, 2018. He notified his employer of the accident timely on February 19, 2018, and immediately began medical treatment. The Respondent scheduled the Petitioner for a Section 12 examination with Dr. Abdullah Foad on 4/17/18. Petitioner attended the Section 12 exam and immediately after the Respondent denied all future benefits. After Petitioner retained the services of Reese & Reese attorneys, depositions of the treating surgeon, Dr. Jeffery Thormeyer, taken on October 31, 2019, and Respondent's Section 12 examiner, Dr. Abdullah Foad, was completed on February 19, 2020. Following completion of both Dr. Thormeyer and Dr. Foad's depositions, Attorney Reese forwarded on March 11, 2020, correspondence to Respondent's attorney indicating: Dr. Foad agrees all treatment was reasonable and necessary, including surgery. Dr. Foad agrees that the Petitioner suffered trauma to his right shoulder as a result of the work accident and most importantly, Dr. Foad opined that the work accident on 2/13/18, was a factor in the need for surgery (PX #18 p. 657). Respondent was requested in this correspondence to now accept the claim and pay all benefits that are owed and that if they are continuing to deny this claim, then to please state the basis of their denial. Further summarization of medical expenses, group payments, TTD benefits and TPD benefits that were owed, was highlighted. Respondent consistently has denied benefits and refused to provide the basis of its denial of benefits. Additional correspondence from Attorney Reese dated April 8, 2020 (PX #18 pp. 659-660) highlighted the outstanding demand for payment since August 20, 2019, the depositions of Dr. Foad and Dr. Thormeyer, asked for payment of medical bills, satisfaction of the group lien, payment of TTD, payment of TPD, and payment of permanency. Again, Petitioner requested the basis of Respondent's denial of benefits. This

correspondence stated that after review of depositions and specifically the opinions of Respondent's own Section 12 examiner, Dr. Foad, we believed we would be successful in showing, at this point, that the continued defenses are arbitrary and capricious, and asked for the basis of the defense pursuant to Rule 9110.70, but the Respondent had refused to comply (PX #18 pp. 659-660).

Instead of indicating a basis of their denial, the Respondent filed its own Motion for Penalties under Section 25.5 alleging fraud. The Respondent never indicated a factual basis for their allegation of fraud. The Respondent has not complied with the provisions of Rule 9110.70 which indicates that the Respondent needs to state a basis for termination of benefits. The Respondent refused to state their basis for the denial of benefits, relying solely upon their Petition alleging "fraud" without any other information. The Petitioner has filed his Petition for Penalties and Attorney's Fees under Section 19(k), Section 19(l) and/or Section 16. The Arbitrator further notes that the Respondent disputed "all issues" up to the time of trial, including employment relationship between Petitioner and Respondent, and still does not provide the basis of their denial.

On 6/15/21, immediately before the hearing, the Respondent finally agreed to the employment relationship, wage calculation Petitioner's age and marital status. All other issues were denied subject to proof and the Respondent continued to maintain its unsupported Petition for Penalties alleging fraud.

On 6/15/21, at the time of the hearing the Respondent produced his sole witness, the Human Resources Manager for the Respondent IFH Group, Inc., Kate Brown. Kate Brown's testimony substantially corroborated the testimony of Petitioner. Respondent's witness verified the timely notice of the accident was given to Respondent both orally and in writing. She verified the accident involved the specific 448 tanks that Petitioner had indicated were the cause of his injury when he attempted to stand the tank up end over end. She further verified the heavy weight of the tank, and Petitioner's heavy work duties. By and large, Respondent's witness corroborated testimony that the injury likely occurred on the date, time, and in the manner in which Petitioner described and provided notice of, both orally and in the form of a written Incident Report. Kate Brown verified that Petitioner was working on the #448 tanks, weighing at least 110 pounds, on 2/13/18, the date that Petitioner said he was injured. She independently verified that those tanks which only ran as little as once a month were worked on by Petitioner on the date that he said the injury occurred, 2/13/18.

Furthermore, while Petitioner was on medical restrictions of no lifting over the shoulder greater than 1 pound using the right arm, Respondent continued to require him to perform his work duty for 3 months up until the date of his surgery on July 11, 2018. Respondent's sole witness testified that she had knowledge of his restrictions, they were provided to her both by Physicians Immediate Care and by Petitioner when he returned to work. Ms. Brown claims she not aware Petitioner worked full duty for the entire three month. He should have been working on various light duty jobs that were available. She further confirms he did not have group insurance through his employer, and that no benefits were paid to Petitioner after Respondent's Section 12 examination on April 17, 2018.

Respondent's witness brought a video which was marked as Respondent's Exhibit #9 that depicted Petitioner's work station, showing a worker handling a completely different tank other than the one that injured Petitioner. As of the date of Dr. Foad's deposition of 2/19/20, the Respondent was in full possession of knowledge and evidentiary testimony that even the Section 12 examiner believed all the treatment sustained by Petitioner was reasonable and necessary treatment, and that he believed the work injury of 2/13/18 was a factor or contributing factor to Petitioner's need for surgery.

The Arbitrator finds that the Respondent's conclusory statement of fraud is unsupported by any factual evidence that has been presented at the time of hearing. There is simply no evidence of fraud in this case. Even Respondent's own Section 12 examiner found that Petitioner was forthright, did not exhibit any pain behavior, that he was credible, and was not giving him wrong information (PX #16 p. 572). There is no evidence that Respondent faked any injury, that he had suffered any prior injury to his shoulder, or that he suffered any injury between 2/13/18 and the report of injury on 2/19/18. The Arbitrator finds Petitioner's explanation of the mechanism of injury, the date of injury, the corroborating testimony of the date of injury by Respondent's witness, and the explanation that he didn't report the injury initially because he didn't know how serious the injury was and didn't want to make a big deal out of it because when you get hurt at IFH does not let you work and put you on light duty, reasonable and credible. Petitioner has been found to be credible by multiple sources. He gave maximum effort in his FCE; his treating physician found him credible; even Respondent's Section 12 examiner found him credible; and the Arbitrator at hearing found the Petitioner gave credible testimony.

Where there has been unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not represent a real controversy, but are merely frivolous or for delay, 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 the award.

The Arbitrator has found that Petitioner is entitled to $7,543.95 in unpaid TTD benefits pursuant to Section 8(b), and $416.59 in TPD benefits.

Also, the Respondent has refused to pay medical in the amount of $101,631.81, less amounts paid by Respondent incurred prior to April 17, 2018 (at the time of hearing Respondent had not provided proof of payment of benefits, although it was stipulated they had made some medical bill payments up until 4/17/18. Respondent was permitted to supplement with their proposed Decision amounts of medical bills that they have in fact paid).

Respondent acknowledges and admits that they have not paid any medical expenses after 4/17/18, and further that they did not provide any group health benefit coverage to Petitioner. Therefore, Respondent is not entitled to any credit pursuant to 8(j) for any medical expenses that may have been paid by Petitioner directly or by his wife's group insurance. The Arbitrator finds Respondent's failure to pay medical expenses unreasonable and vexatious. Medical expenses are found on Petitioner's Exhibit #6, #7, #8, #9, and #10. Further, in HCFA format attached to Petitioner's Exhibit #12. Arbitrator finds medical bills were submitted and Respondent failed to pay medical expenses or indicate any additional information that they required. Further, at the time

of trial, Respondent has failed to provide any proof of payments for medical expenses that were made up until 4/17/18 as stipulated by Petitioner.

An award of compensation must be paid directly to the Petitioner. "The law is clear that an award of medical expenses is an award of compensation." In *Virgilio Carreno v. Cambridge Homes,* 96 IL.W.C. 56337, 2006 WL 1968954 (June 30, 2006). The Arbitrator thereby directs the Respondent to pay the remaining unpaid balance of medical expenses directly to Petitioner.

The Arbitrator calculates Penalties as follows:

19(k): Penalty for delay of payment or intentional underpayment of compensation in accordance with provisions of Section 8(b), equal to 50% of the amount payable at the time of such award. Respondent has intentionally underpaid TTD & TPD benefits in the amount of $7,960.54 and medical expenses of $101,631.81, less proven amounts paid prior to 4/17/18.

Petitioner is awarded 50% of the unpaid TTD benefits in the amount of $3,771.98; 50% of the unpaid TPD benefits in the amount of $203.30; and 50% of the unpaid medical expenses in the amount of $50,815.91.

19(l): $30 per day for a period of 3/11/20 (PX #18) through 6/19/21. 461 days @ $30 per day equals $13,830.00. The penalty is limited to $10,000.00.

16: Attorney's fees are awarded at 20% of the total award, calculated as follows:

Total Award:
$7,543.95 unpaid TTD benefits
$416.59 unpaid TPD benefits
$101,631.81 unpaid medical expenses
$3,771.98 Section 19(k) penalty on unpaid TTD
$208.30 Section 19(k) penalty on unpaid TPD
$50,815.91 Section 19(k) penalty on unpaid medical expenses
$10,000.00 Section 19(l) penalty
$56,281.51 permanency awarded 22.5% PAW (112.5 weeks x $500.28 PPD rate)

Total Award: $230,670.05

Attorney's fees are awarded at 20% of the total award. Therefore, the Arbitrator finds Section 16 attorney's fees are awarded in the amount of $46,134.01 ($230,670.05 x 20%).

With respect to Issue (N), whether Respondent is due any credit, the Arbitrator finds as follows:

The Arbitrator adopts and incorporates all of the above findings of fact into these findings and conclusions of law.

The Arbitrator finds and the parties stipulate that the Respondent has not paid any benefits for TTD; the Respondent has not paid any benefits for TPD; the Respondent has not paid any medical expenses after 4/17/18; and did not provide any proof at the time of trial as to any amounts paid. The Arbitrator finds Respondent is not entitled to any credit for 8(j), as Respondent admits it had not provided any group health insurance benefits to the Petitioner. Further, the Arbitrator finds Respondent has not paid any permanency. Therefore, unless proof of medical expenses paid up until 4/17/18 is provided, the Arbitrator finds that the Respondent is not due any credit for payments made.

With respect to Issue (O), Penalties under Fraud Section 25.5, the Arbitrator finds as follows:

The Arbitrator adopts and incorporates all of the above findings of fact into these findings and conclusions of law.

The Respondent has presented no factual evidence of fraud on the part of the Petitioner. Therefore, Respondent's Motion for Penalties under Section 25.5 W.C. Fraud is denied.

To the contrary, Section 25.5 specifically lists unlawful acts which are subject to penalties, including paragraph A which states it is unlawful for any person, company, corporation, or insurance carrier, or other entity to: (2) intentionally make or cause to be made any false or fraudulent material statement or material representation for the purpose of denying any Workers' Compensation benefits; and (3) intentionally make or cause to be made any false or fraudulent statements with regard to entitlement to Workers' Compensation benefits with the intent to prevent an injured worker from making a legitimate claim for his Workers' Compensation benefits.

The evidence presented at hearing on 6/15/21 demonstrates that the Respondent has made an allegation of fraud against the Petitioner when there is no factual basis to claim fraud. The Respondent did not present any factual evidence at the time of trial that would support their claim. The Respondent did not provide any basis for their denial of benefits on the basis of fraud prior to or up to and including at the hearing on 6/15/21.

The Arbitrator finds that the Respondent's unfounded frivolous, arbitrary and capricious allegations of fraud support an award for maximum penalty pursuant to Sections 19(k), 19(l), and 16 of the Act, awarded and discussed pursuant to Issue (M) above.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC009543
Case Name	Donnie Revelle v. Kraft-Heinz
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0261
Number of Pages of Decision	17
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	David Galanti
Respondent Attorney	James Clune

DATE FILED: 6/15/2023

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DONNIE REVELLE,

Petitioner,

vs. NO: 21 WC 9543

KRAFT HEINZ,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, prospective medical treatment and temporary total disability benefits and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, but makes a clarification as outlined below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission corrects the following scrivenor's errors:

In the second sentence of the second paragraph of the Order Section, the Commission strikes the word "authorize" and replaces with the word "provide".

In the second sentence of the third full paragraph on the second to last page of the Arbitrator's Decision, the Commission strikes the word "authorize" and replaces with the word "provide".

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 20, 2022 is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $12,344.00. 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.

June 15, 2023

/s/ *Maria E. Portela*

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

MEP/dmm
O: 050923
49

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC009543
Case Name	Donnie Revelle v. Kraft-Heinz
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	David Galanti
Respondent Attorney	James Clune

DATE FILED: 7/20/2022

/s/Linda Cantrell, Arbitrator

Signature

INTEREST RATE WEEK OF JULY 19, 2022 2.91%

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Donnie Revelle
Employee/Petitioner

v.

Kraft-Heinz
Employer/Respondent

Case # **21** WC **009543**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **5/11/2022**. 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, **3/26/21**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**62,320.44**; the average weekly wage was $**1,198.47**.

On the date of accident, Petitioner was **57** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**11,870.56** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**11,870.56**.

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

ORDER

Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's Group Exhibit 5, directly to the medical providers per the Illinois medical fee schedule, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits.

The Arbitrator further finds Petitioner is entitled to receive the additional care recommended by Dr. Paletta. Therefore, Respondent shall authorize and pay for prospective medical treatment, including, but not limited to, a right partial medial meniscectomy, debridement, and chondroplasty of the patellofemoral joint, and postoperative care until Petitioner reaches maximum medical improvement.

Respondent shall pay Petitioner temporary total disability benefits of $**798.98** for **14-3/7th** weeks commencing **3/30/21 through 7/8/21**, as provided in Section 8(a) of the Act.

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

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

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

Arbitrator Linda J. Cantrell

July 20, 2022

ICArbDec19(b)

STATE OF ILLINOIS)
) **SS**
COUNTY OF JEFFERSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

DONINIE REVELLE,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 21-WC-009543
	)	
KRAFT-HEINZ,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Mt. Vernon on May 12, 2022, pursuant to Section 19(b) of the Act. On 4/9/21, Petitioner filed an Application for Adjustment of Claim alleging injuries to his right knee as a result of crawling under a machine on 3/26/21. The issues in dispute are accident, causal connection, medical expenses, temporary total disability benefits, and prospective medical treatment.

TESTIMONY

Petitioner was 57 years old, single, with no dependent children at the time of accident. Petitioner has worked for Respondent for 24 years as a Machine Maintenance Technician. He described his job duties as physical, and involves changing cylinders, valves, and teflons. Petitioner testified that on 3/26/21 there was an electric problem with a machine, and he crawled under the machine to locate cables. The crawl space was 27 inches in height, and he had to crawl on his hands and knees. He stated he crossed the main frame and felt a "bad bee sting" in his right knee. He testified he had worked nine hours before the incident occurred, and he completed his work shift that ended at 6:00 a.m.

Petitioner testified he has never had right knee problems prior to 3/26/21. The next day his knee was swollen, and he thought he pulled something. He thought his symptoms would pass and reported to work that evening. He reported the incident and sought medical care at Multicare Specialists on 3/30/21, who he treated with in the past for a shoulder injury. An MRI was ordered that showed a torn meniscus and he was taken off work. Petitioner testified he received TTD benefits while he was off work.

Petitioner testified he returned to work on 7/9/21. He saw Dr. Paletta one time on 8/4/21. Petitioner testified he has not sustained injuries to his right knee since 3/26/21. He is currently working light duty but 12-hour shifts. He stated he could not perform his full job duties at this

time because he cannot crawl in tight spaces on his knee. He stated he has intense pain when he bends his knee. He has to hold onto the machine he is working on to take the weight off his knee when he squats down to sit on a stool. He works on machines from a seated position. He cannot get into a full squatted position without assistance. He has not attempted to crawl since he was placed on light duty restrictions. He feels capable of performing his light duty work. He desires to undergo surgery as recommended by Dr. Paletta because his pain is excruciating. If he kneels on his knee it feels like a knife between his kneecap and lower leg bone.

On cross-examination, Petitioner testified he was in a motorcycle accident 35 years ago and his knees were debrided. He was involved in a head-on collision in his 20's that resulted in injuries to his left knee.

MEDICAL HISTORY

On 3/30/21, Petitioner was examined at Multicare Specialists and gave a history of sustaining an injury at work on 3/26/21. Petitioner reported he was working on his knees when he felt a sharp pain in his right knee. (PX1, p. 443) Petitioner reported he was able to finish his shift but had a lot of pain when kneeling and going up and down stairs. He had to negotiate steps one at a time. His pain continued to increase, and it felt like something was caught. After a physical examination, Dr. Brooks suspected a right knee meniscus tear and ordered an MRI. Petitioner was placed off work.

On 3/31/21, a right knee MRI was performed that revealed some fraying at the inner margin of the posterior horn of the medial meniscus, which may be identifiable as a tear on arthroscopy. (PX2) The Radiologist also observed joint effusion with a small 3 mm loose body posterior to the medial meniscus, and chondral thinning and erosion more prominent along the medial patellar surface.

Petitioner underwent physical therapy through Multicare Specialists. On 7/1/21, Dr. Priebe at Multicare Specialists injected Petitioner's right knee. (PX1, p. 289) Petitioner reported some improvement with pain secondary to the injection.

On 8/4/21, Petitioner was examined by Dr. George Paletta on referral from Dr. Brooks. (PX3). Petitioner gave a history of being injured on March 25th or 26th while working with a co-worker on machinery. He reported he felt a sudden pain in his right knee while crawling under the machine. He was unsure if his knee popped at the time of the incident. His pain was localized to the anterior and medial aspects of the knee. He reported his knee swelled at the time of the accident. Dr. Paletta performed a physical examination and reviewed the MRI scan. He believed the MRI was of diagnostic quality and revealed chondral thinning of the medial femoral condyle, a 2 mm area of partial thickness grade 3 chondrosis, and an abnormality at the posterior horn free edge of the medial meniscus consistent with a tear. X-rays were taken that day that revealed minimal joint space narrowing of the medial compartment, with no evidence of osteophyte formation.

Dr. Paletta diagnosed Petitioner with patellofemoral pain in the setting of patellofemoral chondrosis, as well as a medial meniscus tear of the right knee. (PX3, p. 3) He recommended

surgery based on diagnostics studies, the sudden onset of pain, and continued symptoms. He stated additional conservative treatment would not be beneficial. He recommended a partial medial meniscectomy, as well as debridement and chondroplasty of the patellofemoral joint. Dr. Paletta opined that Petitioner's work incident was an aggravating factor with respect to the patellofemoral arthritis and a causative factor with respect to the meniscus tear. Dr. Paletta recommended that Petitioner continue light duty restrictions of no squatting, kneeling, ladders, or climbing under any circumstances, and a maximum of 30 minutes standing and walking. He recommended no lifting, pushing/pulling, or carrying more than 10 pounds. Dr. Paletta opined that Petitioner's treatment to date was appropriate.

On 6/18/21, Petitioner was examined by Dr. Ryan Pitts pursuant to Section 12 of the Act. (RX1, Ex 2). Dr. Pitts testified by way of deposition on 3/9/22. (RX1) Dr. Pitts is a board-certified orthopedic surgeon who is fellowship trained in sports medicine and arthroscopy. His practice focuses on the shoulder, hip, and knee.

Dr. Pitts performed an examination of Petitioner and reviewed his medical records. Petitioner provided a history of crawling on the floor and kneeling on a piece of metal causing pain in his right knee. Petitioner stated he thought he knelt on a metal frame with his anterior knee. He was unsure whether he felt a pop. Petitioner finished his shift and noticed swelling in his knee approximately 5 to 6 hours later. Dr. Pitts noted Petitioner sought medical treatment at Multicare Specialists the following Monday and had been doing stretching, e-stim, ultrasound, massage, and strengthening. At the time of examination, Petitioner complained of constant symptoms that were sharp and stabbing. He complained of pain in the anterior portion of the knee, but not the medial portion. He complained of locking, swelling, medial pain at other times, night pain, and pain with walking. He clarified that walking was not difficult, but stairs, kneeling, and bending the knee caused anterior pain. His pain was worse in the morning, improved during the day, and became bothersome at the end of the day.

Dr. Pitts stated he did not gather from Petitioner or his medical records that Petitioner sustained a specific traumatic event. Petitioner did not step from a height, twist his knee, or have a significant traumatic injury. The records were consistent that Petitioner had anterior pain following kneeling. He noted that by 5/6/21 Petitioner reported to Multicare Specialists that his pain had resolved for the most part, with minimal pain with passive range of motion.

Dr. Pitts noted there was not much finality to the chiropractic treatment at Multicare Specialists. Toward the end of his treatment his symptoms appeared to improve but there was no indication that Petitioner was going to be allowed to return to some type of work, which he opined was unusual.

Dr. Pitts testified that the MRI showed no significant edema or signs of acute injury to the ligaments, meniscus, or tendons. Dr. Pitts testified that an acute, displaced meniscus tear would have generally been fairly obvious on an MRI five days after the alleged accident. Dr. Pitts' examination revealed Petitioner had a normal gait and a slight virus alignment suggestive of a pre-existing medial compartment arthritic change. He did not have medial or lateral joint line tenderness. His tenderness was diffuse and anterior. He did have fairly significant crepitus with range of motion through the kneecap suggesting cartilage wear, which was consistent with the MRI.

Dr. Pitts opined that Petitioner had moderate to severe patellofemoral degenerative osteoarthritis as well as moderate medial compartment osteoarthritis. He testified Petitioner could have a small degenerative tear of the medial meniscus. There was no displaced tear, no displaced buckle handle tear, no large radial flap tear, or other tear pattern that would more commonly be associated with a traumatic injury. He opined that Petitioner appeared to have a moderately arthritic knee with symptoms consistent with moderate arthritis. Petitioner's difficulty squatting was a hallmark of patellofemoral arthritis.

Dr. Pitts opined that Petitioner's alleged injury did not cause any significant structural traumatic injury and it did not cause his arthritic condition. He opined that Petitioner had a pre-existing degenerative progressive condition common for a 57 year old.

Dr. Pitts opined that Petitioner's patellofemoral arthritis may have been exacerbated with the kneeling incident. This was consistent with what Petitioner's medical providers observed. Petitioner had therapy and symptomatic modalities. His condition improved over the course of six weeks. Dr. Pitts did not believe surgery was appropriate and Petitioner did not require further treatment. He testified that the risk of conducting arthroscopic surgery to determine whether a meniscus tear is present is that the surgery could create a worse problem regarding the patellofemoral arthritis. He opined that Petitioner's exacerbation was temporary and appeared to have resolved. Dr. Pitts testified that Petitioner could return to relatively normal duties. He opined that if Petitioner's condition deteriorated over time and required a knee replacement it was related to his arthritic condition and not the alleged work accident. Dr. Pitts testified he was not surprised that after six weeks of conservative care Petitioner's condition improved. Dr. Pitts felt Petitioner could have returned to work at the time of his examination on 6/18/21 as he had reached MMI at that time.

Dr. Pitts recommended restrictions related to Petitioner's pre-existing osteoarthritis consisting of using knee pads when kneeling or doing any groundwork and minimizing kneeling or squatting to less than 15 minutes. Dr. Pitts reiterated that these restrictions would be reasonable for Petitioner to do his job. He conceded that in the 23 years prior to the incident Petitioner did not require restrictions and Petitioner never received medical care or missed work for his right knee during that period.

Dr. Pitts testified that the medial meniscus had a degenerative signal, but there was no definitive tear noted, and certainly no apparent, displaced traumatic tear. There was, possibly, an inner rim degenerative tear. Dr. Pitts conceded that a meniscal tear can be caused by hyperextension of the knee, but that is not a typical mechanism. He also stated that hyper-flexion is not generally a cause for a meniscus tear, but it is possible. Kneeling, with the knees at 90°, would not be hyper-flexion as it would require the patient to have rocked all the way back beyond 90 degrees. Dr. Pitts admitted that Petitioner's level of arthritis can be asymptomatic and made symptomatic with trauma to the knee and his condition could be made symptomatic by crawling and kneeling.

Dr. Pitts testified that although arthroscopic surgery could confirm the presence of a meniscus tear, the better manner in which to treat Petitioner's degenerative condition would be

with injections, physical therapy, icing, anti-inflammatories, and possibly bracing. Arthroscopy is a treatment for degenerative meniscus tears and in the setting of moderate or worse arthritic change is not generally useful. He testified that if Petitioner had an obvious displaced meniscus tear and locking, then arthroscopy might be considered. However, he did not believe arthroscopy was an option for Petitioner because he had no medial symptoms and no provocative meniscal signs, and no mechanical symptoms of locking. The MRI showed only a small, inner rim tear in the setting of at least moderate arthritic changes.

Dr. Pitts testified there are patients who have the kind of moderate osteoarthritis that Petitioner has who have waxing and waning symptoms. He stated that some patients become symptomatic either spontaneously or dramatically. Dr. Pitts noted that Petitioner's underlying structure was getting worse because of the progressive process of the arthritis.

Dr. George Paletta testified by way of deposition on 12/15/21. (PX4) Dr. Paletta is a board-certified orthopedic surgeon and is fellowship trained in sports medicine. He testified consistent with his medical record. Dr. Paletta testified that Petitioner presented to him with a minimal limp on the right side and his left knee was normal. He had signs suggestive of a right meniscus tear, specifically medial joint line tenderness and positive McMurray sign and Apley compression test. Dr. Paletta reviewed the MRI films and appreciated Grade 3 changes (more than 50% thinning of the cartilage) in the patellofemoral joint and medial femoral condyle, but no bone-on-bone, and a medial meniscus tear, with no ligament tears and a normal lateral meniscus. Dr. Paletta testified you cannot tell the age of a medial meniscus tear by MRI. Dr. Paletta testified that Petitioner had a radial or an oblique tear, which in his experience, is more typical of a new or acute tear as opposed to a degenerative or complex tear. Dr. Paletta continued to recommend surgery and light duty restrictions. He opined that Petitioner's work incident caused the meniscus tear and aggravated his underlying degenerative condition.

CONCLUSIONS OF LAW

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

The Act is a remedial statute, which should be liberally construed to effectuate its main purpose of providing financial protection for injured workers. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 149, 337 Ill.Dec. 707, 923 N.E.2d 266 (2010). According to the Act, in order for a claimant to be entitled to workers' compensation benefits, the injury must "aris[e] out of" and occur "in the course of" the claimant's employment. 820 ILCS 305/1(d) (West 2014). Case law interpreting the Act makes it clear that both elements must be present at the time of the accidental injury in order to justify compensation. *Orsini*, 117 Ill. 2d at 44-45, 109 Ill.Dec. 166, 509 N.E.2d 1005; *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483, 137 Ill.Dec. 658, 546 N.E.2d 603 (1989); *Fire King Oil Co. v. Industrial Comm'n*, 62 Ill. 2d 293, 294, 342 N.E.2d 1 (1976); *Wise v. Industrial Comm'n*, 54 Ill. 2d 138, 142, 295 N.E.2d 459 (1973). Therefore, in order to obtain compensation under the Act, a claimant bears the burden of proving by a preponderance of the evidence two elements: (1) that the injury occurred in the course of claimant's employment and (2) that the injury arose out of claimant's employment. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 278 Ill.Dec. 70, 797 N.E.2d 665 (2003) (collecting cases).

The phrase "in the course of employment" refers to the time, place, and circumstances of the injury. *Scheffler Greenhouses, Inc. v. Industrial Comm'n*, 66 Ill. 2d 361, 366-67, 5 Ill.Dec. 854, 362 N.E.2d 325 (1977). "A compensable injury occurs 'in the course of' employment when it is sustained while a claimant is at work or while he performs reasonable activities in conjunction with his employment." *Wise*, 54 Ill. 2d at 142, 295 N.E.2d 459. The record is clear that Petitioner was, in fact, at work when he sustained accidental injuries.

Petitioner was performing activities in conjunction with his employment when he crawled under a machine in a confined space to make repairs. The Arbitrator finds that Petitioner has met his burden of proving that his accident occurred in the course of his employment with Respondent.

An injury arises out of one's employment if its origin is in a risk connected with or incidental to the employment so that there is a causal relationship between the employment and the accidental injury. *Orsini v. Indus. Comm'n*, 509 N.E.2d 1005 (1987). In order to meet this burden, a claimant must prove that the risk of injury is peculiar to the work ***or*** that he or she is exposed to the risk of injury to a greater degree than the general public. *Id.* Specifically, the Court has acknowledged the existence of three categories of risk: (1) risks distinctly associated with her employment; (2) personal risks; and (3) neutral risks which have no particular employment or personal characteristics. *Springfield Urban League v. Illinois Workers' Comp. Comm'n*, 2013 IL App (4th) 120219WC, 990 N.E.2d 284, 290 (4th Dist. 2013). Injuries resulting from a neutral risk generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public. *Id.* This increased risk may be qualitative, such as some aspect of employment that contributes to risk, or quantitative, such as the number of times they are required to encounter the risk. *Id.*

The first category of risks involves risks that are distinctly associated with employment. "Employment risks include the obvious kinds of industrial injuries and occupational diseases and are universally compensated." *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 162, 247 Ill.Dec. 22, 731 N.E.2d 795. Examples of employment-related risks include "tripping on a defect at the employer's premises, falling on uneven or slippery ground at the work site, or performing some work-related task which contributes to the risk of falling." *First Cash Financial Services*, 367 Ill. App. 3d at 106, 304 Ill.Dec. 722, 853 N.E.2d 799. Injuries resulting from a risk distinctly associated with employment are deemed to arise out of the claimant's employment and are compensable under the Act. *Steak 'n Shake*, 409 Ill.Dec. 359, 67 N.E.3d 571 (2016).

The first step in risk analysis is to determine whether the claimant's injuries arose out of an employment-related risk—a risk distinctly associated with the claimant's employment. *Mytnik*, 2016 IL App (1st) 152116WC, ¶ 39, 409 Ill.Dec. 491, 67 N.E.3d 946; *Steak 'n Shake*, 2016 IL App (3d) 150500WC, ¶ 38, 409 Ill.Dec. 359, 67 N.E.3d 571. 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. *Caterpillar Tractor*, 129 Ill. 2d 52, 58, 133 Ill.Dec. 454, 541 N.E.2d 665; see also *The Venture—Newberg-*

Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n, 2013 IL 115728, ¶ 18, 376 Ill.Dec. 823, 1 N.E.3d 535; *Sisbro*, 207 Ill. 2d at 204, 278 Ill.Dec. 70, 797 N.E.2d 665.

The Arbitrator finds that Petitioner's injuries arose out of an employment-related risk because the evidence supports that at the time of the occurrence, he was performing an act distinctly associated with his employment. The act of crawling under a machine in a 4' x 2.7' crawl space to perform mechanical work is a risk incidental to Petitioner's employment. Petitioner's job was to perform repairs and maintenance on machines that required him to contort his body in various ways to perform his duties. Petitioner had to crawl under the machine on his hands and knees in a space 2.7 feet tall and maintain that position while he performed repairs. There is no evidence that Petitioner was performing an act he was instructed not to perform. Petitioner's act of crawling on his hands and knees under a machine was an act Respondent would reasonably expect him to perform.

Based on the above, the Arbitrator finds that Petitioner sustained his burden of proof in establishing that he sustained accidental injuries that arose out of and in the course of his employment with Respondent.

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

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to the injury. Petitioner has worked for Respondent for 23 years performing a heavy physical job without any evidence of right knee complaints or treatment. Petitioner testified he underwent bilateral knee debridements as a result of a motorcycle accident 35 years ago. There is no evidence Petitioner had problems with or received treatment for his right knee in 35 years since his motorcycle accident. Examination of Petitioner's left knee was normal following the work accident on 3/26/21 and his right knee became symptomatic.

The law holds that an accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. Sisbro, Inc. v. Indus. Comm'n, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 672-673 (2003). [Emphasis added]. "Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." Fierke v. Industrial Commission, 309 Ill. App. 3d 1037, 723 N.E.2d 846 (2000).

Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury, such as a chain of events showing a claimant's ability to perform manual duties before accident but decreased ability to still perform immediately after accident. Pulliam Masonry v. Indus. Comm'n, 77 Ill. 2d 469, 397 N.E.2d 834 (1979); Gano Electric Contracting v. Indus. Comm'n, 260 Ill.App.3d 92, 96–97, 631 N.E.2d 724 (1994); International Harvester v. Indus. Comm'n, 93 Ill.2d 59, 442 N.E.2d 908 (1982).

Petitioner's history of injury was consistent in all of his treatment records, as well as his report of an immediate onset of knee pain while crawling under the machine and swelling that occurred approximately 5 to 6 hours later. Petitioner testified he thought his symptoms would calm down, but he presented to Multicare Specialists the following Monday with persistent

symptoms. Petitioner has consistently received medical treatment since his accident, and he remains symptomatic.

The Arbitrator is more persuaded by the opinions of Dr. Paletta than those of Dr. Pitts. Both Dr. Paletta and Dr. Pitts agree Petitioner is not capable of performing full duty work since 3/26/21, despite Dr. Pitts' opinion that Petitioner's symptoms are the result of a degenerative condition and not related to the work accident. Dr. Pitts testified that he did not gather from Petitioner or his medical records that Petitioner sustained a specific traumatic event, such as stepping down from a height or twisting his knee, that would cause an acute meniscus tear. There is no dispute that Petitioner's right knee is degenerative; however, the evidence supports that Petitioner's degenerative condition was asymptomatic prior to 3/26/21.

Dr. Pitts opined that Petitioner had patellofemoral arthritis, which may have been exacerbated with the kneeling incident and was consistent with what his treating physicians observed. He opined that Petitioner's exacerbation was temporary and appeared to have resolved based on a review of the medical records. Dr. Pitts and Dr. Paletta agree that it is not usual for Petitioner's symptoms to wax and wane, particularly when Petitioner's improvement was noted while he was off work and undergoing conservative treatment.

Dr. Pitts conceded that in the 23 years prior to the incident, Petitioner did not require restrictions and he never received medical care or missed work for his right knee during that period. Dr. Pitts opined there was possibly an inner rim degenerative tear. He conceded that a meniscal tear can be caused by hyperextension of the knee which could possibly cause a meniscus tear. Dr. Pitts admitted that Petitioner's level of arthritis can be asymptomatic and made symptomatic by crawling and kneeling.

Dr. Paletta opined that Petitioner's work incident was an aggravating factor with respect to the patellofemoral arthritis and a causative factor with respect to the meniscus tear. His examination revealed signs suggestive of a right meniscus tear, specifically medial joint line tenderness and positive McMurray sign and Apley compression test. Dr. Paletta appreciated degenerative changes in the patellofemoral joint and medial femoral condyle, and a medial meniscus tear. He testified that although you cannot tell the age of a meniscus tear on MRI, Petitioner had a radial or an oblique tear, which in his experience, is more typical of a new or acute tear as opposed to a degenerative or complex tear. Dr. Paletta continues to recommend surgery and light duty restrictions.

Based on the evidence, the Arbitrator finds that Petitioner's current condition of ill-being in his right knee is causally connected to his 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?

ISSUE (K): Is Petitioner entitled to any prospective medical care?

The right to be compensated for medical costs associated with work-related injuries is at the very heart of the Workers' Compensation Act. *Hagene v. Derek Polling Const*., 388 Ill. App.

3d 380, 383, 902 N.E.2d 1269, 1273 (2009). Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13 (1997). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 758 N.E.2d 18 (2001).

The Arbitrator finds that the medical treatment rendered to Petitioner was reasonable and necessary to treat his work-related injuries. Petitioner's treating physicians ordered a number of diagnostic tests and conservative treatment in an effort to diagnose and treat his unremitting symptoms. Respondent's Section 12 examiner, Dr. Pitts, testified that Petitioner sustained an aggravation of his underlying right knee condition and had reached MMI as of the date of his examination on 6/18/21. Dr. Paletta opined that Petitioner's medical treatment was reasonable and necessary up through the date he examined Petitioner on 8/4/21. Respondent disputes liability for medical bills based on accident and causal connection. Based on the Arbitrator's findings as to accident and causal connection, the Arbitrator hereby awards Petitioner medical benefits.

Therefore, Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's Group Exhibit 5, directly to the medical providers per the Illinois medical fee schedule, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits.

The Arbitrator further finds Petitioner is entitled to receive the additional care recommended by Dr. Paletta. Therefore, Respondent shall authorize and pay for prospective medical treatment, including, but not limited to, a right partial medial meniscectomy, debridement, and chondroplasty of the patellofemoral joint, and postoperative care until Petitioner reaches maximum medical improvement.

ISSUE (L): What temporary benefits are in dispute? (TTD)

Petitioner claims entitlement to temporary total disability benefits for the period 3/27/21 through 7/8/21, representing 14-6/7th weeks. The evidence supports that Petitioner was placed off work on 3/30/21 and he testified he returned to light duty work on 7/9/21. Therefore, the Arbitrator awards temporary total disability benefits from 3/30/21 through 7/8/21, representing 14-3/7th weeks. Respondent shall receive credit for temporary total disability expenses paid in the amount of $11,870.56.

This award shall in no instance be a bar to further hearing and determination of any additional amount of medical benefits or compensation for temporary or permanent disability, if any.

Arbitrator Linda J. Cantrell

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC011698
Case Name	Ronnie Peterson v. City of Chicago - Dept of Water
Consolidated Cases	21WC014555;
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0262
Number of Pages of Decision	25
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Al Koritsaris
Respondent Attorney	Elaine Newquist

DATE FILED: 6/20/2023

/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 other Prospective medical	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RONNIE PETERSON,

Petitioner,

vs. NO: 19 WC 011698

CITY OF CHICAGO-DEPARTMENT OF WATER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary disability, medical expenses and prospective medical, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below, reverses the Arbitrator's denial of prospective medical 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).

Preliminarily, the Commission notes that the Arbitrator's Decision contains two separate Conclusions of Law sections as Petitioner alleged he sustained injuries in two distinct accidents and for which he filed two separate Applications for Adjustment of Claim which were consolidated for purposes of arbitration. However, to avoid any confusion, the Commission strikes everything after the first Section L on page 21 in the Arbitrator's Conclusions of Law section so there is no mistake that the modifications in this Decision and Opinion on Review pertain solely to the Arbitrator's Decision and Conclusions of Law in case number 19 WC 11698, for date of accident on April 2, 2019.

Next, the Commission agrees with the Arbitrator's Decision finding in case number 19 WC 11698, that Petitioner sustained his burden of proving he sustained an accident arising out of and in the course of his employment however, the Commission disagrees with the Arbitrator's analysis. The Commission, therefore, strikes the second and third sentences in the third paragraph under Section C: Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? Further, the Commission strikes the last sentence in Section C. The Commission modifies the Arbitrator's Decision further by adding the following paragraphs after the last sentence in Section C:

Petitioner signed an Incident Report, only one day after the accident, on April 3, 2019. (RX5) In response to #21 of the report, "Detailed Description of Injury or Illness. What Caused the Incident? What Duty was the Employee Performing?" Petitioner described, "While getting out of Vactor WD 1000 my right knee buckled and then I fell down on the last step and then fell backwards and over a fire hydrant, slamming my right elbow in the ground." *Id.* The first medical history at MercyWorks documents that Petitioner reported the same history as was in the incident report and then he described, "he was getting out of the Vactor machine when the right knee buckled, and he fell down onto his left knee and then backwards onto his right elbow." (PX2, 6) The first history in Dr. Cole's office notes documents Petitioner reported, "that on April 2, 2019, he was attempting to climb into his truck for which he works for the Water Department, and is right-hand-dominant, and he fell back after his left knee buckled…" (PX 3, 101) Dr. Westin's first history documents that Petitioner reported on "April 2, 2019, he was getting in the truck, he had reached the first step, which he estimates was eighteen inches high and the second step was a little greater than eighteen inches. He told me his right knee buckled at the top step. He caught his left foot on the way down, which turned him and he landed mostly on his right elbow trying to avoid a fire hydrant." (RX3) On June 17, 2021, Petitioner consulted Genesis Orthopedics and saw Dr. Shadid's PA, Elliot Johnson when he reported that his "symptoms were also worsened during the fall getting out of his cab when at work when his right knee 'buckled' causing him to fall to the ground on his left knee and right elbow. This occurred on April 2, 2019." (PX5, 16) Although there were inconsistencies in the medical histories that the Commission infers to be attributed to scrivener's errors, the Commission finds that the Petitioner sustained an idiopathic fall when climbing out of the Vactor truck cab. However, our analysis does not end there.

In *City of Bridgeport*, the Petitioner, the husband of a water meter reader who had a seizure disorder, filed an Application for Adjustment of Claim against the City of Bridgeport, seeking workers' compensation benefits for the death of his wife, in an alleged work accident. The meter reader suffered a seizure while in a rural area and subsequently fell face down into 8 inches of water surrounding the meter that she was trying to read. The meter was located at an elevation approximately two feet lower than the road. The coroner testified that the cause of death was drowning due to clinical seizure. *City of Bridgeport v. Ill. Workers' Comp. Comm'n,* 2015 IL App (5th) 140532WC, P42, 44 N.E.3d 652, 663, 2015 Ill. App. LEXIS 918, *25, 398 Ill. Dec. 623, 634. In finding in favor of the Petitioner, the *City of Bridgeport Court* held the following:

> It is undisputed that the decedent sustained an idiopathic fall. However, injuries resulting from an idiopathic fall are compensable if the employment significantly contributed to the injury by placing the employee in a position increasing the dangerous effects of the fall. *Elliot v. Industrial Comm'n*, 153 Ill. App. 3d 238, 244, 505 N.E.2d 1062, 1066-67, 106 Ill. Dec. 271 (1987). *City of Bridgeport v. Ill. Workers' Comp. Comm'n,* 2015 IL App (5th) 140532WC, P42, 44 N.E.3d 652, 663.

The Commission finds that similarly, in the subject case, Petitioner's employment, which required alighting from the Vactor truck cab to the first stair that was 18 inches down and to the next step which was greater than 18 inches down from the first one, significantly contributed to his injury by placing him in a position increasing the dangerous effects of his buckled knee and subsequent fall.

The Commission further affirms and adopts Sections F, J and L of the Arbitrator's Decision respectively addressing causal connection, medical services and expenses provided to Petitioner, and TTD, with one minor correction of a scrivener's error. In Section F, third paragraph, line four, the Commission strikes the phrase, "in February 2021" so the sentence now reads, "[a]ccordingly, as noted above, based on the credible testimony of Petitioner, as well as the medical records and opinions of Drs. Cole and Shadid, which includes diagnostic testing, the Arbitrator finds that Petitioner proved a causal relationship between his work-related injuries to his left knee, right elbow, and right knee and his current condition of ill-being and his accident on April 2, 2019."

Finally, the Commission views the Petitioner's entitlement to prospective medical care differently than the Arbitrator's finding in Section K. The Commission finds that while Petitioner's entitlement to the total knee arthroplasty surgery is contingent upon Petitioner reaching the weight loss goal established by Dr. Shadid, his entitlement is not speculative. Therefore, the Commission strikes everything after the second sentence of the second paragraph in Section K and substitutes the following:

While the prospective medical surgery as recommended by Dr. Shadid is contingent upon Petitioner's weight loss to attain a target weight of 245 pounds, with BMI of under 40, to make him eligible for the total knee arthroplasty ("TKA") surgery, (PX5, 35) Petitioner is entitled to prospective medical care.

Therefore, the Respondent shall provide and pay for a right knee TKA when Petitioner reaches the target weight goal of 245 pounds with BMI under 40 as recommended by Dr. Shadid of Genesis Orthopedics. (PX5, 35)

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on August 17, 2022, is hereby modified for the reasons stated herein, reversed on the issue of prospective medical and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $963.74 per week for a period of 96 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay fees and charges for reasonable and necessary medical services provided by MercyWorks and Midwest Orthopedics at RUSH up to February 4, 2021, as provided by §8(a) of the Act and adjusted in accord with the Medical Fee Schedule provided by §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay for prospective medical treatment in the form of a right total knee arthroplasty as recommended by Dr. Shadid with the contingencies 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.

Based upon the named Respondent herein, no bond is set by the Commission. *820 ILCS 305/19(f)(2)*. 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. *820 ILCS 305/19(f)(1).*

June 20, 2023

KAD/bsd
04/18/23
42

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC011698
Case Name	Ronnie Peterson v. City of Chicago - Dept of Water
Consolidated Cases	21WC014555
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	20
Decision Issued By	Steven Fruth, Arbitrator

Petitioner Attorney	Al Koritsaris
Respondent Attorney	Elaine Newquist

DATE FILED: 8/17/2022

/s/Steven Fruth, 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
19(b)

Ronnie Peterson
Employee/Petitioner

Case # **19 WC 11698**

v.

Consolidated cases:

City of Chicago – Dept. of Water
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 **October 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, **April 2, 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 $**75,172.24**; the average weekly wage was $**1,445.62**.

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

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

Respondent shall be given a credit of $**94,953.41** 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 fees and charges for reasonable and necessary medical services provided by MercyWorks and Midwest Orthopedics at RUSH up to February 4, 2021, as provided by §8(a) of the Act and adjusted in accord with the Medical Fee Schedule provided by §8.2 of the Act.

The prospective treatment recommended by Drs. Cole and Shadid is denied due to the speculative nature of Petitioner's condition of obesity and failure to obtain medical clearance for surgery.

Respondent shall pay Petitioner temporary total disability benefits of $963.74 /week for 96 weeks, commencing April 3, 2019 through February 4, 2021, as provided in §8(b) of the Act. Respondent is given a credit for any amount paid prior to hearing.

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

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

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

Signature of Arbitrator

August 17, 2022

ICArbDec19(b)

RONNIE PETERSON v. CITY OF CHICAGO – DEPT. OF WATER,
19 WC 11698, consolidated 21 WC 14555

INTRODUCTION

These matters proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were:

19 WC 11698 (DOI 4/2/2019): ***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

Petitioner claims TTD benefits from 4/3/2019 through 2/4/2021, 96 weeks, which Respondent disputes. Respondent claims a credit of $94,953.41 in TTD benefits paid and a credit of $40,941.81 in medical benefits paid.

21 WC 14555 (DOI 5/6/2021): ***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

Petitioner claims TTD benefits from 5/7/2021 through 10/26/2021, 24 & 4/7 weeks, which Respondent disputes.

FINDINGS OF FACT

Petitioner Ronnie Peterson testified that he has been employed with Respondent City of Chicago's Water Department as a motor truck driver for approximately 16 years. He testified that his general daily responsibilities include driving various City vehicles from the Central Yard located at 39th and Ashland to various Water Department jobsites around the city. He testified that he delivers materials to various jobsites. He testified

that he also transported City workers to various jobsites.

Petitioner testified that he operated different types of trucks in order to perform his work. He testified he would operate service trucks, Vactor trucks, and different size dump trucks. At the beginning of each shift, he would be assigned specific tasks as well as which type of truck that he would be driving for that task. He testified that he would pick up the assigned vehicle from "Central." He testified that on April 2, 2019, he was assigned to operate a "Vactor" truck. He drove the truck to a jobsite. As he was exiting the truck and stepping down he fell to the ground.

Petitioner testified that the Vactor truck has two steps from the ground to the cab of the truck. The first step down is approximately 18 inches and the height to the second step was greater than18 inches. He testified that as he attempted to step down from the first to the second step, he lost his footing causing his left knee to twist. He then fell striking his right elbow on a fire-hydrant as he fell and landed on his leg, causing his right knee to buckle. He testified that he felt immediate pain in his right knee, left knee, and right elbow.

Petitioner notified his supervisor and then went to University of Chicago Medical Center for emergency treatment. The following day, April 3, Petitioner presented to MercyWorks at the direction of Respondent.

Petitioner presented to MercyWorks April 3, 2019, complaining of left knee, right knee, and right elbow pain (PX #2). He gave a history of emergency care at University of Chicago Emergency Room. Petitioner reported falling while attempting to get out of the Vactor truck, landing on a fire hydrant and then the ground. It was noted that he reported that his right knee buckled as he was getting out of the Vactor. Petitioner testified that he never told the staff at MercyWorks that his right knee buckled before the fall, stating it buckled during the fall. Petitioner also testified that when he gave a history, he was not shown the documented history by the staff to confirm the accuracy of the transcription.

The MercyWorks physical examination revealed slow and deliberate ambulation. There was right elbow swelling and induration at the olecranon bursa in the right elbow and tenderness to palpation. Elbow range of motion was normal. Examination of the knees revealed no increase in calor ("heat") or effusion or ecchymosis. There was tenderness to palpation and valgus stress at the medial compartment. There was negative valgus stress, negative patellar grind, and negative Lachman's in both knees. The diagnoses were left knee contusion, right elbow contusion, and right knee strain. Petitioner was provided a stabilizer for the knee, without stating which knee, to wear

daily and a 4-inch Ace wrap for the right elbow. He was also taken off work. Petitioner testified that he began receiving disability benefits shortly thereafter.

Petitioner returned to MercyWorks April 11, 2019 for follow-up. He complained of 2-3/10 right elbow pain, 7-8/10 left knee pain, and 6-7/10 right knee pain. He also complained about his right knee support. Petitioner reported that he had scheduled himself to see Dr. Brian Cole of Rush Orthopedics. On examination it was noted that he favored his left knee. There was still a small area of induration and effusion in the right elbow. Both knees demonstrated positive varus signs and there was a positive valgus stress sign in the left knee. The remainder of the examination of the knees were as before.

Petitioner saw Dr. Cole of Midwest Orthopaedics at RUSH for an evaluation on April 22, 2019 (PX #3). Petitioner reported that he fell off his work truck injuring his left knee, right knee, and right elbow. He complained of right elbow pain and bilateral knee pain, left worse than right. On physical examination Dr. Cole noted positive findings with respect to the left knee, right knee, and right elbow. X-rays showed right knee bone-on-bone tricompartmental diffuse arthritis, left knee arthritis in the medial and lateral compartments, and olecranon bursitis with bone spur in the right elbow. Dr. Cole diagnosed right knee tricompartmental osteoarthritis, left knee osteoarthritis, and right elbow olecranon bursitis.

Petitioner was given an intraarticular injection in the left knee. He was provided a right elbow pad and prescribed physical therapy for the knees. Further, Petitioner was placed on a light duty work restriction which included avoiding kneeling, squatting, stooping, and prolonged standing.

Petitioner testified that he remained off work since his employer could not accommodate his restrictions and continued to receive disability benefits at that time. Petitioner began physical therapy at Atletico on May 2, 2019 (PX #4). He presented with 8/10 knee pain and stabilizers on both knees. He had diminished range of motion and strength in both knees. He testified that that therapy did not help improve his symptoms.

On June 3, 2019, the Petitioner returned to Dr. Cole on June 3, 2019. Petitioner reported no improvement with therapy to his right and left knees. He was diagnosed with left knee injury, right knee aggravation of osteoarthritic flare, and right elbow traumatic bursitis. Dr. Cole recommended a left knee diagnostic arthroscopy and

debridement as well as right elbow open traction spur excision.

On August 16, 2019, Petitioner submitted to a §12 IME with Dr. Craig Westin (RX #3). Dr. Westin took Petitioner's history of falling off his truck between the first and second step of the truck, catching his left foot on the way down, which turned him and then landing on a fire hydrant with his right elbow. Petitioner stated that his knee buckled as he fell. Petitioner described the different heights between the steps leading up to and down from the Vactor. The distance between the ground and the first step is 18 inches, while the distance between the first and second step is greater than 18 inches.

Dr. Westin reviewed Petitioner's medical records in addition to his clinical examination. The examination revealed mildly reduced right elbow range of motion with tenderness to palpation at the olecranon. There was moderate left calf, and foot swelling. Petitioner had limited range of motion of the left knee with extension and tenderness to palpation over the medial and lateral tibiofemoral joint lines. Dr. Westin was unable to assess instability or crepitus. He also reviewed of X-rays of the right knee, left knee, and right elbow.

Dr. Westin diagnosed a lateral meniscal tear of the left knee, right elbow olecranon contusion at the site of an underlying osteophyte, and right knee pre-existing osteoarthritis that was aggravated by the fall of April 2, 2019. Dr. Westin opined that the left knee meniscal was causally related to the April 2, 2019 work-related accident. He also opined that the accident aggravated a pre-existing asymptomatic arthritic condition of the right knee and aggravated an asymptomatic pre-existing bone spur in the right olecranon of the right elbow.

Dr. Westin agreed with Dr. Cole's opinion that Mr. Peterson required left knee surgery in the form of lateral meniscectomy and surgical repair of internal derangement of the left knee. Dr. Westin also opined that the right elbow would also require surgery if the symptoms continue, but that the left knee surgery should be done first to see if the elbow symptoms subside in the interim. Further, Dr. Westin opined that Petitioner should undergo cortisone and hyaluronte injections in the right knee and that a total knee replacement could eventually be needed. He opined that the accident caused the need for the injections due to the aggravation of the asymptomatic pre-existing arthritis but that the knee replacement, if necessary, would not be as a result of the April 2, 2019 accident. Dr. Westin added that Petitioner was not able to return to full duty work.

Petitioner returned to Dr. Cole on November 27, 2019, where surgery to repair

for the left knee was scheduled. Dr. Cole performed the arthroscopic surgery on Petitioner's left knee on November 27, 2019, which included debridement of the articular cartilage, the medial femoral condyle, the trochlea, and also a synovectomy in the suprapatellar pouch (PX #3).

On December 9, 2019, Petitioner followed up with Dr. Cole for his left knee surgery. Dr. Cole noted range of motion at 0° - 120°. The doctor ordered physical therapy 2-3 times per week and scheduled a 6-week follow-up appointment. He estimated Petitioner would achieve MMI within 12 weeks. Petitioner was kept on light duty restricted work.

Petitioner began post-operative therapy at Athletico (PX #4). He returned to Dr. Cole for a follow-up on January 20, 2020. The doctor ordered continued physical therapy for another 4 weeks and kept Petitioner on light duty sedentary restrictions.

Petitioner returned to Dr. Cole for another post-operative follow-up appointment on February 10, 2020. Physical therapy was suspended due to increased swelling during therapy. Dr. Cole administered a left knee intraarticular cortisone injection. In addition, Petitioner's right elbow and right knee continued to remain symptomatic. Dr. Cole recommended a right knee replacement but ordered the right elbow bursectomy procedure first.

Dr. Cole performed a right elbow olecranon bursectomy with bony excision at Rush Oak Brook Surgery Center June 3, 2020 (PX #3). Petitioner was placed in right arm sling and was instructed on proper use. Petitioner was then seen for follow-up on June 6, 2020, when Physician Assistant Kaileen Healy ordered post-operative physical therapy for his right elbow (PX #3). Petitioner returned to Athletico for post-operative therapy on his right elbow (PX #4).

Petitioner returned to Dr. Cole August 3, 2020, complaining of residual elbow pain and persistent right knee pain. Dr. Cole administered an intra-articular injection in the right knee and ordered additional physical therapy. Petitioner was still kept on light duty work restrictions.

On August 31, 2020, Petitioner returned to Dr. Cole for another follow-up visit, complaining of continuing right knee pain, which was not relieved by the injection. He also complained of some left knee pain and swelling. Dr. Cole put Petitioner at MMI for his right elbow. Dr. Cole recommended a left knee Zilretta injection and a right knee Gel-One injection at this time. He was continued light duty restriction.

Petitioner returned to Dr. Cole on October 12, 2020 for the injections in his knees. Dr. Cole performed a left knee Zilretta injection and a right knee Gel-One injection (PX #3). Dr. Cole prescribed additional physical for both knees. Petitioner returned to Athletico for this course of therapy on October 14 (PX #4).

Petitioner returned to Dr. Cole on November 16, 2020. Petitioner reported two weeks improvement in his symptoms in both the right and left knee. Petitioner complained that the right knee pain was much worse than the left knee but that due to overcompensating for the right knee pain it is causing his left knee to be more painful. Dr. Cole placed Petitioner at MMI for his left knee but recommended arthroscopic debridement surgery for the right knee because he had such great symptom relief following surgery with the left knee. Petitioner was again continued on light duty work restrictions.

Petitioner testified that following this recommendation, he was sent back to see Dr. Westin for another IME December 14, 2020 (RX #4). Dr. Westin noted that he had examined Petitioner for his right knee, left knee, and right elbow on August 16, 2019. He noted that the December 14 IME was limited to Petitioner's right knee only. In addition to the physical examination Dr. Westin reviewed additional medical records.

On examination Dr. Westin noted Petitioner was 5' 7" tall and weighed 290 pounds. Dr. Westin found no effusion or significant tenderness over the tibio-femoral or patella-femoral joint lines in the left knee. He did find right knee effusion and maximal tenderness at the medial tibio-femoral joint line. Right knee range of motion was 5° - 90°. There was diffuse right knee crepitus.

Dr. Westin noted Petitioner's pre-existing, chronic arthritis, further noting Petitioner's present bone-on-bone osteoarthritis. The doctor opined that that the "alleged" work injury was not the cause or a contributing cause of Petitioner's current diagnosis. He also opined that the right knee was probably aggravated by the accident but that the knee had returned to baseline. He described any aggravation as "not a great deal." Dr. Westin added that Petitioner's left knee and right elbow were far more painful after his fall.

Dr. Westin opined that X-rays, medication and injections was reasonable and

necessary for the temporary aggravation of the right knee arthritis by the work injury of April 2, 2019. Dr. Westin disagreed with Dr. Cole's treatment plan for arthroscopic debridement and stated that the likelihood of improvement is minimal with pre-existing bone-on-bone arthritis. He noted that his opinion is that Mr. Peterson would only benefit from a total knee arthroplasty or potentially oral medications and reinjection of cortisone or hyaluronate. Dr. Westin further stated that progression of Petitioner's symptoms is of the natural disease process of obesity and osteoarthritis and not the fall of April 2, 2019. He finally opined that as to the April 2, 2019 occurrence, Petitioner was at MMI with respect to the right knee and could return to work as a driver.

Petitioner testified that following the second IME, his knee surgery was denied, and his disability benefits were terminated. He further testified that he had no choice but to request a release to return to driving in order to support his family. Dr. Cole provided a note allowing him to return to driving February 4, 2021. Dr. Cole noted Petitioner could return to work as a driver but that he is still under his care for treatment.

Petitioner testified he returned to work until he was injured in another work accident on May 6, 2021.

Petitioner testified that on May 6, 2021, he was exiting the Central garage after getting his truck assignment when he slipped and fell on a downslope grade leading out from the garage, which was wet and full of loose gravel. Petitioner testified that as he attempted to get up, his right knee buckled, and he fell back down to the ground and needed to be helped up by a co-worker. Petitioner took a photograph of the area where he fell a few days after the occurrence (PX #1). Petitioner identified the photograph, using it to describe how and where he fell. PX #1 was admitted in evidence without objection. Petitioner testified that he sought immediate medical attention and went to MercyWorks.

Petitioner presented to MercyWorks on May 6, complaining of severe right knee and left-hand pain (PX #2). The chart quoted Petitioner: "Walking out garage door and my leg gave out on me …" The chart further noted Petitioner's statement that "for unknown reason, he had a sharp pain in his right knee, and his leg gave out." He denied any twisting injury prior to his fall. Petitioner reported that he had bone-on-bone arthritis in the right knee and that he previously been told he needed a total knee replacement. Petitioner's history of hypertension, hypercholesterolemia, and insulin for

diabetes was also noted.

On examination Petitioner was noted as favoring his right leg. There was a mild increase in calor and effusion. Petitioner showed a right knee X-ray on his phone which showed bone-on-bone osteoarthritis. Range of motion was adequate but there was tenderness to palpation and with varus stress at the medial compartment. There was also a positive patellar grind sign. However, valgus stress and Lachman's were negative. Petitioner was diagnosed with severe right knee osteoarthritis, contusions to the right knee and left hand, and bilateral lower extremity edema. Petitioner was advised to follow up with his primary physician but chose to follow-up with Dr. Brian Cole. Petitioner was taken off work.

Petitioner testified that went back to Dr. Cole. On May 24, 2021 he presented to Dr. Cole with complaints of worsening right knee pain (PX #3). He complained of pain, giving out, and stiffness in the knee since his last visit on November 16, 2020. Petitioner reported that he had been working full duty but did not report a fall or other incident at work.

Dr. Cole noted Petitioner's significant right-sided antalgic gait. He had bilateral pitting edema, right worse than left. There was tenderness to palpation in the anterior, medial, and lateral aspects of the knee. Range of motion was 30° to 90°. Dr. Cole noted that arthroscopy would not give satisfactory relief, given Petitioner body habitus. He referred Petitioner for evaluation by a joint replacement specialist.

On June 17, 2021, Petitioner presented to Dr. Hythem Shadid of Genesis Orthopedics complaining of right knee pain (PX #5). Petitioner gave a history that while exiting a garage while it was raining he slipped on wet concrete and fell onto the ground, twisting his right knee. Petitioner further stated that the event was witnessed, and he was helped up from the ground. After examination, Dr. Shadid agreed with the recommendation of Dr. Cole for a knee replacement but noted that Petitioner needed to lose weight before being cleared for surgery. Petitioner was placed on light duty.

Petitioner testified that he remained off work as the City of Chicago is unable to accommodate light duty work. He testified that he weighed 300 pounds at this first visit.

Petitioner testified that he returned for monthly follow-up appointments at

Genesis Orthopedics. The records show that he was seen July 19, August 13, and September 17, 2021 (PX #5). The records show that during that time period, Petitioner consistently lost approximately 10 pounds between each visit and was 271 pounds as of September 17, 2021. Further, the record notes that the target weight for clearance for surgery is 245 pounds, which Petitioner confirmed. Petitioner testified that he has another follow-up visit coming up on November 12, 2021.

CONCLUSIONS OF LAW

19 WC 11698 (DOI 4/2/2019)

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

The Arbitrator finds that Petitioner Ronnie Peterson proved that he sustained an accidental injury that arose out of and in the course of his employment by Respondent City of Chicago on April 2, 2019.

Petitioner was employed as a motor truck driver by Respondent's Water Department. His job involved delivery of workers and work materials to various jobsites. He was engaged in these activities on April 2, 2019. He was operating a truck described as a Vactor. Petitioner described steps from the ground to the cab as being high and unequal, 18 inches and greater than 18 inches.

Petitioner testified that he lost his footing as he alighted from the cab of the Vactor. The Arbitrator notes that climbing into and out of a high truck cab with high and unequal steps is an activity incidental to and required by Petitioner's employment by Respondent in the performance of his ordinary work duties. Further, climbing into and out of a high truck cab with high and unequal steps involves risks greater than the general public would ordinarily be exposed to.

Petitioner was immediately seen in the emergency department at the University of Chicago Medical Center following his accident. The records of that encounter were not admitted in evidence. However, Petitioner was seen at MercyWorks on April 3, 2019 on referral from Respondent. Petitioner's documented history at MercyWorks noted his report that as he was getting out of the Vactor his right knee buckled and then he fell onto his left knee and right elbow. Petitioner testified credibly that he did not state his right knee buckled causing him to fall. He testified that he reported that his

knee buckled in the process of falling. The Arbitrator finds this is a credible rebuttal to the medical chart notes, recognizing that misinterpretation can occur in the hurried atmosphere of any medical facility, particularly one which often addresses emergency situations.

The Arbitrator finds that either account of Petitioner's fall would result in a compensable injury. The medical evidence demonstrated that Petitioner had bone-on-bone arthritis in his right knee. Arthritis to that extent would compromise the motion and function of that joint. A pre-existing condition such as this may be a contributing factor to Petitioner's fall but that does not exclude compensability if the activity is incidental or required in the performance of the employee's assigned job, such as here.

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 his work injury on April 2, 2019. The evidence established that Petitioner sustained injuries to his left knee, his right knee, and his right elbow when he fell as he was alighting from his work truck on April 2. In addition, the evidence demonstrated that Petitioner had pre-existing degenerative arthritis in his right knee. Petitioner was working without complaints or restrictions with his right knee before his accident but that his condition became symptomatic as a result of the accident to the extent that he was taken off work by his physicians.

It is well settled that employers take their employees as they find them. Therefore, even though an employee may have a pre-existing condition which may make him more susceptible to an injury, compensation for the injury will not be denied if it can be shown that the work-related accident was also a causative factor. An accidental injury need not be the sole cause, or even the primary cause, as long as it was a cause of the claimant's ill-being.

Accordingly, as noted above, based on the credible testimony of Petitioner, as well as the medical records and opinions of Drs. Cole and Shadid, which includes diagnostic testing, the Arbitrator finds that Petitioner proved a causal relationship between his work-related injuries to in February 2021 his left knee, right elbow, and right knee and his current condition of ill-being and his accident on April 2, 2019. Even Dr. Westin found that the April 2, 2019 accident caused a temporary aggravation of the pre-existing degenerative osteoarthritis in Petitioner's right knee.

Prior to his April 2,2019 accident Petitioner did not have any issues with his left

knee, right knee, or right elbow. He was performing full duty work. The accident caused an immediate disability to those body parts. Petitioner admitted he had a minor injury at work in January 2019 but lost no time from work, sought no treatment for that injury, and continued to work without restrictions. There was no evidence that Petitioner suffered any injury other than the work-related injury he suffered on April 2, 2019. The Arbitrator notes that Respondent's §12 examiner, Dr. Westin, agreed that Petitioner suffered injury to his left knee and right elbow following the April 2, 2019 accident and also agreed with the treating diagnoses and treatment plan.

Regarding Petitioner's right knee, Dr. Westin also agreed that Petitioner sustained an injury on April 2, 2019 but disagreed with the extent of the injury and treatment with respect to causal connection. He found no causal relationship with Petitioner's condition of ill-being and that accident. It is noteworthy that Dr. Westin did opine, regardless of causation, that Petitioner required a total knee arthroplasty. The Arbitrator finds that the causation opinions of Petitioner's treating doctors are more persuasive regarding the right knee condition of ill-being which will be explained below. Dr. Westin overlooked the obvious: Petitioner was asymptomatic and working without restrictions before the April 2 accident and then was not thereafter. The mechanism of injury of Petitioner falling while alighting from his work truck onto his right knee is a competent to cause asymptomatic pre-existing degenerative arthritis to become symptomatic to where medical intervention was necessary.

Dr. Westin conceded that each fall aggravated Petitioner's pre-existing arthritis. He opined that he first accident aggravated asymptomatic arthritis, while the second fall exacerbated arthritis that became symptomatic because of the first injury. However, he opined that the aggravation was temporary, and that Petitioner's current condition was from the natural progression of the pre-existing degenerative arthritis. Regardless, the Arbitrator notes that Dr. Westin did not state bases for his opinion that the aggravation was only temporary. The Arbitrator does not give weight to an opinion lacking the bases for that opinion. Also, Dr. Westin conceded at the first IME that Petitioner's right knee was taking on more stress than the left since the left knee pain was worse. Since Petitioner's right knee, which is arthritic to begin with, was taking on more stress, then the condition would only worsen, thus further questioning that the aggravation was "temporary."

Therefore, the Arbitrator finds that Petitioner's current conditions of ill-being of his left knee, right elbow, and right knee are causally related to the April 2, 2019 work accident. Also, the medical records document Petitioner's consistent complaints of right knee pain following the April 2 accident. Dr. Cole related the right knee injury to the

April 2 occurrence. Specifically, he noted that the pre-existing asymptomatic arthritis became symptomatic from the April 2 fall and then was exacerbated following the May 6, 2021 fall.

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 has previously found that Petitioner sustained injuries that were causally related to an accident on April 2, 2019 that arose out of and in the course of his employment by Respondent. At the time of the hearing on October 26, 2021, Petitioner presented medical bills from Midwest Orthopedics at RUSH, MercyWorks, and Genesis Orthopedics (PX #6, PX #7, & PX #8). The Arbitrator finds that the treatment rendered by his physicians up to his return to work on February 4, 2021 was reasonable and necessary to treat Petitioner for the work-related injuries he sustained on April 2, 2019.

The Arbitrator also finds that since Petitioner's condition of ill-being is causally related, Respondent is responsible for those medical charges up to February 4, 2021 and that such charges were generated as a result of treatment that was reasonable and necessary to relieve or cure the effects of Petitioner's injuries sustained on April 2, 2019. The Arbitrator finds that Petitioner's related medical bills are limited to charges for medical care provided prior to May6, 2021 for reasons stated below. All charges are to be adjusted in accord with to the Medical Fee Schedule provided by §8.2 of the Act.

K: Is Petitioner entitled to prospective medical care?

The Arbitrator finds that the evidence supports a finding that Petitioner requires additional medical treatment, a right total knee replacement, which is causally related to his April 2, 2019 work accident. There was competent medical opinion from Petitioner's treating physicians as well as Respondent's §12 examiner that Petitioner has bone-on-bone degenerative arthritis in his right knee, which requires a total arthroplasty

However, the evidence also showed that Petitioner is not currently medically cleared for surgery due to his obesity. Although the evidence showed that Petitioner has steadily lost weight over the course of his medical care, the evidence also showed that he has not yet attained his target weight of 245 pounds. It is therefore speculative whether Petitioner is entitled to the recommended prospective medical care of total knee replacement surgery at the present time. When and if Petitioner attains the target

weight of 245 pounds, Petitioner would be entitled to that prospective medical care.

Therefore, the Arbitrator cannot at this time direct Respondent to authorize and pay for what is currently a speculative perspective procedure.

L: What temporary benefits are in dispute? TTD

Having found an accident that arose out of and in the course of Petitioner's employment, and that Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator awards temporary total disability benefits. The medical records show that Petitioner was unable to work for Respondent per his doctors from April 3, 2019 through February 4, 2021. The Arbitrator finds that Petitioner is owed Temporary Total Disability benefits from April 3, 2019 through February 4, 2021, 96 weeks at a rate of $963.74 per week.

21 WC 14555 (DOI 5/6/2021)

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

The Arbitrator finds that Petitioner failed to prove that he was injured in an accident on May 6, 2021 that arose out of and in the course of his employment by Respondent.

Petitioner testified that he was beginning his workday at Respondent's Central garage. He testified he was walking down a slopped ramp that was wet from rain and that was covers with gravel. He further testified that he slipped on the wet gravel-covered ramp and fell onto his right knee. Petitioner gave this same account to his subsequent treating physicians. The Arbitrator does not find Petitioner was credible in describing how he fell.

Petitioner was initially seen for his injury at MercyWorks. The attending physician specifically quoted Petitioner's report, "Walking out garage door and my leg gave out on me …" It was also noted that Petitioner reported, "for unknown reason, he had a sharp pain in his right knee, and his leg gave out." Petitioner's history of the occurrence approximates an excited utterance. An excited utterance is an exception to the hearsay rule is premised on the notion that under those circumstance there is little or no time for fabrication. See *Handbook of Illinois Evidence,* §803.2.

The history given by Petitioner at MercyWorks does not describe an activity peculiarly incidental to his work or of exposure to a risk greater than a risk to which the general public would be exposed. The MercyWorks history does not describe any sort of defect in the workplace that may have caused the fall.

When Petitioner consulted Dr. Cole on May 24, 2021 for continuing problems with his right knee he did not report the claimed slip and fall on May 6 or any other work-related incident triggering those complaints.

It was not until Petitioner saw Dr. Shadid on June 16, 2021 that he reported that he slipped on wet ground, although Dr. Shadid himself did not diagnose more than a contusion or strain from the fall. He addressed his treatment and work restrictions to the pre-existing osteoarthritis, unrelated to the fall. Dr. Shadid did not document any specific causation opinion linking the claimed May 6 incident to Petitioner's presentation on June 16.

The Arbitrator finds the more immediate reports (MercyWorks and Dr. Cole) more credible than the later report to Dr. Shadid. One would normally expect a person claiming injury from an accident would report that accident when seeking emergent and follow-up medical care for that claimed accidental injury. Petitioner's failure to report this claimed accident when seeking medical care from MercyWorks and Dr. Cole undermines his credibility when claiming an accident now.

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

Given that the Arbitrator has found that Petitioner failed to prove that he was injured in a compensable accident, this issue is moot. Were it not for the failure to prove a compensable accidental injury there was amble proof that Petitioner suffered an aggravation of his previous injury that was causally related to a fall on May 6, 2021.

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?

Given that the Arbitrator has found that Petitioner failed to prove that he was injured in a compensable accident, this issue is moot. Were it not for the failure to prove a compensable accidental injury there was amble evidence of an aggravation of Petitioner's previous injury and that all medical care was reasonable and necessary.

K: Is Petitioner entitled to prospective medical care?

Given that the Arbitrator has found that Petitioner failed to prove that he was injured in a compensable accident, this issue is moot. Were it not for the failure to prove a compensable accidental injury it is still speculative whether Petitioner would be entitled to the recommended prospective medical care, see above analysis.

L: What temporary benefits are in dispute? TTD

Given that the Arbitrator has found that Petitioner failed to prove that he was injured in a compensable accident, this issue is moot. Were it not for the failure to prove a compensable accidental injury there is amble medical evidence of disability that Petitioner would be entitled to Total Temporary Disability benefits from May 7, 2021 through October 26, 2021, 24 & 4/7 weeks.

Steven J. Fruth, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC014555
Case Name	Ronnie Peterson v. City of Chicago Dept. of Water
Consolidated Cases	19WC011698;
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	23IWCC0263
Number of Pages of Decision	23
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Al Koritsaris
Respondent Attorney	Elaine Newquist

DATE FILED: 6/20/2023

/s/ Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RONNIE PETERSON,

Petitioner,

vs. NO: 21 WC 014555

CITY OF CHICAGO-DEPARTMENT OF WATER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary disability, causal connection and medical expenses and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms and adopts the Arbitrator's Statement of Facts in its entirety. The Commission strikes the paragraphs in the Arbitrator's Conclusions of Law pertaining to case number 19 WC 11698 on pages 13 through 17. Under the heading of case number 21 WC 14555, in the Arbitrator's Conclusions of Law, the Commission further affirms and adopts in its entirety Section C: Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?. Therefore, based upon the findings in Section C, the Commission finds all other issues are moot and, therefore, strikes the remainder of the Sections, specifically Sections F, J, K, and L under the heading of case number 21 WC 14555 beginning on page 18 through page 19.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on August 17, 2022, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner failed to prove that he sustained an accidental injury which arose out of and in the course of his employment. Therefore, Petitioner's claim for benefits related to the claimed work accident on May 6, 2021 is denied.

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.

Based upon the named Respondent herein, no bond is set by the Commission. *820 ILCS 305/19(f)(2)*. 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. Or *820 ILCS 305/19(f)(1).*

June 20, 2023
KAD/bsd
04/18/23
42

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC014555
Case Name	Ronnie Peterson v. City of Chicago Dept. of Water
Consolidated Cases	19WC011698
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	20
Decision Issued By	Steven Fruth, Arbitrator

Petitioner Attorney	Al Koritsaris
Respondent Attorney	Elaine Newquist

DATE FILED: 8/17/2022

/s/Steven Fruth, 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
19(b)

Ronnie Peterson
Employee/Petitioner

v.

City of Chicago – Dept. of Water
Employer/Respondent

Case # **21 WC 14555**

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 **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **October 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, **May 6, 2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being ***is not*** causally related to the accident on May 6, 2021.

In the year preceding the injury, Petitioner earned $**79,768.00**; the average weekly wage was $**1,534.00**.

On the date of accident, Petitioner was **61** years of age, ***married*** with **0** dependent child.

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

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

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

ORDER

Petitioner failed to prove that he sustained an accidental injury which arose out of and in the course of his employment. Therefore, Petitioner's claim for benefits related the claimed work accident on May 6, 2021 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.

Signature of Arbitrator

August 17, 2022

ICArbDec19(b)

RONNIE PETERSON v. CITY OF CHICAGO – DEPT. OF WATER,
19 WC 11698, consolidated 21 WC 14555

INTRODUCTION

These matters proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were:

19 WC 11698 (DOI 4/2/2019): ***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

Petitioner claims TTD benefits from 4/3/2019 through 2/4/2021, 96 weeks, which Respondent disputes. Respondent claims a credit of $94,953.41 in TTD benefits paid and a credit of $40,941.81 in medical benefits paid.

21 WC 14555 (DOI 5/6/2021): ***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

Petitioner claims TTD benefits from 5/7/2021 through 10/26/2021, 24 & 4/7 weeks, which Respondent disputes.

FINDINGS OF FACT

Petitioner Ronnie Peterson testified that he has been employed with Respondent City of Chicago's Water Department as a motor truck driver for approximately 16 years. He testified that his general daily responsibilities include driving various City vehicles from the Central Yard located at 39th and Ashland to various Water Department jobsites around the city. He testified that he delivers materials to various jobsites. He testified

that he also transported City workers to various jobsites.

Petitioner testified that he operated different types of trucks in order to perform his work. He testified he would operate service trucks, Vactor trucks, and different size dump trucks. At the beginning of each shift, he would be assigned specific tasks as well as which type of truck that he would be driving for that task. He testified that he would pick up the assigned vehicle from "Central." He testified that on April 2, 2019, he was assigned to operate a "Vactor" truck. He drove the truck to a jobsite. As he was exiting the truck and stepping down he fell to the ground.

Petitioner testified that the Vactor truck has two steps from the ground to the cab of the truck. The first step down is approximately 18 inches and the height to the second step was greater than18 inches. He testified that as he attempted to step down from the first to the second step, he lost his footing causing his left knee to twist. He then fell striking his right elbow on a fire-hydrant as he fell and landed on his leg, causing his right knee to buckle. He testified that he felt immediate pain in his right knee, left knee, and right elbow.

Petitioner notified his supervisor and then went to University of Chicago Medical Center for emergency treatment. The following day, April 3, Petitioner presented to MercyWorks at the direction of Respondent.

Petitioner presented to MercyWorks April 3, 2019, complaining of left knee, right knee, and right elbow pain (PX #2). He gave a history of emergency care at University of Chicago Emergency Room. Petitioner reported falling while attempting to get out of the Vactor truck, landing on a fire hydrant and then the ground. It was noted that he reported that his right knee buckled as he was getting out of the Vactor. Petitioner testified that he never told the staff at MercyWorks that his right knee buckled before the fall, stating it buckled during the fall. Petitioner also testified that when he gave a history, he was not shown the documented history by the staff to confirm the accuracy of the transcription.

The MercyWorks physical examination revealed slow and deliberate ambulation. There was right elbow swelling and induration at the olecranon bursa in the right elbow and tenderness to palpation. Elbow range of motion was normal. Examination of the knees revealed no increase in calor ("heat") or effusion or ecchymosis. There was tenderness to palpation and valgus stress at the medial compartment. There was negative valgus stress, negative patellar grind, and negative Lachman's in both knees. The diagnoses were left knee contusion, right elbow contusion, and right knee strain. Petitioner was provided a stabilizer for the knee, without stating which knee, to wear

daily and a 4-inch Ace wrap for the right elbow. He was also taken off work. Petitioner testified that he began receiving disability benefits shortly thereafter.

Petitioner returned to MercyWorks April 11, 2019 for follow-up. He complained of 2-3/10 right elbow pain, 7-8/10 left knee pain, and 6-7/10 right knee pain. He also complained about his right knee support. Petitioner reported that he had scheduled himself to see Dr. Brian Cole of Rush Orthopedics. On examination it was noted that he favored his left knee. There was still a small area of induration and effusion in the right elbow. Both knees demonstrated positive varus signs and there was a positive valgus stress sign in the left knee. The remainder of the examination of the knees were as before.

Petitioner saw Dr. Cole of Midwest Orthopaedics at RUSH for an evaluation on April 22, 2019 (PX #3). Petitioner reported that he fell off his work truck injuring his left knee, right knee, and right elbow. He complained of right elbow pain and bilateral knee pain, left worse than right. On physical examination Dr. Cole noted positive findings with respect to the left knee, right knee, and right elbow. X-rays showed right knee bone-on-bone tricompartmental diffuse arthritis, left knee arthritis in the medial and lateral compartments, and olecranon bursitis with bone spur in the right elbow. Dr. Cole diagnosed right knee tricompartmental osteoarthritis, left knee osteoarthritis, and right elbow olecranon bursitis.

Petitioner was given an intraarticular injection in the left knee. He was provided a right elbow pad and prescribed physical therapy for the knees. Further, Petitioner was placed on a light duty work restriction which included avoiding kneeling, squatting, stooping, and prolonged standing.

Petitioner testified that he remained off work since his employer could not accommodate his restrictions and continued to receive disability benefits at that time. Petitioner began physical therapy at Atletico on May 2, 2019 (PX #4). He presented with 8/10 knee pain and stabilizers on both knees. He had diminished range of motion and strength in both knees. He testified that that therapy did not help improve his symptoms.

On June 3, 2019, the Petitioner returned to Dr. Cole on June 3, 2019. Petitioner reported no improvement with therapy to his right and left knees. He was diagnosed with left knee injury, right knee aggravation of osteoarthritic flare, and right elbow traumatic bursitis. Dr. Cole recommended a left knee diagnostic arthroscopy and

debridement as well as right elbow open traction spur excision.

On August 16, 2019, Petitioner submitted to a §12 IME with Dr. Craig Westin (RX #3). Dr. Westin took Petitioner's history of falling off his truck between the first and second step of the truck, catching his left foot on the way down, which turned him and then landing on a fire hydrant with his right elbow. Petitioner stated that his knee buckled as he fell. Petitioner described the different heights between the steps leading up to and down from the Vactor. The distance between the ground and the first step is 18 inches, while the distance between the first and second step is greater than 18 inches.

Dr. Westin reviewed Petitioner's medical records in addition to his clinical examination. The examination revealed mildly reduced right elbow range of motion with tenderness to palpation at the olecranon. There was moderate left calf, and foot swelling. Petitioner had limited range of motion of the left knee with extension and tenderness to palpation over the medial and lateral tibiofemoral joint lines. Dr. Westin was unable to assess instability or crepitus. He also reviewed of X-rays of the right knee, left knee, and right elbow.

Dr. Westin diagnosed a lateral meniscal tear of the left knee, right elbow olecranon contusion at the site of an underlying osteophyte, and right knee pre-existing osteoarthritis that was aggravated by the fall of April 2, 2019. Dr. Westin opined that the left knee meniscal was causally related to the April 2, 2019 work-related accident. He also opined that the accident aggravated a pre-existing asymptomatic arthritic condition of the right knee and aggravated an asymptomatic pre-existing bone spur in the right olecranon of the right elbow.

Dr. Westin agreed with Dr. Cole's opinion that Mr. Peterson required left knee surgery in the form of lateral meniscectomy and surgical repair of internal derangement of the left knee. Dr. Westin also opined that the right elbow would also require surgery if the symptoms continue, but that the left knee surgery should be done first to see if the elbow symptoms subside in the interim. Further, Dr. Westin opined that Petitioner should undergo cortisone and hyaluronte injections in the right knee and that a total knee replacement could eventually be needed. He opined that the accident caused the need for the injections due to the aggravation of the asymptomatic pre-existing arthritis but that the knee replacement, if necessary, would not be as a result of the April 2, 2019 accident. Dr. Westin added that Petitioner was not able to return to full duty work.

Petitioner returned to Dr. Cole on November 27, 2019, where surgery to repair

for the left knee was scheduled. Dr. Cole performed the arthroscopic surgery on Petitioner's left knee on November 27, 2019, which included debridement of the articular cartilage, the medial femoral condyle, the trochlea, and also a synovectomy in the suprapatellar pouch (PX #3).

On December 9, 2019, Petitioner followed up with Dr. Cole for his left knee surgery. Dr. Cole noted range of motion at 0° - 120°. The doctor ordered physical therapy 2-3 times per week and scheduled a 6-week follow-up appointment. He estimated Petitioner would achieve MMI within 12 weeks. Petitioner was kept on light duty restricted work.

Petitioner began post-operative therapy at Athletico (PX #4). He returned to Dr. Cole for a follow-up on January 20, 2020. The doctor ordered continued physical therapy for another 4 weeks and kept Petitioner on light duty sedentary restrictions.

Petitioner returned to Dr. Cole for another post-operative follow-up appointment on February 10, 2020. Physical therapy was suspended due to increased swelling during therapy. Dr. Cole administered a left knee intraarticular cortisone injection. In addition, Petitioner's right elbow and right knee continued to remain symptomatic. Dr. Cole recommended a right knee replacement but ordered the right elbow bursectomy procedure first.

Dr. Cole performed a right elbow olecranon bursectomy with bony excision at Rush Oak Brook Surgery Center June 3, 2020 (PX #3). Petitioner was placed in right arm sling and was instructed on proper use. Petitioner was then seen for follow-up on June 6, 2020, when Physician Assistant Kaileen Healy ordered post-operative physical therapy for his right elbow (PX #3). Petitioner returned to Athletico for post-operative therapy on his right elbow (PX #4).

Petitioner returned to Dr. Cole August 3, 2020, complaining of residual elbow pain and persistent right knee pain. Dr. Cole administered an intra-articular injection in the right knee and ordered additional physical therapy. Petitioner was still kept on light duty work restrictions.

On August 31, 2020, Petitioner returned to Dr. Cole for another follow-up visit, complaining of continuing right knee pain, which was not relieved by the injection. He also complained of some left knee pain and swelling. Dr. Cole put Petitioner at MMI for his right elbow. Dr. Cole recommended a left knee Zilretta injection and a right knee Gel-One injection at this time. He was continued light duty restriction.

Petitioner returned to Dr. Cole on October 12, 2020 for the injections in his knees. Dr. Cole performed a left knee Zilretta injection and a right knee Gel-One injection (PX #3). Dr. Cole prescribed additional physical for both knees. Petitioner returned to Athletico for this course of therapy on October 14 (PX #4).

Petitioner returned to Dr. Cole on November 16, 2020. Petitioner reported two weeks improvement in his symptoms in both the right and left knee. Petitioner complained that the right knee pain was much worse than the left knee but that due to overcompensating for the right knee pain it is causing his left knee to be more painful. Dr. Cole placed Petitioner at MMI for his left knee but recommended arthroscopic debridement surgery for the right knee because he had such great symptom relief following surgery with the left knee. Petitioner was again continued on light duty work restrictions.

Petitioner testified that following this recommendation, he was sent back to see Dr. Westin for another IME December 14, 2020 (RX #4). Dr. Westin noted that he had examined Petitioner for his right knee, left knee, and right elbow on August 16, 2019. He noted that the December 14 IME was limited to Petitioner's right knee only. In addition to the physical examination Dr. Westin reviewed additional medical records.

On examination Dr. Westin noted Petitioner was 5' 7" tall and weighed 290 pounds. Dr. Westin found no effusion or significant tenderness over the tibio-femoral or patella-femoral joint lines in the left knee. He did find right knee effusion and maximal tenderness at the medial tibio-femoral joint line. Right knee range of motion was 5° - 90°. There was diffuse right knee crepitus.

Dr. Westin noted Petitioner's pre-existing, chronic arthritis, further noting Petitioner's present bone-on-bone osteoarthritis. The doctor opined that that the "alleged" work injury was not the cause or a contributing cause of Petitioner's current diagnosis. He also opined that the right knee was probably aggravated by the accident but that the knee had returned to baseline. He described any aggravation as "not a great deal." Dr. Westin added that Petitioner's left knee and right elbow were far more painful after his fall.

Dr. Westin opined that X-rays, medication and injections was reasonable and

necessary for the temporary aggravation of the right knee arthritis by the work injury of April 2, 2019. Dr. Westin disagreed with Dr. Cole's treatment plan for arthroscopic debridement and stated that the likelihood of improvement is minimal with pre-existing bone-on-bone arthritis. He noted that his opinion is that Mr. Peterson would only benefit from a total knee arthroplasty or potentially oral medications and reinjection of cortisone or hyaluronate. Dr. Westin further stated that progression of Petitioner's symptoms is of the natural disease process of obesity and osteoarthritis and not the fall of April 2, 2019. He finally opined that as to the April 2, 2019 occurrence, Petitioner was at MMI with respect to the right knee and could return to work as a driver.

Petitioner testified that following the second IME, his knee surgery was denied, and his disability benefits were terminated. He further testified that he had no choice but to request a release to return to driving in order to support his family. Dr. Cole provided a note allowing him to return to driving February 4, 2021. Dr. Cole noted Petitioner could return to work as a driver but that he is still under his care for treatment.

Petitioner testified he returned to work until he was injured in another work accident on May 6, 2021.

Petitioner testified that on May 6, 2021, he was exiting the Central garage after getting his truck assignment when he slipped and fell on a downslope grade leading out from the garage, which was wet and full of loose gravel. Petitioner testified that as he attempted to get up, his right knee buckled, and he fell back down to the ground and needed to be helped up by a co-worker. Petitioner took a photograph of the area where he fell a few days after the occurrence (PX #1). Petitioner identified the photograph, using it to describe how and where he fell. PX #1 was admitted in evidence without objection. Petitioner testified that he sought immediate medical attention and went to MercyWorks.

Petitioner presented to MercyWorks on May 6, complaining of severe right knee and left-hand pain (PX #2). The chart quoted Petitioner: "Walking out garage door and my leg gave out on me …" The chart further noted Petitioner's statement that "for unknown reason, he had a sharp pain in his right knee, and his leg gave out." He denied any twisting injury prior to his fall. Petitioner reported that he had bone-on-bone arthritis in the right knee and that he previously been told he needed a total knee replacement. Petitioner's history of hypertension, hypercholesterolemia, and insulin for

diabetes was also noted.

On examination Petitioner was noted as favoring his right leg. There was a mild increase in calor and effusion. Petitioner showed a right knee X-ray on his phone which showed bone-on-bone osteoarthritis. Range of motion was adequate but there was tenderness to palpation and with varus stress at the medial compartment. There was also a positive patellar grind sign. However, valgus stress and Lachman's were negative. Petitioner was diagnosed with severe right knee osteoarthritis, contusions to the right knee and left hand, and bilateral lower extremity edema. Petitioner was advised to follow up with his primary physician but chose to follow-up with Dr. Brian Cole. Petitioner was taken off work.

Petitioner testified that went back to Dr. Cole. On May 24, 2021 he presented to Dr. Cole with complaints of worsening right knee pain (PX #3). He complained of pain, giving out, and stiffness in the knee since his last visit on November 16, 2020. Petitioner reported that he had been working full duty but did not report a fall or other incident at work.

Dr. Cole noted Petitioner's significant right-sided antalgic gait. He had bilateral pitting edema, right worse than left. There was tenderness to palpation in the anterior, medial, and lateral aspects of the knee. Range of motion was 30° to 90°. Dr. Cole noted that arthroscopy would not give satisfactory relief, given Petitioner body habitus. He referred Petitioner for evaluation by a joint replacement specialist.

On June 17, 2021, Petitioner presented to Dr. Hythem Shadid of Genesis Orthopedics complaining of right knee pain (PX #5). Petitioner gave a history that while exiting a garage while it was raining he slipped on wet concrete and fell onto the ground, twisting his right knee. Petitioner further stated that the event was witnessed, and he was helped up from the ground. After examination, Dr. Shadid agreed with the recommendation of Dr. Cole for a knee replacement but noted that Petitioner needed to lose weight before being cleared for surgery. Petitioner was placed on light duty.

Petitioner testified that he remained off work as the City of Chicago is unable to accommodate light duty work. He testified that he weighed 300 pounds at this first visit.

Petitioner testified that he returned for monthly follow-up appointments at

Genesis Orthopedics. The records show that he was seen July 19, August 13, and September 17, 2021 (PX #5). The records show that during that time period, Petitioner consistently lost approximately 10 pounds between each visit and was 271 pounds as of September 17, 2021. Further, the record notes that the target weight for clearance for surgery is 245 pounds, which Petitioner confirmed. Petitioner testified that he has another follow-up visit coming up on November 12, 2021.

CONCLUSIONS OF LAW

19 WC 11698 (DOI 4/2/2019)

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

The Arbitrator finds that Petitioner Ronnie Peterson proved that he sustained an accidental injury that arose out of and in the course of his employment by Respondent City of Chicago on April 2, 2019.

Petitioner was employed as a motor truck driver by Respondent's Water Department. His job involved delivery of workers and work materials to various jobsites. He was engaged in these activities on April 2, 2019. He was operating a truck described as a Vactor. Petitioner described steps from the ground to the cab as being high and unequal, 18 inches and greater than 18 inches.

Petitioner testified that he lost his footing as he alighted from the cab of the Vactor. The Arbitrator notes that climbing into and out of a high truck cab with high and unequal steps is an activity incidental to and required by Petitioner's employment by Respondent in the performance of his ordinary work duties. Further, climbing into and out of a high truck cab with high and unequal steps involves risks greater than the general public would ordinarily be exposed to.

Petitioner was immediately seen in the emergency department at the University of Chicago Medical Center following his accident. The records of that encounter were not admitted in evidence. However, Petitioner was seen at MercyWorks on April 3, 2019 on referral from Respondent. Petitioner's documented history at MercyWorks noted his report that as he was getting out of the Vactor his right knee buckled and then he fell onto his left knee and right elbow. Petitioner testified credibly that he did not state his right knee buckled causing him to fall. He testified that he reported that his

knee buckled in the process of falling. The Arbitrator finds this is a credible rebuttal to the medical chart notes, recognizing that misinterpretation can occur in the hurried atmosphere of any medical facility, particularly one which often addresses emergency situations.

The Arbitrator finds that either account of Petitioner's fall would result in a compensable injury. The medical evidence demonstrated that Petitioner had bone-on-bone arthritis in his right knee. Arthritis to that extent would compromise the motion and function of that joint. A pre-existing condition such as this may be a contributing factor to Petitioner's fall but that does not exclude compensability if the activity is incidental or required in the performance of the employee's assigned job, such as here.

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 his work injury on April 2, 2019. The evidence established that Petitioner sustained injuries to his left knee, his right knee, and his right elbow when he fell as he was alighting from his work truck on April 2. In addition, the evidence demonstrated that Petitioner had pre-existing degenerative arthritis in his right knee. Petitioner was working without complaints or restrictions with his right knee before his accident but that his condition became symptomatic as a result of the accident to the extent that he was taken off work by his physicians.

It is well settled that employers take their employees as they find them. Therefore, even though an employee may have a pre-existing condition which may make him more susceptible to an injury, compensation for the injury will not be denied if it can be shown that the work-related accident was also a causative factor. An accidental injury need not be the sole cause, or even the primary cause, as long as it was a cause of the claimant's ill-being.

Accordingly, as noted above, based on the credible testimony of Petitioner, as well as the medical records and opinions of Drs. Cole and Shadid, which includes diagnostic testing, the Arbitrator finds that Petitioner proved a causal relationship between his work-related injuries to in February 2021 his left knee, right elbow, and right knee and his current condition of ill-being and his accident on April 2, 2019. Even Dr. Westin found that the April 2, 2019 accident caused a temporary aggravation of the pre-existing degenerative osteoarthritis in Petitioner's right knee.

Prior to his April 2,2019 accident Petitioner did not have any issues with his left

knee, right knee, or right elbow. He was performing full duty work. The accident caused an immediate disability to those body parts. Petitioner admitted he had a minor injury at work in January 2019 but lost no time from work, sought no treatment for that injury, and continued to work without restrictions. There was no evidence that Petitioner suffered any injury other than the work-related injury he suffered on April 2, 2019. The Arbitrator notes that Respondent's §12 examiner, Dr. Westin, agreed that Petitioner suffered injury to his left knee and right elbow following the April 2, 2019 accident and also agreed with the treating diagnoses and treatment plan.

Regarding Petitioner's right knee, Dr. Westin also agreed that Petitioner sustained an injury on April 2, 2019 but disagreed with the extent of the injury and treatment with respect to causal connection. He found no causal relationship with Petitioner's condition of ill-being and that accident. It is noteworthy that Dr. Westin did opine, regardless of causation, that Petitioner required a total knee arthroplasty. The Arbitrator finds that the causation opinions of Petitioner's treating doctors are more persuasive regarding the right knee condition of ill-being which will be explained below. Dr. Westin overlooked the obvious: Petitioner was asymptomatic and working without restrictions before the April 2 accident and then was not thereafter. The mechanism of injury of Petitioner falling while alighting from his work truck onto his right knee is a competent to cause asymptomatic pre-existing degenerative arthritis to become symptomatic to where medical intervention was necessary.

Dr. Westin conceded that each fall aggravated Petitioner's pre-existing arthritis. He opined that he first accident aggravated asymptomatic arthritis, while the second fall exacerbated arthritis that became symptomatic because of the first injury. However, he opined that the aggravation was temporary, and that Petitioner's current condition was from the natural progression of the pre-existing degenerative arthritis. Regardless, the Arbitrator notes that Dr. Westin did not state bases for his opinion that the aggravation was only temporary. The Arbitrator does not give weight to an opinion lacking the bases for that opinion. Also, Dr. Westin conceded at the first IME that Petitioner's right knee was taking on more stress than the left since the left knee pain was worse. Since Petitioner's right knee, which is arthritic to begin with, was taking on more stress, then the condition would only worsen, thus further questioning that the aggravation was "temporary."

Therefore, the Arbitrator finds that Petitioner's current conditions of ill-being of his left knee, right elbow, and right knee are causally related to the April 2, 2019 work accident. Also, the medical records document Petitioner's consistent complaints of right knee pain following the April 2 accident. Dr. Cole related the right knee injury to the

April 2 occurrence. Specifically, he noted that the pre-existing asymptomatic arthritis became symptomatic from the April 2 fall and then was exacerbated following the May 6, 2021 fall.

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 has previously found that Petitioner sustained injuries that were causally related to an accident on April 2, 2019 that arose out of and in the course of his employment by Respondent. At the time of the hearing on October 26, 2021, Petitioner presented medical bills from Midwest Orthopedics at RUSH, MercyWorks, and Genesis Orthopedics (PX #6, PX #7, & PX #8). The Arbitrator finds that the treatment rendered by his physicians up to his return to work on February 4, 2021 was reasonable and necessary to treat Petitioner for the work-related injuries he sustained on April 2, 2019.

The Arbitrator also finds that since Petitioner's condition of ill-being is causally related, Respondent is responsible for those medical charges up to February 4, 2021 and that such charges were generated as a result of treatment that was reasonable and necessary to relieve or cure the effects of Petitioner's injuries sustained on April 2, 2019. The Arbitrator finds that Petitioner's related medical bills are limited to charges for medical care provided prior to May6, 2021 for reasons stated below. All charges are to be adjusted in accord with to the Medical Fee Schedule provided by §8.2 of the Act.

K: Is Petitioner entitled to prospective medical care?

The Arbitrator finds that the evidence supports a finding that Petitioner requires additional medical treatment, a right total knee replacement, which is causally related to his April 2, 2019 work accident. There was competent medical opinion from Petitioner's treating physicians as well as Respondent's §12 examiner that Petitioner has bone-on-bone degenerative arthritis in his right knee, which requires a total arthroplasty

However, the evidence also showed that Petitioner is not currently medically cleared for surgery due to his obesity. Although the evidence showed that Petitioner has steadily lost weight over the course of his medical care, the evidence also showed that he has not yet attained his target weight of 245 pounds. It is therefore speculative whether Petitioner is entitled to the recommended prospective medical care of total knee replacement surgery at the present time. When and if Petitioner attains the target

weight of 245 pounds, Petitioner would be entitled to that prospective medical care.

Therefore, the Arbitrator cannot at this time direct Respondent to authorize and pay for what is currently a speculative perspective procedure.

L: What temporary benefits are in dispute? TTD

Having found an accident that arose out of and in the course of Petitioner's employment, and that Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator awards temporary total disability benefits. The medical records show that Petitioner was unable to work for Respondent per his doctors from April 3, 2019 through February 4, 2021. The Arbitrator finds that Petitioner is owed Temporary Total Disability benefits from April 3, 2019 through February 4, 2021, 96 weeks at a rate of $963.74 per week.

21 WC 14555 (DOI 5/6/2021)

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

The Arbitrator finds that Petitioner failed to prove that he was injured in an accident on May 6, 2021 that arose out of and in the course of his employment by Respondent.

Petitioner testified that he was beginning his workday at Respondent's Central garage. He testified he was walking down a slopped ramp that was wet from rain and that was covers with gravel. He further testified that he slipped on the wet gravel-covered ramp and fell onto his right knee. Petitioner gave this same account to his subsequent treating physicians. The Arbitrator does not find Petitioner was credible in describing how he fell.

Petitioner was initially seen for his injury at MercyWorks. The attending physician specifically quoted Petitioner's report, "Walking out garage door and my leg gave out on me …" It was also noted that Petitioner reported, "for unknown reason, he had a sharp pain in his right knee, and his leg gave out." Petitioner's history of the occurrence approximates an excited utterance. An excited utterance is an exception to the hearsay rule is premised on the notion that under those circumstance there is little or no time for fabrication. See *Handbook of Illinois Evidence,* §803.2.

The history given by Petitioner at MercyWorks does not describe an activity peculiarly incidental to his work or of exposure to a risk greater than a risk to which the general public would be exposed. The MercyWorks history does not describe any sort of defect in the workplace that may have caused the fall.

When Petitioner consulted Dr. Cole on May 24, 2021 for continuing problems with his right knee he did not report the claimed slip and fall on May 6 or any other work-related incident triggering those complaints.

It was not until Petitioner saw Dr. Shadid on June 16, 2021 that he reported that he slipped on wet ground, although Dr. Shadid himself did not diagnose more than a contusion or strain from the fall. He addressed his treatment and work restrictions to the pre-existing osteoarthritis, unrelated to the fall. Dr. Shadid did not document any specific causation opinion linking the claimed May 6 incident to Petitioner's presentation on June 16.

The Arbitrator finds the more immediate reports (MercyWorks and Dr. Cole) more credible than the later report to Dr. Shadid. One would normally expect a person claiming injury from an accident would report that accident when seeking emergent and follow-up medical care for that claimed accidental injury. Petitioner's failure to report this claimed accident when seeking medical care from MercyWorks and Dr. Cole undermines his credibility when claiming an accident now.

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

Given that the Arbitrator has found that Petitioner failed to prove that he was injured in a compensable accident, this issue is moot. Were it not for the failure to prove a compensable accidental injury there was amble proof that Petitioner suffered an aggravation of his previous injury that was causally related to a fall on May 6, 2021.

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?

Given that the Arbitrator has found that Petitioner failed to prove that he was injured in a compensable accident, this issue is moot. Were it not for the failure to prove a compensable accidental injury there was amble evidence of an aggravation of Petitioner's previous injury and that all medical care was reasonable and necessary.

K: Is Petitioner entitled to prospective medical care?

Given that the Arbitrator has found that Petitioner failed to prove that he was injured in a compensable accident, this issue is moot. Were it not for the failure to prove a compensable accidental injury it is still speculative whether Petitioner would be entitled to the recommended prospective medical care, see above analysis.

L: What temporary benefits are in dispute? TTD

Given that the Arbitrator has found that Petitioner failed to prove that he was injured in a compensable accident, this issue is moot. Were it not for the failure to prove a compensable accidental injury there is amble medical evidence of disability that Petitioner would be entitled to Total Temporary Disability benefits from May 7, 2021 through October 26, 2021, 24 & 4/7 weeks.

Steven J. Fruth, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC017742
Case Name	Norman Sallis v. Burnham Investors LP
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0264
Number of Pages of Decision	18
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Jill Wagner
Respondent Attorney	Stuart Pellish

DATE FILED: 6/20/2023

/s/ Deborah Baker, Commissioner
Signature

DISSENT: /s/ Deborah Baker, Commissioner
Signature

23IWCC0264

STATE OF ILLINOIS)
) SS.
COUNTY OF LA SALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Norman Sallis,

Petitioner,

vs. NO: 21 WC 017742

Burnham Investors, L.P.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical care, temporary total disability ("TTD"), average weekly wage, nature and extent, and penalties and attorney fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below. The Commission otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Findings of Fact

Petitioner is a 56-year-old man who was employed by Burnham Oaks Apartments (hereinafter referred to as the "Respondent") as a maintenance man/janitor on May 12, 2021. T. 8-9. The apartment building he was responsible for was located at 745 University Park. It was five (5) stories with a total of 58 units. T. 9-10. He was the only maintenance man/janitor assigned to that building. T. 10. There were other buildings in the complex for which he was not responsible. T. 9-10. His job duties consisted of groundskeeping outside the building, cleaning inside the buildings and fixing equipment. T. 9. Petitioner testified that the complex at 745 University Park was open with a creek behind it. People could cut through the complex. T. 10.

Petitioner worked for Respondent part-time, specifically working for five hours on Monday, Wednesday and Friday, for two hours on Sunday and one hour on Tuesday, Thursday and Saturday. T. 11. He was paid $20.00 per hour. T. 11. Petitioner also worked in Hobart, Indiana at a plant called Diafuka, part of the Wynright Corporation, building all different types of conveyers. T.11-12. Laura Martinez, the property manager and John Lynch, the owner of the 745 building knew Petitioner was working at Diafuka/Wynright. T.11-12.

While working for Respondent, Petitioner also lived at Burnham from 2009 to 2018. T. 17. Petitioner testified that he was aware of crimes in the building. T. 18. He testified that he once had to assist the police after a person had been robbed at the front door. T. 18-20. He also indicated the police were called constantly for domestic instances, loud music and fights. T. 63.

During the time Petitioner was living at Burnham, he testified he would check the entry doors to make sure they were closed securely at night. T. 20. He would also check the back door and ride up the elevator to look at hallways if anyone was hanging out. T. 21. He then would go to his apartment. He moved out of the building in 2018. T. 20-21. He did not perform these actions after he moved out. T.54. Petitioner worked in the building for 14 years. T. 21. As such, he testified he knew everybody in the building and knew if someone was a stranger who was not supposed to be there. T. 21.

On May 12, 2021, Petitioner testified he was picking up garbage in the west parking lot. T.22. As he was picking up the garbage, he heard something in the woods. T. 22. He looked up and saw a man he did not recognize. T. 22. He greeted the man, but the man did not reply. T. 22. Petitioner kept picking up garbage and noticed the man did not pass him and didn't go back into the woods. T. 22. Petitioner watched as his neighbor got in her car and drove off. T. 23. Petitioner went to the other side of the parking lot and resumed picking up garbage. T. 23. He noticed there was a truck parked in the parking lot. T. 23. Petitioner could see through the windshield and passenger door. T. 23. He noticed the man he had seen earlier was leaning up against the side of the truck. T23. Petitioner testified that he started walking, saying, "Dude what are you doing?". T23. When Petitioner said this, the man came from around the side of the truck. T23. The man had a bandana on and pointed a gun at Petitioner. T23.

Petitioner threw his hands up. T23. He noticed the gun did not go off and the man lowered the gun down. T23. Petitioner started to run. T23. Then, Petitioner heard, "boom, boom, boom, boom." T23. The fourth "boom" hit Petitioner in the back of his knee. T23. He went down. T23. His reaction was to get back up, but his leg wouldn't support his weight. T23-24. Petitioner began rolling. T.23-24. The man was still shooting. T24. Petitioner tried to drag himself between the cars and the last bullet hit his right big toe. T. 24. He testified that he hollered and hollered, and people came out. T. 24.

Petitioner testified that he never saw this man before. T. 25. The man did not come through the front door. There were other access points to the apartment besides the front door and the back door. Anybody with a key could access the front or back doors. Petitioner further noted he did not recognize the man and believed the man was acting suspicious. T. 26. The police arrived at the scene, but no arrests were made. T. 28.

Medical Treatment

Petitioner was taken via ambulance to St. James in Olympia Fields, where he stayed until May 22, 2021. T. 31. In the history note it states, "Patient reports he was at work and cleaning up a parking lot when an unknown person showed up and started shooting. Patient states that he did not know the individual and was attempting to run away from the bullets." (PX1 at 21). He was diagnosed with a comminuted fracture of his left leg, a bullet fragment was surgically removed

from his left foot, he underwent left knee surgery, and he suffered pulmonary embolism. T. 31-32.

Shortly after surgery, Petitioner was hypoxic, tachycardic and was transferred to the ICU for observation. PX1 271. The cardiologist, Dr. Rashad Belin, diagnosed him with a pulmonary embolism with right ventricular strain. He underwent a bilateral EKOS catheter procedure into the right and left pulmonary arteries on May 15, 2021. *Id* at 272.

Following his discharge, Petitioner treated with Dr. William Payne. (PX3). Petitioner was initially seen on June 10, 2021. The records do not contain a corresponding medical note.

As of December 6, 2021, Petitioner was off work. (PX5 at 5376). On December 21, 2021 Petitioner followed up with Dr. Payne to discuss further options of his left femur fracture. (PX3 at 5236). Dr. Payne noted he was treated by an open reduction internal fixation. Petitioner believed his pain had worsened. *Id* at 5237. Petitioner was prescribed a CT scan. *Id.* at 5238. Petitioner was also prescribed physical therapy. *Id.* at 5251.

On December 31, 2021, Petitioner underwent a CT of his lower extremity which revealed a subacute to chronic fracture appearing mildly comminuted, and a mild to moderately displaced distal femoral metadiaphyseal fracture status post prior ORIF. There was no evidence of hardware failure. The vast majority of the femur fracture was ununited with nonbridging mild periosteal callus formation and mild left external iliac chain lymphadenopathy was favored to be reactive or infectious. (PX4 at 5360-61).

Petitioner followed up with Dr. Payne on January 4, 2022. (PX3 at 5320). Petitioner stated the pain was to his entire left leg and he could not bear weight. Petitioner was assessed with a delayed union of fracture of shaft of the left femur. Petitioner was ordered a bone stimulator, recommended an infectious disease consult, and continued off work. *Id*. at 5322, 5346.

Petitioner sought a second opinion with Dr. George Branovacki at Midwest Orthopaedic Consultants on January 13, 2022. (PX4 at 5370). Dr. Branovacki noted Petitioner sustained a gunshot injury to his left thigh which fractured his femur. He diagnosed him with unilateral primary osteoarthritis left hip, pain in left thigh, displaced comminuted fracture of shaft of left femur, and pain in the left knee. *Id.* at 5372. He further noted that his case was quite complex and that he required another surgery to get the bones to heal, either through exchange nailing with bone grafting or with plates and screws. (PX4 at 5372).

On February 3, 2022, Petitioner followed up with Dr. Branovacki. There were no changes in his symptoms. The Doctor continued to recommend a femur nail removal with shaft reaming for bone grafting as well as conversion to distal femur fracture open reduction internal fixation with plates and screws. (PX4 at 5365).

Petitioner testified that as of the date of trial, he still had not received the recommended surgery. T. 37.

Petitioner testified he never had any pain or treatment to his right foot or left leg prior to

May 12, 2021. T. 38. He was also able to work full duty prior to the May 12, 2021 incident. *Id.* He testified that he had been off work since May 12, 2021 and had not received any benefits from the Respondent. *Id*. at 39. Petitioner testified that he was in constant pain and could not bend his leg. T. 40. He reported being unable to walk without assistance, run, dance, go to the grocery store, or many other everyday activities that he used to do as an athletic man. *Id.* at 40-41.

Conclusions of Law

Petitioner bears the burden of proving every element of his case by a preponderance of the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). After carefully considering the totality of the evidence, the Commission affirms the Arbitrator's conclusion that Petitioner did not suffer a compensable accident, however, the Commission modifies the Arbitrator's legal basis for this finding.

There is no dispute that the Petitioner was acting in the course of his employment at the time of the injury. However, this alone is insufficient to make an injury compensable. *Orsini v. Industrial Commission,* 509 N.E.2d 1005 (1987). Petitioner must also prove the injury arose out of the course of his employment. For an injury to arise out of his employment as described through Petitioner's testimony and the demonstrable evidence submitted at the time of hearing, the risk of injury must be a risk peculiar to the work or a risk which the employee is exposed to a greater degree than the general public by reason of his employment. *Id.*

Under Illinois law, there are three different types of risks associated with employment: 1) risks distinctly associated with the employment; 2) risks personal to the employee; and 3) neutral risks which has no particular employment or personal characteristics. *Illinois Institute of Technology Research Institute v. Indust. Comm'n.,* 314 Ill.App.3d 149, 161 (2000).

While the Arbitrator was correct in the categorization of the risk as a neutral risk, the analysis under "stray bullet" cases was contrary to the evidence submitted. Petitioner was under a direct assault from a man who was located in the Respondent's parking lot. Petitioner's own testimony was that the man aimed the gun at him before pulling the trigger numerous times. (He pointed the gun at me. I threw my hands up, whoa.) T. 23. Even after the Petitioner was initially hit by a bullet, the man continued to shoot. T. 23. Petitioner fell to the ground and tried to roll out of the path of the gunfire, but he was struck again in the foot. T. 23-24. According to Petitioner's testimony and the police report, there was no one else present and no alternative reason for the gunfire. The testimony demonstrates an intentional shooting, despite a lack of an evident reason for the assault.

The issue of compensability for injuries resulting from assaults is not a new concept. The Courts have consistently held that "**injuries suffered by employees resulting from assaults were not compensable** if there was evidence to sustain a finding by the Industrial Commission that the motive was personal to the victim rather than work related or **if claimant could not demonstrate a reason for the assault**. [Emphasis added.] *Schultheis v. Indus. Comm'n*, 96 Ill. 2d 240 (1983), citing *Rodriguez v. Indus. Comm'n*, 95 Ill. 2d 166, 171 (1983); *Greene v. Indus. Comm'n*, 87 Ill. 2d 1 (1981); *Laboy v. Indus. Comm'n*, 74 Ill. 2d 18 (1978); *Thurber v. Indus. Comm'n*, 49 Ill. 2d 561 (1971); *American Brake Shoe Co. v. Indus. Comm'n*, 20 Ill. 2d 132 (1960); *Math Igler's*

Casino, Inc. v. Indus. Comm'n, 394 Ill. 330 (1946); *Chicago Hardware Foundry Co. v. Indus. Comm'n*, 393 Ill. 294 (1946). Petitioner repeatedly testified, he had never seen the man before. T. 22, 25, 26. It is also noted in the medical records from St. James in Olympia Fields, where the history notes state, "Patient reports he was at work and cleaning up a parking lot when an unknown person showed up and started shooting. Patient states that he did not know the individual and was attempting to run away from the bullets." PX1 at 21. It was also memorialized in the narrative supplemental report of Officer Murphy which detailed his interview with Petitioner, indicating Petitioner walked past "an unknown male" RX5 at 6. The record is absent any reason for the attack. There was no testimony of other criminal or non-criminal acts that might have been the basis for the attack. The gunman simply took out his gun and pointed it at Petitioner before pulling the trigger multiple times. In this case, Petitioner neither knew the man who assaulted him, nor could he provide a reason for the attack. As such, the injury does not arise out of the Petitioner's employment.

In assault cases, an injured employee has the burden of showing that the assault was work-related in order to be entitled to benefits under the Act. It is not enough for employment to place Petitioner in a particular place and time as this is positional risk and positional risk has been expressly rejected in Illinois. *Illinois Institute of Technology Research Institute v. Indust. Comm'n.,* 314 Ill.App.3d 149, 161 (2000).

Here, Petitioner failed to show that his employment would place him at greater risk of being the victim of a shooting than the members of the general public. Petitioner's employment position as a janitor/maintenance man would not inherently place him in a dangerous circumstance involving gunfire. According to the evidence presented, Petitioner's duties included maintaining the grounds outside the building, cleaning the inside of the building and providing repairs within resident's apartments. T. 9. None of the job-related duties were inherently dangerous or high risk. Similarly, the location that Petitioner performed his job was not established to be in an area of high crime. While Petitioner testified there was police presence at the 745 building, that presence was reportedly due to internal factors including, domestic disturbances, loud music, noise and fights. T. 63. While Petitioner testified people were held up in the parking lot T. 17-18, there was no testimony as to when these attacks occurred, who was present for the "hold ups" or whether Petitioner had direct knowledge of any attacks. The only "hold up" with details was when Petitioner testified that he assisted the police after a guest was held up at gun point at the building. Petitioner was not present for the attack but testified that he was tasked with showing the police a security video of the event. T. 18-20. However, this was one instance of gun related violence in this nine years Petitioner lived at the Respondent's building in fourteen years of working for Respondent. This one occurrence fails to demonstrate a high-risk environment, particularly when Petitioner was not present for the attack. There was no other evidence submitted to illustrate gun violence at building 745 on a regular basis. Petitioner's generalized testimony that the area had high crime or was dangerous is not sufficient to prove high crime in the area.

Petitioner attempts to distinguish *Heath* from the case at hand, by arguing accident was denied in *Heath v. Industrial Commission* due to a co-worker witness not testifying, 628 N.E.2d 335 (1993). This was a separate issue in the decision and not a basis for denial in the accident analysis.

The Arbitrator correctly relied upon *Heath,* due to the similarities in the facts asserted to the case at hand. In *Heath*, the stock clerk was working in the store while it was closed when an unknown assailant entered the store and shot the stock clerk. The clerk did not know the person that shot him. The attack was not motivated by theft. There was nothing to suggest that the neighborhood or store location was prone to criminal activity. The Appellate Court affirmed the Commission's decision that the attack did not arise out of the petitioner's employment. The facts are similar to this case. Petitioner did not know his attacker, there was no apparent motive for the attack, such as theft, and the evidence did not support the location of the attack to be a high-crime location.

Petitioner argues that Petitioner was acting as a Good Samaritan, making his actions arise out of and in the course of his employment. While the Arbitrator does not address this argument in the Arbitration Decision, having found the risk to be a neutral risk, both parties briefed this issue. Petitioner argues that he was protecting the physical safety of his neighbor, Ms. Smith, from the unknown man in the parking lot, when he was injured. T. 25. Petitioner relies upon *Ace Pest Control, Inc. v. Industrial Comm'n, 32 Ill.2d 386, 205 N.E.2d 453 (1965)* to support his argument he was acting as a Good Samaritan at the time of the shooting. The facts of *Ace Pest Control* are distinguishable from the case at hand. The claimant was a termite control operator that traveled frequently, driving his employer's truck. He stopped to provide aid to a woman and her four young children stranded on the roadside with temperatures below freezing. He drove the woman and her children to their home, picked up gasoline and returned to the disabled vehicle to administer the gas, when he was struck by another car on the road. *Id*. at 389. At its essence a "Good Samaritan" is providing *aid* to an individual or individuals. *Id.* at 455. In this case, Petitioner was the sole person present at the time of the assault. While Petitioner's neighbor had been in the parking lot, she had driven off, waving to Petitioner as she left, Petitioner had crossed the parking lot and continued to collect garbage before confronting the man regarding his motives for being in the parking lot. T. 22-23. As Ms. Smith had already left the area well prior to the assault and there was no evidence to suggest she would be returning in the near future, he could not have been providing her with any aid. Therefore, his action of speaking with the unidentified man for Ms. Smith's safety could not be classified as "Good Samaritan" in nature. In addition, the case Petitioner relies upon to support his actions as a "Good Samaritan" is legally distinguishable, in that the issue at hand in *Ace Pest Control* was whether the injury occurred "in the course of employment". Petitioner here was already found to be acting in the course of his employment. As such the case is both factually and legally distinguishable.

The Arbitrator correctly found this to fall under a neutral risk category. The injury sustained was the result of an attack from an assailant unknown to Petitioner and with no demonstrable reason.

After carefully considering the totality of the evidence, the Commission finds Petitioner did not sustain an accidental injury as a result of his employment on May 12, 2021. While the *Findings* section of the Decision of the Arbitrator filed on May 18, 2022, stated "Petitioner did sustain an accident that arose out of and in the course of employment", this clearly was a typographical error and inconsistent with the Arbitrator's finding on page 5 that Petitioner failed to prove his accident arose out of and in the course of his employment. The Commission therefore inserts the word "not" in the afore-referenced sentence in the *Findings* section of the Arbitration

Decision so the sentence now reads, "Petitioner did not sustain an accident that arose out of and in the course of employment." The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on May 18, 2022, is affirmed and modified as stated herein.

June 20, 2023

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

d: 4/18/23
kjj
43

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

DISSENT

I disagree with the majority's decision to affirm the Arbitrator who denied Petitioner's claim. Additionally, I disagree with the majority's interpretation and reading of the case law. Based on the evidence in the record and applicable case law, I would have found that Petitioner's claim is compensable.

I find *Holthaus v. Industrial Com. of Illinois*, 127 Ill. App. 3d 732, 736 (5th Dist. 1984) and *Chicago Housing Authority v. Industrial Comm'n*, 241 Ill. App. 3d 720, 723 (1st Dist. 1993) to be instructive. In *Holthaus,* a swimming pool manager was assaulted and shot by an escaped convict and the appellate court found the claim to be compensable as "the site at which [the employee] was required to work created an enhanced risk of criminal assault." *Holthaus,* 127 Ill. App. 3d at 736. The court in *Holthaus* ruled that the employee did not have to establish both that the environment increased the risk of attack *and* that the attack was motivated by something related to the employee's employment, ***but that either one suffices to establish the requisite causal link***. *Id.* at 737-738.

Similarly, in *Chicago Housing Authority*, the appellate court found a claim to be compensable where the employee had been assaulted by an unknown assailant while the employee worked as a carpenter. The court relied on evidence that showed the employee worked "in an area which presented a greater risk of criminal assault than that to which the general public is exposed." *Chicago Housing Authority,* 241 Ill. App. 3d at 722. Based on these holdings, Petitioner has proven a compensable case as he has proven that the environment increased the risk of attack.

Petitioner's unrebutted testimony is that he was aware of past criminal activity in and around the building during the 14 years he worked there. He testified that police were called to the building on several occasions for various reasons. Additionally, he was very familiar with the

building and the individuals who lived there. Contrary to the majority decision, Petitioner did not have to prove that his specific job duties were dangerous. As noted in the case law, the courts have found cases to be compensable where a carpenter and a swimming pool manager were assaulted, neither of which worked in jobs that could be considered "dangerous" with respect to the potential to be exposed to criminal activity. Additionally, there is no requirement that Petitioner had to be present for any previous criminal activity or that the criminal activity had to be "external" in nature, rather than "internal." Accordingly, I would find Petitioner proved he sustained a work accident on May 12, 2021, that arose out of and in the course of his employment as he presented evidence showing that he worked at a place where he was exposed to the risk of criminal assault to a greater degree than the public. There is no dispute that Petitioner was in the course of his employment on the day in question.

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	21WC017742
Case Name	SALLIS, NORMAN v. BURNHAM INVESTORS, L.P.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Roma Dalal, Arbitrator

Petitioner Attorney	Jill Wagner
Respondent Attorney	Stuart Pellish

DATE FILED: 5/18/2022

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

/s/ Roma Dalal, Arbitrator

Signature

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

- ☐ 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)

Norman Sallis
Employee/Petitioner

v.

Burnham Investors, L.P.
Employer/Respondent

Case # **21** WC **017742**

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 **Arbitrator Dalal**, Arbitrator of the Commission, in the city of **Ottawa**, on **March 28, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

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

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

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

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

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

In the year preceding the injury, Petitioner earned $**52,691.92**; the average weekly wage was $**1,011.96**.

On the date of accident, Petitioner was **55** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**3,500.00** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**3,500.00**.

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

ORDER

Because Petitioner did not sustain an accident that arose out of and in the course of his employment with Respondent, all benefits are denied.

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

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

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

MAY 18, 2022

Signature of Arbitrator

NORMAN SALLIS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case # 21 WC 017742
	)	
BURNHAM INVESTORS LP,	)	
	)	
Respondent.	)	

STATEMENT OF FACTS

This matter was heard on March 28, 2022, pursuant to Section 19(b) of the Workers Compensation Act. Both parties were represented by counsel. Issues in dispute were accident, causation, average weekly wage, medical bills, TTD benefits, prospective medical and penalties.

The Petitioner, Norman Sallis (hereinafter referred to as the "Petitioner"), is a 55-year-old man who works for the Respondent, Burnham Investors LP (hereinafter referred to as the "Respondent"), as a maintenance man / janitor. (T.9). He testified his job duties consisted of maintaining the up keeping of the ground outside the building, cleaning inside the buildings, and fixing equipment. *Id.* Respondent's premises consists of multiple apartment buildings, one 5 story apartment building with 58 units, with 3 other high-rise buildings nearby. *Id*.

He was the only maintenance man/janitor for Respondent at the 5-story building, 745 in University Park. (T.10). Petitioner testified the complex was open with a creek behind it. People could cut through. *Id*.

Petitioner worked for Burnham on Monday, Wednesday and Friday, 5 hours. On Sundays he worked 2 hours, and on Tuesday, Thursday, and Saturday, he worked one hour. He was paid $20.00 per hour. Petitioner also worked in Hobart, Indiana at a plant called Diafuka, part of the Wynright Corporation. He would build all different types of conveyers. Laura Martinez, the property manager and John Lynch, the owner of the 745 building knew Petitioner was working at Diafuka/Wynright. (T.11-12).

In addition to working for Respondent, Petitioner also lived at Respondent's premise from 2009 until 2018, while working simultaneously. (T.17). Petitioner testified he witnessed crimes. He testified he once had to show the Police a crime of a person being robbed. *Id.* at 18-20. He also indicated Police were called constantly for domestic instances, loud music and fights. *Id.* at 63.

While Petitioner lived in at Burnham, he testified he would check the entry doors to make sure they were closed. He would also check the back door and ride up the elevator to look at hallways if anyone was hanging out. He then would go to his apartment. Petitioner did this activity off duty while he was a tenant in the building. He moved out in 2018. (T.20-21). He did not do this in years after he moved out. *Id.* at 54. Petitioner worked in the building for 14 years. As such he knew everybody in the building and knew if someone was a stranger, hanging out. *Id.* at 21.

On May 12, 2021, Petitioner testified he was picking up garbage to go in the garbage can. (T.22). As he was picking up garage, he saw a gentleman in the woods. *Id*. Petitioner testified he also saw his neighbor who got in her car and drove off. *Id.* at 23.

Petitioner resumed picking up garbage, now on the other side of the parking lot. While picking up garbage, he was looking at the woods where he had seen the gentleman. As he was looking, there was a truck parked in the

parking lot. (T.23) Petitioner could see through the windshield and passenger door; the gentleman was leaning there. Petitioner testified that he started walking, saying 'dude what are you doing'? When Petitioner said this, the gentleman came from around the side of the truck. The gentleman had a bandana on, pointing a gun at Petitioner. *Id*.

Petitioner threw his hands up. He noticed the gun did not go off. Petitioner started to run. Because the gentleman pulled the gun down, this gave Petitioner a chance to run. He heard boom, boom, boom, and boom. The 4th boom hit Petitioner in the back of his knee. He went down. His reaction was to get back up, but his leg wouldn't support his weight. Petitioner began rolling. (T.23-24). Petitioner testified that at the time of the shooting his neighbor was no longer in the parking lot. (T.47).

The gentleman was still shooting. Petitioner tried to drag himself between the car and the last bullet hit his right big toe. (T.24). He testified that he hollered and hollered, and people came out. *Id*. Petitioner testified he never saw this man before. (T.25). The gentleman did not come through the front door. There were other access points to the apartment besides the front door and back door. Anybody with a key could access the front or back doors. Petitioner further noted he did not recognize the gentleman and was of the opinion the gentleman was acting suspicious. (T.26). The police arrived at the scene, but no arrests had been made. (T. 28).

Petitioner testified he subsequently went to St. James in Olympia Fields and was hospitalized there. (T.31). In the history note it states, "Patient reports he was at work and cleaning up a parking lot when an unknown person showed up and started shooting. Patient states that he did not know the individual and was attempting to run away from the bullets." (PX1 at 21). A CT scan showed a comminuted fracture of the distal femoral metadiaphyseal with multiple metallic ballistic fragments. *Id.* at 26. An x-ray of the right foot showed metallic bullet fragment. He was diagnosed with a closed femur fracture and pulmonary embolism. *Id.* at 58. He then underwent left knee arthroscopy and irrigation, open reduction and internal fixation of the left femur fracture, and removal of bullet fragment of the right foot. *Id.* at 76 and 263. Shortly after surgery, Petitioner was hypoxic and tachycardic was transferred to the ICU for observation. *Id.* at 271. The cardiologist, Dr. Rashad Belin, diagnosed him with a pulmonary embolism with right ventricular strain. He underwent a bilateral EKOS catheter procedure into the right and left pulmonary arteries on May 15, 2021. *Id* at 272.

Following his discharge, Petitioner treated with Dr. William Payne. (PX3). Petitioner was initially seen on June 10, 2021. The records do not contain a corresponding medical note.

As of December 6, 2021 Petitioner was off work. (PX5 at 5376). On December 21, 2021 Petitioner followed up with Dr. Payne. (PX3 at 5236). Petitioner was here to discuss further options of his left femur fracture. The Doctor noted he was treated by an open reduction internal fixation. Petitioner believed his pain had worsened. *Id* at 5237. Petitioner was prescribed a CT scan. *Id.* at 5238. Petitioner was also prescribed physical therapy. *Id.* at 5251.

On December 31, 2021 Petitioner underwent a CT of his lower extremity which revealed a subacute to chronic appearing mildly comminuted mild to moderately displaced distal femoral metadiaphyseal fracture status post prior ORIF. There was no evidence of hardware failure. The vast majority of the femur fracture was ununited with nonbridging mild periosteal callus formation and mild left external iliac chain lymphadenopathy was favored to be reactive or infectious. (PX4 at 5360-61).

Petitioner followed up on January 4, 2022. (PX3 at 5320). Petitioner stated the pain was to his entire left leg and he could not bear weight. Petitioner was assessed with a delayed union of fracture of shaft of the left femur. Petitioner was ordered a bone stimulator, recommended an infectious disease consult, and continued off work. *Id.* at 5322, 5346.

Petitioner sought a second opinion with Dr. George Branovacki at Midwest Orthopaedic Consultants on January 13, 2022. (PX4 at 5370). Dr. Branovacki noted Petitioner sustained a gunshot injury to his left thigh which fractured his femur. He diagnosed him with unilateral primary osteoarthritis left hip, pain in left thigh, displaced comminuted fracture of shaft of left femur, and pain in the left knee. *Id.* at 5372. He further noted that his case was quite complex and that he required another surgery to get the bones to heal, either through exchange nailing with bone grafting or with plates and screws. (PX4 at 5372).

On February 3, 2022, Petitioner followed up with Dr. Branovacki. There were no changes in his symptoms. The Doctor continued to recommend a femur nail removal with shaft reaming for bone grafting as well as conversion to distal femur fracture open reduction internal fixation with plates and screws. (PX4 at 5365).

Petitioner testified that as of the date of trial, he has still not received the recommended surgery. (T.37).

Petitioner testified he never had any pain or treatment to his right foot or left leg prior to May 12, 2021. (T.38). He was also able to work full duty prior to May 12, 2021 incident. *Id.* He testified that he has been off work since May 12, 2021 and has not received any benefits from the Respondent. *Id.* at 39.

Petitioner testified that he is in constant pain and cannot bend his leg. (T.40). He cannot walk without assistance, run, dance, go to the grocery store, or many other everyday activities that he used to do as an athletic man. *Id.* at 40-41.

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 regard to issue "C", whether an accident occurred that arose out of and in the course of Petitioner's employment, the Arbitrator finds as follows:

An employee has the burden of proving all the elements of his case, including the extent and permanency of the injury, in order to recover benefits under the Workmen's Compensation Act. Liability cannot be premised upon imagination, speculation or conjecture, but must arise from facts established by a preponderance of the evidence. Arbuckle v Industrial Commission (1965), 32 Ill 2d 581. An employee's injury is compensable under the Act only if it arises out of and in the course of the employment. 820 ILCS 305/2 (West 1994). Both elements must be present at the time of the claimant's injury in order to justify compensation. Illinois Bell Telephone Co. v. Industrial Comm'n, 131 Ill.2d 478, 483, 137 Ill. Dec. 658, 546 N.E.2d 603 (1989). Injuries sustained on an

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

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).

It is clear that Petitioner sustained injuries in the course of his employment. He was in the 745 parking lot performing his work task of picking up garbage, when he was shot. The issue presented by the parties is whether Petitioner's injuries arose out of his employment with Respondent.

For an injury to arise out of the employment, the risk of injury must be a risk peculiar to the work *or* a risk to which the employee is exposed to a greater degree than the general public by reason of his employment. Orsini v Industrial Commission, 509 N.E.2d 1005 (1987).

There are three categories of risk an employee may be exposed to: (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. Employment risks include the obvious kinds of industrial injuries and occupational diseases and are universally compensated. Personal risks include nonoccupational diseases, injuries caused by personal infirmities such as a trick knee, and injuries caused by personal enemies are generally not compensable. Neutral risks include stray bullets, dog bites, lunatic attacks, lightning strikes, bombing, and hurricanes. Compensation for neutral risks depends upon whether claimant was exposed to a risk of injury to an extent greater than to which the general public is exposed. Illinois Institute of Technology Research Institute v The Industrial Commission, 731 N. E. 2d 795 (2000).

As Petitioner has denied knowing the gentleman shooter, the Arbitrator looks for guidance to Illinois cases where an employee is struck by a stray bullet. It is not enough Petitioner's employment placed him in the west parking lot on May 12, 2021. This would be a positional risk, which has been expressly rejected by Illinois Courts, see for example Springfield School District No. 186 vs Industrial Commission, 687 N.E. 2d. 334(1997). In Heath v Industrial Commission, 628 N.E. 2d.335(1993), the employee was a stock clerk who was shot by an unknown assailant after the store he was working at closed. In denying benefits, the Heath court noted there was no evidence submitted showing the store was located in a risky environment. There was no evidence submitted at trial that showed the store's neighborhood was dangerous or the location of the store lent itself to criminal activity. In denying benefits, the Heath court noted the claimant could not identify the attacker. The Heath court denied the claimant Workers Compensation benefits, noting there was no evidence that the attack was work related as opposed to a personal dispute.

Petitioner, like the claimant in Heath could not identify his attacker. Petitioner submitted no evidence from the Police Department showing the location of the 745 building was in a neighborhood which was dangerous, or the location was in a risky environment. Petitioner testified to living in the 745 building for 9 years. In those years he testified to showing the Police one person being "held up" but he testified he did not witness it himself. (T.19). He further noted that the Police were called for domestic dispute, loud noise, loud music and fights. (T.63). Petitioner never mentioned gun violence or violence in his testimony for the Arbitrator to infer this was a dangerous area.

The Arbitrator takes note of the Appellate Court decision in Illinois Institute of Technology Research Institute v Industrial Commission, 731 N.E. 2d 795 (2000). In this case, testimony of a Chicago police officer was presented. He testified the employer's building was being fought over by rival gangs. He testified activity in the area had

increased with gun shots being heard daily. Also, a co-employee testified of hearing gunshots at least weekly, and sometimes daily. In addition, the claimant called the decedent's co-employee. He had been a security guard for 17 years, testifying that he heard gunshot at least weekly. Further, he stated that sometimes he heard them daily. According to him, bullets had previously struck the upper floors of the building, but none had entered the lobby. He did not know how many bullets had hit the building nor how many he had found, stating he did not count them. When the gang first began shooting on the day of the incident, Hammer stated to decedent that "they were at it again." Illinois Institute of Technology Research Institute v Industrial Commission, 731 N.E.2d 795, 799, 314 Ill. App. 3d 149, 153. The Technology Research Institute court, relying on the testimony of the Police Officer, held claimant was entitled to Workers Compensation benefits as claimant was exposed to being struck by a stray bullet by virtue of the conditions of his employment were not the same as the general public was exposed to.

The Court in Technology Research Institute noted that "the focus then in the instant case is whether the conditions or environment of decedent's employment increased his risk of being struck by a stray bullet over that of the general public. Again, if the *only* basis for finding that decedent sustained injuries was the fact that his employment placed him in the position where he was struck by a bullet at that time ("*but for*"), then the injuries would not arise out of his employment. This would be the classic positional risk situation. However, if the injury occurred not just because of where decedent was, at that particular time, but was *coupled* with some factor that increased the risk of being struck by a stray bullet, then the injury is said to arise out of his employment. Illinois Inst. of Tech. Research Inst. v. Industrial Comm'n, 731 N.E.2d 795, 807-808, 314 Ill. App. 3d 149, 164, 2000 Ill. App. LEXIS 371, *32-33, 247 Ill. Dec. 22, 34-35. Unlike the employee in Technology Research Institute, Petitioner offered no testimony of either a Police Officer or of other custodians working in the other buildings in the complex where Petitioner worked. In addition, Petitioner lived in that building for 9 years and only mentioned that Police were called for domestic dispute, loud noise, loud music and fights. (T.63). Petitioner never mentioned gun violence in his testimony for the Arbitrator to infer this was a dangerous area. There was no competent evidence submitted to show the neighborhood of the 745 building was dangerous or the location of the building lent itself to criminal activity.

As a result, the Arbitrator finds Petitioner failed to meet his burden in showing that his accident arose out of and in the course of his employment by Respondent.

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

Given the Arbitrator's finding with respect to the issue of accident, this issue is moot.

With respect to Issue (G), What were Petitioner's earnings, the Arbitrator finds as follows:

Given the Arbitrator's finding with respect to the issue of accident, this issue is moot.

With respect to Issue (J) whether the medical services that were provided to the Petitioner were reasonable and necessary and Issues (K) whether Petitioner is entitled to any prospective medical care, the Arbitrator finds the follows:

Given the Arbitrator's finding with respect to the issue of accident, this issue is moot.

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

Given the Arbitrator's finding with respect to the issue of accident, this issue is moot.

With respect to Issue (M), whether Penalties or fees should be imposed upon Respondent, the Arbitrator finds as follows:

Given the Arbitrator's finding with respect to the issue of accident, this issue is moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC027301
Case Name	Andre Love v. City of Chicago – Department of Water Management
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0265
Number of Pages of Decision	15
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Michael Youkhana
Respondent Attorney	Elaine Newquist

DATE FILED: 6/22/2023

/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	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Andre Love,

Petitioner,

vs. NO: 19 WC 27301

City of Chicago
Department of Water Management,

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, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

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

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

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

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

Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

June 22, 2023
MP:yl
o 6/15/23
68

/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC027301
Case Name	Andre Love v. City of Chicago – Dept. of Water Management
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Jeffrey Huebsch, Arbitrator

Petitioner Attorney	Michael Youkhana
Respondent Attorney	Elaine Newquist

DATE FILED: 10/17/2022

THE INTEREST RATE FOR THE WEEK OF OCTOBER 12, 2022 4.03%

/s/ Jeffrey Huebsch, Arbitrator

Signature

A Love v. City of Chicago, etc., 19 WC 027301

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)

Andre Love
Employee/Petitioner
v.
City of Chicago – Dept. of Water Management
Employer/Respondent

Case # **19** WC **027301**

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, Illinois**, on **March 31, 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: **Credit for overpaid TTD, medical, excessive choice of physicians under § 8(a).**

FINDINGS

On the date of accident, **August 20, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**90,937.60**; the average weekly wage was $**1,748.80**

On the date of accident, Petitioner was **55** years of age, ***married*** with **1** dependent children.

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

Respondent shall be given a credit of $**136,745.76** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**136,745.76**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,165.87/week for 132-6/7 weeks, commencing September 14, 2019 through March 31, 2022, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $4,566.33 to Chicago Neck and Back Institute, as provided in Sections 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 8/20/2019 through 3/31/2022 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 17, 2022

Signature of Arbitrator

FINDINGS OF FACT

Petitioner was employed by Respondent as a laborer. He has been so employed since 1992.

The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of his employment by Respondent on August 20, 2019. Petitioner testified that he was injured while he was positioning a fire hydrant into the ground to be installed. He was in a hole, trying to hook the hydrant assembly into the water pipe and felt the weight of the hydrant on his back; he felt pain in his lower back. His back felt tweaked. He reported the injury to his foreman.

Petitioner testified that he was working without restrictions at the time of the accident. He testified that he recalled a prior injury to his lower back around 20 years ago. He might have injured his back another time.

Petitioner testified that he sought medical attention from his PCP, Dr. Feerst. Petitioner testified that he reported back pain and the PCP took Petitioner off work and referred him to Dr. Cicero. No records from the PCP were submitted.

The billing records of Dr. Cicero show a detailed exam occurred on September 11, 2019 (PX 4), but there is no chart note for this visit. (PX 3) PX 3 shows that, on September 14, 2019, Petitioner presented to Dr. Gerard Cicero of Chicago Neck & Back Institute complaining of lower back pain. Dr. Cicero recommended a lumbar MRI and physical therapy and placed Petitioner off work. Petitioner testified that during that visit with Dr. Cicero he was experiencing pain in his low back and buttocks numbness and tingling, tightness going down the center of his back down to the buttocks. The complaints of pain are documented, but the physical exam is not documented (same as 9/11/2019, per the chart). On October 15, 2019, Petitioner presented to Molecular Imaging for a lumbar MRI. The MRI showed: posterolateral herniations on the right and left at L2-3, an annular bulge and foramina herniation indenting the thecal sac and compromising the neural recesses and foramina at L3-4, an annular bulge indenting the thecal sac and compromising the neural recesses at L4-5, and an annular bulge obliterating the anterior epidural fat and compromising the neural recesses and foramina at L5-S1. (PX 3)

On October 1, 2019, Petitioner presented to an orthopedist, Dr. Howard An, for a Section 12 Examination. (RX 9) The prior history, per Dr. An's report, was of minor back problems, but Petitioner denied any severe pain with some numbness going down the left leg. Dr. An opined that Petitioner had preexisting disc degeneration or spondylosis, but the injury of August 21, 2019 aggravated the condition beyond normal progression and he became symptomatic. Dr. An suspected a herniated disc and recommended a lumbar MRI. (RX 9)

On October 16, 2019, Petitioner followed up with Dr. Cicero. Petitioner testified that Dr. Cicero reviewed his MRI during the visit. Dr. Cicero recommended additional physical therapy and to remain off work. On October 30, 2019, Petitioner followed up with Dr. Cicero, who he recommended that he get a second opinion by Dr. Charles Slack. (PX 3)

On November 19, 2019, Petitioner presented to Dr. Charles Slack of Illinois Bone & Joint Institute the second opinion. (PX 1) Petitioner testified that Dr. Slack reviewed his lumbar MRI. The physical examination reflected a slow and deliberate gait pattern, toe and heel walk causing lower back pain, flexion causing lower back pain, extension to neutral causing lower back pain, supine straight leg raise causing lower back pain and seated straight leg raise causing lower back pain. The assessment section reflects persistent left lumbar radiculopathy with symptomatic aggravation of degenerative lumbar disc disease with an L5-S1 left-sided disc protrusion with radiculopathy. Dr. Slack recommended an EMG and a lumbar epidural injection. Dr. Slack also recommended that Petitioner remain off work. (PX 1)

Dr. An reviewed the 10/15/2019 MRI and thought that it showed degenerative changes of the lumbar spine, especially at L4-5 and L5-S1, with disc space narrowing and mild to moderate lateral recess stenosis at L4-L5 and moderate to severe stenosis at left L5-S1. Petitioner's low back pain and the pain radiating down the left leg correlated with the MRI film. Dr. An recommended a selective left L5-S1injection. If the symptoms did not respond, a 2 level micro decompression may be considered. (RX 9)

Petitioner testified that he received the lumbar injection on January 18, 2020. He testified that he felt a little better, but the lower back pain returned.

On February 26, 2020, Petitioner presented to Dr. Cicero, complaining of continued lower back pain and numbness and tingling. Dr. Cicero recommended a second epidural injection and to remain off work. (PX 3) Petitioner testified that he received the second epidural injection on April 11, 2020.

On July 31, 2020, Petitioner presented to Dr. An for a second Section 12 Examination. (RX 9) Petitioner testified that he was still experiencing lower back stiffness and pain going down his buttocks during that examination. Dr. An opined that Petitioner had pre-existing L4-5 and L5-S1 disc degeneration and opined that it was aggravated by the work injury. Dr. An recommended that Petitioner consider an L4-S1 decompression and fusion (but as a last resort). Suggested work restrictions were 20 pounds lifting, avoid frequent bending and twisting and bending of the back. (RX 9)

There was no evidence submitted showing that Respondent was willing and able to accommodate the suggested restrictions.

On October 2, 2020, Petitioner was seen by an orthopedist, Dr. Theodore Fisher of Illinois Bone & Joint Institute, due to Dr. Slack retiring. (PX 1) Dr. Fisher recommended physical therapy and a repeat MRI. Petitioner had the MRI on December 16, 2020 and followed up with Dr. Fisher on January 5, 2021. Dr. Fisher diagnosed Petitioner with L3-S1 stenosis, degenerative disc disease, and herniated nucleus pulposus. Dr. Fisher's plan reflects a recommendation for a third epidural injection and, if he does not do well with conservative treatment, then he will be a candidate for surgery likely in the form of lumbar fusion surgery versus lumbar decompression. Petitioner followed up with Dr. Fisher again on February 3, 2021. Dr. Fisher recommended a Functional Capacity Evaluation. (PX 1)

On February 13, 2021, Petitioner received a third lumbar epidural injection. Petitioner testified that he subsequently followed up with Dr. Cicero, who recommended a diagnostic medial branch block injection. On April 2, 2021, Petitioner received the diagnostic medial branch block. Petitioner followed up with Dr. Cicero on April 12, 2021 and he recommended a second diagnostic medial branch block injection. (PX 3)

On April 13, 2021, Petitioner presented to Dr. An for a third Section 12 Examination. Dr. An recommended the second diagnostic branch block along with a Functional Capacity Evaluation. (RX 9)

Petitioner underwent the second branch block on May 15, 2021. Petitioner testified that he subsequently followed up with Dr. Cicero on June 7, 2021. Dr. Cicero recommended a radiofrequency ablation, which Petitioner received on August 21, 2021. He testified that the procedure did not help. On August 30, 2021, Petitioner followed up with Dr. Cicero, who recommended a Functional Capacity Evaluation. (PX 3)

On January 11, 2022, Petitioner presented to Athletico Physical Therapy for the Functional Capacity Evaluation (hereinafter, "FCE"). (PX 2) Petitioner testified that there was a gap between the time the FCE was recommended through the time he had the examination because the therapist recommended that he get cleared by cardiologist due to his blood pressure. The FCE reflects consistent performance. The recommendations section reflects that Petitioner did not demonstrate the physical capabilities and tolerances to perform all the essential job functions of his job. The job demands match table reflects that he did not meet his job demands for the following lifting activities: floor to waist; 12" to waist; waist to shoulder; occasional overhead lift; occasionally carrying weight; bending; sustained bending; squatting; climbing ladders; occasionally pushing and pulling carts; and occasionally shoveling. (PX 2)

There was no evidence that Respondent offered Petitioner work within the recommended restrictions.

Petitioner subsequently followed up with Dr. Cicero, who opined that he should remain off work and get a second opinion by Dr. Trombley, a neurosurgeon. The last visit with Dr. Cicero was on February 28, 2022. Dr. Cicero charted the physical exam results were the same as those of January 17, 2022 and his assessment was:

1.) Improved persistent low back pain secondary to lumbar discogenic pain superimposed on bulging and herniated discs at various levels L1-S1 with spondylolisthesis, multilevel DDD attributed to work injury;
2.) Resolved left L5 weakness;
3.) Resolving left buttocks, left leg pain secondary to left posttraumatic lumbar radiculitis attributed to work injury;
4.) Resolving right lumbar radiculitis attributed to work injury;
5.) Resolved disturbed gait secondary to antalgic stance;
6.) Persistent physical deconditioning and decreased tolerances FCE supported.

Dr. Cicero advised Petitioner that he could not return to work at this time. Dr. Cicero thought that Petitioner had 3 options: 1.) Work hardening for 4 weeks; 2.) Surgery; 3.) Placement on permanent disability. (PX 3)

Petitioner testified about the activities he participated in and did not participate in throughout the time he treated for his work-related injuries. He testified that subsequent to the work-accident he never performed activities similar to his job and that his understanding of being off work means that he cannot do what his job requires him to do. He testified that when his doctor tells him he's off work he understands that as not lifting 100 pound pipes, moving them from point to point, climbing up and down ladders with fittings that are 50 pounds, and putting things together weighing over 200 pounds. He testified that he owns a motorcycle and he hasn't ridden his motorcycle in years. He testified that the picture of him riding a motorcycle in a Facebook post subsequent to his accident was photographed prior to his accident. He testified that he did not believe he told all of his doctors about owning and riding a motorcycle because they never asked. Petitioner testified that prior to the work-accident he had a less restricted workout regime at the gyms he was a member of. He testified that after the accident he continued going to the gym for strength and cardio exercise. He testified that he told his doctors and therapists the types of activities he participated in at the gym. Petitioner testified that they encouraged him to participate in the activities.

Respondent submitted investigation reports, surveillance video and supporting testimony. (RX 5, 6, 7 and 8) The Arbitrator notes that the reports contained Petitioner's SSN, which was redacted by the Arbitrator to comply with SCR 138. Petitioner was observed by Jose Guzman from November 12, 2021 through November 16, 2021. Guzman testified that he recorded video of Petitioner at a gym on an elliptical, on a pull up machine, and on a push machine. He did not observe the weight on the machines that Petitioner used during the workouts. Petitioner was seen perhaps putting some flooring down with his son (actual activities not observed) at his Mother-in Law's house. Petitioner was also privately investigated by Michael Gutierrez from January 10, 2022 through January 11, 2022. Guzman testified that he only observed Mr. Love's activities on January 11,

2022 which consisted of going to Athletico Physical Therapy and picking up pizza from a pizzeria. (RX 5, 6, 7, and 8)

Petitioner testified that his TTD payments stopped November 19, 2021.

Petitioner testified that he is still experiencing lower back pain, and has issues with walking, standing for long periods, sitting for long periods, and lying in bed. He testified that he understood surgery was recommended at some point in his treatment and that he would be willing to undergo the surgery. He did not understand why Andre Love hasn't had a surgery yet. He said that he wants to go back to work. Finally, Petitioner testified that after his work accident he never participated in activities that his doctor told him not to perform.

On cross-examination, Petitioner testified that he told Dr. An that he would like hm to do the surgery. He does not like Dr. Fisher.

Petitioner agreed with the FCE findings and limitations, in that he thought that the study was valid. He denied telling the therapist that he no longer goes to the gym (as is noted in the FCE, see: PX 2). He doesn't ride his motorcycle anymore.

Petitioner said that he probably sat in the car with his foreman at some point after the accident. He was experiencing pain in his back, butt and legs. His current back pain is medium. Petitioner has a Facebook account, but he doesn't update it. He said that a post on August 24, 2019 of a picture of Petitioner on a motorcycle was of him riding to Sturgis, S.D. in 2013, not riding to Indianapolis on that date. Petitioner did travel to a motorcycle show in Indianapolis on August 24, 2019. He did not ride his motorcycle to the show. He thought that he rode in an SUV driven by "E". Neither Party called "E" as a witness. The Facebook posts were probably done by a deceased relative, Kenneth Lee. Of course, neither Party call Kenneth Lee as a witness.

Respondent submitted evidence regarding Petitioner's nine prior filed Worker's Compensation cases. (RX 3) The cases all settled. There appear to have been four prior claims for injuries to the back (08 WC 023864; 99 WC 027394; 93 WC 034925; 88 WC 048921), which were settled for an aggregate of 23.5% loss of

the person as a whole. The remaining cases were settled for an aggregate of 1.5% loss of the person as a whole, 42.5% loss of the right leg, 17.5% loss of the left leg and 30% loss of the right arm. (RX 3)

Respondent submitted information regarding Petitioner's prior low back injury of 4/8/2008 (Case Number 08 WC 002262 against Respondent, settled for 10% loss of use of a person as a whole, per RX 3) which included a Section 12 exam report by Dr. Jay Levin of August 25, 2011 and a further report of August 29, 2011, commenting on a lumber MRI of August 25, 2011. The MRI was said to show DDD at the levels of T12 through L5, with a left sided herniated disc at L5-S1. Petitioner was found to be at MMI and released to full-duty work. He was not in need of further medical care for the diagnosis of: History of Previous Low Back Complaints with Multiple-Level Degenerative Changes and Lumbar Myofascial Strain. (RX 4)

CONCLUSIONS OF LAW

The Arbitrator adopts the above Statement of Facts 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)

The Arbitrator was aware of the disputes in this case and of his responsibility as the finder of fact to observe the witnesses testify, judge their credibility and to determine how much weight to afford to their testimony and the other evidence presented. Walker v. Chicago Housing Authority, 2015 IL App (1st) 133788 ¶ 47.

In support of the Arbitrator's decision relating to (F), whether the petitioner's present condition of ill-being is causally related to the injury, the Arbitrator finds:

The Arbitrator finds that Petitioner's current condition of ill-being regarding his low back (to wit: mechanical low back pain due to lumbar spondylosis, especially at L4-5 and L5-S1 is causally related to the work injury of August 20, 2019.

This finding is based on the testimony of Petitioner, the treating medical records (which include the causation opinions documented by Dr. Cicero) and the opinions of Dr. An.

Some of Petitioner's answers to questions were less than satisfactory and he certainly had significant prior back problems, but these factors are not fatal to Petitioner's case in light of the fact that on the date of accident Petitioner was working full duty (at a labor intensive job) and there was no evidence showing that he was under any active medical care for his low back at that time and Dr. An endorses causation in that the work accident aggravated a degenerative condition in Petitioner's lumbar spine and caused it to become symptomatic.

The Arbitrator views any defects or inconsistencies in Petitioner's testimony as reflecting his nervousness/anxiety about testifying, rather than being an attempt to deceive the finder of fact. He did admit to traveling to the motorcycle show in Indianapolis 4 days after the accident and he did tell Dr. Slack that he couldn't even get dressed the day after the accident. He did go to the gym after the accident. He did have significant prior back injuries, but there was no evidence of ongoing treatment at the time of the accident. Dr. An's opinion is that the work injury was an aggravating factor beyond normal progression, which caused Petitioner's mechanical low back pain.

"A claimant may be entitled to benefits under the Act even though he suffers from a preexisting condition of ill-being." Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205 (2003). "In preexisting condition cases, recovery will depend on the employee's ability to show that a work-related accidental injury aggravated or accelerated the preexisting disease such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition. 207 Ill. 2d 193, 204-205. "Accidental injury need not be the

sole causative factor, nor even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being." 207 Ill.2d at 205. Dr. An's opinion ties up causation and he supports that Petitioner is not able to return to his job as a laborer.

In support of the Arbitrator's decision relating to (J), were the medical services that were provided to petitioner reasonable and necessary and has respondent paid all reasonable and necessary medical expenses, the Arbitrator finds:

The medical services rendered to Petitioner were reasonable and necessary to cure or relieve the effects of the injuries. This finding is based upon the Arbitrator's finding on the issue of causation, above and the opinions of Dr. An.

Petitioner claimed unpaid medical bills from Chicago Neck and Back in the amount of $4,566.33. (PX 4) The Arbitrator awards same, pursuant to §§8(a) and 8.2 of the Act and subject to the medical fee schedule. Respondent is entitled to a credit for all awarded bills that it has paid or compromised.

In support of the Arbitrator's decision relating to (L), is the Petitioner entitled to any TTD benefits, the Arbitrator finds:

Based upon the Arbitrator's finding above on the issue of causation, Petitioner's testimony, the medical records and the opinions of Dr. An, Respondent shall pay Petitioner TTD benefits of $1,165.87/week for 132-6/7 weeks, commencing September 14, 2019 (the first date that the Record shows that he was medically authorized off work {per Dr. Cicero}) through March 31, 2022 (the date of trial).

In support of the Arbitrator's decision relating to (O), Credit for overpaid TTD, medical, excessive choice of physicians under §8(a) the Arbitrator finds:

Respondent is entitled to a credit of $136,745.76 in TTD benefits paid, per the RFH form. There is no overpayment of TTD.

Respondent is entitled to a credit for all awarded medical bills that have been paid or compromised. There is no overpayment of medical expenses.

Petitioner did not exceed his 2 choices of physicians under §8(a) of the Act. The evidence is that Petitioner first sought treatment from his PCP, Dr. Feerst, who referred him to Dr. Cicero, who referred him to Dr. Slack, who retired and was succeeded by Dr. Fisher. Petitioner is within his first chain of physicians.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC033360
Case Name	Epifanio Nieva v. Panda Express
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0266
Number of Pages of Decision	7
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Jordan Browen
Respondent Attorney	Scott Webber, Randall Stark

DATE FILED: 6/22/2023

/s/ Deborah Simpson, Commissioner

Signature

18WC33360
Page 1

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

Epifanio Nieva,
Petitioner,

vs. NO: 18 WC 033360

Panda Express,
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 disfigurement under Section 8(c) and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $55,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

June 22, 2023
o6/14/23
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	18WC033360
Case Name	NIEVA, EPIFANIO v. PANDA EXPRESS
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	5
Decision Issued By	Michael Glaub, Arbitrator

Petitioner Attorney	Jordan Browen
Respondent Attorney	Randall Stark

DATE FILED: 4/6/2022

THE INTEREST RATE FOR THE WEEK OF APRIL 5, 2022 1.11%

/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
NATURE AND EXTENT ONLY

Epifanio Nieva
Employee/Petitioner

v.

Panda Express
Employer/Respondent

Case # 18 WC 033360

Consolidated cases: N/A

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Michael Glaub, Arbitrator of the Commission, in the city of Woodstock, IL, on February 2, 2022. By stipulation,

On the date of accident, September 25, 2018, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $37,107.20, and the average weekly wage was $713.60.

At the time of injury, Petitioner was 31 years of age, married, with 1 dependent child.

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

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 paid $8,087.41 in TTD benefits and $2,899.33 in TPD benefits.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury and attaches the findings to this document.

ORDER

Respondent shall pay directly to Petitioner the sum of $428.16/week for a further period of 58 weeks, as provided in Section8(c) of the Act, because the injuries sustained caused 45 weeks of disfigurement of the left foot, 3 weeks of disfigurement the right foot and 10 weeks of disfigurement of the left leg.

Respondent shall pay Petitioner compensation that has accrued from 5/9/19 through 9/23/20 (72 weeks), and shall pay the remainder of the award, if any, in weekly payments.

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

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

Michael Glaub

Signature of Arbitrator

APRIL 6, 2022

Epifanio Nieva,	)	
	)	
Petitioner,	)	
	)	
v.	)	18 WC 033360
	)	
Panda Express,	)	Arb. Glaub
	)	
Respondent.	)	

FINDINGS OF FACT

On September 25, 2018, Petitioner was employed with Panda Express. Petitioner testified that he was a long tenured employee of Respondent's and was training other employees on September 25, 2018. Specifically, Petitioner was demonstrating how to change the oil used in food preparation. While disposing of the old, hot oil, the cart got caught on a crack and the hot oil spilled onto his feet.

Petitioner was initially taken to Centegra Hospital Huntley, where it was noted that Petitioner works at Panda Express and spilled hot oil onto his feet. Pet. Ex. 1. It was determined by hospital staff that it was necessary to transfer Petitioner to OSF St. Anthony Hospital.

Petitioner was transported from Huntley to St. Anthony Medical Center by A-Tec Ambulance. Pet. Ex. 2.

Petitioner was admitted to St. Anthony Medical Center the morning of September 26, 2018 and discharged on October 9, 2018. Petitioner was treated for "2% TBSA full thickness burns to the bilateral feet and ankles." Pet. Ex. 3, page 69. On October 3, 2018, a grafting procedure was done to the left foot, using donor material from the left lateral calf.

After his discharge, Petitioner followed up with OSF medical group. He was off work through January 16, 2019. At that follow up visit, he was given restrictions to return to work beginning January 21, 2019. His restrictions were gradually lessened at follow up appointments, culminating in his final visit May 8, 2019. At this visit, he was discharged to full duty.

At the final visit May 8, 2019, a "Review of Systems" noted with respect to the musculoskeletal system, "Positive for – pain in foot – left." Pet. Ex. 4, page 21. (internal numbering system). Under subjective complaints, it was noted that pain was "mild" in severity, and the patient presented "currently in pain yes." It was further noted that pain level was "cramping, dull" and "pain is perceived as moderate (4-6 pain scale)." On physical examination, it was noted that "excellent graft take to left foot/ankle, with good function, with tenderness to palpation of left toes, distal foot. Petitioner's donor site was noted to be "well healed." Id.

The treatment plan included that Petitioner perform wound care with lotion and he was also instructed on exercises and physical/occupational therapy was ordered. He was cleared to return without restrictions and instructed to follow up in 6 months. Id., page 22.

Petitioner testified that the May 8, 2019, appointment was the last time he saw the doctor. Petitioner also testified that on the date of the hearing he was still regularly using Eucerin cream on the scarred area. He further testified that he had pain in his left foot and that he stretched his left foot in the morning to alleviate some pain. Specifically, Petitioner demonstrated flexing and extending his left foot.

The Arbitrator made a record of the significant scarring on the left foot from the outside ankle across the top of the foot to about the great toe. Photographs taken by Petitioner in July 2020 were entered as Pet. Ex. 6 for demonstrative purposes only. The Arbitrator will rely on his own record of the scarred area. A record was also made of the scarring at the donor site on the outer left calf.

CONCLUSIONS OF LAW

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues present at the hearing as follows:

What is the nature and extent of the injury?

The Arbitrator is tendering an award for disfigurement under Section 8(c) of the Act. The Arbitrator is not tendering any award for permanency and therefore the Arbitrator will not be addresses the 5 factors as set forth in Section 8.1b

The Arbitrator's ruling is based upon his viewing of petitioner's left leg, right foot and left foot. The Doner site for the skin graft is on the left leg. It was a relatively large area. While any specific scarring of the left leg was minimal, the area is shiny and hairless. The scarring to the right foot was minimal. However, there was an area of slight discoloration on the forefoot between the ankle and great and second toe. There was, however, significant residual scarring to the left foot approximately 3 inches tall by 6 inches wide. The scar extends from the mid forefoot around the exterior of the foot to the Achilles tendon region and covers the lower 20-25% of the ankle down to the base of the foot. There was also a white pigmented area located on the exterior of the left ankle above the larger scar described above.

Based on the Arbitrator's viewing of the left leg, right, foot and left foot, the Arbitrator awards 10 weeks disfigurement of the left leg, 3 weeks of disfigurement of the right foot and 45 weeks of disfigurement of the left. The total award under Section 8(c) of the Act equates to 58 weeks of disfigurement.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC022840
Case Name	Kelly McCarty v. Bombshell Blowout Boutique
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0267
Number of Pages of Decision	16
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Luis J. Magaña
Respondent Attorney	Robert Harrington

DATE FILED: 6/22/2023

/s/ Christopher Harris, 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

KELLY MCCARTY,

Petitioner,

vs. NO: 16 WC 22840

BOMBSHELL BLOWOUT BOUTIQUE,

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, medical, and temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

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 shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The bond requirement in Section 19(f)(2) of the Act is only applicable when the Commission has entered an award for the payment of money. Therefore, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

June 22, 2023
O: 06/15/23
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	16WC022840
Case Name	Kelly McCarty v. Bombshell Blowout Boutique
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	Luis Magana
Respondent Attorney	Robert Harrington

DATE FILED: 7/22/2022

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

/s/Stephen Friedman, 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

Kelly McCarty
Employee/Petitioner

v.

Bombshell Blowout Boutique
Employer/Respondent

Case # **16** WC **022840**

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 **Geneva**, on **May 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 **March 31, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On the date of the alleged accident, Petitioner was **42** years of age, ***single*** with **3** dependent children.

Respondent shall be given a credit of $**00.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**00.00**.

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

ORDER

BECAUSE PETITIONER FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THERE EXISTED AN EMPLOYER/EMPLOYEE RELATIONSHIP BETWEEN THE PARTIES ON MARCH 31, 2016, PETITIONER'S CLAIM FOR COMPENSATION IS HEREBY 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 22, 2022

/s/ Stephen J. Friedman
Signature of Arbitrator

Statement of Facts

Petitioner Kelly McCarty testified that she worked as an esthetician at Respondent Bombshell Blowout Boutique beginning in February 2016. She testified she was hired to be an esthetician (skin care specialist) by Meredith James. She did skin care, waxing, facials, peels. She testified that in addition to providing skincare services to clients, she helped out everywhere by giving drinks to clients, walking them to their next appointment, folding towels, and assisting with the general flow of the salon. She testified she answered phones, and helped keep the flow for events such as bridal parties and proms, made appointments, and watched over the salon when no one was there. She did not answer the phone until she was trained on the computer. She would book clients for herself and others who worked in the salon. She testified she did anything Meredith James asked. She testified that Ms. James would ask her in advance or text her if she needed to be at the salon to help with a patron. These could be her clients or clients of the salon. Petitioner testified that during the time she was at Respondent, she did not work anywhere else.

Petitioner testified she was paid by direct deposit or by check. Petitioner offered PX 14 showing checks and direct deposits from February 2016 through August 2016. She testified that she was paid a percentage of what she did and hourly for helping out with events and weddings. She did not recall the percentage. Her business card said Bombshell Blowout with her name on it. It had the salon number and her cell number (PX 15). She testified that she brought clients with her and serviced any client that was on the books scheduled by either Meredith or anyone who worked there and booked appointments. She testified she worked roughly 30 hours per week. She had a rough set schedule of Tuesday to every other Saturday. She testified she was never paid a salary, was not provided a W-2, and that Social Security was never withheld from her check or direct deposit. She testified she was not provided any benefits from Respondent.

Petitioner called Gretchen Vandy as a subpoenaed witness. She testified that she did not work at Respondent during the same time period that Petitioner worked at Bombshell. Ms. Vandy testified that she is a licensed esthetician and worked at Respondent as an independent contractor prior to Petitioner's retention by Respondent. Ms. Vandy testified that she quit working at Respondent in February of 2016 after becoming disgruntled. She testified that because she was an independent contractor and did not work for Meredith, she simply took her business and moved to another location.

Meredith James testified that she was the owner and manager of a business known as Bombshell Blowout Boutique in St. Charles, Illinois. She testified that she opened that business in January of 2015 and closed it in May of 2017. Ms. James testified that Respondent was a high-end blowout boutique that would provide services for women mostly for formal blowout styles and updo styles. She testified that the salon had estheticians that were independent contractors. Ms. James testified that she and Petitioner were very good friends for approximately 12 years prior to her opening the business and that Petitioner had also been her personal esthetician. Prior to starting as an esthetician at Respondent, Petitioner signed an independent contractor agreement. It was the same contract that Ms. Vandy had. Ms. James testified that Petitioner was never paid a salary, was never provided a W-2 by Bombshell, and was paid based on a percentage that was negotiated in her contract (20% to the salon and 80% to the independent contractor). Petitioner was provided a 1099. The calculations for percentage payments were done on an online web application which was also used to schedule the appointments. Petitioner was paid her percentage every two weeks through a direct deposit or check. Petitioner was provided no benefits and was free to come and go as she pleased. Ms. James testified that she personally provided Petitioner with a key to the salon. Petitioner was not paid to answer phones, just as an esthetician. Customers paid Respondent for Petitioner's services.

Petitioner testified that on March 31, 2016, she sustained an accident. She testified that prior to that date she had never had neck issues or a concussion. She was on no work restrictions. She testified that the accident occurred after spray tanning a client named Renee Piermattei in the spray tan room at Respondent. This room also held other things such as employee belongings. She went to look at her cell phone, and a mirror then fell on her and hit her on the right side of the top of her head. She fell to the left to the ground. The mirror was on top of a storage locker or cart on rollers and that the mirror was not attached to the wall. She testified the mirror was framed, 3 feet tall, 2-1/2 feet wide and was heavy. Petitioner testified that Ms. Piermattei was facing her when the mirror struck her. She stated that after the mirror struck her, Ms. Piermattei yelled, “help, help!" Petitioner testified the mirror came off the cart and landed on her and that it took Ms. Piermattei and another person, Kari Karlin, to take it off of her, move it behind the door, and lean it against the wall.

Ms. Vandy testified to an alleged incident involving a mirror in a tanning room at Respondent in approximately December of 2015. She estimated the mirror in that incident was 4 feet tall and 2 to 3 feet wide. She testified it was definitely big and really heavy. She testified the cart or cabinet on which the mirror was resting was on wheels. She testified that the mirror was framed. She testified she told Ms. James about the incident. Ms. James said that if someone is so stupid that they can’t figure out that the cabinet moves, it is their fault. Ms. Vandy testified that she left on bad terms. Ms. James described the circumstances surrounding her leaving as a year end assessment that went bad resulting in 3 people leaving. She testified that Ms. Vandy “slandered her on Facebook,” and that is when the contract was terminated.

Renee Piermattei testified pursuant to a subpoena issued by Respondent. Ms. Piermattei testified that on March 31, 2016, she visited Bombshell Blowout Boutique and obtained a spray tan. She identified the Petitioner as the individual that administered the spray tan. Ms. Piermattei testified that following her spray tan she was naked with her back turned to Petitioner and in a bent over position attempting to get dressed. At that time, she heard Petitioner say, “Oh my God." She testified that she was two steps away from Petitioner. She turned around and saw that Petitioner was bent over with a mirror with the reflection part of the mirror leaning against her. Petitioner’s rear-end was leaning against the top of the cabinet and Petitioner was looking at the cell phone in her hands. Ms. Piermattei testified that the mirror was about 2 feet high and about 2 feet wide . Piermattei also stated that it did not take a second person to help her lift the mirror off Petitioner. Immediately upon seeing the mirror leaning against Petitioner, while still naked, she took two steps toward Petitioner and simply tilted the mirror back on the wall and then continued getting dressed. Ms. Piermattei testified that even though her back was turned to Petitioner while dressing, it was not possible that Petitioner had fallen to the floor with the mirror on top of her. Ms. Piermattei testified that Petitioner stated, “Oh my God, I am going to get help.” She testified that she then replied, “for what?” because she did not see that there was any problem. She did not see any cuts or bruises. Petitioner did not say anything about being hurt or in pain. She testified that Petitioner then left the room before her and that she, Ms. Piermattei, then proceeded to get dressed and leave the salon. Ms. Piermattei testified that she was not a party to this case and had never had any ownership interest in Respondent. She testified she had no financial interest in the outcome of the case. She stated that she considered herself a friend of both Ms. James and the Petitioner. The only reason she appeared was because a subpoena.

Ms. James testified that when she purchased the business it was gutted and that she then built and furnished everything from scratch. Respondent had two identical spray tanning rooms that were each 10 feet by 12 feet. Both rooms had the exact same cabinets installed that she purchased from IKEA. She testified that the cabinets never had wheels and that having wheels was not even an option on that cabinet. Ms. James identified RX 2 as a screenshot she took of the same cabinet as she purchased for both esthetician rooms. It

did not show the front doors because the cabinet doors could be changed out. Ms. James testified it appeared to be the same dimensions of the cabinet that existed on March 31, 2016, with the exception of the clear front door. Ms. James testified that the mirror was 20 inches by 24 inches and purchased at Lowe's, unframed. The mirror weighed 4.76 pounds. Ms. James identified RX 3 as a true and accurate copy of a screenshot she took similar to the mirror that she purchased and existed at Respondent on March 31, 2016. Ms. James testified that the mirror in the spray tanning room on March 31, 2016, was a regular leaning mirror sitting probably 3 to 4 inches away from the wall so that it could lean back to the wall. She testified that the mirror on the cabinet was never framed.

Petitioner testified she continued working the rest of the day. She testified that she texted Ms. James. She waxed Ms. James daughter's eyebrows that day. She testified that after she went home, she was nauseous. She had head pain. She was tired and felt sick. She tried to work because she thought it was just a concussion. She never had a concussion before but believed it was a concussion because it struck her in the head. She testified she could not recall what days she worked at the salon immediately following the mirror incident. Petitioner did not fill out an accident report.

Ms. James testified that she did not work at the salon on March 31, 2016. She testified she did work the next day, April 1, 2016 and also on April 2, April 5, and April 6, 2016 and that the Petitioner also worked those days. She stated that Petitioner never mentioned that she was in any pain or saw spots. Petitioner attended a party for Ms. James' birthday about a week later. She did not complain about headaches, being in pain, or not being able to see.

Petitioner testified she saw her dentist, Dr. Colletti because two of her teeth were cracked and she had pain in her face and neck. Dr. Colletti's records note (PX 3) she had a fall in 2005 with symptoms of TMJ. Petitioner had not seen her dentist for routine treatment since 2010. His handwritten notes were transcribed (RX 6). Petitioner reported pain on the upper right side of her mouth with swelling and constant throbbing. She described an accident at her work place on April 1st when a heavy mirror fell on her head. She went down to her knees, felt dizzy, and saw spots. She also reported pain in her neck. X-ray were without any conclusive etiology. He recommended anti-inflammatory non-steroidal medication and suggested an MRI or CT if issues persist from her physician (RX 6).

Petitioner saw Dr. Tejada D.C on April 23, 2016 (PX 11, p 63). She told Dr. Tejada that a heavy mirror fell and hit her on the right side on the temple. She stated she had a cracked tooth and a concussion causing headaches, blurry vision, and spots. She reported neck pain that radiates to the left shoulder and upper thoracic pain. Dr. Tejada noted muscle spasms and trigger points with palpation and stiffness (PX 11, p 63). Thereafter, Dr. Tejada prepared an addendum stating the mirror fell on the back of her head, not the right side of the temple (PX 11, p 62). Petitioner went to the emergency department of Delnor Hospital on April 27, 2016, described the mirror incident, and complained of lightheadedness and double vision. She complained of tightness in her upper back, lower neck area. She denied weakness in her arms or legs. Examination of the neck noted normal range of motion, neck supple. A CT scan of her brain was negative (RX 4, p 17-23). Petitioner testified she continued to see Dr. Tejada for massage and stretching though June 2016. His records document only a single follow up visit on May 2, 2016 with complaints of neck pain radiating to the left shoulder, 4/10 headaches 50% of the time, intermittent dizziness, and paresthesia of the left arm (PX 11, p 160).

Petitioner testified that prior to March 31, 2016, she had migraines. Those headaches were hormonal-based stemming from her menstrual cycle. She testified the headaches after the incident were different from the migraines. The pain was focused on the head area that the mirror struck her along with pain down her back. Ms. James testified that from the time Petitioner first started at Respondent, she said she had blurry vision, migraines, a bad back, and a bad neck. At times, it caused her to remove herself from previously scheduled appointments. Because she was an independent contractor, she would take herself off.

Petitioner continued to work for Respondent until August 2016. Petitioner does not recall if her independent contractor agreement was considered breached because she had not provided for liability insurance. She testified that Ms. James texted her that she was fired and needed to get her things out. Petitioner testified that she did not have any treatment for her neck and head pain because she believed a concussion had run its course although she continued to have neck pain. She testified she did not work elsewhere because she was injured and lost her sense of taste and smell and had pain radiating down her left arm and down her back that, combined with the neck pain, made her nauseous.

On September 6, 2016, Petitioner was seen at the Delnor Hospital emergency room (RX 4, p 25-29). Petitioner reported that a heavy mirror fell on her head. Petitioner reported her concussive symptoms have resolved, but she has persistent neck pain localized to the posterior aspect of her neck. She denied radiation of the pain or numbness or tingling. She noted that she was fired and is currently unemployed, mother of 3 that is very stressful. She reported she does have a lawyer who referred her to the emergency room for further evaluation. On examination, there was diffuse tenderness there was no radiculopathies or paresthesia. Strength was intact. Petitioner received IV Didaudid. She was diagnosed with a cervical strain and advised to follow up with her primary care provided. She may require a cervical MRI (RX 4, p 25-29).

Petitioner saw Heather Chen PA-C at Emediate Cure on September 8, 2016 (PX 4). She recorded Petitioner's work injury and noted she had sharp and shooting neck pain and pain radiating to both upper extremities. Examination noted tenderness, stiffness, and spasm of the cervical spine. Neurological exam was normal. Petitioner was diagnosed with a cervical sprain, head injury and muscle cramps and spasms. MRI of the brain and cervical spine were ordered. The records indicate Petitioner was contracted with Respondent. She told them the location was where she was providing contracted work, but not her place of employment (PX 4). The September 9, 2016 MRI of the brain was unremarkable. The MRI of the cervical spine impression was annular tear and moderate sized disc herniation at C5-6 resulting in bilateral foraminal stenosis and mild cord compression, annular tear and broad-based disc herniation at C6-7 resulting in mild foraminal stenosis., and mild degenerative disease at other levels (PX11, p 75-77). Petitioner had additional chiropractic care with Dr. Tejada from September 17, 2016 through December 19, 2016 with reduction in the intensity and frequency of her symptoms (PX 11, p 163-180).

On June 24, 2017, Petitioner slipped and fell on a wet floor at a McDonald's. She was seen at Delnor Hospital for pain in her neck, right knee, left foot, and back. She reported she jarred her neck. Cervical x-rays noted no significant changes from prior exam. Petitioner also had x-rays of the left foot, low back, right knee, and ribs (RX 4, p 32-42). Petitioner testified her symptoms did not change apart from her muscles in the area tightening up.

Petitioner began treatment at Fox Valley Orthopedic Institute for her neck and left foot (RX 5). Petitioner reported the mirror incident and her fall in June, 2017. Petitioner saw Angela Lang PA-C on August 7, 2017 reporting she injured her left foot on both accidents. She reported twisting her foot when she was hit by the

mirror (RX 5, p 35). She saw Dr. Popp on August 8, 2017 for her neck. She noted both accidents. She stated she had a concussion and cracked tooth. Her symptoms began that day and slowly got worse. She reported spasms in her neck and shoulders with numbness and tingling into the bilateral upper extremities. She has weakness in both upper extremities, balance problems. Dr. Popp diagnosed Petitioner with cervical spondylosis and radiculopathy, ordered another cervical MRI and prescribed physical therapy. Dr. Popp noted, "It appears the patient was previously pain-free. Appears that the patient had an injury to her neck that resulted in a previously asymptomatic condition to become symptomatic. Most likely she herniated some disc material on these level with this injury. This resulted in some of the arm symptomatology that she has (RX 5, p 29-32). The August 10, 2017 cervical MRI noted a small left paracentral disc protrusion superimposed upon disc bulge at C5-6 and disc narrowing and bulge with bilateral uncovertebral arthropathy at C6-7 (RX 5, p 12). On August 15, 2017, Dr. Popp read the MRI and recommended physical therapy. On September 29, 2017, Dr. Popp informed Petitioner he was leaving Fox Valley Orthopedics and advising that they did not have a spine surgeon to assume her care and gave her the names of other surgeons (RX 5, p 20). Petitioner continued treating with Dr. Bartel for her left foot (RX 5).

Petitioner saw Jessica Barr APN at Suburban Neurology Group on August 30, 2017 (PX 12). She reported she was hit on the left side of her head by the mirror causing her to fall to the floor and fracture her left foot. She claimed to have developed a headache, neck pain, loss of taste and smell, dizziness, nausea, and visual changes. She reported the mirror incident and indicated she has neck pain with left arm paresthesia and weakness into her left sided first and second digits. The impression was likely post concussive syndrome after the mirror fell on her head, chronic neck pain with bilateral finger and left arm paresthesia/left arm weakness with MRI evidence of C5-6 and C6-7 herniation, history of migraine headaches and anxiety. Ms. Barr indicated she should continue her treatment with her spine surgeon and follow up in 2 months. On December 7, 2017, Dr. Santwani noted Petitioner reported no change in her symptoms. She declined prescription medication. He recommended physical therapy for her cervicogenic issues, but notes she did not have insurance (PX 12).

Petitioner saw Dr. Santwani on June 14, 2018 with ongoing neck pain with tingling in her bilateral hands, left worse than right and weakness into her left arm. He gave her the same diagnosis, ordered an additional cervical MRI to compare with her previous study, an EMG/NCV, and physical therapy. He referred her to another orthopedist (PX 11, p 97-98). The June 23, 2018 MRI impression was multilevel degenerative changes most pronounced at C5-6 and C6-7 (PX 11, p 99). Petitioner participated in physical therapy at Delnor from June 25, 2018 through July 25, 2018. On July 31, 2018 she saw Dr. Patel at the Pain Spine Institute with ongoing neck complaints. Dr. Patel referred Petitioner to Dr. Templin for evaluation of neck pain. On August 14, 2018 Dr. Patel prescribed Tramadol (PX 10). On September 4, 2018, Dr. Templin recommended cervical epidural injections. He discussed doing a fusion if the injections helped (PX 9). Petitioner testified that Dr. Templin was out of her network, so she stopped seeing him. On November 14,2018, Petitioner advised Dr. Santwani she had severe neck pain from vacuuming. He notes the EMG/NCV revealed probable chronic C7 and C8 radiculopathy. He referred her to an orthopedist and interventional pain doctor (PX 11, p 113-14).

Petitioner suffered an accident at a Target on December 1, 2018, when a patron ran into her lower back with a cart and hit her into shelving. On March 11, 2019, Dr. Froese recorded that Petitioner stated she has had low back symptoms since a mirror fell on her, but her symptoms have progressed since December 1 (PX 11, p 183-186). Petitioner continued to see Dr. Froese and Dr. Santwani for her low back complaints including MRI studies of the lumbar and thoracic spine which revealed multilevel degenerative changes. She was given a referral to Dr. Richard Heim for her cervical spine.

Petitioner saw Dr. Heim on July 2, 2019 to evaluate both her neck and her low back (PX 11, p 135). Petitioner described the mirror incident and indicated she continued to have neck pain with numbness and tingling into her left arm. She noted her symptoms would wax and wane. She also reported suffering a concussion. She stated that she had been in therapy and had temporary symptomatic improvement. After his examination and review of Petitioner's diagnostic testing, including a May 21, 2019 cervical MRI, Dr. Heim diagnosed cervical degenerative disc disease, cervical spondylosis, severe C5-6 and C6-7 stenosis with left cervical radiculopathy. He recommended a C5-6 and C6-7 anterior cervical microdiscectomy, micro decompression of the cervical spinal cord and fusion (PX 11, p 135-140). Petitioner saw Dr. Heim for her low back symptoms from the December 1, 2018 injury on July 2, 2019. Treatment for lumbar degenerative disc disease and herniated disc was deferred (PX 11, p 141-144).

Petitioner followed up with Dr. Heim again on February 18, 2020, reporting similar complaints but with increased weakness in her left upper extremity and biceps area. Dr. Heim's diagnosis and recommendation for surgery remained unchanged. He ordered a repeat MRI of her cervical spine (PX 5, p 413- 417). On April 16, 2020, Dr. Heim performed a C5-6 and C6-7 ACDF (PX 5, p 457). Petitioner testified that she used her Illinois state insurance to pay for the surgery. Petitioner testified she began physical therapy at Northwestern. It strengthened the muscles around her neck. She testified that she last saw Dr. Heim after surgery in the spring of 2020 – approximately two weeks after surgery. He then released her. Dr. Heim's records note he saw Petitioner on June 10, 2020. She reported doing well with no radicular pain, numbness, or tingling. She was to begin physical therapy (PX 5, p-470). Petitioner had further follow-up for her lumbar spine thereafter (PX 5, p 483).

Petitioner was evaluated by Dr. Faris Abusharif at her attorney's request on January 23, 2021 (PX 7). After taking a history from Petitioner, reviewing the medical records, and examining Petitioner, he diagnosed cervical spinal stenosis of a moderate to severe degree at C5-6 and C6-7, with cervical radiculopathy primarily at C6-7. Despite surgery, she still has residual symptoms of weakness in the left arm as well as numbness and tingling. She still has pain on cervical range of motion. He opined that with no history of prior cervical treatment, the heavy and strong force of the mirror would be consistent with the disc herniations and annular tears. He found the treatment and work restrictions reasonable and necessary. He opined that Petitioner was unlikely to be able to return to work as an esthetician. He discussed a possibility of a spinal cord stimulator (PX 7).

Petitioner was evaluated by Dr. Frank Phillips at Respondent's request (RX 1). He obtained a history from Petitioner, reviewed medical records including MRI imaging, and completed an examination of Petitioner. He opined that the accident caused a cervical strain/sprain based on subjective complaints. She had underlying cervical spondylosis. The MRI findings are consistent with chronic degenerative condition without acute findings. He opined that the diagnosis is not causally related to the accident. He notes she had no treatment between April 2016 and September 2016 after which Petitioner had been fired and sent to the emergency room by her attorney. He stated that, regardless of causation, Petitioner is at MMI from her surgery and could return to her regular work without restriction (RX 1).

Petitioner testified she did not return to work because she was still having pain and let her license go. She received Social Security since 2017 for her husband. She currently does water therapy for her whole spine. She sees Dr. Rodriquez and a neurologist once per year. She testified that if she puts pressure on the area where she was hit, it is till sensitive. The muscles in her neck tighten up and her fingers turn blue. This happens every day. She has a dull, constant pain in her neck. She testified that she has to be careful with lifting. She must take breaks. She takes Tylenol for pain about every 3 days.

Conclusions of Law

In support of the Arbitrator's decision with respect to (B) Employer/Employee Relationship, the Arbitrator finds as follows:

The claimant in a workers' compensation case 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, 403 N.E.2d 221, 38 Ill. Dec. 133 (1980)*. Respondent has disputed that the relationship between Petitioner and Respondent was employer/employee on March 31, 2016, claiming the relationship was that of an independent contractor.

Ware v. Industrial Comm'n, 318 Ill. App. 3d 1117, 743 N.E.2d 579, 2000 Ill. App. LEXIS 998, 252 Ill. Dec. 711(1992) set out the analysis to determine the status of the relationship:
No rigid rule of law exists regarding whether a worker is an employee or an independent contractor. *Area Transportation Co. v. Industrial Comm'n*, 123 Ill. App. 3d 1096, 1099, 80 Ill. Dec. 421, 465 N.E.2d 533 (1984). Rather, courts have articulated a number of factors to consider in making this determination. The single most important factor is whether the purported employer has a right to control the actions of the employee. *Bauer v. Industrial Comm'n*, 51 Ill. 2d 169, 172, 282 N.E.2d 448 (1972). Also of great significance is the nature of the work performed by the alleged employee in relation to the general business of the employer. *Ragler Motor Sales v. Industrial Comm'n*, 93 Ill. 2d 66, 71, 66 Ill. Dec. 342, 442 N.E.2d 903 (1982); *Peesel v. Industrial Comm'n*, 224 Ill. App. 3d 711, 716, 166 Ill. Dec. 752, 586 N.E.2d 710 (1992). Additional factors to consider are the method of payment, the right to discharge, the skill the work requires, which party provides the needed instrumentalities, and whether income tax has been withheld. *Wenholdt v. Industrial Comm'n*, 95 Ill. 2d 76, 80-81, 69 Ill. Dec. 187, 447 N.E.2d 404 (1983). Finally, a factor of lesser weight is the label the parties place upon their relationship. *Earley*, 197 Ill. App. 3d at 317.

This standard has been restated in *Esquinca v. Ill. Workers' Comp. Comm'n*, 2016 IL App (1st) 150706WC, P47, 51 N.E.3d 5, 15, 2016 Ill. App. LEXIS 60, *25-27, 401 Ill. Dec. 812, 822:
Our supreme court has identified a number of factors to assist in determining whether a person is an employee. Among the factors cited by the supreme court are: (1) whether the employer may control the manner in which the person performs the work; (2) whether the employer dictates the person's schedule; (3) whether the employer compensates the person on an hourly basis; (4) whether the employer withholds income and social security taxes from the person's compensation; (5) whether the employer may discharge the person at will; and (6) whether the employer supplies the person with materials and equipment. *Roberson*, 225 Ill. 2d at 175. Another relevant factor is the nature of the work performed by the alleged employee in relation to the general business of the employer. *Id.*; see also *Ware*, 318 Ill. App. 3d at 1122. The label the parties place on their relationship is also a consideration, although it is a factor of "lesser weight." *Ware*, 318 Ill. App. 3d at 1122. The significance of these factors rests on the totality of the circumstances, and no single factor is determinative. *Roberson*, 225 Ill. 2d at 175. Nevertheless, whether the purported employer has a right to control the actions of the employee is "[t]he single most important factor." *Ware*, 318 Ill. App. 3d at 1122; see also *Bauer v. Industrial Comm'n*, 51 Ill. 2d 169, 172, 282 N.E.2d 448 (1972). The nature of the claimant's work in relation to the employer's business is also an important consideration. *Kirkwood*, 84 Ill. 2d at 21; *Steel & Mach. Transp., Inc. v. Ill. Workers' Comp. Comm'n*, 2015 IL App (1st) 133985WC, ¶ 31, 392 Ill. Dec. 873, 33 N.E.3d 674.

In assessing this fact specific issue, the Arbitrator notes that there were widely divergent versions of the nature of the relationship between the testimony of Petitioner and Ms James. The parties agree that Petitioner signed an independent contractor agreement before beginning with Respondent. Ms. Vandy confirm that this was an independent contractor agreement. Petitioner received a check or direct deposit every two weeks which did not take out any taxes or other deductions. She was provided no benefits. Petitioner did not receive a salary but was compensated based upon a percentage of the receipts from the clients she serviced. Petitioner claimed she also received hourly pay for other work she did such as folding towels, answering phones, or assisting with groups. Ms. James agreed she may have done some of these tasks, but denied any additional payments beyond her percentage commission. The checks and direct deposit forms do not indicate any such additional hourly payments. Petitioner claimed a regular work schedule, while Ms. James testified Petitioner could come and go as she pleased and did cancel appointments prior to March 31, 2016 due to physical problems.

In determining the issue, the Arbitrator must assess the weight to be given to the divergent factual testimony of the parties. 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. *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).

Having heard the testimony, observed the witnesses, and reviewed the exhibits in this matter, including the extensive medical records which include Petitioner's histories and statements to the providers, the Arbitrator finds that the Petitioner repeatedly made statements or representations that were contradicted by other evidence or her own words. Petitioner advised numerous medical providers of diagnoses that had not been made other than in her own mind. Her histories all contain statement that she cracked her teeth, but the dental records do not corroborate this. The x-ray taken by Dr. Colletti do not state that there were any fractures. She reports from the very onset that she had a concussion, but this diagnosis does not appear in any of the early records. She testified she just assumed that because she was struck on the head, she had a concussion. Petitioner also continues to claim ongoing multiple symptoms including headache, dizziness, nausea, and vision disturbances along with her neck pain and continued radicular complaints into her arm. She testified that she did not look for work after her August 2016 separation from Respondent because she lost her sense of taste and smell and had pain radiating down her left arm and down her back that, combined with the neck pain, made her nauseous. But on September 6, 2016, when Petitioner went to the Delnor Hospital emergency room at her attorney's instruction, she reported her concussive symptoms have resolved, and denied radiation of the pain or numbness or tingling.

After the 2017 McDonald's fall, the x-ray reports do not disclose a fracture, but Petitioner continues to report a left foot fracture in subsequent histories. She also reported that she twisted her ankle on March 31, 2016 and relates her foot fracture to this incident in other subsequent histories. Similarly, after the Target injury, she claims to have also injured her low back on March 31, 2016 in subsequent medical records. The Arbitrator notes that the medical histories of exactly where the mirror purportedly struck her (right side of the head, back of the head, left side of the head) vary with the history provided.

Petitioner's propensity to stray from the truth is highlighted most prominently in her testimony and medical histories of the accident itself. Petitioner repeatedly describes a heavy mirror striking her and driving her to the ground. She then reports immediate onset of significant, disabling symptoms. The Arbitrator recognizes the thinly veiled personal animosity between Petitioner, Ms. Vandy and Ms. James, the result of soured business

and personal relationships. But Renee Piermattei has no personal stake in this matter and contradicts Petitioner's version of the event in every significant detail, including the size of the mirror, her location at the time it fell, her reaction, Petitioner's position, the method of lifting the mirror and its weight, and Petitioner's reaction after the incident. The Arbitrator finds this testimony to be the most credible presented and untainted by the animosity of the other witnesses to each other.

The Arbitrator also takes note that Petitioner was able to continue working the rest of the day and for almost 5 months until she was separated for reasons unrelated to her physical condition and immediately stated she was unable to work due her pain. And she before seeking any medical attention. Based upon the record as a whole, the Arbitrator finds that Petitioner lacks credibility and therefore discounts her testimony as to the nature of the relationship. Based upon the testimony presented and corroborated by the documents and the testimony of Ms. James, the Arbitrator completes the analysis of the relationship.

It is undisputed that the parties entered a signed independent contractor agreement at the start of the relationship. Ms. Vandy corroborated that there was an independent contract signed. She testified that when she left, she took her clients with her to a new location. Petitioner also acknowledged that she viewed the relationship as a contractor when she saw Emediate Cure on September 8, 2016 and told them the location was where she was providing contracted work, but not her place of employment. The Arbitrator notes no testimony as to who provided her tools and equipment. Since Petitioner was told in August 2016 to come collect her things, the Arbitrator infers that she had some equipment she provided. Petitioner was paid commission, not hourly or salary, based upon the clients she serviced. The Arbitrator finds no credible evidence that she received hourly pay for other duties. The checks she submitted show no such calculation and no evidence to corroborate her claim was made. Ms. James disputed this claim. Petitioner's checks did not take out taxes or other deductions. She did not receive a W-2. She did not receive any benefits.

With respect to her performing ancillary services beside her specific specialty skills, the Arbitrator infers that since Petitioner's income was based on the clients she serviced, it is to her own interest to answer the phone because the call may be someone she can schedule. Given the personal relationship between Ms. James and Petitioner, and that she would likely have down time between clients, it is reasonable to infer that other services she performed were voluntary and in the interest of the relationship rather than compensated duties. The Arbitrator notes that Petitioner has schooling and special skills as an esthetician. Respondent did not determine or dictate the manner in which she would provide these specialized services. This was a separate service provided at Respondent's location ancillary to the blowout services performed. Petitioner had her own clients. The computer system and app allowed her to do her own scheduling and to check to schedule for clients set by others. The Petitioner testified she had a general schedule. This would be necessary for others scheduling appointments for her but does not rise to the level of Respondent setting her hours. Her business card included her personal cell phone number as well as the salon's. There was no evidence that Respondent controlled her work. The Arbitrator notes that Ms. James contacted Petitioner on March 31,2016 to ask if she could provide service for her daughter. The Arbitrator also notes that Ms. James testified she did not fire Petitioner, but rather terminated the contract. The document was not offered into evidence, and therefore the Arbitrator cannot determine what provisions for ending the relationship were contained therein and if they were followed.

Reviewing the record as a whole, and the elements of the relationship to be analyzed, the Arbitrator does not find any of the elements of employment have been proven by Petitioner. Most importantly, the Petitioner has failed to establish that Respondent had sufficient control of her work to establish employment.

Based upon the record as a whole, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that on March 31, 2016 the relationship between Petitioner and Respondent was one of Employer/Employee.

In support of the Arbitrator's decision with respect to (C) Accident, (E) Notice, (F) Causal Connection, (J) Medical, (K) Temporary Compensation, (L) Nature & Extent, and the Arbitrator finds as follows:

Based upon the Arbitrator's finding with respect to Employer/Employee Relationship, the remaining issues are moot. Petitioner's claim for compensation is denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC017245
Case Name	Mary Catherine Kelly v. Jacobs Engineering
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0268
Number of Pages of Decision	16
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Jonathan Svitak
Respondent Attorney	Martin T. Spiegel

DATE FILED: 6/22/2023

/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 strike sentence, page 6, first paragraph, 3rd sentence	☐ PTD/Fatal denied
☐ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARY CATHERINE KELLY,

Petitioner,

vs. NO: 20 WC 17245

JACOBS ENGINEERING,

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, notice, temporary total disability, medical expenses, permanent partial disability, and Statute of Limitations, 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, herein, modifies the Arbitrator's Decision, on page 6, first paragraph, striking the third sentence beginning with "Under the 'street risk' doctrine…".

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 19, 2022, is hereby, otherwise, affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $42,600.00. 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.

June 22, 2023

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

o- 5/23/23
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	20WC017245
Case Name	Mary Catherine Kelly v. Jacobs Engineering
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Jonathan Svitak
Respondent Attorney	Martin Spiegel

DATE FILED: 7/19/2022

/s/Charles Watts, Arbitrator
Signature

INTEREST RATE WEEK OF JULY 19, 2022 2.91%

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

MARY CATHERINE KELLY Case # **20** WC **17245**
Employee/Petitioner

v.

JACOBS ENGINEERING
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **CHARLES WATTS**, Arbitrator of the Commission, in the city of **Chicago**, on **November 15, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **07/21/2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**71,305.00**; the average weekly wage was $**1,371.25**.

On the date of accident, Petitioner was **61** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**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 **all medical bills and disability benefits** under Section 8(j) of the Act.

ORDER

Petitioner has proven that she sustained an injury arising out of and in the course of her employment with Respondent on July 21, 2017. Petitioner has further proven that she provided notice to her employer both verbally and in writing within 45 days following the accident. Petitioner has established that the July 21, 2017 accident was a cause of her left knee injury, which required surgical repair of her left knee meniscus.

Respondent shall pay Petitioner permanent partial disability benefits of $**790.64**/week for **53.75** weeks, because the injuries sustained caused the **25**% loss of the **left leg**, as provided in Section 8(e) of the Act.

SEE ATTACHED MEMORANDUM

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

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

Signature of Arbitrator

July 19, 2022

IN THE WORKERS' COMPENSATION COMMISSION OF THE STATE OF ILLINOIS
CHICAGO, ILLINOIS

MARY CATHERINE KELLY **Petitioner,**	)	
v.	)	**20 WC 17245**
JACOBS ENGINEERING, **Respondent.**	)	

DECISION OF THE ARBITRATOR

Findings of fact

Petitioner's Testimony

Petitioner testified that on the day of her work injury, July 21, 2017, she was a 61-year-old security analysis for Jacob's Engineering. Petitioner had held this position with Respondent for 2 years, although she had been with Respondent in a similar capacity since July of 2014. TR., pg. 9-10. Petitioner testified her work duties consisted of helping to develop and write procedures and protocols for Respondent's global security program. In addition, she handled internal investigations. TR, pg. 9. Petitioner frequently traveled as part of her work responsibilities. TR, pg. 14. Over the last year and a half, prior the accident, Petitioner made approximately seventeen (17) work trips. TR, pg. 15.

Petitioner testified that on July 21, 2017, she was returning home from Houston, Texas. She had just attended a meeting for all of the safety and security employees. Attendance at the meeting was required by her supervisor, Joe Olivarez. TR, pg. 16. The flight home to Chicago was scheduled for July 21, 2017. That day, she met again with her team members, including her supervisor, Joe Olivarez. Petitioner testified that her team, including Mr. Olivarez, knew that she was returning home. Upon landing at Midway Airport, Petitioner proceeded to baggage claim

with her carry-on luggage, which included a company-issued laptop and documents. Petitioner used the moving walkway within the concourse of Midway Airport. Petitioner testified that when she attempted to step off of the moving walkway, her left knee buckled and she fell to the floor. TR, pg. 18.

An airport concierge helped her into a wheelchair and then to baggage claim, where her checked luggage was retrieved. Petitioner testified that after retrieving her luggage, she waited for her boyfriend to come pick her up. That same night, on July 21, 2017, Petitioner sent a text message to her supervisor, Joe Olivarez. Petitioner informed Mr. Olivarez that she had arrived in Chicago, but that she "blew out my knee." TR, pg. 22. Petitioner would have no further communication with her employer that weekend.

Petitioner testified that on Monday, July 24, 2017, she had another conversation with Mr. Olivarez. Petitioner testified that she told him that she had fallen at Midway Airport and that her left knee had given out. TR, pg. 24. Petitioner also testified that during this conversation, she told him that she had scheduled a doctor's appointment specifically for her knee injury.

Petitioner's Medical Treatment

Petitioner testified, and the medical records show, that her first appointment for her left knee injury was with Dr. Kathryn Burke, Petitioner's primary care doctor. See PX #3. Dr. Burke referred Petitioner to an orthopedic named Dr. David Mehl of Specialty Physicians of Illinois. See PX #1. Petitioner's first visit with Dr. Mehl was on August 11, 2017, during which she told him that she had injured her knee while walking through the Midway Airport. Dr. Mehl examined Petitioner's left knee and recommended that she undergo an MRI. Petitioner underwent the MRI on August 21, 2017. It demonstrated left knee medial meniscus tear, left knee chondromalacia, and left knee Baker's cyst. Dr. Mehl recommended a left knee

arthroscopy, including a partial medical meniscectomy, chondroplasty, and an aspiration of Baker's cyst. See PX 1. Petitioner's surgery was scheduled for September 8, 2017. Following Petitioner's August 21, 2017 visit, Dr. Mehl created an Occupational Health Injury Report, which was contained in RX #1. Petitioner testified that the note indicated her injury was an "acute medial meniscus tear of the left knee." The note also indicated that Petitioner would have to remain out of work between September 7, 2017 through September 18, 2017. Petitioner testified that she would have presented this note to her employer. TR, pg. 61-62.

Petitioner testified that prior to her scheduled surgery, on numerous occasions, she would discuss her left knee injury and treatment with her supervisor, Joe Olivarez. Petitioner testified that she informed Mr. Olivarez about the scheduled surgery and that she would have to be off work for ten days. Mr. Olivarez knew that her left knee surgery was related to the occurrence at Midway Airport.

Petitioner's medical records show that she underwent the aforementioned surgery on September 8, 2017 and continued to follow-up with Dr. Mehl on a regular basis through December 12, 2018 for post-surgical care and treatment. Petitioner underwent multiple post-surgical cortisone injections.

Petitioner also underwent physical therapy at Independence Physical Therapy after the September 8, 2017 surgery. Petitioner attended therapy from September 15, 2017 through December 8, 2017. PX #2. For each and every therapy visit, Petitioner testified that she would inform Mr. Olivarez that she would be out of work due to physical therapy. TR, pg. 29-30.

Petitioner testified that she had had other conversations with her supervisor, Joe Olivarez, regarding her work accident. Petitioner testified that on or around November 14, 2017, she had a conversation with Mr. Olivarez about her left knee injury. During the conversation, Petitioner

mentioned that her left knee had happened during a work trip. Petitioner testified that Mr. Olivarez told her that he had not considered that fact and gave her the name and phone number of a member of Jacob's Engineering's human resources department. TR, p. 34-35. Petitioner testified that although she attempted to call the number given to her by Mr. Olivarez, she did not get in contact with anyone.

Petitioner testified that while working for Jacob's Engineering, she submitted her medical bills incurred as a result of her left knee injury through United Health Care, Respondent's group insurance carrier. TR, pg. 39. Petitioner testified that she would pay part of the premiums for her health insurance and cover any portion of the medical bills not paid by her group insurance. Petitioner testified that the bills pertaining to her care and treatment for her left knee were automatically submitted to her group health insurance carrier, including the medical bills identified in PX 1, PX 2, and PX 3.

Conclusions of Law

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

An employee's injury is compensable under the Act if it arises out of and in the course of her employment. 820 ILCS 305/2. In the course of refers to the time, place, and circumstances under which the accident occurred. A traveling employee is considered to be in the course of her employment from the time she leaves home until he or she returns. Cox v. Illinois Workers' Compensation Comm'n, 406 Ill.App.3d 541, 545 (2010). Traveling employees include anyone required to travel away from her employer's premises in order to perform her job. Id. A traveling employee must still establish that her injury arose out of her employment. Id. The test for determining whether an injury to a traveling employee arose out of and in the course of her

employment is the reasonableness of the conduct in which he was engaged and whether the conduct might normally be anticipated or foreseen by the employer. Id. A traveling employee may be compensated for an injury as long as the injury was sustained in an activity which was both reasonable and foreseeable. Id. at 546.

Here, Petitioner qualifies as a traveling employee. She testified that she was required to fly to Houston for a work meeting: her home office was located in Chicago. She further testified that over the last year and a half of her employment with Respondent, she estimates that she made seventeen (17) flights for work-related events. Each time Petitioner traveled for work, including on July 21, 2017, she booked her travel through a company travel agency. While walking through the Midway Airport on July 21, 2017, Petitioner used the moving walkway. When attempting to step off the moving walkway, her left knee buckled. She still had her carry-on luggage, which including a company-issued laptop slung over her right shoulder. Petitioner's walk through the airport and her use of the moving walkway was reasonable and foreseeable to Respondent.

In Mlynarczyk v. Illinois Workers' Compensation Comm'n, 2013 IL App (3d) 120411WC, the appellate court found that because the petitioner was considered a traveling employee, the accident occurring "as she was walking" to the vehicle used to transport her to work, was compensable under the Act. Mylnarczyk, 2013 IL App (3d) 12041WC at ¶ 21. In Metropolitan Water Reclamation Dist. Of Greater Chicago v. Illinois Workers' Compensation Comm'n, the appellate court again found that petitioner, by virtue of her designation as a traveling employee, sustained a compensable injury when she tripped over a public sidewalk. Id. at 1014. The court noted that under the "street risk" doctrine, where evidence establishes that the claimant's job requires that she be on the street to perform the duties of her employment, the

risks of the street become one of the risks of the employment, and an injury sustained while performing that duty has a causal relationship to her employment. Id. In that circumstance, it is presumed that the claimant is exposed to risks of accidents in the street to a greater degree than if she had not been employed in such a capacity, and the claimant will be entitled to benefits under the Act. Id. at 1015.

Here, the same logic applies. Petitioner was a traveling employee for Respondent. Under the "street risk" doctrine, she is exposed to the risk of accident simply by being mobile. For those reasons, the Arbitrator finds Petitioner has established that the July 21, 2017 accident arose out of and in the course of her employment with Respondent.

D. What was the date of the Accident?

The Arbitrator finds, as the Petitioner testified, that the date of her accident was July 21, 2017.

E. Was timely notice of the accident given to Respondent?

The Arbitrator finds that Petitioner provided notice of her accident to her immediate supervisor, Joe Olivarez, on multiple occasions and has thus complied 820 ILCS 305/6(c). Section 6(c) allows for notice of the accident to be provided orally or in writing, and the notice element of the Act is satisfied if the employer becomes aware of the accident from observation or from receiving reports from sources other than the injured employee. The notice element is satisfied if the employer is generally aware of the employee's medical condition or injury, even if there is no knowledge the condition or injury is work-related. Yellow Freight Systems v. Industrial Commission, 124 Ill. App. 3d 10018 (2nd Dist. 1984).

Petitioner testified credibly that she texted her immediate supervisor on the day of the accident to let him know that she had injured her knee. She also testified that she was in regular

communication with her supervisor the following week and told him that she was making an appointment to see her doctor for her knee injury. Further, Petitioner provided an off work note to her employer on August 21, 2017, informing it that she would be off work between September 8, 2017 through September 19, 2017 due to an "acute medial meniscus" injury. Based on the foregoing findings of fact, the Arbitrator finds that Petitioner has established proper notice under the Act.

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

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to the July 21, 2017 work accident in which Petitioner injured her left knee while walking through the Midway Airport returning from a work-related trip to Houston. This finding is supported by the Petitioner's testimony and the consistent histories provided in the medical records admitted as evidence. Dr. Mehl's records clearly establish an acute injury to the medial meniscus of Petitioner's left knee. Between July 26, 2017 and August 21, 2017, Petitioner consistently reported her symptoms to both Dr. Burke and Dr. Mehl. The MRI report also confirmed Dr. Mehl's diagnosis and recommendation for surgery.

The Arbitrator also notes that Petitioner testified that she had prior bruising to her knees in a motor vehicle accident in December of 2016. However, Petitioner testified that she did not have extensive treatment for that injury and that it was not until the July 21, 2017, accident did she experience persistent left knee pain. Prior to August 11, 2021, she had never undergone an MRI for her left knee nor had she ever received a recommendation for surgery. With respect to causation, proof of prior good health and change immediately following and continuing after an injury may establish that an impaired condition was due to the injury. Granite City Steel Co. v. Indus. Comm'n, 97 Ill.2d 402 (1983). To constitute an accidental injury within the meaning of

the Act, the claimant need only show that some act or phase of the employment was a causative factor of the resulting injury. Teska v. Indus. Comm'n, 266 Ill.App.3d 740, 742 (1st Dist. 1994). Every natural consequence that flows from the injury which arose out of and in the course of the claimant's employment is compensable under the Act. Id.

Accordingly, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the July 21, 2017 work accident.

J. Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The Arbitrator finds that the medical bills incurred by Petitioner for treatment between July 21, 2017, and December 12, 2018 were reasonable and necessary medical services.

Petitioner testified and Petitioner's Exhibits demonstrate that all of the medical bills incurred as a result of the July 21, 2017, accident and subsequent injury to her left knee were paid by Petitioner's group health insurance. There is no dispute that Respondent is entitled to a credit pursuant to section 8(j).

L. What is the nature and extent of the injury?

Section 8.1(b) of the Act requires consideration of five factors in determining permanent partial disability:

1. The reported level of impairment;
2. Petitioner's occupation;
3. Petitioner's age at the time of the injury;
4. Petitioner's future earning capacity; and
5. Petitioner's evidence of disability corroborated by treating medical records.

No single factor is determinative.

1. Reported level of impairment:

An AMA impairment rating was not performed on Petitioner in this case. As such, this factor is given no weight.

2. Petitioner's occupation:

Petitioner was a security analyst. Petitioner testified that she primarily worked out of her home office when she was not required to travel for work. Petitioner testified that she was able to return to work following her surgery, even though she was supposed to be off work. Petitioner was able to continue to work for Respondent through her retirement.

Accordingly, this factor is given little weight, as Petitioner was able to return to her job and is now retired.

3. Petitioner's age at the time of injury:

Petitioner was 61 years-old at the time of her injury. It is likely that her pain will have a substantial impact on his ability to perform activities of daily living. It is also likely that Petitioner will require longer recovery periods after particularly bad flare-ups or aggravations than would a younger person. This factor is given some weight.

4. Petitioner's future earning capacity:

Petitioner is now retired. The Arbitrator places no weight on this factor.

5. Evidence of disability corroborated by the medical records:

Petitioner's left knee injury resulted in a medial meniscus tear, which required arthroscopic surgery, three months of physical therapy, three to four cortisone injections, and heavy-duty pain medications, including hydrocodone. Petitioner experienced persistent left knee pain from July 21, 2017, through her surgery date on September 8, 2017. Following surgery, Petitioner required extensive physical therapy and routine follow-ups with Dr. Mehl who continued to see Petitioner for more than a year following her surgery and continued to offer cortisone injections and prescriptions for pain medications.

Petitioner testified that that she continues to experience pain and instability in her left knee today, especially when climbing stairs or walking long distances. Petitioner testified that her pain levels fluctuate and that sometimes it feels "okay" and sometimes it feels "bad.". TR, pg. 37. The Arbitrator assigns this factor significant weight.

The Respondent shall pay the Petitioner the sum of $790.64 per week for a period of 53.75 weeks as the injury resulted in 25% loss of use of the Petitioner's left leg.

O. Statute of Limitations

The Arbitrator finds that Petitioner's Application for Adjustment of Claim has been timely filed, as she has satisfied the tolling exception under Section 8(j) of the Act.

Petitioner filed her Application for Adjustment of Claim on July 22, 2020. Petitioner testified that her injury occurred on July 21, 2017. As such, Petitioner's must establish an exception to the general rule that Applications be filed within three years of the date of accident in cases where no compensation has been paid.

Under Section 8(j) of the Act, if an employee establishes that she is receiving medical benefits from a group plan that receives contributions in whole or in part from the employer, the period of time for giving notice of accidental injury and filing Application of Adjustment of claim does not commence to run until the termination of such payments.

Here, Petitioner testified that her medical bills related to her care and treatment for the July 21, 2017 accident were submitted to her group health insurance carrier. Petitioner remained under the care and treatment of Dr. Mehl through December 12, 2018. As such, the applicable statute of limitations did not commence to run until December 12, 2018. Petitioner's Application is thus timely filed.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	11WC014161
Case Name	Lukasz Jendrzejczak v. Rafael Dominguez, David Rudolph & IWBF
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0269
Number of Pages of Decision	18
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Matt Walker
Respondent Attorney	Denise Greathouse, Charlene Copeland

DATE FILED: 6/23/2023

/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

LUKASZ JENDRZEJCZAK,

Petitioner,

vs. NO: 11 WC 14161

RAFAEL DOMINGUEZ, DAVID RUDOLF and
ILLINOIS STATE TREASURER,
as EX-OFFICIO CUSTODIAN of the
INJURED WORKERS' BENEFIT FUND,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed August 1, 2022, is hereby affirmed and adopted.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Illinois State Treasurer, as *ex-officio* 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.

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.

June 23, 2023
O: 06/15/23
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	11WC014161
Case Name	Lukasz Jendrzejczak v. Rafael Dominguez, David Rudolph & State Treasurer and Ex-Officio Custodian of the IWBF,
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	15
Decision Issued By	Raychel Wesley, Arbitrator

Petitioner Attorney	Matt Walker
Respondent Attorney	Denise Greathouse, Charlene Copeland

DATE FILED: 8/1/2022

THE INTEREST RATE FOR THE WEEK OF JULY 26, 2022 2.92%

/s/ Raychel Wesley, 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

Lukasz Jendrzejczak, Case # 11 WC 014161
Employee/Petitioner
v.
Rafael Dominguez, David Rudolph & State Treasurer And Ex-Oficio Custodian of the IWBF,
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 Raychel A. Wesley, Arbitrator of the Commission, in the city of Chicago, on May 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 Respondents?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondents?
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? Have Respondents 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 Section 9 Motion for Lump Sum Commutation

FINDINGS

On July 19, 2010, Respondents ***were*** operating under and subject to the provisions of the Act.

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

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 Respondents.

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

In the year preceding the injury, Petitioner earned $**13,000.00**; the average weekly wage was $**250.00**.

On the date of accident, Petitioner was **27** years of age, ***single*** with **0** dependent children.

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

Respondents have not paid all appropriate charges for all reasonable and necessary medical services.

Respondents 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

RESPONDENTS SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS OF $220.00 / WEEK FOR 337 WEEKS, COMMENCING JULY 19, 2010 THROUGH JANUARY 1, 2017 AS PROVIDED IN SECTION 8(B) OF THE ACT.

RESPONDENTS SHALL PAY REASONABLE AND NECESSARY MEDICAL SERVICES OF $772,683.88, AS PROVIDED IN SECTION 8(A) OF THE ACT.

RESPONDENTS SHALL PAY PETITIONER PERMANENT AND TOTAL DISABLITY BENEITS OF $466.13 / WEEK FOR LIFE, COMMENCING JANUARY 2, 2017, 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.

PETITIONER'S MOTION FOR SECTION 9 LUMP SUM COMMUTATION TO PRESENT CASH VALUE IS PREMATURE, AND THEREFORE DENIED. PETITIONER IS FREE TO REFILE THIS MOTION BEFORE THE COMMISSION OR A MEMBER THEREOF AS ALLOWED BY 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 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 RESPODNENTS RAFAEL DOMINGUEZ AND / OR DAVID RUDOLPH FAIL TO PAY 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. RESPONDENTS RAFAEL DOMINGUEZ AND DAVID RUDOLPH SHALL REIMBURSE THE INJURED WORKERS' BENEFIT FUND FOR ANY COMPENSATION OBLIGATIONS 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.

AUGUST 1, 2022

Raychel A. Wesley

Signature of Arbitrator

STATEMENT OF FACTS

Summary

Petitioner, Lukasz Jendrzejczak, was a twenty-six year old Polish immigrant who testified that he was injured on July 19, 2010 while working for Rafael Dominguez and David Rudolph. He testified that he learned the Respondent was hiring when he met Rafael at the Paris Café and that Rafael asked him if he wanted to drive for him. Petitioner said he would receive regular pay when he returned from trips and that he was paid $250.00 in cash weekly. However, he would sometimes be paid by check which he would cash at Western Union.

He explained that he drove a box truck and that his job was to pick up a load and bring it back to the Paris Café or wherever Rafael told him to deliver it. He sometimes worked seven days a week. When asked whether there were other drivers working for Rafael Dominguez and David Rudolph, he said there were more than two.

Petitioner explained that there were three trucks provided by Rafael. The trucks were kept at the Paris Café and Rafael decided which trucks Petitioner would drive. He reported to the Paris Café each working day where he picked up the keys for the truck. Rafael would then provide Petitioner with the address for the pickup and supply him with gas money. Rafael advised him that there were insurance cards in the truck's glove box.

He performed pickups and deliveries at different companies and he was required to inspect all loads to make sure they were safely secured but he did not have to do any of the loading or unloading. He handled the bills of lading and was required to check in with Mr. Dominguez at the beginning of the trip and should he travel toll roads, he would be reimbursed by Dominguez. Furthermore, if he had any mechanical problems while on a delivery, he just called Dominguez. For example, he testified that on his way to Pennsylvania, he lost the power steering. He contacted Rafael who told him where to take the truck for repairs. He testified that once the load was delivered, he was required to send the signed bill to Rafael.

Rafael Dominguez was an uninsured employer. (Petitioner's Exhibit #16). David Rudolph was an uninsured employer. (Petitioner's Exhibit #16). The Injured Workers' Benefit Fund (IWBF) was added as a Respondent. The only Respondent that appeared at the time of the hearing was the IWBF. The IWBF was represented by the Attorney General's Office. Respondents Rafael Dominguez and David Rudolph were provided with proper notice but failed to appear at the hearing. (Petitioner's Exhibits 22 & 23).

The petitioner was injured in a motor vehicle accident on July 19, 2010 while working for Respondents. Respondents Rafael Dominguez and David Rudolph were notified of the accident within 45 days as required by the Act. The petitioner has been unable to return to work since the accident on July 19, 2010.

Medical treatment has been reasonable, necessary and related to the work injury.

The petitioner's orthopedic and cardiac injuries are related to the work injury. This is based on the chain of events as well as the opinions of the medical doctors contained within the medical records. The petitioner's subsequent stroke is related to the work accident. Petitioner was on coumadin as a result of the aortic valve replacement performed on August 2, 2010. Poor management of coumadin led to the stroke. The stroke occurred due to treatment related to the first injury and was therefore a natural consequence flowing from the original injury.

Claimant is permanently and totally disabled because of the work accident. This is based on the unrebutted opinions of Lisa Helma, CRC. The petitioner is entitled to permanent total disability benefits as of the date of Ms. Helma's opinion dated January 2, 2017.

No benefits have been paid to date. Petitioner's Exhibit 24 consisted of a Section 9 Motion requesting any award be commuted to a lump sum. Section 9 of the Act states that such a motion must be made before the Commission or any member thereof, and not the Arbitrator. As such, Petitioner's motion is denied as premature. The petitioner is free to refile the Section 9 motion before the Commission or a member thereof as specified by the Act.

Traffic Crash Report

The Ohio State Highway Patrol completed a traffic crash report on July 19, 2010. (Petitioner's Exhibit #15). The report revealed that the petitioner was driving a white Chevy box truck owned and insured by David Rudolph at the time of the accident. The petitioner was identified in the report as Unit #1. The narrative was as follows: Unit #2 was a disabled motor vehicle parked on the shoulder of the eastbound lanes of the Ohio Turnpike. Unit #3 was a service vehicle parked in front of Unit #2. Unit #1 (Petitioner's truck) drove off the right side of the roadway and struck Unit #2, causing Unit #2 to strike Unit #3. The report recorded in the damage analysis section that the engine compartment of the petitioner's vehicle was pushing into the cab, trapping Petitioner inside the vehicle.

Medical Treatment

Following the accident, the petitioner was taken to St. Elizabeth Health Center. The initial impression was right hip posterior dislocation and chest wall trauma. The recorded history was: "This was a 23-year-old, unrestrained, male driver. Extensive intrusion and damage to the car. He was complaining of chest pain and right hip / leg pain. He was sent in by a Metro Life Flight Helicopter." (Petitioner's Exhibit #1, p. 14).

On July 19, 2010, the Petitioner underwent an open knee arthrotomy, incision and draining of the right lower extremity followed by a complex closure of the left lower extremity. (Petitioner's Exhibit #1, p. 26). On July 20, 2010, the Petitioner underwent an open reduction and internal fixation of the right femoral head fracture through anterior Smith-Petersen approach with removal of loose bodies. (Petitioner's Exhibit #1, p. 46).

On July 20, 2010, the Petitioner was diagnosed with a tear drop fracture of L4 and an L5 transverse process fracture. (Petitioner's Exhibit #1, p. 24).

On July 30, 2010, the Petitioner was warned that it was extremely important that he be on the drug, Coumadin. (Petitioner's Exhibit #1, p. 41).

On August 2, 2010, the Petitioner underwent a CarboMedics aortic valve replacement, primary repair and closure of focal aortic dissection, flap and exploration of ruptured posterior pericardium and epiaortic ultrasound. (Petitioner's Exhibit #1, p. 49). In the operative report, the surgeon, Dr. Timothy Hunter, noted that "[i]t appeared to me to be traumatic for two reasons: One, I think had this been congenital, that the heart would have been firmly adhered to the lung and it would not have been able to be taken down. These were bluntly dissectible adhesions with my finger. Secondarily, there appeared to be lung visible that was also eccymotic.". (Petitioner's Exhibit #1, p. 51).

The Petitioner was discharged from St. Elizabeth Health Center on August 26, 2010. (Petitioner's Exhibit #1, p. 15). The discharge summary provided a succinct recitation of the treatment rendered at St. Elizabeth Health Center after the work accident, the salient points of which are set forth above.

On January 12, 2011 Petitioner was seen at Loyola. (Petitioner's Exhibit #7, p. 5). History of the accident was provided. Petitioner's current status is included and his complaints of pain were noted. The physical

examination that day revealed a well-developed 27 year old male in no acute distress. A well healed incision over his anterior knee and an anterior incision over the hip were noted. The plan was to continue activity as tolerated and follow up in six months.

On April 11, 2011, Petitioner came under the care of Dr. Forys at Central Medical Clinic of Chicago. Forys noted the history and the fact that Petitioner was status post aortic valve replacement and ORIF right hip and right knee symptoms was charted. (Petitioner's Exhibit #4, p. 71). At the time of the visit, the Petitioner was having trouble with walking, arm stiffness, decreased range of motion in the hip, trouble with lifting, squatting and kneeling, lower back pain, right knee pain and back pain, lightheadedness with rising and chest pain with coughing and sneezing.

The physical exam performed on April 11, 2011, revealed severe deficits in the right hip range of motion and decreased flexion in the right knee. The assessment was mechanical heart valve secondary to accident, right hip / knee pain and low back pain.

Petitioner continued to treat with Dr. Forys, who prescribed medication, administered injections and prescribed physical therapy. On August 24, 2012, Petitioner was referred to Dr. Mark Sokolowski and continued off work. (Petitioner's Exhibit #4, p. 53). On September 28, 2012, Petitioner had his first appointment with Dr. Sokolowski. (Petitioner's Exhibit #3, p. 2). Sokolowski noted that he was seeing Petitioner as a consult at the request of Dr. Forys. Petitioner gave the history of the accident and his course of treatment to date of consult. He reported that *since the time of the collision, he has had persistent periscapular pain, mid back pain, lumbar pain, and right hip pain, a persistently altered gait pattern, and persistent numbness affecting his right lower extremity, and reported these symptoms as unrelenting. He rates his mid back and low back symptoms as 7/10 and his leg symptoms as 8/10 on the visual analogue scale. He reports that these symptoms collectively adversely affect his quality of life and impede his functional capabilities. He is interested in any incremental relief, which may be available to him. He has not had any recent radiographic studies; his most recent studies were x-rays of his pelvis obtained in January 2011 to evaluate his right hip. Past medical history is significant for collision as noted.*

Medications include Coumadin as part of his chronic anticoagulation for his mechanical aortic valve replacement, Tylenol, and Aspirin.

The physical examination revealed Petitioner's current condition, which among other things included *an antalgic right-sided gait pattern, with evidence of gluteus medius weakness on the right, positive Spurling sign bilaterally, but full shoulder range of motion. Additionally, he had periscapular tenderness to palpation and negative shoulder impingement signs. He had midline thoracic tenderness to palpation in the periscapular region, and lumbar paraspinal tenderness to palpation as well.*

After examination, Sokolowski gave causal connection to the following conditions: lumbar pain, thoracic pain, features of cervical radiculopathy, right open reduction and internal fixation of medial femoral head fracture fragment, right knee pain and lumbar radiculopathy. (Petitioner's Exhibit #3, p. 3). The petitioner continued off work. (Petitioner's Exhibit #3, p. 3).

CT scans were performed on November 14, 2012. (Petitioner's Exhibit #3, pp. 38-40). An EMG-NCV was done on November 29, 2012. (Petitioner's Exhibit #3, p. 42). On December 13, 2012, Sokolowski noted that the EMG demonstrated lumbar radiculopathy, and charted that the hip would need to be followed closely over the coming years to evaluate for degenerative changes or findings consistent with avascular necrosis such as sclerosis or femoral head collapse. (Petitioner's Exhibit #3, p. 4).

On December 13, 2012, Petitioner suffered an Ischemic stroke with hemorrhagic conversion and was treated at the Northwestern Memorial Hospital. In part, the history reads as follows:

Patient with mechanic aortic valve (aortic injury in a major MVA 2 years ago), non-compliant with Coumadin, who presented to an [Northwest Community Hospital] on 12/13 with right facial droop, dysarthria and right-side weakness. Presented outside window for TPA but was taken for mechanical thrombectomy after MR brain with perfusion showed acute left basal ganglia infarct with moderate-sized penumbra of reduced mean transit time in the left frontal lobe. Early the next morning, patient developed nausea / vomiting; HCT done which showed hemorrhagic conversion with mass effect on left frontal horn. Several CTs over the next 24 hours showed expansion of intraparenchymal hematoma with extension into 3rd and 4th ventricles and worsening hydrocephalus. Decision to transfer to NMH on 12/15 for management of hemorrhagic conversion and hydrocephalus.

Of note, the patient acknowledges non-compliance with Coumadin except that he took 2 Coumadin tabs on 12/13 after he noticed neuro deficits; INR on presentation to OSH was 1.1.

The doctors at Northwestern opined that the cause of the original infarct was most likely cardioembolic given mechanical valve with essentially no anticoagulation on board. (Petitioner's Exhibit #13, p. 448).

On December 20, 2012, Petitioner underwent an inferior vena cava filter replacement procedure. (Petitioner's Exhibit #13, p. 370). Petitioner remained at Northwestern Memorial Hospital until he was accepted to the Rehabilitation Institute of Chicago for transfer on December 26, 2012. (Petitioner's Exhibit #14).

Petitioner underwent rehabilitation at RIC from December 26, 2012, through January 16, 2013. (Petitioner's Exhibit #14). During that time period, he underwent an IVC filter removal at Northwestern Memorial Hospital on January 15, 2013. (Petitioner's Exhibit #13, p. 19).

Dr. Forys continued to monitor Petitioner's condition. On March 11, 2013, Petitioner returned to Northwest Community Hospital for a 3-month post-intraarterial stroke rescue assessment with Dr. Michael Hurley. (Petitioner's Exhibit #9, p. 13). After assessment, his impressions were as follows:

The patient has recovered quite well but his deficits of higher function have a significant effect on his social interactions and future employment prospects. I agree with the patient and his mother that he should be continuing some form of longer-term speech and occupational therapy exercises, and they will work with their primary insurance company to find an appropriate provider.

Dr. Hurley's impression was the same at the one-year follow-up. (Petitioner's Exhibit #9, p. 5).

Petitioner saw Dr. Mark Sokolowski on May 26, 2016. (Petitioner's Exhibit #3, p. 6) Sokolowski noted the history and following his assessment, made observations and recommendations as follows: He remains functionally limited and symptomatic, he continues to require chronic anti-coagulation for his metal aortic valve, which precludes MRI evaluation and limits his ability to receive invasive pain management procedures. He further recommended that Petitioner proceed with FCE to objectively delineate his capabilities and need for permanent restrictions going forward and stated that he would see him after the FCE has been completed.

Sokolowski continued Petitioner off work. (Petitioner's Exhibit #3, p.8). The FCE was completed on June 16, 2016. (Petitioner's Exhibit #3, p. 12). The FCE revealed that Petitioner did not meet the requirements to work as a truck driver. It was recommended that he may be eligible to work in a light / sedentary physical demand category but due to the stroke it was recommended that a professional neuropsychological evaluation be done to determine Petitioner's cognitive ability to safely perform his future work duties.

Petitioner followed up with Sokolowski after the FCE. (Petitioner's Exhibit #3, p. 10). The Petitioner was resigned to the fact that he was likely to have ongoing pain indefinitely in his lumbar spine with radiation to his leg and reported his quality of life remained severely adversely affected by his ongoing symptoms. Sokolowski placed Petitioner on permanent restrictions limiting the petitioner to the light / sedentary level of work.

Petitioner's testimony as to his current condition

The Petitioner did not have any physical problems prior to the work accident. (Transcript, pp. 44-45). The Petitioner did not have any issues with thinking, understanding or communicating prior to the accident. (Transcript, p. 45). The pain in his right hip causes him to limp. (Transcript, p. 45). It also affects his ability to sit and stand. (Transcript, pp. 45-46). His right knee is painful. (Transcript, p. 46). He drags his right leg. (Transcript, p. 46). His back hurts every day. (Transcript, p. 46). His conditions affect his ability to sleep. (Transcript, p. 47). The Petitioner can't pick up his right leg, can't run and is unable to kneel. (Transcript, pp. 47-48). The Petitioner is right-handed, and his right hand is now weak, and he is unable to grab things and pick things up. (Transcript, p. 48). Petitioner has issues understanding things. (Transcript, p. 48). His condition has adversely affected his ability to interact with people. (Transcript, p. 49). He requires his mother to assist him with normal daily activities. (Transcript, p. 50). Petitioner is still taking coumadin. (Transcript, p. 49).

Testimony of Marzenna Jendrzejczak

Marzenna Jendrzejczak is Petitioner's mother. (Transcript, p.70). The State of Illinois pays her to be the Petitioner's personal assistant and her duties include helping him with his daily activities including meals, doctor visits, shopping, groceries, laundry and dressing. (Transcript, p. 70-71). She has had ample opportunity to observe the Petitioner both before and after the work accident. (Transcript, p. 71). She confirmed that the Petitioner did not have any physical problems prior to the work accident on July 19, 2020 nor did he have any issues with thinking, understanding, reading or writing. (Transcript, p. 72). Petitioner did not have social problems prior to the work accident on July 19, 2020. (Transcript, p.72).

She testified that after the accident, the Petitioner had issues with walking, standing in one spot, and problems utilizing his right upper extremity. Since the accident, Petitioner has had difficulty understanding and following simple instructions, problems with reading, and has become socially withdrawn. (Transcript, p. 73-77). She confirmed that that Petitioner has not worked since the July 19, 2010, work accident. She also testified to his desire to work again, but "I don't know what kind of work would fit him." (Transcript, p. 82).

Testimony of Wojciech Jendrzejczak

Wojciech Jendrzejczak is Petitioner's father. (Transcript, p. 85). He arrived in Ohio several days after the accident. (86). He notified Respondent David Rudolph after the accident. (Transcript, p. 86). He contacted the liability insurance carrier named on the insurance card that Mateusz Jendrzejczak found in the wrecked truck that Petitioner was driving on the date of the accident. (Transcript, p. 89).

Testimony of Mateusz Jendrzejczak

Mateusz Jendrzejczak is Petitioner's brother. (Transcript, p. 96). He was also working for Rafael Dominguez as a driver at the time of Petitioner's work accident on July 19, 2010. (Transcript, p. 97). Like the Petitioner, Mateusz was hired on the spot by Rafael Dominguez at the Paris Café. (Transcript, p. 97).

He testified that there were three or four trucks available to the drivers, and that trucks would be assigned by the drivers by Rafael Dominguez. (Transcript, p. 99). He testified to the same terms of employment as described by Petitioner. (Transcript, pp. 101-102).

After Petitioner's July 19 2010, work accident, Mateusz called Rafael Dominguez and notified him of the accident. (Transcript, p. 107). Dominguez asked for confirmation as to whether the load had been delivered. When it was established that the accident had occurred before Petitioner had completed the delivery, Rafael Dominguez sent another driver to pick up the merchandise. (Transcript, p. 110). Rafael Dominguez never inquired as to the Petitioner's condition. (Transcript, p. 111).

Report by Lisa Helma, Certified Rehabilitation Counselor (Petitioner's Exhibit #19)

Lisa Helma, a certified rehabilitation counselor, opined that Petitioner has lost access to his usual and customary line of occupation as a driver. She alco concluded that given his current medical status, Petitioner does not have access to any type of stable employment, and thus concluded that he is totally disabled.

In support of her opinion, Helma noted that Petitioner has difficulties with attention to detail, concentration, cognition, reading and writing, and that he would have a hard time working independently. Petitioner does not drive and would be dependent on either public transportation or others in order to commute. Given his cognitive impairments, Petitioner may struggle with utilizing public transportation.

All of Ms. Helma's opinions were rendered to a reasonable degree of rehabilitation certainty and consistent with the guidelines articulated in National Tea.

Credibility Assessments

Petitioner: The Arbitrator notes that Petitioner has been compromised by his stroke. This was evident in both Petitioner's demeanor and his manner of speaking, which at times appeared to be labored and difficult. The Petitioner appeared easily frustrated by his inability to articulate fluidly. The Arbitrator found the Petitioner to be credible. The petitioner's testimony is supported by the traffic crash report, the bill of lading and the histories contained in the medical records. His testimony surrounding his work for Rafael Dominguez and David Rudolph is supported and confirmed by the testimony of his brother Mateusz who was also working as a driver for Rafael Dominguez at the time of the work accident on July 19, 2010.

Marzenna Jendrzejczak: Marzenna Jendrzejczyk's testimony was credible. Her description of Petitioner's current condition is supported by the medical records and the fact that she is employed by the State of Illinois as Petitioner's personal assistant.

Wojciech Jendrzejczak: Wojciech Jendrzejczak testified credibly as to his attempt to contact David Rudolph, one of the Respondents, after the crash. He learned of David Rudolph from the insurance card that was kept in the truck Petitioner was driving at the time of the work accident.

Mateusz Jendrzejczak: Mateusz Jendrzejczak testified credibly. His testimony helped to clarify many of the details surrounding the employer-employee relationship with Rafael Dominguez. His testimony confirmed the testimony of the Petitioner. He testified credibly that he did not have any contact with Respondent David Rudolf, the owner of the truck. This was consistent with David Rudolf's alleged response of "I don't' know any Lukasz" when Petitioner's father called to report the accident to Mr. Rudolph.

CONCLUSIONS OF LAW

The Respondents Rafael Dominguez and David Rudolf were operating under and subject to the Illinois Workers' Compensation Act.

The Arbitrator finds that Rafael Dominguez and David Rudolph were owners of motor vehicles used in the distribution of commodities pursuant to Paragraph 3 as well as Paragraph 15 in which gasoline is used in the operation thereof.

There was an employer-employee relationship between the Petitioner and Respondents Rafael Dominguez and David Rudolf.

The Arbitrator finds that the testimony of Petitioner indicated that Respondents hired him to drive a box truck and that he was required to report to Rafael Dominguez each day whereupon Dominguez instructed him as to which truck to drive, where he was to pick up and deliver loads and required Petitioner to provide him with the Bill of Lading for each trip.

In addition, he provided Petitioner with money for tolls and gas and Petitioner was instructed to notify Dominguez should there be any mechanical problems. After considering the totality of Petitioner's testimony, she finds that an employer/employee relationship existed.

On July 19, 2010 an accident occurred that arose out of and in the course of Petitioner's employment by Rafael Dominguez and David Rudolf.

The petitioner testified credibly that an accident occurred on July 19, 2010. This testimony was supported by the traffic crash report, witness testimony, and medical records. The date of accident also corresponds with the bill of lading, which indicated a pickup in Mundelein Illinois on July 16, 2010 and a drop off at Dick's Sporting Goods in Smithson Pennsylvania on July 19, 2010. (Petitioner's Exhibit #25).

Petitioner was injured in a motor vehicle accident. At the time of the accident, Petitioner was driving west to get something to eat after being told that he was too early to deliver his shipment. This is an act that the Petitioner might be reasonably expected to perform incident to his assigned duties. This act was both reasonable and foreseeable. *See Venture Newberg Perini v. Illinois Workers' Compensation Commission,* 2013 IL 115728 (Ill. 2013). Thus, the Petitioner's accident on July 19, 2010, arose out of and in the course of his employment for the Respondents Rafael Dominguez and David Rudolph.

Timely notice of the accident was given to both Rafael Dominguez and David Rudolph.

Petitioner's father testified that he phoned David Rudolph the following day concerning the accident. Therefore, the Arbitrator finds that timely notice was given. Additionally, Mateusz testified that he called Rafael Dominguez after arriving at the hospital in Ohio. (Transcript, pp. 106-107). Mateusz told Rafael Dominguez that the Petitioner had been involved in a motor vehicle accident. (Transcript, pp. 107-108). This notice was given less than 45 days after the work accident.

As stated, Petitioner's father, Wojciech Jendrzejczak, credibly testified that he called David Rudolph after the accident because he was aware that David Rudolph was the owner of the truck involved in the accident. (Transcript, p. 86). David Rudolph denied knowing the Petitioner and hung up the phone. (Transcript, p. 88). This notice was given less than 45 days after the work accident.

Evidence of notice was unrebutted. No evidence was received that would show Rafael Dominguez or David Rudolph were unduly prejudiced by any perceivable defect in the notice given by Mateusz Jendrzejczak and Wojciech Jendrzejczak.

The petitioner's current conditions of ill-being are causally related to the injury.

"A causal connection between an accident and a claimant's condition may be established by a chain of events including the claimant's ability to perform manual duties before an accident, a decreased ability to so perform immediately after an accident, and other circumstantial evidence." *Pulliam Masonry v. Industrial Commission,* 77 Ill.2d 469, 471-72 (1979). "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 Commission*, 93 Ill.2d 59, 63-64 (1982).

The Workers' Compensation Act is a humane law of remedial nature, and wherever construction is permissible its language is to be liberally construed to affect the purpose of the Act. The purpose of the Act is 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 industry, nor by the public. Every injury sustained in the course of the employee's employment, which causes a loss to the employee, should be compensable. *Shell Oil v. Industrial Commission,* 2 Ill. 2d 590, 596 (1954). It is well established that an accident need not be the sole or primary cause – as long as employment is a cause – of a claimant's condition. *See Sisbro, Inc. v. Industrial Commission,* 207 Ill. 2d 93, 205 (2003).

Petitioner was working full duty with no restrictions prior to the work accident on July 19, 2010. The petitioner underwent surgery for his right knee, right hip and aortic valve / heart at St. Elizabeth in Ohio in the days following the work accident. Injuries to his back and ribs were also documented. These conditions are causally related to the work accident. Dr. Sokolowski also gave causal connection to Petitioner's lumbar pain, thoracic pain, features of cervical radiculopathy, right open reduction and internal fixation of medial femoral head fracture fragment, right knee pain and lumbar radiculopathy.

"Every natural consequence that flows from an injury that arose out of and in the course of the claimant's employment is compensable unless caused by an independent intervening accident that breaks the chain of causation between a work-related injury and an ensuing disability or injury." *Vogel v. Industrial Comm'n,* 354 Ill. App. 3d 780, 786 (2005).

Where the work injury itself causes a subsequent injury, the chain of causation is not broken. *International Harvester Co. v. Industrial Commission*, 263 N.E.2d 49, 53 (Ill. 1970). Clear illustrations of this chain of causation relationship are cases where a second injury occurs due to treatment for the first. *See Shell Oil Co. v. Industrial Com.*, 2 Ill.2d 590, 595 (1954).

The Petitioner's aortic valve surgery required that he be on coumadin. The ischemic stroke (second injury) was deemed to be cardioembolic in nature. The stroke occurred due to treatment related to the first injury and was a natural consequence flowing from the original injury. Therefore, the Arbitrator finds that the stroke is also causally related to the work accident because the aortic valve surgery was a result of the injuries sustained in the accident.

Petitioner's earnings were $13,000.00 per year, with an average weekly wage of $250.00.

The petitioner testified that he was paid $250.00 per week on average. (Transcript, p. 16). Petitioner's testimony is unrebutted.

At the time of the accident, Petitioner was 27 years of age.

The petitioner testified that he was born on September 4, 1983. (Transcript, p. 11). On the date of the accident, the petitioner was 27 years old.

The petitioner was not married at the time of the work accident. Petitioner had no dependent children at the time of the accident.

The petitioner testified that he is not married. (Transcript, p. 11). The petitioner testified that he did not have any children under the age of 18. (Transcript, p. 11). This information is also contained in the Application for Adjustment of Claim. (Petitioner's Exhibit #21).

The medical services provided to the Petitioner were reasonable and necessary. Respondent has not paid all appropriate charges for all reasonable and necessary medical services.

The Arbitrator awards the medical bills as put forth in Petitioner's Exhibit #20:

- Advantage Ambulance: $1,579.00
- Advocate Lutheran Hospital: $10,526.00
- Advocate Medical Group of Chicago $3,711.00
- Camelot Arms Care Center: $36,347.00
- Central Medical Clinic $11,890.00
- Chicago Sports & Spine: $ 3,261.00
- City of Des Plaines Ambulance: $575.00
- Dr. Mark Sokolowski: $1,371.00
- Dr. Michael Stover: $471.30
- Dr. Zajewski: $508.00
- Northwest Community Hospital: $92,367.54
- Northwestern Medical Faculty Foundation: $22,273.00
- Northwestern Memorial Hospital: $156,692.00
- Rehabilitation Institute of Chicago: $79,072.29
- Resurrection Medical Center: $7,739.00
- Saint Elizabeth Hospital: $344,300.75

Total Medical Bills Awarded: $772,683.88

Petitioner is entitled to temporary total disability benefits from July 19, 2010, through January 1, 2017.

"Temporary total disability is awarded for the period from the date on which the employee is incapacitated by injury to the date that [her] condition stabilizes or [she] has recovered as far as the character of the injury will permit." *Whitney Productions, Inc. v. Industrial Commission*, 274 Ill. App. 3d 28, 30 (1995). "To be entitled to TTD benefits, the claimant must prove not only that [she] did not work but that [she] was unable to work." *City of Granite City v. Industrial Commission*, 279 Ill. App. 3d at 1090 (1996). Section 8(b), which governs TTD awards, provides that weekly compensation shall be paid "as long as the total temporary incapacity lasts." 820 ILCS 305/ 8(b).

TTD is awarded for the period from the date of which the employee is incapacitated by injury to the date that his condition stabilizes, or he has recovered as far as the character of the injury will permit. *See Freeman*

United Coal Min. Co. v. Industrial Commission, 318 Ill. App. 3d 170, 177 (2000). To be entitled to TTD benefits, the claimant must prove not only that he did not work but that he was unable to work. *Id.*

The fact that a claimant may occasionally earn wages or perform useful services does not preclude an award of TTD. *See Zenith Co. v. Industrial Commission,* 91 Ill.2d 278, 286087 (1982).

The Petitioner has not worked since the date of the accident. His medical doctors kept him completely off work until he was placed on permanent restrictions by Dr. Sokolowski on July 6, 2016. It was at this point that the Petitioner's condition stabilized.

Therefore, the Petitioner is entitled to temporary total disability benefits of $220.00 per week for 337 weeks, commencing July 19, 2010 and continuing through January 1, 2017 as provided in Section 8(b) of the Act.

Petitioner is permanently and totally disabled starting on January 2, 2017 and continuing for his lifetime due to injuries petitioner sustained in the July 19, 2010, work accident.

The Arbitrator finds that Petitioner is permanently and totally disabled under the odd lot theory as of the date of hearing. A person is permanently and totally disabled when he cannot perform any services except those for which no reasonably stable labor market exists. *A.M.T.C. of Illinois v. Industrial Commission,* 77 Ill.2d 482, 487 (1979). He need not show he has been reduced to total physical incapacity before being entitled to a permanent and total disability award. *Interlake, Inc. v. Industrial Commission,* 86 Ill. 2d 168, 176 (1981). In addition, where any employee's disability is limited in nature so that he is not obviously unemployable or if there is no medical evidence to support a claim of permanent total disability, the burden is on the employee to establish by a preponderance of the evidence that he falls into the "odd lot" category, "that is, one who, although not altogether incapacitated to work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market." *Westin Hotel v. Illinois Workers' Compensation Commission,* 372 Ill. App. 3d 527, 544 (2007).

A claimant may establish he is permanently and totally disabled under the odd lot theory by showing that: (1) considering his age, education, skills, training, physical limitations and work history he would not be regularly employable in any well-known branch of the labor market or (2) following a diligent job search, he was unable to find gainful employment.

When a claimant makes a *prima facie* showing that he falls into the odd lot category, the burden shifts to the employer to show that a reasonably stable job market nevertheless exists for that employee. *See Kula v. A.E.R.O Special Education Cooperative,* 18 I.W.C.C. 0705 (November 19, 2018).

The petitioner was evaluated by Lisa Helma, a certified rehabilitation counselor. Helma opined that Petitioner is unable to return to work as a truck driver, has no transferable skills and is totally disabled. Helma's report took into consideration the petitioner's age, education, skills, training, limitations and work history. Helma's opinions are reasonable and supported by the record.

Even though petitioner may be *physically* capable of returning to a light or sedentary job as of July 6, 2016, he is not capable of securing employment in a well-known branch of the labor market due to the repercussions of his work related stroke. Dr. Hurley opined that Petitioner's higher function deficits have a significant effect on his social interactions and future employment prospects. This was confirmed by Lisa Helma, the vocational expert.

The Petitioner's prima facie case of an odd lot permanent total was unrebutted. Therefore, the Arbitrator awards permanent and total disability benefits from the date of Lisa Helma's report on January 2, 2017 and

continuing for Petitioner's lifetime. Respondents shall pay $466.13 / week for life, commencing January 2, 2017 as provided in Section 8(f) of the Act.

Section 9 Motion for Lump Sum Payment is denied as premature.

Petitioner's Exhibit 24 consisted of a Section 9 Motion requesting any award be commuted to a lump sum. Section 9 of the Act states that such a motion must be made before the Commission or any member thereof, and not the Arbitrator. As such, Petitioner's motion is denied as premature. The petitioner is free to refile his Section 9 motion before the Commission or a member thereof as specified by the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC022697
Case Name	Vsevolvod Samovskiy v. State of Illinois - IYC Warrenville
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0270
Number of Pages of Decision	14
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Will Dimas

DATE FILED: 6/23/2023

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

VSEVOLOD SAMOVSKIY,
Petitioner,

vs. NO: 21 WC 22697

SOI/IYC WARRENVILLE,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 22, 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, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

June 23, 2023
O: 06/15/23
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	21WC022697
Case Name	VSEVOLOD SAMOVSKIY v. SOI/ IYC WARRENVILLE
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Frank Soto, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Will Dimas

DATE FILED: 9/22/2022

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 20, 2022 3.78%

/s/Frank Soto, Arbitrator
Signature

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

September 22, 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

VSEVOLOD SAMOVSKIY
Employee/Petitioner

v.

SOI/IYC WARRENVILLE
Employer/Respondent

Case # **21** WC **022697**

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 **Arbitrator Frank J. Soto**, Arbitrator of the Commission, in the city of **Wheaton**, on **August 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 24, 2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**35,807.25**; the average weekly wage was $**1,466.31**.

On the date of accident, Petitioner was **33** 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 **-** for TTD, $**-** for TPD, $**-** for maintenance, and - for other benefits, for a total credit of **$0**.

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

ORDER

Respondent shall pay the reasonable and necessary medical services of identified in Petitioner's Exhibit #1, as provided in Sections 8(a), 8.2 of the Act and subject to the fee schedule. 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 $**977.54**/week for **3/7** weeks, commencing November 26, 2021, through December 2, 2021, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**871.73**/week for **37.5** weeks, because the injuries sustained caused the **7.5**% loss of the **body as a whole**, as provided in § 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from May 24, 2021 through August 29, 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.

SEPTEMBER 22, 2022

By: /o/ Frank J. Soto

Arbitrator

Procedural History

This case was tried on August 29, 2022 and the issues were whether Petitioner's current condition of ill-being is causally connected to his injury, whether Respondent is liable for unpaid medical bills, whether Petitioner is entitled to TTD benefits and the nature and extent of Petitioner's injury. (Arb. Ex. #1).

Findings of Fact

Vsevolod Samovskiy (hereinafter referred to as "Petitioner") is a Juvenile Justice Specialist for Respondent at its IYC Warrenville facility. (T.11-12) The parties stipulated he suffered accidental injuries that arose out of and in the course of his employment on May 24, 2021 when he was attacked by an inmate and struck in the face with closed fists while escorting a line movement. (T.12) Petitioner testified he completed Respondent's forms to report the injury, but the paperwork packet was 15 pages long and he experienced difficulties completing the paperwork due to his injuries. (T.35-37)

Shortly after the May 27, 2021 incident Petitioner presented to his family physician and was seen by PA Dean Bieniak. (PX3) At that time, PA Bieniak noted Petitioner had bruises and scrapes to his face, nose, right wrist/forearm, upper and lower legs, and knees as a result of an inmate assault. *Id.* The medical history shows that Petitioner reported suffering blows to the head more than once and suffered a bloody nose. *Id.* Petitioner's nasal bridge continued to feel swollen and sore to the touch, and Petitioner also reported unresolved brain fog and posterior neck and right shoulder soreness. *Id.* Petitioner's right shoulder was particularly sore with external range of motion. *Id.* Petitioner's assessment was strain of the neck and right shoulder with multiple abrasions and contusions and concussion with persistent fogginess. *Id.* PA Bieniak expressed hope that Petitioner's ills would resolve with time and light duty work. *Id.*

During his follow-up visit on June 15, 2021, it was noted that Petitioner's facial abrasions and contusions healed and the rest of his physical injuries were improving and he was back to work but Petitioner continued to complain of brain fog and soreness in his knees worsened by longer work days. *Id.* The assistant noted:

> He still has residual concussive symptoms with mental fogginess especially with longer das or light or noise that is constantly changing. He also has residual anterior knee pain without obvious knee effusion. Patient should be able to return to full duty but should not work more than 4 hours of overtime a day. If not continuing to improve may need follow up appointment. *Id.*

Petitioner testified he was given restrictions of no working more than 4 hours of overtime per shift, but Respondent failed to accommodate Petitioner's restrictions. (T.16) Petitioner testified he was told by Respondent that "…we are not allowed – that we're not going to give that to you." (T.16) Petitioner testified despite his work restrictions Respondent continued to give him an excess of up to 8.25 hours of overtime. (T.17) Petitioner testified that as a result, he continued to experience extreme fogginess and anxiety over his poor performance and lack of sleep. (T.17-18)

Petitioner returned to his family physician in August and October and continued to report fogginess and inability to remember numbers along with some residual knee symptoms. (PX3) Petitioner was diagnosed with post-concussion syndrome and recommended for a neuropsychological consultation. *Id.* Petitioner was referred to Dr. Eric Larson for further evaluation. *Id.* Since the earliest Petitioner could obtain an appointment was in December, his family physician continued to monitor him. *Id.* During that time, Petitioner continued to voice complaints of brain fog and poor memory. *Id.*

Petitioner held a telemedicine visit with Physician's Immediate Care on October 15, 2021. (PX4) Petitioner's persistent complaints of brain fog along with occasional flare-up headaches were noted as a result of the work accident. *Id.* Petitioner reported being stressed as a result of increased activity and insufficient rest which interfered with his ability to function effectively. *Id.* Petitioner was assessed with headache and fatigue and was advised to get more rest, drink plenty of fluids, eat healthy, and exercise as tolerated. *Id.* Petitioner returned to his family physician in November and reporting headaches and migraines induced by working too long. (PX3) Petitioner was referred for an MRI in November, which was normal showing only a small cerebellar arachnoid cyst and mild sinusitis. (PX3; PX6)

Petitioner returned to his family physician's office on November 24, 2021, following the MRI, reporting he was "getting more headaches that are worsened by working more than 4 hours overtime a day." (PX3) At that time, Petitioner also reported distress as a result of Respondent not honoring his restrictions which cased more headaches, brain fog, visual changes, and insomnia. *Id.* This was consistent with the exam findings which noted that Petitioner was "more anxious and rubbing head often during visit." *Id.* A Physician's Statement was written to advise Respondent Petitioner would need to be off work unless Petitioner's restrictions were honored. *Id.* Petitioner was off work from November 26, 2021 through December 3, 2021 when

Respondent agreed to accommodate Petitioner's 4-hour restrictions. (T.11, 27-30; AX1) On cross-examination, Petitioner testified the time was reflected as an accrued holiday vacation on Respondent's logs, because it was not approved as service-connected time off. (T.27)

Petitioner was evaluated by Dr. Eric Larson on December 20, 2021. (PX5) After noting the history of the accident, he too noted that Petitioner suffered from persistent post-concussive symptoms, which were further outlined in his review of Petitioner's treatment records. *Id.* He also noted Petitioner's mental health history and treatment prior to the work assault, which included treatment for attention deficit disorder and some anxiety related to the death of a family member. *Id.* After administering several tests, it was noted that based on Petitioner's intelligence, he would have performed in the average to above average range on most neuropsychological tests prior to his recent decline. *Id.* During visuospatial ability and processing speed testing, it was noted that there was a low probability that his decreased function could be explained by premorbid intelligence. *Id.* Petitioner appeared anxious during his interview and during testing but did not exhibit obvious signs of psychosis. *Id.* Dr. Larson concluded that although Petitioner had some findings consistent with his preexisting attention deficit disorder and the physical concussion symptoms should have largely resolved, "it is also likely that this injury greatly exacerbated pre-existing anxiety disorder and sleep disorder, both of which contribute to concentration problems." *Id.*

Dr. Larson stated he agreed with Petitioner's primary care physician, Dr. Fahey, that prolonged work assignments "take a toll on the patient." He further stated, "I would add that long hours may be especially detrimental to his efforts to compensate for his attention deficit. It is likely this has worsened since his injury, especially given the patient's increasing anxiety about his job security. It is recommended that his work restriction of no more than 4 hours of overtime per day remain in place." *Id.* He also recommended that Petitioner undergo additional psychotherapy for management of symptoms of anxiety and depression and perhaps coaching for his ADD. *Id.* He also recommended close monitoring of Petitioner's sleep and exercise to improve the impairment in cognition. *Id.* He expressed hope Petitioner's condition would improve with time. *Id.*

Petitioner returned to his family physician's office on December 22, 2021. (PX3) Petitioner continued to report ongoing symptoms of headache, dizziness, brain fog, and insomnia. *Id.* His insomnia notably magnified his other symptoms, and his insomnia was

aggravated by his work stress, as Respondent continued to ignore his restrictions. *Id.* Petitioner reportedly missed work the day of the visit and the day prior on account of his condition and indicated he needed additional time to rest. *Id.* Petitioner was given an off-work slip for December 21st through December 23rd. *Id.*

Petitioner saw his physician in January and for a final time on February 21, 2022. (PX3) Petitioner suffered a new work injury in January and was off work for that injury. *Id.* Petitioner noted some reduction in frequency of his headaches, but that he still suffered from insomnia and brain fog. *Id.* Petitioner's restrictions on working overtime for his cognitive impairment remained in effect. *Id.*

Petitioner testified his injuries to his right wrist and elbow and bilateral knees healed on their own, but he continued to suffer from his head and neuropsychological injuries. (T.18-19) Though Dr. Larson recommended special therapy, Petitioner hesitated to attend because he was unsure the expense would be covered. (T.19-20)

Respondent had Petitioner examined by Dr. Andrew Zelby, pursuant to Section 12 of the Act, on two separate occasions. (RX4) He first examined Petitioner on October 13, 2021, and noted Petitioner's cognitive complaints of brain fog, headaches rated 6/10 on the pain scale, and light sensitivity with his headaches. *Id.* His examination findings noted no inconsistent or Waddell's findings, and after his review of Petitioner's records and the reports of injury, his assessment was cerebral concussion and mild post-concussion syndrome. *Id.* Dr. Zelby stated, "His current complaints are causally related to his reported assault at work." *Id.* In his assessment, Dr. Zelby noted the only treatment for Petitioner was rest. *Id.* Dr. Zelby expected Petitioner would continue to recover and reach maximum medical improvement by the end of November 2021. *Id.*

The second examination took place on February 4, 2022. (RX4) At that time, Dr. Zelby indicated Petitioner made complete recovery and reported resolution of his headaches, mental fogginess, and memory difficulties at that time. *Id.* Dr. Zelby noted Petitioner had recently been off work for an elbow injury but that Petitioner had done well with working prior to that point. *Id.* Based on his examination, Dr. Zelby concluded Petitioner's condition had resolved completely and required no limitation on overtime hours. *Id.*

Respondent also took the deposition of Dr. Zelby on June 13, 2022. (RX4) Dr. Zelby reviewed his findings as documented in his reports on direct examination and testified

consistently with his opinions as expressed in his reports. *Id.* On cross-examination, Dr. Zelby reiterated that Petitioner's diagnoses of cerebral concussion and post-concussion syndrome were the result of the work accident that occurred on May 24, 2021. *Id.* at 24-25. He testified, however, that he would expect Petitioner would have improved by six months following his injury and stated that his symptoms were "a little harder to explain" at that point given his normal MRI findings. *Id.* at 28-29. He believed Petitioner's baseline anxiety may have contributed to the difference. *Id.* at 29. Notwithstanding, Dr. Zelby agreed that the treatment Petitioner received, including his diagnostic studies, were reasonable, necessary, and causally related to his accident that he described. *Id.* at 30.

Petitioner testified since being placed at maximum medical improvement he continues to experience lingering fogginess, insomnia, and short-term memory loss. (T.23) He avoids working more than 4 hours of overtime because of his condition. (T.23-24) On cross-examination, Petitioner testified that although individuals could volunteer for overtime, when staff overtime needs were not met, individual with the least seniority *or* the least overtime hours were mandated. (T.32-33) If a mandated employee declined overtime, there were unavoidable disciplinary consequences that would eventually culminate with termination. (T.33-34)

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 (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. 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). "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). In addition to or aside from expert medical testimony, circumstantial evidence may also be used to prove a causal nexus between an accident and the resulting injury. *Gano Electric Contracting v. Indus. Comm'n*, 260 Ill.App.3d 92, 631 N.E.2d 724 (1994)

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 of ill-being is causally related to his May 24, 2021 work accident.

All physicians, including Respondent's examiner, acknowledge that Petitioner suffered a concussion and post-concussion syndrome as a result of the work assault. While Petitioner had some preexisting symptoms and conditions that impacted his cognitive ability, the record fully supports Dr. Larson's opinion that these were aggravated and/or exacerbated by his work injury. Employers are to take employees as they find them. *Sisbro supra.* While it is true that Petitioner's baseline anxiety contributed to his prolonged recovery, this does not sever the chain of causal connection. His treatment record document a distinct decline in his condition following assault, and there were no restrictions on his ability to work leading up to the accident such as the ones imposed thereafter.

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 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).

Based upon the above findings as to causal connection, the Arbitrator finds Petitioner proved by the preponderance of the evidence that the medical care received was related to his work accident and was reasonable and necessary to diagnose, relieve or cure Petitioner from the effects of his injury. The Arbitrator finds the opinions of Dr. Larson and Dr. Fahey and his assistant more persuasive than the opinions of Dr. Zelby. The Arbitrator finds the opinions of Dr. Zelby indicating Petitioner's symptoms should have resolved by November of 2021 inconsistent with the treatment records and are nothing more than guess, surmise or conjecture. It is axiomatic that the weight accorded an expert opinion is measured by the facts supporting it and the reasons given for it; an expert opinion cannot be based on guess, surmise, or conjecture. *Wilfert v. Retirement Board*, 318 Ill.App.3d 507, 514-15 (First Dist. 2000).

The Arbitrator finds, in this case, the treating physicians were in a better position to determine when Petitioner had reached maximum medical improvement. Petitioner's complaints as documented in the records of his treating physician remained consistent over the course of his care, including his follow-up visit with is primary care physicians shortly after the February 2022 IME, and remained consistent during his testimony at Arbitration. The Arbitrator thus finds that Petitioner's treatment continued to be reasonable and necessary until his treatment concluded with his primary care physician on February 21, 2022. As such, Respondent shall pay the reasonable and necessary medical expenses identified in Petitioner's Exhibit 1 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 pain but 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," 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 November 26, 2021, through December 2, 2021.

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

Pursuant to § 8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011, are to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

(i) **Level of Impairment**: Neither P\party submitted an AMA rating. Therefore, the Arbitrator gives no weight to this factor.

(ii) **Occupation**: Petitioner continues to work for Respondent as a Juvenile Justice Specialist. However, he avoids working overtime as a result of the injury and its impact on his condition. The Arbitrator places some weight on this factor.

(iii) **Age**: Petitioner was 33 years old at the time of his injury. He must live and work with his condition for an extended number of years. The Arbitrator places greater weight on this factor.

(iv) **Earning Capacity**: Based upon the reduction in Petitioner's tolerance for overtime, the Arbitrator determines that he did suffer some loss in earning capacity and places greater weight on this factor.

(v) **Disability**: As a result of his accident, Petitioner suffered a myriad of injuries, the most prominent of which was a concussion. Though his bruises and lacerations healed, Petitioner continued to suffer from post-concussive symptoms, including headaches, loss of memory, brain fog, insomnia, and other associated symptoms. (PX3) Petitioner testified at Arbitration that since he was placed at maximum medical improvement, he continued to have lingering fogginess, insomnia, and short-term memory loss. (T.23) He avoids working more than 4 hours of overtime

on account of his condition. (T.23-24) As Petitioner's complaints are consistent with is treating records, the Arbitrator places greater weight on this factor.

Based upon the foregoing factors, the Arbitrator finds that Petitioner suffered serious and permanent injuries that resulted in the 7.5% loss of his body as a whole.

By: /o/ Frank J. Soto September 21, 2022

Arbitrator Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC031499
Case Name	Gonzalo Izurieta v. Metro Staff, Inc.
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0271
Number of Pages of Decision	14
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Ivan Rueda
Respondent Attorney	Katharine Gainer, Joseph LaRocco

DATE FILED: 6/23/2023

/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

GONZALO IZURIETA,

Petitioner,

vs. NO: 20 WC 31499

METRO STAFF, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19(b) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical care, petitioner's current condition of ill-being causally related to the injury, penalties and fees, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 28, 2022 is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $27,000.00. 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.

June 23, 2023
O: 06/15/23
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	20WC031499
Case Name	Gonzalo Izurieta v. Metro Staff, Inc.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision 8(a)
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Elaine Llerena, Arbitrator

Petitioner Attorney	Ivan Rueda
Respondent Attorney	Katharine Gainer

DATE FILED: 11/28/2022

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 22, 2022 4.52%

/s/Elaine Llerena, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
8(a)

Gonzalo Izurieta
Employee/Petitioner

v.

Metro Staff, Inc.
Employer/Respondent

Case # **20** WC **031499**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Elaine Llerena**, Arbitrator of the Commission, in the city of **Chicago**, on **September 29, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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, **September 28, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**24,804.00**; the average weekly wage was $**477.00**.

On the date of accident, Petitioner was **50** years of age, ***single*** with **4** dependent children.

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

ORDER

Respondent shall pay reasonable and necessary medical services as listed in Petitioner's Exhibit 9, pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive a credit for medical expenses paid as outlined in Respondent's Exhibit 4.

Respondent shall authorize and pay for prospective medical care for Petitioner as recommended by Dr. Sampat, specifically an L4-S1 fusion surgery, pursuant to Sections 8(a) and 8.2 of the Act.

Petitioner's claim for penalties and attorney's fees under Sections 16, 19(k), and 19(l) is denied.

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

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

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

NOVEMBER 28, 2022

Elaine Llerena
Signature of Arbitrator

ICArbDec19(b)

STATEMENT OF FACTS:

Petitioner testified that as of September 28, 2020, he was employed with Respondent and was assigned to work at a client of Respondent's, Trend Technologies, in the position of a machine operator. (TX, pgs. 8-10) Petitioner testified that on September 28, 2020, his shift began at 6:00 a.m. and ended around 3:00 p.m., and on that date, he was tasked with working on Tesla parts, which encompassed lifting approximately 60 pounds frequently. (TX, pgs. 10-11) Specifically, Petitioner testified that when he arrived at work on September 28, 2020, he began his work by preparing the machines, then organizing the parts on the floor, then lifting the parts into the machine, and then installing the hardware with the pressure machine, which required frequent bending. (TX, pgs. 12-13)

Petitioner testified that just before his shift ended around 3:00 p.m., he was bending over to pick up a part when he felt a sharp pain in his lower back while in a stooped position and was unable to bend back up. (TX, pgs. 13-14) More specifically, Petitioner testified that the onset of pain was immediate and so severe that he could not straighten his back out and stopped working. (TX, pgs. 13-14)

Petitioner testified that he then went to tell his supervisor and boss that he hurt his back and he was then instructed to go take a break. (TX, pg. 14) Petitioner testified that he then went to the bathroom and called Respondent to report that he had hurt his back and he was directed to go to AMITA Health Alexian Brothers Medical Center for an evaluation. (TX, pgs. 14-16)

Petitioner testified that he presented to AMITA Health Alexian Brothers Medical Center the following day on September 29, 2020. (TX, pg. 16) On cross-examination, Petitioner testified that when he initially sought treatment at AMITA Health Alexian Brothers Medical Center, he was truthful and accurate in reporting his claimed mechanism of injury and his subjective complaints to the evaluating physician. (TX, pg. 31)

At Petitioner's initial visit at AMITA Health Alexian Brothers Medical Center on September 29, 2020, Petitioner reported that while at work the day prior, he was bending and lifting 30–40-pound parts for his entire shift, after which he developed some localized right lower back pain and denied any particular traumatic incident. (PX 10, pg. 7) Petitioner further denied any radiation, numbness, or weakness and reported that his back mostly just hurt if he bends or lifts something heavy. (PX 10, pg. 7) Upon physical examination, Dr. Lindahl noted Petitioner had no deformities or tenderness, and specifically, Petitioner's straight-leg raises were negative, his gross motor and sensation were intact, and his deep tendon reflexes were 2 and symmetrical. (PX 10, pg. 7) Petitioner was diagnosed with a lumbar strain for which Dr. Jeffrey Lindahl prescribed Cyclobenzaprine as needed and recommended use of over-the-counter nonsteroidals as needed and that the Petitioner rest for a couple of days. (PX 10, pg. 8) Petitioner was released to return to work with restrictions of lifting, pulling, and pushing up to 10 pounds and no bending. (PX 10, pg. 8)

On October 1, 2020, Petitioner followed-up with Dr. Lindahl and reported tightness in his lower back and continued pain when bending or lifting, but otherwise denied any numbness or weakness. (PX 10, pgs. 9-10) Dr. Lindahl's assessment was again lumbar strain for which a 3-week course of physical therapy was recommended, and in the interim, Petitioner was to continue with light duty work with restrictions of lifting, pulling, and pulling up to 10 pounds and no bending. (PX 10, pgs. 12-14)

At Petitioner's next follow-up with Dr. Lindahl on October 17, 2020, Petitioner reported he had not yet started physical therapy, which Dr. Lindahl again recommended he undergo, and in the interim, Petitioner could continue with light duty work with the previously set restrictions. (PX 10, pgs. 15-19)

On November 3, 2020, Petitioner attended his initial physical therapy evaluation at AMITA Health Medical Group and reported that he injured his low back after heavy lifting at work 3-4 weeks prior, after which he was given muscle relaxers and pain medications and rested for 3 days before returning to light duty work. (PX 1, pgs. 24-52) At best, Petitioner rated his back pain level at 1 out of 10, and at worst, at 7 out of 10. (PX 1, pg. 25) It was noted that his past medical history was positive for hypertension and "back injuries". (PX 1, pg. 29)

Petitioner attended physical therapy again on November 6, 2020, and reported improvement in his pain with exercises, but that he continued experience intermittent sharp pains primarily after work or when getting up in a hurry. (PX 1, pgs. 19-23) It was noted that after that session, Petitioner reported no pain at all. (PX 1, pg. 22)

Petitioner was a no-show for his scheduled physical therapy sessions on November 10, 13, and 17, 2020. (PX 1, pgs. 16-18)

At the physical therapy session on November 20, 2020, it was noted that the Petitioner had reported he was a no show for his prior sessions due to forgetting and/or mixing up the appointments. (PX 1, pgs. 11-15) Petitioner was re-educated on correct sitting posture and body mechanics with bending during that session, and at the end, Petitioner reported decreased low back pain. (PX 1, pg. 14)

Petitioner was then a no-show for his scheduled physical therapy session on November 24, 2020, and when called to inquire, Petitioner reported he was not feeling well. (PX 1, pg. 9) Petitioner was also then a no-show for his next scheduled physical therapy session on December 1, 2020, and when called to inquire, Petitioner reported he had tested positive for Covid. (PX 1, pg. 10)

Petitioner testified that he did not return to AMITA Health Medical Group thereafter because only 6 physical therapy sessions had been authorized and his pursuit of further medical care had been rejected. (TX, pg. 18) The medical records of AMITA Health Medical Group only document that the Petitioner attended 3 out of his 6 sessions and there is no indication in the medical records submitted into evidence that he was denied a follow-up visit or that Petitioner made any attempt to reschedule his missed physical therapy appointments thereafter. (PX 1)

Petitioner testified that he then sought medical treatment with Illinois Orthopedic Network at the referral of an acquaintance. (TX, pg. 18)

At Petitioner's initial consultation with Illinois Orthopedic Network on December 18, 2020, Petitioner was evaluated by Dr. Eugene Lipov and reported that he injured his low back while at work on September 28, 2020. (PX 4, pg. 5) Specifically, Petitioner reported that his job required repetitive heavy lifting for over 10 hours per day and at the end of that week, he started to feel acute low back pain. (PX 4, pg. 5) Petitioner rated his low back pain on a pain scale rating of 5 out of 10 and reported his pain was localized to the low back with some radiation to the left leg. (PX 4, pg. 5) Upon physical examination, Dr. Lipov noted Petitioner had a mild antalgic gait, positive tenderness and hypertonicity of the lumbosacral paraspinal musculature with radiation to the right flank, approximately 90 degrees of lumbar flexion, but pain with full flexion and bilateral facet loading, and a negative straight leg test of the right lower extremity, but positive on the left for axial pain only. (PX 4, pg. 5) Dr. Lipov prescribed Meloxiam, Cyclobenzaprine, and Lidocaine patches and recommended another course of physical therapy and a lumbar spine MRI, and in the interim, Petitioner was released to return to light duty work with restrictions of no carrying, lifting, pulling, or pushing more than 30 pounds. (PX 4, pgs. 6-8)

On December 29, 2020, Petitioner underwent a lumbar spine MRI at Molecular Imaging and the impression was: (1) Reduced lumbar lordosis suggesting muscle spasm; (2) Lumbar spine degenerative changes; (3) At L4-5 level, mild broad-based disc bulging with focal left paracentral disc protrusion with mild to moderate bilateral neural foraminal narrowing; and (4) At L5-S1 level, moderate broad-based disc bulge more inclined to the right side with moderate to marked right and moderate left neural foraminal narrowing. (PX 7, pgs. 3-4)

On December 30, 2020, Petitioner attended an initial physical therapy consultation at ATI Physical Therapy and reported continued low back pain that occasionally radiated into his left lower leg with associated numbness. The plan was for Petitioner to attend physical therapy for 6 weeks. (PX 3, pgs. 53-74)

At Petitioner's initial consultation with Dr. Sajjad Murtaza on January 5, 2021, Petitioner reported that while at work on September 28, 2020, he went to stand up and he felt a sharp pain in his lower back with associated numbness in his left thigh in the lateral aspect and anterior aspect. (PX 4, pg. 11) The assessment was lumbar spondylosis, worse at L4-S1, for which Dr. Murtaza recommended he continue with his course of physical therapy, and in the interim, Petitioner could continue working light duty with restrictions of no carrying, lifting, pulling, or pushing more than 30 pounds. (PX 4, pgs. 12-13)

Petitioner attended physical therapy at ATI Physical Therapy again on January 5, 6, 11, 14, 18, 20, 27, and 28, 2021. (PX 3, pgs. 35-52)

On February 1, 2021, Petitioner underwent a physical therapy re-evaluation at ATI Physical Therapy, which documents objective improvements with range of motion, joint mobility, strength, soft tissue mobility, and flexibility, and it was noted that Petitioner would benefit from additional physical therapy. (PX 3, pgs. 27-34)

At Petitioner's follow-up visit with Dr. Murtaza on February 2, 2021, Dr. Murtaza noted that Petitioner's pain had improved approximately 40-60% since beginning physical therapy, but when lifting at work, his pain would increase. (PX 4, pg. 15) Petitioner denied any radiation of pain into his lower extremities at that visit. (PX 4, pg. 15) Dr. Murtaza noted he reviewed the lumbar spine MRI, which he interpreted to show facet hypertrophy at the L4-S1 levels. (PX 4, pg. 15) Dr. Murtaza recommended that Petitioner undergo bilateral L4-L5 and L5-S1 facet injections to improve his pain and inflammation. (PX 4, pg. 15) In the interim, the Petitioner could continue working light duty with restrictions of no carrying, lifting, pulling, or pushing more than 30 pounds. (PX 4, pg. 14)

Petitioner attended physical therapy at ATI Physical Therapy again on February 5, 9, 11, 17, and 23, 2021. (PX 3, pgs. 20-26)

On February 25, 2021, Petitioner underwent the bilateral facet injections at L4-L5 and L5-S1 using fluoroscopic needle localization. The pre- and post-op diagnoses was lumbar facet pain and spondylosis at L4-5 and L5-S1 bilaterally. (PX 4, pgs. 16-17)

Petitioner attended physical therapy at ATI Physical Therapy again on March 4 and 8, 2021. (PX 3, pgs. 14-19)

On March 11, 2021, Petitioner underwent a physical therapy re-evaluation, which documents objective improvements noted with Petitioner's range of motion, joint mobility, strength, soft tissue mobility, and flexibility and also that he had shown improvements with posture. It was noted that the Petitioner requested to be discharged and he was then discharged from physical therapy. (PX 3, pgs. 11-13)

On cross-examination, Petitioner testified that after he underwent approximately 6 months of medical care, Petitioner was directed to attend an Independent Medical Evaluation (IME) with Dr. Frank Phillips at Midwest Orthopedics at Rush on March 25, 2021. (TX, pgs. 31-32) Petitioner testified that at the March 25, 2021, IME, an interpreter was present to assist with language translation between Petitioner and Dr. Phillips. (TX, pg. 32)

On March 25, 2021, Dr. Phillips reviewed Petitioner's medical records, performed a physical examination of Petitioner, and interviewed him about his subjective history. (RX 1, pgs. 1-4) Petitioner reported that while at work on September 28, 2020, he was lifting and bending repetitively, lifting more than his usual 35 pounds, and at the end of the day, he developed severe low back pain. (RX 1, pg. 2) Petitioner complained of continued pain, particularly axial low back pain that worsens with standing and sitting, intermittent paresthesia around the left foot and ankle, and weakness in his left leg, but no radicular pain down his leg. (RX 1, pg. 2) Dr. Phillips noted Petitioner had a normal posture to his spine and a normal gait, ability to heal and toe walk, and symmetric reflexes. (RX 1, pg. 3) Petitioner's lumbar range of motion included 45 degrees of flexion and extension, both of which reproduced some end-range low back discomfort, his motor exam revealed 5/5 strength of hip flexors, extensors, adductors, abductors, quadriceps, hamstrings, tibialis anterior, EHL, and gastrocsoleus, and his sensation was diminished in an L5 distribution on the left, but otherwise intact in an L2 through S1 dermatomal pattern. (RX 1, pg. 3) Otherwise, Petitioner had no lumbar tenderness to palpation and his straight leg raise was negative bilaterally. (RX 1, pg. 3) Dr. Phillips reviewed the lumbar spine MRI report and noted it showed diffuse disk protrusion without any obvious acute findings described. (RX 1, pg. 3) Dr. Phillips opined that Petitioner sustained a lumbar strain/sprain as a result of his repetitive work activities on September 28, 2020. (RX 1, pg. 3) Dr. Phillips noted that while Petitioner's subjective complaints included residual back discomfort, Dr. Phillips found no supporting objective findings. (RX 1, pg. 3) Dr. Phillips further opined that the medical care Petitioner had undergone to date, including the physical therapy, use of medication, and a single epidural steroid injection, had been appropriate and related to Petitioner's lumbar strain/sprain he sustained on September 28, 2020, but no further medical care was recommended other than his use of over-the-counter analgesic and anti-inflammatory medications to address his residual subjective complaints. (RX 1, pg. 3) Dr. Phillips concluded that Petitioner had reached maximum medical improvement (MMI) as of March 25, 2021, and that he was capable of returning to work without any restrictions. (RX 1, pg. 3)

On April 8, 2021, Petitioner returned to Dr. Murtaza at Illinois Orthopedic Network and reported he had 100% pain relief for 2-3 weeks after his injection, but his pain had since continued; however, Petitioner reported that since the injection, he had 60% overall improvement. Petitioner also reported a new symptom of numbness in his left posterior thigh, but denied any significant tingling or weakness in his legs. (PX 4, pg. 24) The assessment was lumbar spondylosis. Dr. Murtaza noted that since Petitioner had significant improvement after the facet joint injections, Dr. Murtaza would recommend a final procedure of a right L4-L5 and L5-S1 rhizotomy or radiofrequency ablation for more durable pain relief, after which Dr. Murtaza opined the Petitioner would be returned back to baseline. (PX 4, pg. 24) In the interim, the Petitioner was to continue with the same light duty work restrictions. (PX 4, pg. 26)

On May 28, 2021, Petitioner followed-up with Dr. Murtaza via a telephone consult and reported that he had 100% pain relief for 3-4 weeks after his injection, but his pain had since returned due to repetitively lifting of 30 pounds at work. (PX 4, pg. 29) Petitioner described his low back pain as constant with occasional numbness in the left posterior thigh, but denied any right lower extremity symptoms. (PX 4, pg. 29) The assessment was lumbar facet syndrome and lumbar spondylosis with left radiculopathy for which the radio frequency ablation at L4-S1 was again recommended as well as an EMG of his bilateral lower extremities, and in the interim, the Petitioner could continue working with restrictions of lifting, pushing, pulling, or carrying up to 30 pounds and no repetitive lifting or carrying. (PX 4, pgs. 29-31)

Petitioner underwent an EMG on May 29, 2021, which was interpreted to be abnormal. Specifically, the findings included mild left L5-S1 and right S1 radiculopathy as well as suspected mild right peroneal motor axonal neuropathy. (PX 2, pgs. 1-7)

On June 23, 2021, Petitioner attended an initial orthopedic surgeon evaluation with Dr. Kevin Koutsky at DuPage Spine and Orthopedics and reported that currently, he had continued low back pain radiating down his left leg with associated numbness, tingling, and occasional weakness. (PX 5, pg. 3) The assessment was lower back pain with radiculopathy for which Dr. Koutsky recommended radiofrequency ablation at L4-S1 and a pain management consultation, and in the interim, Petitioner was continued on light duty work restrictions of no carrying, lifting, pulling, or pushing more than 30 pounds. (PX 5, pgs. 4-5 & PX 4, pg. 42)

At Petitioner's follow-up visits with Dr. Murtaza on July 15, 2021, and August 12, 2021, Dr. Murtaza again recommended Petitioner undergo bilateral L4-5 and L5-S1 medical branch radiofrequency ablation, and in the interim, he could continue working light duty with restrictions of no lifting, carrying, pushing, or pulling more than 30 pounds and no repetitive lifting, bending, or carrying. (PX 4, pgs. 43-48)

On August 18, 2021, Petitioner attended an initial orthopedic surgeon evaluation with Dr. Sampat and reported that while at work on September 28, 2020, he was lifting pieces of metal on a repetitive basis and developed low back pain that radiates down the left buttock, anterolateral thigh, and posterolateral thigh down to the level of the knee associated with numbness and tingling and that sometimes it went to the left calf area. (PX 6, pg. 3) A lumbar spine x-ray was taken and showed decreased disc height at L4-L5 and L5-S1, but otherwise no spondylolisthesis, fracture, or dynamic instability with flexion and extension maneuvers. (PX 6, pg. 4) Dr. Sampat's diagnosis was L4-S1 lumbar degenerative disc disease, lumbar stenosis, lumbar disc protrusion, and lumbar radiculopathy, primarily in the left lower extremity. (PX 6, pg. 5) Dr. Sampat noted he reviewed Dr. Phillips' opinions and disagreed with the lumbar strain diagnosis because of Petitioner's radicular symptoms. (PX 6, pg. 5) Dr. Sampat noted Petitioner had exhausted conservative care, including medial branch blocks and a radiofrequency ablation, and recommended surgical intervention, including a decompression and fusion at L4-S1. (PX 6, pg. 5) Dr. Sampat also recommended an updated lumbar spine MRI as he noted the last MRI was approximately 8 months old. (PX 6, pg. 5)

Petitioner underwent the updated lumbar spine MRI on October 7, 2021, and the impression was: (1) At L4-5 there is a 2mm left paracentral herniation; (2) At L5-S1 there is a 2mm right paracentral protrusion; (3) Lumbar spondylosis and scoliosis with a grade 1 retrolisthesis of L5 on S1; and (4) Possible right-sided hydronephrosis (recommend ultrasound correlation). (PX 8, pgs. 3-4)

On November 10, 2021, Petitioner followed-up with Dr. Sampat, but it was noted that Petitioner forgot to bring his lumbar spine MRI films. (PX 6, pg. 6) Dr. Sampat recommended he follow-up with his updated MRI films, and in the interim, he was authorized off work. (PX 6, pg. 6)

On March 25, 2022, Petitioner returned to Dr. Sampat and reported continued low back pain that radiated down the left buttock, posterolateral thigh, into the posterior leg associated with numbness and tingling with walking and standing. (PX 6, pg. 9) Dr. Sampat again recommended surgery, and in the interim, a lumbar epidural spine injection. Petitioner was released to return back to light duty work with restrictions of lifting up to 35 pounds and carrying up to 20 pounds. (PX 6, pg. 9-10)

On April 28, 2022, Petitioner underwent a lumbar epidural steroid injection via transforaminal approach at L4-L5 and L5-S1, left side, using fluoroscopic needle localization, which was performed by Dr. Murtaza. (PX 4, pg. 27) The pre- and post-op diagnosis were left-sided lumbar radiculopathy at L4-L5 and L5-S1 with

lower back pain with left lower extremity pain, weakness and radiculopathy. (PX 4, pg. 27) After the injection, Petitioner was released to return back to work as of May 2, 2022, with restrictions of no carrying, lifting, pushing, or pulling more than 10 pounds. (PX 4, pg. 28)

At Petitioner's follow-up with Dr. Sampat on May 6, 2022, Petitioner reported significant improvement post-injection and he was directed to follow-up in 6-8 weeks, and in the interim, he was released to return to work with restrictions of lifting up to 35 pounds and carrying up to 20 pounds. (PX 6, pgs. 12-13)

On May 25, 2022, Respondent's medical expert, Dr. Frank Phillips, authored an Addendum Report to his prior Independent Medical Evaluation performed on March 25, 2021, which was prepared based upon his supplemental review of Petitioner's diagnostic imaging films relative to the lumbar spine MRIs performed on December 29, 2020, and October 7, 2021. (RX 2, pgs. 1-2) After reviewing the supplemental MRI films, Dr. Phillips opined that based upon the totality of medical evidence and his prior IME performed of Petitioner on March 25, 2021, Petitioner had underlying lumbar degeneration at L4-5 and L5-S1 and there was no evidence of any acute structural injury to Petitioner's lumbar spine related to the September 28, 2020, work injury. (RX 2, pg. 2) Dr. Phillips further noted that while the MRI films showed a disk prolapse central and to the right at L5-S1, no contact existed with the left-sided nerve root, which was the side of Petitioner's reported leg pain. (RX 2, pg. 2) Dr. Phillips concluded that his prior opinions as set forth in his March 25, 2021, report were unchanged, including that Petitioner had reached MMI for his resolved lumbar strain/sprain sustained on September 28, 2020, as of March 25, 2021, at which time he could have also returned to full duty work without restrictions. (RX 2, pg. 2)

At Petitioner's follow-up visits with Dr. Sampat on June 3, 2022, and July 5, 2022, Dr. Sampat again recommended Petitioner undergo a transforaminal lumbar interbody fusion and decompression from L4 to S1. (PX 6, pgs. 14-19) On July 5, 2022, Dr. Sampat released Petitioner to return back to work with restrictions of lifting up to 35 pounds and carrying up to 20 pounds.

Petitioner testified at trial that he continued to work for Respondent in a full-time capacity at all times relevant after his work injury on September 28, 2020, through January 9, 2022, when he obtained new employment. (TX, pg. 33)

Respondent submitted a wage statement for the Petitioner documenting his earnings between the week ending on August 30, 2020, through January 9, 2022, which shows that Petitioner continued to work on a full-time basis with a significant amount of overtime hours logged through that time period. (RX 5, pgs. 1-3)

Respondent also submitted an itemized payment ledger documenting all medical bills previously paid relative to the medical care Petitioner previously underwent. (RX 4)

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

A claimant has the burden of proving by a preponderance of the credible evidence all elements of the claim, including that any alleged state of ill-being was caused by a workplace accident. *Parro v. Industrial Commission*, 260 Ill.App.3d 551, 553 (1st Dist. 1994). Liability cannot be premised upon imagination, speculation, or conjecture, but must arise from the facts established by a preponderance of the evidence. *Illinois Bell Tel. Co. v. Industrial Comm'n*, 265 Ill.App.3d 681, 685 (1st Dist. 1994).

The Arbitrator notes the MRIs of Petitioner's lumbar spine show disc herniations and protrusions and also notes that Petitioner was able to work without restrictions prior to the September 28, 2020, work

accident. The Arbitrator also relies on the findings and opinions of Dr. Sampat over those of Dr. Phillips. The Arbitrator acknowledges the opinions of Dr. Phillips, but notes Dr. Phillips' finding of a lumbar strain is not supported by the MRIs and Petitioner's ongoing back problems. Therefore, the Arbitrator finds the findings and opinions of Dr. Sampat more persuasive and supported by the objective evidence.

Based on the above, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the September 28, 2020, work accident.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Under Section 8(a) of the Act, a claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising out of and in the scope of employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury. *Absolute Cleaning/SVMBL v. Ill. Workers' Compensation Comm 'n,* 409 Ill.App.3d 463, 470 (4th Dist. 2011).

Based on the above finding of causal connection, the Arbitrator finds that Petitioner's treatment to date has been reasonable and necessary for the treatment of Petitioner's condition caused by the September 28, 2020, work accident. The further finds Respondent liable for the medical bills listed in Petitioner's Exhibit 9 that remain unpaid pursuant to Section 8(a) and 8.2 of the Act. Respondent shall receive a credit for medical bills paid as outlined in Respondent's Exhibit 4.

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

Based on the above finding of causal connection, the Arbitrator finds that Petitioner is entitled to, and Respondent shall authorize and pay for prospective medical care as recommended by Dr. Sampat, specifically an L4-S1 fusion surgery.

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

Petitioner filed a Petition for Penalties and Fees pursuant to Sections 16, 19(k), and 19(l) of the Act, and in support thereof, Petitioner stated as follows:

1. Long before the filing date of this pleading, Respondent refused to authorize the prescribed lower back surgery prescribed by treating orthopedic surgeon Dr. Chintan Sampat MD.
2. In the face of credible objective MRI and EMG evidence and a consistent chain of events, respondent appears to rely on its IME Dr. Phillips MD who opines that Petitioner only sustained a lumbar strain.
3. That Petitioner is in a resultingly desperate financial situation because of Respondent's wholly self-serving and unsubstantiated effort to meet its burden of proof that its delay/denial of medical benefits is based on a good faith and objective assessment of what this record presents.

The Arbitrator notes that Petitioner is seeking imposition of penalties and fees on Respondent for Respondent's failure to authorize the lumbar spine surgery recommended by Dr. Sampat. Otherwise, the

Arbitrator notes that Petitioner did not seek imposition of any penalties or fees for Respondent's delay in paying medical expenses or other benefits.

After considering the Petitioner's request in conjunction with the applicable provisions of the Illinois Workers' Compensation Act, the Arbitrator finds that no statutory authority for imposing penalties or fees for an alleged delay in authorizing medical treatment exists, which is consistent with a recent Illinois Appellate Court holding in *O'Neil vs. Ill.Workers'Comp.Comm'n*, 2020 ILApp(2) 190427WC.

The Arbitrator further notes for the record that even if Petitioner had sought the imposition of penalties and fees on Respondent due to Respondent's failure to pay all outstanding medical bills for treatment provided through March 25, 2021, which the date that Respondent's medical expert Dr. Phillips opined Petitioner reached MMI, the Arbitrator would find the imposition of penalties or fees to be unwarranted. In support thereof, the Arbitrator notes that Respondent did pay the majority of medical bills Petitioner incurred for care through March 25, 2021 and Petitioner presented no evidence to demonstrate that a written demand was made for payment of those specific medical bills that remain unpaid or that such medical bills were even submitted to Respondent for payment prior to the date of the hearing, and as such, the record does not support a finding that Respondent actions were unreasonable, vexatious, or intentional pursuant to Sections 16, 19(k), or 19(l) of the Act.

Therefore, Petitioner's claim for penalties and attorney's fees under Sections 16, 19(k), and 19(l) is denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC027998
Case Name	Maria Delia Vargas v. Hansen Plastics
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0272
Number of Pages of Decision	9
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Brian McManus Jr
Respondent Attorney	Gregory Rode

DATE FILED: 6/23/2023

/s/Carolyn Doherty, 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

MARIA DELIA VARGAS,

Petitioner,

vs. NO: 21 WC 27998

HANSEN PLASTICS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19(b) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability (TTD), medical expenses, prospective medical care, penalties and fees, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

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

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $46,300.00. 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.

June 23, 2023
O: 06/15/23
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	21WC027998
Case Name	Maria Delia Vargas v. Hansen Plastics
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Gerald Granada, Arbitrator

Petitioner Attorney	Brian McManus, Jr.
Respondent Attorney	Gregory Rode

DATE FILED: 10/17/2022

THE INTEREST RATE FOR THE WEEK OF OCTOBER 12, 2022 4.03%

/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)

MARIA DELIA VARGAS
Employee/Petitioner

v.

HANSEN PLASTICS
Employer/Respondent

Case # **21** WC **027998**

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 **7/22/22**. 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, **7/26/21**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**26,719.65**; the average weekly wage was $**513.84**.

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

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**750.34** for other benefits, for a total credit of $**750.34**.

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

ORDER

Respondent shall pay all reasonable and necessary medical services related to Petitioner's back condition as set forth in Petitioner's exhibits, pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $ 342.56/week for 51 weeks, commencing 7/31/21 through 7/22/22, as provided in Section 8(b) of the Act.

Respondent shall authorize and pay pursuant to the Fee Schedule for the prospective medical care recommended by Petitioner's treating physicians, including the physical therapy prescribed by Dr. Jacoby and Dr. Colman.

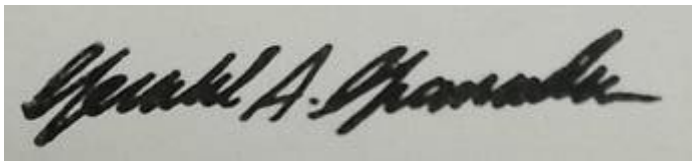
The petition for penalties and attorney fees is denied.

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

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

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

OCTOBER 17, 2022



Signature of **Arbitrator Gerald Granada**

FINDINGS OF FACT

This case involves Petitioner Maria Delia Vargas, who alleges she sustained injuries while working for the Respondent Hansen Plastics on July 26, 2021. Respondent disputes Petitioner's claims, with the issues being: 1) accident; 2) causation; 3) medical expenses; 4) TTD; 5) prospective medical care; and 6) penalties and attorney fees. Petitioner testified at the arbitration hearing via a Spanish interpreter.

In July of 2021 Petitioner was a supervisor for the Respondent. She started her shift that began on Sunday, July 25, 2021 at around 11:00 p.m. That shift ended 7:00 a.m. on Monday, July 26, 2021. While working in the early morning hours of the third shift, Petitioner lifted an object and felt pain in her back. After this incident, Petitioner testified that she had problems walking. Petitioner denies seeing a doctor prior to July 25, 2021 for low back complaints. Petitioner testified that she told Alex at work about her injury.

On July 28, 2021, Petitioner went to the company clinic at Physicians Immediate Care where she provided a history of turning and lifting a pallet high at work and hurting her lower back. (PX 1) The records from this company clinic indicate the injury occurred on July 25, 2021 and occurred gradually as she was lifting and stacking pallets that were not heavy while rotating her back from right to left. She had complaints of pain with walking, sitting and laying down. Her diagnosis was lumbar sprain and was released to return to work with restrictions of no lifting below waist level greater than 15 lbs., avoid prolonged bending over and twisting.

On July 31, 2021, Petitioner went to the emergency room at St. Joseph Hospital / Amita Health Elgin with complaints of back pain. (PX 2) In addition to her back pain, Petitioner also had complaints of rectal and vaginal numbness with urinary issues. Petitioner was admitted as an in-patient with this provider through August 4, 2021. The August 1, 2021 Physician Report Neurology Consultation report, Assessment and Plan section indicates: "Etiology of symptoms related to MRI of the thoracic and lumbar spine findings which noted disc protrusion at L3-4 impinging upon the right traversing nerve root; as well as multilevel lumbar and thoracic spondylosis; and suspect sacral alar insufficiency fractures." A follow-up orthopedic surgery consultation report from August 2, 2021 indicates an assessment of: "1. Right sacral insufficiency fracture that by verbal history is related to an injury that occurred at work. 2. L3-L4 protusion of disk."

On August 10, 2021, Petitioner saw Dr. Qadir at Advocate Medical Group. (RX 11) Dr. Qadir noted that Petitioner was using a walker at her initial visit. He confirmed Petitioner had a disc protrusion at L3-4 with impingement and mild spondylosis. Dr. Qadir also indicated that the Petitioner could not return to work. He referred Petitioner for an orthopedic consultation with Dr. Jacoby.

On September 7, 2021, Petitioner saw Dr. Jacoby at Fox Valley Orthopaedic Institute. (PX 3) Dr. Jacoby had previously seen Petitioner during her in-patient stay at St. Joseph Hospital / Amita Health Elgin on August 3, 2021. Dr. Jacoby's assessment of Petitioner was low back pain with bilateral L5 foraminal narrowing. In his September 7, 2021 Work Status Report, he indicated a diagnosis of L5-S1 disc bulge with foraminal stenosis L5-S1; prescribed an epidural steroid injection along with physical therapy; and ordered Petitioner off work for 4 weeks. Dr. Jacoby later provided a Work Status report on October 5, 2021 ordering Petitioner off work for 4 weeks. Petitioner testified that she has not been able to get the physical therapy, nor was she paid any TTD based on the denial from workers compensation.

On January 10, 2022, Petitioner underwent an IME at Respondent's request with Dr. Butler. (RX 8) Dr. Butler diagnosed Petitioner with a resolved lumbar strain for which she has reached maximum medical improvement, needs no further medical treatment, and could return to work full duty.

On March 11, 2022, Petitioner saw Dr. Colman at Midwest Orthopaedics at Rush. (PX 5) Her medical history was consistent with the history given to her other medical providers. Dr. Colman reviewed Petitioner's prior medical records, prescribed Petitioner physical therapy and kept Petitioner off work. Petitioner saw Dr. Colman again on April 27, 2022 and on June 7, 2022. Dr. Colman noted in Petitioner's last visit that she had not undergone physical therapy because of workers compensation issues and he continued to have her off work.

Petitioner testified that her back pain has not improved and that she has not received any authorization for the physical therapy recommended by her doctors. She also has not been paid any TTD benefits.

Glen Whitecotton testified on behalf of Respondent. He works for Respondent as a value stream leader. He confirmed that Petitioner told him of her back injury occurring on July 26, 2021 around 4:30 am. He testified that Petitioner reported the incident to Alex on July 26, 2021 at 11:00 pm.

Veronica Flores also testified for Respondent. She works for Respondent as a human resources representative. She testified that the Petitioner told her about falling at home on some stairs on July 23, 2021. Ms. Flores sent Petitioner a letter asking her about returning to work following the Dr. Butler IME. After sending the letter, Mr. Flores called the Petitioner to see if she was going to return to work following the Dr. Butler IME. Petitioner informed Ms. Flores that she was still not feeling well.

CONCLUSIONS OF LAW

1. Regarding the issue of accident, the Arbitrator finds that the Petitioner has met her burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's testimony and the preponderance of the medical evidence which shows that Petitioner sustained an injury to her back on July 26, 2021 due to lifting materials at work. The Arbitrator notes that the all the medical records substantiate Petitioner's testimony regarding her work activities leading to the onset of her back pain. Although there may have been some confusion as to the exact date of her accident – this issue was clarified with Petitioner's unrebutted explanation of having started her shift in the evening on July 25, 2021 and ending her shift in the morning on July 26, 2021. The initial medical records indicate the Petitioner's pain progressed throughout her shift, which would make July 26, 2021 a more accurate accident date. Based on the facts presented, the Arbitrator concludes that the Petitioner sustained an accident while working for the Respondent on July 26, 2021.

2. Regarding the issue of causation, the Arbitrator finds that the Petitioner has met her burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's testimony and the preponderance of the medical evidence. On this issue, the Arbitrator finds persuasive the medical records of Petitioner's treating physicians, who diagnose Petitioner with a protrusion at L3-4 with impingement and who relate that condition to a lifting incident at work. On this issue, Respondent relies on the opinions of its IME,

Dr. Butler. However, Dr. Butler's opinion that Petitioner basically suffered a resolved lumbar strain is outweighed by the Petitioner's initial test results that revealed a herniated disc with impingement. Based on the above, the Arbitrator concludes that the Petitioner's current condition of ill-being in her back is causally connected to her July 26, 2021 work accident.

3. Consistent with the Arbitrator's findings above, the Arbitrator further finds that the Petitioner's medical treatment has been reasonable and necessary in addressing her work-related condition. Respondent's IME, Dr. Butler is also in agreement on this issue. As such, Respondent shall pay any and all outstanding medical expenses related to Petitioner's work-related back condition as set forth in the Petitioner's exhibits subject to the Fee Schedule. Respondent shall receive a credit for any medical expenses it has already paid.

4. Consistent with the Arbitrator's findings above, the Arbitrator finds that the Petitioner's request for prospective medical treatment is both reasonable and necessary in addressing her work-related back condition stemming from her July 26, 2021 work accident. Accordingly, Respondent shall authorize and pay for the physical therapy and any related treatment, as recommended by Petitioner's treating physicians, subject to the Fee Schedule and in accordance with the provisions of Section 8 and 8.2 of the Act.

5. Consistent with the Arbitrator's findings above, the Arbitrator finds that the Petitioner was temporarily totally disabled from July 31, 2021 through July 22, 2022. This finding is supported by Petitioner's unrebutted testimony and the medical evidence that show Petitioner was given work restrictions that Respondent did not accommodate. Those restrictions have not been lifted as of the date of this arbitration hearing. Therefore, the Arbitrator awards Petitioner TTD benefits for the aforementioned time period and Respondent shall be credited for any TTD it has paid.

6. The Arbitrator finds the assessment of penalties and attorneys' fees in this case is unwarranted. Benefits were denied based on the various issues that became evident during the hearing – including the Petitioner's actual accident date, the Petitioner's condition of ill-being, whether Petitioner's condition is causally connected to her work injury, and whether Petitioner could return to work. Respondent raised many valid issues during trial and reasonably relied on the opinions and testimony of its IME, Dr. Butler who casted a reasonable doubt on some of these issues. As such, the denial or non-payment of benefits were not unreasonable or vexatious. Accordingly, the petition for penalties and attorneys' fees is hereby denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC031132
Case Name	Darlene Nauert-Aspen v. Walmart
Consolidated Cases	
Proceeding Type	Petition for Review Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0273
Number of Pages of Decision	17
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Mark Weiner
Respondent Attorney	Bret Taylor

DATE FILED: 6/23/2023

/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

DARLENE NAUERT-ASPEN,

Petitioner,

vs. NO: 18 WC 31132

WALMART,

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 causal connection, temporary total disability (TTD), medical expenses, permanent partial disability, and post-hearing evidence, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission does not consider the narrative letter attached to Petitioner's Statement of Exceptions, as no additional evidence may be introduced by the parties on review under Section 19(e) of the Act. 820 ILCS 305/19(e) (West 2022).

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

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $45,200.00. 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.

June 23, 2023

O: 06/15/23
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	18WC031132
Case Name	NAUERT-ASPEN, DARLENE v. WALMART
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Mark Weiner
Respondent Attorney	Bret Taylor

DATE FILED: 10/17/2022

THE INTEREST RATE FOR THE WEEK OF OCTOBER 12, 2022 4.03%

/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

Darlene Nauert-Aspen
Employee/Petitioner

v.

Walmart
Employer/Respondent

Case # **18WC031132**

Consolidated cases:

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

DISPUTED ISSUES

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

FINDINGS

On **10/12/2018**, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**53,584.44**; the average weekly wage was $**1,030.47**.

On the date of accident, Petitioner was **64** 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 $**36,213.66** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

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

ORDER

- Respondent shall pay Petitioner temporary total disability benefits of $686.98/week for 52-3/7 weeks, commencing 10/13/2018 through 10/16/2019, as provided in Section 8(b) of the Act.
- Respondent shall be given a credit of $36,213.66 for temporary total disability benefits that have been paid.
- Respondent shall pay reasonable and necessary medical services of:

1. MidWest Specialty Pharmacy, LLC: 1/29/2019 to 7/8/2019, totaling $4,947.86
2. Premium Healthcare Solutions: 12/6/2018, totaling $2,336.00
3. Quest Diagnostics: 12/6/2018, totaling 1,045.91
4. Chicago Medical Imaging: 10/25/2018, totaling $1500.00
5. Northwest Radiology Associates: 10/18/2018 and 10/26/2018, totaling $150.69
6. ATI Physical Therapy: 5/13/2019 through 7/18/2019, totaling $12,165.13.

- Respondent shall pay the medical listed above at the lesser of the amount billed, the Illinois Medical Fee Schedule amount or at the negotiated rate. Respondent shall be given a credit for any of the bills already paid.
- Respondent shall pay Petitioner permanent partial disability benefits of $618.28/week for 37.5 weeks, because the injuries sustained caused the 7.5% 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 17, 2022

Signature of Arbitrator

STATEMENT OF FACTS

Petitioner testified she first worked for Respondent 25 years ago as a cashier. In October 2018, she was a cashier supervisor. Petitioner testified it was her job to take care of the cashiers. She assigned cashiers to registers, handled problems with customers and price changes, counted cash drawers throughout the day and answered questions.

On October 12, 2018, Petitioner testified she was involved in an accident at work. She testified she is only partially able to recall the accident. She recalled going into the back area because she was getting ready to leave for the day. She was putting her stuff down, turned and then it all goes blank. She testified, though, she hit two helium tanks, must have spun around and hit the two corners of the cigarette cage. She did not recall much else until she arrived at Northwest Community Hospital.

Petitioner was transported by ambulance to the hospital. It was reported Petitioner lost her balance, fell backwards and struck her head, but she could not recall if she was knocked out. Petitioner's past medical history was noted to include anxiety, depression, GERD and hypertension. A CT scan of the brain demonstrated a prominent scalp hematoma, but no acute abnormalities of the brain. The laceration was closed with 4 stiches and a staple. Petitioner lost a significant amount of blood, and she was admitted for blood transfusions. (Pet'r Ex. No. 2)

Petitioner remained hospitalized until October 17, 2018, When discharged, the diagnosis was a mild TBI after a mechanical fall with post-concussion syndrome, complicated with anemia from blood loss. Petitioner returned to the emergency room on October 23, 2018 reporting bleeding from the wound. She was directed to follow-up with her primary care physician. (Pet'r Ex. No. 2)

Dr. Shaku Chhabria of Illinois Orthopedic Network (ION) evaluated Petitioner on October 22, 2018. He noted a scalp laceration and recommended an MRI of the brain. He followed Petitioner for post-trauma syndrome, small vessel disease, cerebrovascular, and mild cognitive impairment until November 27, 2018. An MRI of the brain was done on December 7, 2018. The findings indicated mild periventricular ischemic changes of a chronic duration. (Pet'r Ex. No. 5)

Dr. Ahmad Dalif, also of ION, took over Petitioner's care beginning on December 17, 2018, noting the MRI of the brain showed SVD due to chronic hypertension. The neurologic examination was normal. He recommended an EEG to assess cognitive function and rule out epileptic activity, and he recommended continued medication management. He also opined Petitioner could return to work and should be reassessed on a monthly basis for one year. Petitioner saw Dr. Dalif one additional time on January 14, 2019 after which neurologic care was transferred to Dr. Gulati. (Pet'r Ex. No. 5)

Dr. Irvin Weisman through ION evaluated Petitioner on October 24, 2018. Petitioner reported dizziness and changes in mental status. He evaluated and cleaned the scalp wound, removing the stiches and staple. He referred Petitioner to a neurologist. A second CT scan of Petitioner's brain was taken on October 25, 2018. Mild soft tissue

swelling was seen in the posterior right high parietal region, representing a contusion/hematoma. A small hypodense lesion was seen in the anterior limb of the left internal capsule. An MRI was suggested to look for ischemic changes. While Dr. Weisman noted soft tissue inflammation and tenderness to palpation, he also opined the wound healed completely on November 19, 2018. Petitioner was to remain off work due to gait imbalance. (Pet'r Ex. No. 5)

Dr. Anil Gulati evaluated Petitioner on January 28, 2019. Petitioner reported frequent headaches, generalized throbbing throughout the day lasting for several hours and frequent episodes of dizziness with exertion. Petitioner reported fatigue, poor sleep, memory loss and some numbness in the right hand. She ambulated without assistance. On examination, Dr. Gulati noted normal speech and language function, no facial asymmetry, normal pupil examination, full eye movement, no nystagmus, trace pronator sign on the right and normal sensory examination. Dr. Gulati diagnosed hypertension, anxiety, cerebral concussion and right hemiparesis. (Pet'r Ex. No. 9)

Dr. Gulati opined symptoms of daily headaches, insomnia, dizziness and persistent fatigue could be a constellation of post-traumatic headache syndrome or post-traumatic nervous hyperexcitability syndrome. He also opined the right hemiparesis was likely secondary to stroke/lucnar stroke to the left subcortical region. Dr. Gulati wrote: "Though it is tempting to speculate that she likely had a lucnar stroke resulting in loss of balance and fall and subsequent trauma to the head. The symptoms of stroke may tend to improve and not worsen with time. It likely occurred at some point after the blunt trauma to the head and is not related to cerebral concussion/fall. She does have risk factors for stroke, including her age as well as history of hypertension." (Pet'r Ex. No. 9)

Petitioner returned to Dr. Gulati on February 25, 2019, reporting episodes of anxiety. She claimed to spend most of her time at home, not wanting to go out of the house. She expressed concerns for memory loss, and she was reluctant to return to work. She had episodes of crying and was easily upset. Dr. Gulati opined Petitioner exhibited signs of posttraumatic stress disorder (PTSD). (Pet'r Ex. No. 9)

Petitioner was evaluated by Dr. Gulati at regular intervals until April 11, 2022. Throughout the course of care, she reported periodic improvement of symptoms, including less frequent headaches. When seen by Dr. Gulati on October 21, 2021, she was working full-time, regular duty, was very active, sleeping well, walking every day with her husband and might experience a headache once or twice a month. He recommended she remain compliant with medication management of Xanex, melatonin, Fioricet and Depakote. When she returned on April 11, 2022, Dr. Gulati noted the presentation of Petitioner's headaches fluctuated. She was to continue medication management, as needed, and return in 3-months for follow-up. (Pet'r Ex. No. 9)

Katie Freeman, a licensed clinical social worker, began individual therapy with Petitioner on March 11, 2019. Petitioner's affect was appropriate. Her mood was anxious and depressed. Her speech and language were normal. Her cognitive functions was noted to include memory deficit. Her behavior was isolated. She avoided triggers. Petitioner

reported memory loss, eating disturbances, anxiety/panic, sleep disturbances, an inability to enter a Walmart store or other crowded public places, nightmares involving head injuries and depressive symptoms including hopelessness and hesitation to leave her home. Freeman provided Petitioner with psychoeducation about PTSD and its effect on brain and behavior, discussed EMDR and how it helps to resolve trauma. The goals of therapy were established as: working on coping mechanisms and mood regulation techniques to reduce symptoms, utilize EMDR to resolve trauma associated with symptoms, incrementally begin taking steps toward being able to be in public places and to build confidence to return to work. (Pet'r Ex. No. 11)

From March 18, 2019 through December 12, 2019, Petitioner attended a total of 57 sessions with Freeman. During sessions, Petitioner expressed the following from time to time:

- Reports of anxiety when entering other stores such as Meijer, Jewel, Target and Costco. (3/18/2019, 4/4/2019, 4/11/2019, 4/26/2019, 5/30/2019, 6/10/2019, 9/23/2019).
- Anxiety and panic while at an indoor playground facility with her grandchildren (3/25/2019)
- Her experiences sitting in a Walmart parking lot or entering the store (4/4/2019, 4/18/2019, 6/17/2019, 6/24/2019, 6/27/2019, 7/15/2019, 7/29/2019, 8/5/2019, 8/8/2019, 9/16/2019, 10/14/2019, 11/25/2019)
- Conflict with her daughter (6/6/2019, 6/17/2019, 6/24/2019, 7/18/2019, 7/22/2019, 10/14/2019)

She also noted concerns about memory loss, sadness in response to her mother's illness and referred to spending time with her grandchildren. (Pet'r Ex. NO. 11)

Freeman's records document no sessions after December 12, 2019 until December 10, 2020. When she returned for therapy, Petitioner reported improvement with fear of being in stores with some residual anxiety if a store is too big or too busy. At the December 21, 2020 session, she discussed conflict with her daughter and its being the primary source of anxiety. At the December 28, 2020 session, Petitioner feared her grandson being taken away from her, if she used her voice. At sessions in 2021, Petitioner primarily expressed concern about continued conflict with her daughter, her mother's declining health and her brother's death. At a February 2, 2022 session, Petitioner expressed frustration her memory was permanently damaged from the fall. At the March 18, 2022 session, she mentioned a fear of big box stores. Petitioner later expressed concern about her case proceeding to hearing. (Pet'r Ex. No. 11)

Karen L. Cassiday, PhD evaluated Petitioner on March 3, 2020 and March 10, 2020. Each appointment lasted 60-70 minutes. (Pet'r Ex. No. 14 at 6) Dr. Cassiday is a Licensed Clinical Psychologist (*Id.* at 5), and she is not board certified (*Id.* at 18) Dr. Cassiday administered the Impact of Event Scale and Beck Depression Inventory tests. (*Id. at 6)* Dr. Cassidy testified testing showed Petitioner had a very high level of depression, being above the cutoff and in the severe range. This indicated, Dr. Cassiday opined, Petitioner was currently suffering major depression. (*Id.* at 7)

Petitioner told Dr. Cassiday she had been married once, she has two children and a grandson. Petitioner and her husband raised her grandson since the age of 4 due to her daughter's substance abuse issues. (*Id.* at 8 and Exhibit 2) Petitioner reported she found it difficult to concentrate, to retrieve words, ideas and memories and she did not feel like herself. (*Id.* at 12) Dr. Cassiday testified she observed Petitioner having trouble finishing sentences and fatiguing easily. (*Id.* at 13) Dr. Cassidy opined Petitioner suffered from depression and PTSD caused by the fall. (*Id.* at 14-15) She testified Petitioner would require ongoing psychological care, and she could not return to work for Walmart. (*Id.* at 16)

Dr. Cassidy did not review records from Freeman, Dr. Gulati or the report of Dr. Sani. (*Id.* at 19) Petitioner reported no prior history of depression and anxiety before the fall, and she admitted it surprised her both were noted in Petitioner's past medical history at Northwest Community Hospital. (*Id.* at 22) Dr. Cassiday testified Petitioner would not be able to operate a motor vehicle alone, but could likely care for her grandson now that he is older. (*Id.* at 23-24) Dr. Cassidy did not know if Petitioner had returned to work. (*Id.* at 25)

Ronald J. Ganellen, Phd, evaluated Petitioner on September 4, 2019. Dr. Ganellen is a neuropsychologist. Neuropsychology is the study of the relationship between brain function and behavior. (Resp't Ex. No. 1 at 8) His practice involves work in neuropsychology as well as clinical psychology. (*Id.* at 9) He is board certified in clinical psychology. (*Id.* at Ex. 1)

Petitioner told Dr. Ganellen her first husband was abusive both physically and verbally, and she ended the marriage when he threw her down the stairs. She had one daughter. (*Id.* at Ex. 1 and page 13) She and her current husband have been married for 28 years, and they have no children. Petitioner reported she was an average student, graduated high school and had a solid work history. (*Id.* at 12) Dr. Ganellen testified this indicated Petitioner was at least of average intelligence before the injury occurred.

Dr. Ganellen reviewed the medical records for treatment after the fall, including the records of Freeman, Dr. Gulati and Northwest Community Hospital. He noted Petitioner's past medical history included a history of depression and anxiety for which the medications alprazolam (Xanax) and escitalopram were prescribed. (*Id.* at 17) Dr. Ganellen found this significant because Petitioner reported no preinjury history of depression and anxiety, which makes it difficult to determine accurately whether the symptoms she reported after the accident reflected a new condition or a continuation of the pre-existing condition.

Dr. Ganellen also explained Petitioner had a scalp hematoma, not a brain hematoma. A scalp hematoma forms on the surface of the skin. (*Id.* at 19) He further opined Petitioner sustained a mild traumatic brain injury. (*Id.* at 20)

Dr. Ganellen administered five categories of tests. On verbal testing, he found Petitioner's language skills and verbal abilities were fine. (*Id.* at 21) On intellectual testing, her performance was significantly below average, which was unexpected. (*Id.* 21-22) The finding was unexpected because she had a mild head injury, which would cause only mild impairment of neurocognitive functioning. Because she scored so low, Petitioner's score could not be valid and appeared to have been inconsistent and reflecting lack of effort. In other words, the validity measures in place on testing suggested Petitioner could have scored higher if she had tried. (*Id.* at 23)

When Dr. Ganellen tested Petitioner's memory, there was a discrepancy between her performance on the digit span and the Rey Verbal Learning Test. The findings suggested either intentional or motivational factors impacted her performance. Inconsistencies were also noted when she completed the Wechsler Memory Scale IV. The findings indicated serve impairment, which is not expected and is uncharacteristic for a mild closed head injury. (*Id.* at 25-26)

Testing of Petitioner's visual/motor skills also revealed unexpected findings when she performed poorly on the drawing of complex figures. Her test results were fine for Judgment Line of Orientation (*Id.* at 26-27) On sensory/motor function testing, Petitioner tested to a severely impaired range. The findings were again inconsistent with a mild head injury. Dr. Ganellen also noted, in the medical records, Petitioner had normal motor strength and speed when tested. (*Id.* at 28)

The final area of testing was for emotional/personality function. Petitioner's responses to the MMPI-2 were not valid and could not be interpreted to be a true representation of her psychological state because there was an unusual degree of inconsistency and distortion of how she portrayed herself. (*Id.* at 30-31)

Based on the testing, Dr. Ganellen opined the severe impairment Petitioner exhibited was not proportional to the head injury she sustained. The findings indicated either a neurological condition, unrelated to the fall or her very, very poor performance was an indication of malingering. (*Id.* at 32) Dr. Gulati did not diagnose any such neurological conditions. Dr. Ganellen testified PTSD could not be diagnosed due to the invalid testing. (*Id.* at 33) Dr. Ganellen did not administer the Beck Depression Inventory or the other tests administered by Dr. Cassiday because the testing does not include the validity measures of the MMPI-2. (*Id.* at 34)

Dr. Sani examined Petitioner on July 16, 2019. Dr. Sani diagnosed a concussion with post-concussion syndrome, an ischemic stroke involving the left anterior limb of the internal capsule, anxiety and depression and status post scalp laceration and hematoma. He causally related the concussion, post-concussion syndrome, laceration, hematoma and acute blood loss anemia to the fall. (*Id.* at 17-18) He testified the stroke was not related to the fall because an ischemic stroke is not traumatic. (*Id.* at 19-20) He also testified the worsening, rather than improvement of symptoms, Dr. Gulati noted was inconsistent with post-concussion syndrome. With post-concussion syndrome, the patient's symptoms will improve over time. (*Id.* at 21-22) He opined she was able to return to work. (*Id.* at 24)

Petitioner testified her grandson is 23-years old. She testified her daughter never had substance abuse issues, and her relationship with her daughter is no longer tense. She testified she has seen Freeman consistently since March of 2019 without interruption. She testified she was treated for depression 20-years ago when her father passed away. She admitted she had been married before her current marriage to her husband, Kurt. Petitioner testified she continues to see Dr. Gulati, having last seen him the first week of May of 2022. Petitioner testified she will get a headache 4 to 5 times a week. The headaches are to the right-side of her head. She described it like a "rocket." Petitioner has a visible scar on the scalp at the back of her head. Petitioner testified the scar will get warm, if she does not wear a hat while in the sun. She does not go into big box stores unless she is with her husband and they have a list. She also does not go on busy days, limiting her visits to weekdays.

Petitioner testified she returned to work in February of 2020. She was working for Walgreens two days a week. She began as a cashier, and she has been promoted to a supervisor or shift lead in May of 2021. She works weekends. She works all shifts. During COVID, she took on the role of a safety champion, meaning she ensured all safety protocols were met. Employment records show Petitioner had earnings during the week of February 26, 2020 to March 5, 2020. Petitioner's employee review was positive. She met expectations, made decisions on her own, wanted to learn other positions and interacted well with other employees. (Resp't Ex. No. 4)

Respondent offered into evidence surveillance from February 24, 25 and 26, 2019 and November 22, 2020. Petitioner's attorney acknowledged on the record she was the person in the video. In February of 2019, Petitioner was observed operating a motor vehicle alone, transporting two young children to school and a doctor's office. Petitioner managed buckling the children into the backset of the car and handling a number of bags at the same time. She went to a strip mall, gas station and store with the children. It was a snowy day. (Resp't Ex. No. 6)

In November of 2020, Petitioner and her husband went into a grocery store and unloaded the groceries into a truck. Petitioner handled the heavier items from the bottom of the shopping cart. She also drover alone to Walgreens, where she is seen tripping as she existed her vehicle, getting up and entering the store. Video then shows her helping customers at the front cash register. (Resp't Ex. No. 7)

CONCLUSIONS OF LAW

Before addressing the issues in dispute, it is necessary to address a threshold issue of credibility. The role of the Commission is the determine the credibility of witnesses. *See*, *Hosteny v. Illinois Workers' Compensation Commission*, 397 Ill.App.3d 665, 928 N.E.2d 474, 340 Ill.Dec. 475 (1st Dist. 2009) and *Rechenberg v. Illinois Workers' Compensation Commission,* 2018 IL App (2d) 170263WC, 99 N.E.2d 521, 421 Ill.Dec. 277 (2nd Dist. 2018). In both cases, the claimants' testimony was inconsistent with the evidence; thus, the Commission and Appellate Court on appeal denied benefits on the basis the claimants were not credible.

In the instant case, the parties agree Petitioner was involved in a work-related accident and sustained injuries. The dispute goes to the severity, duration and extent of the injuries. The record is replete with inconsistent representations by Petitioner of her condition of ill-being, which affect her credibility.

At trial, Petitioner testified she is married, has one daughter and her grandson is 23-years of age. She admitted to a prior marriage. She denied her daughter had substance abuse problems and testified her relationship with her daughter is not contentious. She claimed to have seen Freeman consistently, without interruption since March of 2019. She downplayed her position with Walgreens and the level of responsibility she had as a safety champion. She admitted to being promoted to a supervisor or shift lead in May of 2021. The evidence shows she returned to work in February of 2020. Petitioner testified she avoids big box stores or only goes to such stores when they will be less crowded.

To Dr. Cassiday, Petitioner reported she had been married only one time, she had two children, and her daughter had substance abuse issues. Petitioner and her husband, according to what Petitioner told Dr. Cassiday, raised their grandson since the age of four because of the daughter's substance abuse problems. She told Dr. Cassiday she was motivated to return to work, but she did not tell Dr. Cassidy she had already returned to work and was working for Walgreens.

To Dr. Ganellen, Petitioner reported her first husband was abusive, threw her down the stairs and she then ended the marriage. She reported having one daughter, but she and her current husband had no children together.

Freeman noted in her records Petitioner reported going to an indoor playground facility with her grandchildren, and conflict with her daughter on multiple occasions. Freeman's records also documented Petitioner's concern she would have her grandson taken away, if she used her voice. Freeman's records do not document treatment after December 12, 2019 until December 10, 2020.

When testifying, Petitioner kept referencing her memory problems and the inability to recall things such as the medications she was taking and what doctors she had seen at Respondent's request. She testified she did not remember seeing Dr. Cassiday. At other times, Petitioner had total recall, such as her continued insistence she avoided big box

stores. Her position with Walgreens was retail, and she worked all shifts, including times the store would be busy. She testified she had problems learning at work, but her performance review was positive, noted her interaction with others and her desire to learn new positions. She was also promoted after little more than a year of employment with Walgreens. The company would not have promoted Petitioner, if she was having problems doing the job.

The Arbitrator observed Petitioner to be hostile to questioning at times, especially if a question challenged the image of herself she wanted to present to the Commission. Based on the inconsistencies of what Petitioner testified to and the various stories she reported to the physicians who examined her, the Arbitrator finds Petitioner's testimony as to the extent of her condition, the nature of the injury and the extent of disability not credible.

In support of the Arbitrator's decision relating to F, whether Petitioner's current condition of ill-being is causally related to the work injury, the Arbitrator finds the following:

There is no question Petitioner tripped and fell while working for Respondent on October 12, 2018. She sustained a laceration to the head, a mild-concussion and anemia due to blood loss. She saw multiple physicians for complaints of headaches, depression and other issues both of her own choosing and at Respondent's request. At some point following the accident, she also suffered a stroke.

Dr. Gulati was Petitioner's treating neurologist for the longest period of time. He considered causation between the stroke and the accident, concluding it was natural to speculate there was a causal connection between the two events, but he ultimately concluded the stroke occurred sometime after the accident and was not related to the fall. He reached this conclusion because Petitioner was at risk for a stroke due to her age and high blood pressure. Dr. Sani is the only other physician to consider the question of causation for the stroke. He opined the stroke was ischemic and therefore not related to the fall. Such strokes are not traumatic.

Freeman and Dr. Cassidy diagnosed depression and PTSD. Dr. Cassidy testified the diagnoses were related to the fall. Neither was aware of Petitioner's prior history of depression and anxiety. Neither was aware of her prior use of medications for those conditions, as had been documented in the chart from Northwest Community Hospital. The testing Dr. Cassidy used did not include validity measurements, meaning she did not question the history, stories and Petitioner's performance during her assessment. The histories and stories Petitioner told to both Freeman and Dr. Cassiday were inconsistent with what she told Dr. Ganellen and what she testified to at trial.

Dr. Ganellen performed a comprehensive neuropsychological assessment of Petitioner to determine whether there was a causal relationship between Petitioner's brain function and her behavior. Dr. Ganellen found Petitioner's performance on testing to be inconsistent with the severity of the head injury sustained and overall demonstrated a lack of effort by

Petitioner. Her performance led him to conclude the test results were invalid. The testing therefore did not support the diagnosis of depression, anxiety and PTSD made by Freeman and Cassiday.

The Arbitrator considered the various professional and medical opinions based on the determination of Petitioner's credibility. Dr. Ganellen challenged Petitioner's credibility with comprehensive testing, including measures for validity. The findings of Dr. Ganellen support the Arbitrator's finding Petitioner's presentation of her condition and the extent of injury is not supported by the evidence. The Arbitrator finds the conclusions and opinions of Dr. Ganellen more credible than those of Dr. Cassiday or Freeman for just those reasons.

The Arbitrator therefore finds Petitioner sustained an injury consisting of a scalp laceration/hematoma, a concussion and anemia due to blood loss. The stroke and the psychological conditions of depression, anxiety and PTSD are not related to the accident. Petitioner was at maximum medical improvement for the injuries she sustained as of July 16, 2019 when she was seen by Dr. Sani. Her condition of ill-being and any treatment received after this date is not related to the fall.

In support of the Arbitrator's Decision relating to J, whether the medical services provided to Petitioner were reasonable and necessary, the Arbitrator finds the following:

Pursuant to Section 8(a) of the Act, the following medical expenses claimed by Petitioner were reasonable, necessary and causally related to the injury:

1. MidWest Specialty Pharmacy, LLC: 1/29/2019 to 7/8/2019, totaling $4,947.86
2. Premium Healthcare Solutions: 12/6/2018, totaling $2,336.00
3. Quest Diagnostics: 12/6/2018, totaling $1,045.91
4. Chicago Medical Imaging: 10/25/2018, totaling $1500.00
5. Northwest Radiology Associates: 10/18/2018 and 10/26/2018, totaling $150.69
6. ATI Physical Therapy: 5/13/2019 through 7/18/2019, totaling $12,165.13.

Respondent shall pay the medical listed above at the lesser of the amount billed, the Illinois Medical Fee Schedule amount or at the negotiated rate. Respondent shall be given a credit for any of the bills already paid.

The Arbitrator finds all other medical expenses claimed by Petitioner were either unnecessary or were not causally related to the injury, as all such services were provided to Petitioner after she was found to have reached maximum medical improvement or were for conditions found unrelated to the work injury.

In support of the Arbitrator's Decision relating to K, the period of temporary total disability, the Arbitrator finds the following:

An award for temporary total disability benefits is appropriate when an employee cannot return to gainful employment as a result of the work injury. The period of temporary total disability will continue until the employee's condition has stabilized, meaning he reaches maximum medical improvement, or until the employee returns to gainful employment. *See*, *Mt. Olive Coal Co. v. Industrial Commission,* 295 Ill. 429, 129 N.E. 104 (1920) and *Interstate Scaffolding v. Workers' Compensation Commission*, 236 Ill.2d 132, 923 N.E.2d 266, 337 Ill.Dec. 707 (2010).

The parties stipulated to TTD benefits beginning on October 13, 2018 and through October 16, 2019. Petitioner claimed benefits through May 15, 2020; however, she had reached maximum medical improvement and was released to return to work by Dr. Sani on July 19, 2019.

Based on the foregoing, the Arbitrator finds Petitioner was entitled to receive TTD benefits for a period of 52-3/7 weeks representing the period from October 13, 2018 through October 16, 2019. Respondent shall be given a credit of $36,213.66 for the payment of TTD benefits.

In support of the Arbitrator's decision relating to, L, the nature and extent of injury, the Arbitrator finds the following:

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 Petitioner was employed as a cashier supervisor at the time of the accident. She is able to return to work in her prior. The Arbitrator notes Petitioner did not return to work for Respondent, claiming an inability to enter a big box store; a claim the Arbitrator does not find credible. Petitioner returned to work initially as a cashier, but working for Walgreens. In May of 2021, she was promoted to a supervisor or lead position. Because of her return to work for a retail company like Walgreens, the Arbitrator gives lesser weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes Petitioner was 64 years old at the time of the accident. Because of her age, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner testified she is earning less working for Walgreens. However, the Arbitrator also found Petitioner is able to return to work for Walmart without limitation. Her claim she cannot enter and remain in a big box store is not credible. Because Petitioner is not credible and the reason for lesser earnings is unrelated to the work injury, the Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Dr. Gulati, Freeman and Dr. Cassidy opined Petitioner could not return to work in a big box store. Petitioner was working in a large store, Walgreens, at the time she was seen by Dr. Cassiday. Dr. Gulati later noted Petitioner was working full duty, no restrictions or limitations, expressing no concern for the environment in which she was working.

Petitioner testified at trial she has a headache 4 to 5 times a week. Dr. Gulati's records note the frequency of headaches to be one to two a month. As discussed extensively when addressing credulity, the Arbitrator does not find Petitioner's testimony of memory loss credible. Because the Arbitrator finds Petitioner not credible and there are inconsistencies in her reporting of symptoms, the Arbitrator therefore gives lesser weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 7.5% loss of use of the person as a whole pursuant to §8(d)2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC025276
Case Name	Sonia Womack v. Alton Mental Health
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0274
Number of Pages of Decision	10
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Todd Schroader, Mary Massa
Respondent Attorney	Caitlin Fiello

DATE FILED: 6/23/2023

/s/Amylee Simonovich, Commissioner

Signature

23IWCC0274

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Sonia Womack,

Petitioner,

vs. NO: 20 WC 25276

Alton Mental Health,

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 issue of nature and extent, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

As an initial matter, the Commission notes that a prior 19(b) hearing was held in this case on June 15, 2021. In the Arbitration Decision filed on October 7, 2021, the Arbitrator concluded Petitioner was entitled to prospective medical treatment in the form of the multi-level cervical disc replacement surgery recommended by Dr. Gornet, Petitioner's treating physician.

On March 10, 2020, Petitioner sustained injuries while helping to subdue a combative patient. She complained of immediate pain in her upper back and her neck radiating into the right shoulder. A right shoulder MRI showed possible tendinopathy without evidence of a tear. A cervical spine MRI revealed small, broad-based disc protrusions and foraminal narrowing from C3-C7 with possible mild central stenosis at C4-C5. Petitioner's right shoulder condition resolved with minimal conservative treatment and she was placed at maximum medical improvement (MMI) regarding the shoulder in September 2020.

Petitioner underwent conservative treatment for her cervical condition including a right ESI at C6-C7. Dr. Gornet eventually recommended Petitioner undergo disc replacement surgery at C3-C4, C4-C5, C5-C6, and C6-C7; however, Petitioner testified that she decided not to proceed with the surgery due to her relatively young age. Dr. Gornet last examined Petitioner on December 9, 2021. Petitioner continued to complain of low level pain in her neck, right trapezius, right shoulder, and right arm. She reported that her symptoms had improved and that her new job was less stressful. Dr. Gornet wrote that because Petitioner was tolerating her symptoms, he

recommended observation of Petitioner's cervical condition instead of surgery. He wrote that Petitioner more likely than not will ultimately have to undergo further treatment due to the significant disc pathology evident on the cervical MRI. Dr. Gornet wrote that Petitioner was doing relatively well and placed Petitioner at MMI.

Petitioner returned to her original job without restrictions before she eventually transferred to her current position. Petitioner testified that her new job is in the control room and involves monitoring the alarms, security system, and cameras. Petitioner is right-handed and testified that when she brushes her teeth, her right hand sometimes goes numb. She testified that her right arm sometimes goes numb while she drives and sleeps. Petitioner testified that the numbness in her arm wakes her up at night. She testified that her right arm occasionally goes numb if she sits for a prolonged period at work. Petitioner testified that she avoids lifting and no longer picks up her granddaughter.

The Arbitrator concluded Petitioner sustained a 16% loss of the whole person due to the work accident. While the Commission generally agrees with the Arbitrator's analysis of the five factors pursuant to Section 8.1b(b) of the Act, the Commission modifies the award of permanent partial disability. After carefully considering the totality of the evidence and analyzing the five factors pursuant to Section 8.1b(b) of the Act, the Commission finds Petitioner sustained a 12% loss of the whole person due to the March 10, 2020, work accident. Petitioner sustained injuries to her right shoulder and cervical spine. While her right shoulder condition resolved with minimal treatment, Petitioner continues to experience cervical and radicular symptoms including occasional numbness in her right hand and arm. Dr. Gornet recommended Petitioner undergo a four-level cervical disc replacement surgery; however, Petitioner decided not to proceed with the surgery. In December 2019, Petitioner reported her symptoms had improved and Dr. Gornet wrote that Petitioner was doing relatively well. The doctor no longer recommended surgery because Petitioner was tolerating her symptoms and had changed jobs. He wrote that Petitioner likely would need to undergo additional cervical treatment in the future. Due to Petitioner's diagnoses, conservative treatment, and residual complaints, the Commission finds Petitioner sustained a 12% loss of the whole person as a result of the March 10, 2020, work accident.

As a final matter, the Commission corrects a scrivener's error on the Arbitration Decision Form. The Arbitrator mistakenly identified the date of accident as August 19, 2019. The Commission modifies the above-referenced sentence to read as follows:

> On the date of accident, March 10, 2020, Respondent was operating under and subject to the provisions of the Act.

The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 4, 2022, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay reasonable and necessary medical services set forth in Petitioner's Exhibit 3, pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall receive a credit for medical benefits that have been paid and shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, pursuant to Section 8(j) of the Act.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner permanent partial disability benefits of **$804.31**/week for **60** weeks, because Petitioner's injuries caused a 1**2%** loss of the whole person, pursuant to Section 8(d)2 of the Act.

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

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

Pursuant to Section 19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review.

June 23, 2023
d: 5/23/23
AHS/jds
51

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC025276
Case Name	Sonia Womack v. Alton Mental Health
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	6
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Todd Schroader
Respondent Attorney	Caitlin Fiello

DATE FILED: 11/4/2022

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 1, 2022 4.44%

/s/ Jeanne AuBuchon, Arbitrator
Signature

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

November 4, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Sonia Womack
Employee/Petitioner

v.

Alton Mental Health
Employer/Respondent

Case # **20** WC **25276**

Consolidated cases: _____

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeanne L. AuBuchon**, Arbitrator of the Commission, in the city of **Collinsville**, on **May 27, 2022**. By stipulation, the parties agree:

On the date of accident, **8/19/19**, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**69,707.04**, and the average weekly wage was $**1,340.52**.

At the time of injury, Petitioner was **46** years of age, ***married*** with **0** dependent children.

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

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**.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay the medical expenses listed in Petitioner's Exhibit 3 pursuant to Sections 8(a) and 8.2 of the Act and the fee schedule. Respondent shall be given credit for any and all expenses paid directly or through its group medical plan as allowed under Section 8(j) of the Act. Respondent shall hold Petitioner harmless from any claims for which Respondent claims credit.

Respondent shall pay Petitioner the sum of $**804.31**/week for a further period of **80** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **16% loss of the body as a whole**.

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

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

NOVEMBER 4, 2022

Jeanne L. AuBuchon
Signature of Arbitrator

PROCEDURAL HISTORY

This matter proceeded to trial on May 27, 2022, on all disputed issues. The sole issue in dispute is the nature and extent of the Petitioner's injury. The case was previously tried pursuant to Sections 19(b) and 8(a) if the Illinois Workers' Compensation Act (hereinafter "the Act") on October 27, 2020, at which time this Arbitrator found the Petitioner to be entitled to prospective medical treatment in the form of cervical disc replacement surgery. At the final arbitration hearing, the parties stipulated that all outstanding medical bills would be paid.

FINDINGS OF FACT

The Petitioner was 46 years old and employed by the Respondent as a security therapy aide when, on March 10, 2020, she was injured in an altercation with a combative patient. (AX1, PX1) Afterwards she suffered neck pain that radiated into her right trapezius, right shoulder and right arm as well as frequent headaches. (PX1) Dr. Matthew Gornet, an orthopedic spine surgeon at The Orthopedic Center of St. Louis, had recommend cervical disc replacements at C3-4, C4-5, C5-6 and C6-7. (Id.)

The Petitioner followed up with Dr. Gornet on December 8, 2021, at which time she decided to hold off on surgery because she was young and had changed jobs from being a floor supervisor with daily contact with patients to a control job monitoring alarms, security and cameras with less contact with patients. (T. 10) She was continuing to have a low level of pain in her neck, right trapezius, right shoulder, right arm and headaches. (PX2) Her symptoms were somewhat improved. (Id.) Dr. Gornet recommended against surgery at that time and was in favor of observation. (Id.) He believed it was more likely than not that the Petitioner "will ultimately come

to treatment." (Id.) He released her at maximum medical improvement and prescribed medications to help alleviate her symptoms. (Id.)

The Petitioner, who is right-handed, testified that sometimes her right hand goes numb when brushing her teeth and her right arm goes numb when driving and sleeping. (T. 13) She said that while working, she gets numbness in her arm sometimes if she sits for a long time, and she has to stretch and walk around. (T. 13-14) She said she does not do a lot of lifting because of her injury, including picking of her granddaughter. (T. 14) The Petitioner acknowledged that she returned to work full duty with no restrictions. (T. 15-16)

CONCLUSION

Issue 10: 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.** The Petitioner continues to work for the Respondent but has a different position with very little patient contact. The Arbitrator places some weight on this factor.

(iii) **Age.** The Petitioner was 46 years old at the time of the injury. She has many work years left during which time she will need to deal with the residual effects of her injury. The Arbitrator places some weight on this factor.

(iv) **Earning Capacity.** There was no evidence of limitation of the Petitioner's earning capacity. Therefore, the Arbitrator places no weight on this factor.

(v) **Disability.** The Petitioner testified that she still experiences numbness in her hand and arm. Although she has no work restrictions, she restricts her activities of daily life when it comes to lifting. Dr. Gornet believed her condition will get to the point that she will need to undergo surgery. The Arbitrator puts some 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 16 percent loss of her body as a whole regarding her cervical spine.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC021010
Case Name	Zahieh Al Ashhab v. Walmart Associates Inc
Consolidated Cases	
Proceeding Type	Remand from Circuit Court of Cook County Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0275
Number of Pages of Decision	4
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Andrew Kriegel
Respondent Attorney	Bret Taylor

DATE FILED: 6/23/2023

/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	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Zahieh Al Ashhab,

Petitioner,

vs. No. 19 WC 21010

Walmart Associates, Inc.,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Circuit Court of Cook County. On January 7, 2022, the Commission issued its Decision and Opinion on Review in this matter. In that decision, we modified the Arbitrator's April 21, 2021, §19(b) decision which found that only Petitioner's right thumb laceration and residual right thumb area dysesthesias were causally related to her April 18, 2019 work accident. In our January 7, 2022 Decision and Opinion on Review, we found that in addition to Petitioner's right thumb condition, her work injury also caused chronic regional pain syndrome (CRPS) and nerve dysesthesias. We awarded Petitioner her outstanding medical bills for treatment of those conditions; 57-4/7 weeks of temporary total disability, and the reasonable and necessary prospective care recommended by her treating physicians for her CRPS and nerve dysesthesias.

In its Order dated April 11, 2023, the Circuit Court of Cook County set aside that part of our January 7, 2022 decision which awarded prospective medical care, "recommended by Petitioner's treating physicians…" The Circuit Court found that award to be, "insufficiently specific." The Circuit Court remanded the case to the Commission, *"for fact finding on the issue of prospective medical care – namely, identifying whatever specific medical procedures or treatments that have been prescribed by a medical service provider [which] are reasonable and necessary (including, but not limited [to], whether the recommended stellate ganglion blocks are*

sufficiently related to claimant's treatment for the previously diagnosed CRPS and/or nerve dysesthesias to be considered reasonable and necessary…," and enter an award for such care. In all other respects, the Circuit Court confirmed the Commission's January 7, 2022 Decision and Opinion on Review.

In accordance with the Circuit Court's mandate, we have considered the evidence, and make the following findings of facts relative to Petitioner's need for prospective medical care.

On April 18, 2019, Petitioner lacerated her right thumb on a meat slicer while working for Respondent, and received emergency room treatment for that injury. In May 2019, Petitioner saw Dr. Biafora, a hand specialist, due to increased sensitivity of her thumb. In August 2019, Petitioner began treating with Dr. Metz for hyperesthesias in her right and left hands. Dr. Metz believed Petitioner was suffering from CRPS Type I of both upper extremities. On August 30, 2019, Petitioner reported the onset of left foot pain which had begun two weeks earlier. Dr. Metz was unable to offer Petitioner a surgical solution for her hand and foot pain, and referred her to Dr. Sarantopoulos.

Petitioner began treating with Dr. Sarantopoulos for her CRPS pain in September 2019. His treatment consisted of medication, physiotherapy, and desensitization techniques. He also recommended Petitioner see a pain management specialist, Dr. Dabah, to discuss possibly undergoing stellate ganglion blocks for her CRPS pain.

In October 2019, Petitioner saw Dr. Dabah twice, with complaints of joint pain in her hands. Dr. Dabah diagnosed her with CRPS Type I, and recommended a right upper extremity stellate ganglion nerve block for her symptoms. At that time, Petitioner declined his recommendation. She has not been back to Dr. Dabah since October 29, 2019.

Since then, Petitioner has continued receiving treatment for her work-related conditions, consisting of medications and physiotherapy, under Dr. Sarantopoulos' care. He continued to encourage Petitioner to try the nerve block offered by Dr. Dabah, but has reported that Petitioner is not interested in undergoing Dr. Dabah's recommended treatment.

Accordingly, the Commission finds the following prospective medical care, recommended by Drs. Sarantopoulos and Dr. Dabah, to be reasonable and necessary to treat her CRPS and nerve dysesthesias – conditions which are causally related her April 18, 2019 accident: physiotherapy, medications, and a right upper extremity stellate ganglion nerve block.

IT IS THEREFORE ORDERED BY THE COMMISSION that its Decision and Opinion dated January 7, 2022, is hereby modified as stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for the following reasonable and necessary prospective medical care for Petitioner's CRPS

and nerve dysesthesias: physiotherapy for her bilateral hands and left foot; medications, and a right upper extremity stellate ganglion nerve block.

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $68,200. 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.

June 23, 2023

MP/mcp
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	21WC020662
Case Name	Kevin Hayes v. Fisher Printing Inc
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0276
Number of Pages of Decision	25
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	John Popelka
Respondent Attorney	Jeff Goldberg

DATE FILED: 6/23/2023

/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

KEVIN HAYES,

Petitioner,

vs. NO: 21 WC 020662

FISHER PRINTING, 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 medical expenses, causal connection, temporary total disability, 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 of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission clarifies the award of prospective medical care to specify that in addition to the care the Arbitrator awarded for Petitioner's left elbow, that the prospective medical care shall also include evaluation, testing, and any treatment of Petitioner's left shoulder that follows, including but not limited to surgery and associated medical treatment arising therefrom. All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $821.79 per week for a period of 71-6/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this

award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $31,474.04 for medical expenses under §8(a) and 8.2 of the Act. The medical services for the April 15, 2021, left CTS release are hereby denied.

IT IS FURTHER ORDERED that Respondent shall authorize and pay for prospective medical care to include the contemplated surgery and associated medical treatment to Petitioner's left elbow. Additionally, Respondent shall authorize and pay for medical evaluation, testing, and any treatment of Petitioner's left shoulder that follows including but not limited to 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 be given a credit of $30,406.23 for temporary total disability. Respondent is entitled to a credit of $21,316.66 under Section 8(j) of the Act.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $50,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

SJM/msb
o-5/10/2023
44

June 23, 2023

/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	21WC020662
Case Name	HAYES, KEVIN v. FISHER PRINTING, INC
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	22
Decision Issued By	Joseph Amarilio, Arbitrator

Petitioner Attorney	John Popelka
Respondent Attorney	Jeff Goldberg

DATE FILED: 6/27/2022

/s/Joseph Amarilio, Arbitrator

Signature

INTEREST RATE WEEK OF JUNE 22, 2022 2.39%

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)

Kevin G. Hayes
Employee/Petitioner

v.

Fisher Printing, Inc.
Employer/Respondent

Case # **21** WC **020662**

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 **Joseph Amarilio**, Arbitrator of the Commission, in the city of **Chicago**, on **02/24/2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **10/09/20**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being regarding the left shoulder and left arm/elbow ***is*** causally related to the accident. Petitioner's current condition of ill-being regarding the bilateral carpal tunnel syndrome is not.

In the year preceding the injury, Petitioner earned **$64,099.36**; the average weekly wage was **$1,232.68**.

On the date of accident, Petitioner was **68** 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 **$30,406.23** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of **$30,406.23**. Respondent is entitled to a credit of **$21,316.66** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services of **$31,474.04,** as provided in Sections 8(a) and 8.2 of the Act. The medical services for the April 15, 2021, left CTS release are hereby denied.

Respondent shall pay Petitioner temporary total disability benefits of **$821.79**/week for **71-6/7** weeks, commencing **10/10/20** through **2/24/22**, as provided in Section 8(b) of the Act.

The Arbitrator further awards Petitioner prospective medical in the form of the contemplated left elbow surgery and associated medical treatment.

Respondent shall pay to Petitioner penalties of **0**, as provided in Section 16 of the Act; **0** as provided in Section 19(k) of the Act; and **0**, as provided in Section 19(l) of the Act.

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

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

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

/s/ *Joseph D. Amarilio*

Signature of Arbitrator JOSEPH D. AMARILIO

June 27, 2022

ICArbDec19

THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ATTACHMENT TO DECISION OF ARBITRATOR

KEVIN G. HAYES	)	
	)	
Petitioner,	)	
	)	**Case No. 21 WC 020662**
vs.	)	
	)	**19(b)**
FISHER PRINTING, INC.	)	
	)	
Respondent.	)	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

I. Findings of Fact

Petitioner testified he was employed by Respondent on October 9, 2020 as an imaging technician. (R.9) He had worked there for approximately 13 years. (Id.) His job duties consisted of standing before a machine that was approximately 7 feet tall and 25 feet long, feeding in 4-to-5-pound plates, on average 200 times per day, to the machine, which would then project images from a PDF onto the plates. (R.9-11) When the imaging process was done, Petitioner would take the plates off the machine and load them onto a pallet. (R.12) The job required him to stand for at least four hours per day and sit at a computer inputting the advertisements from the PDFs on a computer. (Id.)

On October 9, 2020, Petitioner was standing at his processor machine performing these job duties. (R.12) There is a 55-gallon drum of chemicals to the side of his machine that had a tube going out leading to his processor. (R.12-13) The tube, which was running along the floor, had clamps on it. (R.13) Petitioner's shoelace got caught in a clamp, causing him to fall onto his left

elbow and left shoulder. (Id.) After he fell, he testified he experienced excruciating pain in his left shoulder and elbow and nausea. (Id.) He remained on the floor until the paramedics arrived. (Id.) Accident is not in dispute. (Arb.X 1) Petitioner testified that prior to this incident, he had never injured his left elbow or shoulder, nor did he receive medical care for either. (Id.)

Petitioner was taken by ambulance to Christ Hospital. (R.14, PX#1, p.30) He was admitted from October 9, 2020 through October 29, 2020. (R.14-15, PX#1, p.30,104) Petitioner came under the care of Dr. Bedikian for his shoulder. (R.15, PX#1, p.72) Dr. Bedikian recommended shoulder surgery, but first wanted Petitioner to increase his platelet count before surgery. (R.15-16, PX#1,p.78-79) Petitioner underwent a transfusion of platelets on October 9, 2020. (R.15-16, PX#1,p.76,97) He subsequently developed pneumonia, from which he recovered. (R.16, PX#1,p.1341) A few days later, he testified that he blacked out, and lost consciousness for several days. (R.16-17) He was eventually evaluated for AFib and cleared for left shoulder surgery. (R.17, PX#1,p.1316,1395-1396) The night before the surgery was scheduled, Dr. Bedikian canceled the surgery. (R.17, PX1, p.1526)

Petitioner testified he had not been out of bed for the first two weeks he was at Christ Hospital. (R.16) As a result, he became non-ambulatory. (R.18, PX1, p.1562) He was transferred from Christ Hospital to Manor Care on October 29, 2020. (R.18, PX2, p.320) He remained an inpatient at Manor Care through November 22, 2020. (R.18, PX#2, p.496) He underwent physical therapy to become ambulatory. (R.18, PX#2, p.130-131,504-505)

On November 18, 2020, Dr. Bedikian examined Petitioner at Manor Care. Dr. Bedikian diagnosed a proximal humerus fracture comminuted and recommended physical therapy before considering surgery. (R.19, PX#3, p.64-65) Petitioner was discharged from Manor Care on November 22, 2020, and began physical therapy at ATI the next day, November 23, 2020. (R.19,

PX#4, p.599) He continued in therapy at ATI through July 26, 2021. (R.19-20, PX#4, p.32) Petitioner testified he noted improvement with physical therapy. (R.20) On December 16, 2020, Petitioner was seen by Dr. Bedikian, complaining of less shoulder pain and indicating that his main concern was his elbow. (R.20, PX#3, p.62) Dr. Bedikian x-rayed the elbow, prescribed a sling and physical therapy, recommended a left elbow MRI and released him the light duty restrictions. (R.20, PX#3, p.63) Petitioner testified his employer did not have work available for him within those restrictions. (R.20-21) He further testified it was his understanding that he would not be allowed to return to work for Respondent until he had no restrictions. (R.21)

Petitioner underwent the MRI at MidAmerica Orthopaedics and followed up with Dr. Bedikian to review the MRI on December 30, 2020. (R.21, PX#3, p.60) The MRI revealed a sprain of the radial collateral ligament, distal biceps brachii tendinitis and tendinopathy, distal triceps tendinopathy, spurring of the olecranon, mild synovitis and soft tissue edema. (PX#3, p.60) Dr. Bedikian released Petitioner to light duty work and referred him to an elbow specialist in his office. (R.21-22, PX#3, p.61)

Petitioner was seen by Dr. Rybalko on January 7, 2021. (R.22) Petitioner was complaining of pain, stiffness and clicking in the elbow. Dr. Rybalko x-rayed the elbow, injected his left elbow, recommended occupational therapy for the elbow and released him to light duty work. (R.22, PX#3, p.58) Petitioner testified he had some relief from the injection, but it was temporary. (R. 22-23) Petitioner began therapy for the elbow at ATI on January 11, 2021. (R.23, PX#4, p.503) He noticed improvement with the therapy. (R.23) He was seen by Dr. Bedikian on January 20, 2021. (R.23, PX#3, p.55) The doctor examined him, x-rayed his shoulder and recommended he continue physical therapy, and increase the intensity of the therapy without restriction. (R.23, PX#3, p.55-56) On February 4, 2021, Dr. Rybalko examined Petitioner, noted improvement with

the injection, recommended continued therapy and recommended an EMG/NCV. (R.23, PX#3, p.52-53) The nerve studies took place at MidAmerica Orthopaedics on February 11, 2021 and (R.23-24, PX#3,p.135) were performed by Dr. Metzler. (Id.) The test revealed denervation at the left deltoid, severe median mononeuropathy at the right wrist, moderate to severe mononeuropathy at the left wrist, polyneuropathy and chronic reinnervation in the left C7 myotomal distribution. (PX#3,p.137) Petitioner was next seen by Dr. Bedikian on February 17, 2021, at which time Dr. Bedikian recommended continued physical therapy and light duty restrictions. (PX#3, p.51) On March 9, 2021, Petitioner reviewed the results of the EMG/NCV with Dr. Rybalko. (R.24, PX#3,p.48) Dr. Rybalko noted the injection lasted only two weeks, that Petitioner's elbow was improving with therapy, and recommended that Petitioner continue therapy, wear nighttime splints, continue light duty work, and he injected his left elbow. (R.24-25, PX#3, p.47, 49) Petitioner

testified that this injection lasted longer, approximately 4 to 5 days. (R.25) Petitioner saw Dr. Bedikian again on March 17, 2021 and was told to continue with therapy and light duty restrictions. (R.25, PX#3, p.46)

On April 6, 2021, Petitioner was seen again by Dr. Rybalko. (R.25, PX#3, p.43) The doctor noted that Petitioner was complaining of numbness and tingling in his bilateral hands and fingers, diagnosed bilateral carpal tunnel syndrome and recommended surgery for left carpal tunnel release. (R.25-26, PX#3,p.43-44) He also recommended Petitioner continue occupational therapy for his elbow, continue with nighttime splints, prescribed a brace for the lateral epicondylitis and released him with light duty work. (R.26, PX#3, p.42) Petitioner testified his employer did not accommodate these restrictions. (R.26) Petitioner was then seen by Dr. Bedikian on April 14, 2021.

(R.26, PX#3, p.38) Dr. Bedikian recommended continued therapy to break up adhesions that had been forming in the shoulder. (R.26, PX#3,p.39)

On April 15, 2021, Petitioner underwent surgery by Dr. Rybalko at MidAmerica Orthopaedics. (R.26-27, PX#3, p.66) It consisted of a left open carpal tunnel release under local anesthesia. (Id.) Petitioner testified that he noticed immediate improvement with the surgery, specifically, that the tingling went away in his left hand. (R.27) Petitioner followed up with Dr. Rybalko on April 27, 2021. (R.26, PX#3, p.32) Dr. Rybalko noted improvement with surgery, indicated Petitioner was complaining of pain over the medial epicondyle, and injected the medial epicondyle. (R.27, PX#3, p.36-37) Petitioner testified that the injection lasted about 4 to 5 days. (R.28) He also testified that Dr. Rybalko released him to light duty, and his employer did not accommodate those restrictions. (R.27-28)

Petitioner next followed up with Dr. Rybalko on May 7, 2021. (R.28, PX#3, p.29) The doctor noted improvement with the injection, but indicated Petitioner complained of pain over the ulnar nerve of the elbow. (Id.) The doctor recommended continued therapy, prescribed Voltaren and a JAS brace, and released him to return to light duty work, which Petitioner's employer did not accommodate. (R.28-29, PX#3, p.31) Petitioner was seen by Dr. Bedikian on May 12 and June 9, 2021, at which time the doctor continued therapy and light duty restrictions. (R.29, PX#3, p.26)

On June 18, 2021, Petitioner was seen by Dr. Rybalko. (R.29, PX#3, p.22,28) The doctor noted that Petitioner was complaining of cubital tunnel symptoms with numbness and tingling of the small finger of his left hand. (R.29, PX#3, p.22) Dr. Rybalko recommended Petitioner undergo left cubital tunnel release surgery and medial epicondyle debridement. (PX#3, p.24) He released Petitioner to light duty work. (R.29-30)

At the request of Respondent, Petitioner was seen by Dr. Brian Cole on July 1, 2021. (RX 1) Dr. Cole that he was complaining of pain at 7/10 when he is active and 4/10 when his is not active. that day. Petitioner informed Dr. Cole that "not moving" his left shoulder is the only alleviating factor. Aleve helps as well. At the examination, his pain level was 5/10. Regarding his left elbow, Petitioner reported that his pain level was 7-1/2 to 8 out 10 on the day of the examination. (RX 1, p. 3) Dr. Cole concluded that there was no surgical indication for the left elbow based in part on Petitioner's minimal subjective complaints, and diagnosed him with a left elbow injury, resolved. (RX#1, p.6) Dr. Cole found petitioner suffered limited overhead use limited to 10 lbs. repetitively of the left shoulder. Cole recommended a FCE if more specificity became necessary. PX3, 7.

Respondent's Job Summary reflects that Petitioner is required to reach above, push and pull and lift tup to 20-50 lbs. between .25 to 2. 5 hours daily. (RX 5, p. 2)

Petitioner was seen by Dr. Bedikian again on July 7, 2021. (R.30, PX#3, p.20) He continued to recommend therapy and restricted duty, which the Respondent did not accommodate. (R.31, PX#3, p.21) On July 9, 2021, Petitioner was seen by Dr. Rybalko. (R.30, PX#3, p.17) The doctor noted that Petitioner was complaining of cubital tunnel symptoms of numbness and tingling in the small and ring fingers of the left hand and noted weakness of grip. (PX#3, p.17) He again recommended surgery and light duty restrictions, which the Respondent did not accommodate. (R.31, PX#3, p.19) Petitioner testified that his temporary total disability benefits terminated on August 3, 2021, but he did not receive a letter from Respondent advising him that the benefits would stop or why they stopped. (R.32)

Petitioner was seen by Dr. Bedikian August 4, 2021. (R.31, PX#3, p.15) At that time Dr. Bedikian recommended continued therapy and recommended he undergo a functional capacity

evaluation. (R.31, PX#3,p.16) On August 20, 2021, Dr. Rybalko reviewed the Section 12 report of Dr. Cole, commented that Petitioner's cubital tunnel symptoms were not discussed, noted that Dr. Cole's exam was not consistent with his, and again recommended surgery. (R.33, PX#3, p.12,14) Petitioner testified that Dr. Rybalko released him to light duty restrictions, but his employer did not call him back to do light duty work. (R.33, PX#3,p.14) Instead, his employer called him back to do full duty, and he advised his employer he could not perform that work.(R.33-34)

On August 24, 2021, Petitioner underwent the functional capacity evaluation at MidAmerica Orthopedics. (R.34, PX#3, p.87-118) The report concluded that Petitioner was not capable of performing his regular job. (R.34, PX#3, p.96) Petitioner saw Dr. Bedikian for the last time on September 8, 2021 to review the FCE results. (R.34, PX#3, p.10) He noted Petitioner had increased pain in his left shoulder and recommended a left shoulder MRI. (R.34-35, PX#3, p.10) Petitioner testified that his left shoulder was in pain due to the FCE and characterized the FCE as "brutal." (R.34-35) On September 10, 2021, Petitioner was seen for the last time by Dr. Rybalko. (R.35, PX#3,p.7) Dr. Rybalko reviewed the FCE and again recommended surgery and light duty restrictions. (R.35, PX#3, p.9) Petitioner testified that Dr. Rybalko referred him for a second opinion concerning the elbow surgery. (R.36) Petitioner was seen on December 20, 2021 by Dr. Jason Ghodasra at Hinsdale Orthopaedics. (R.36, PX#5, p.2) Dr. Ghodasra examined Petitioner, reviewed x-rays and the EMG/NCV, and recommended left ulnar nerve release with possible transposition and debridement of the medial epicondyle and the common flexor origin. (R.36-37, PX#5,p.4-5) He further recommended that Petitioner get a second opinion on his shoulder with Dr. Robert Thorsness and released him to light duty work. (R.36-37, PX#5, p.5-6)

Petitioner testified that he wished the Arbitrator to order Respondent to authorize and pay for the left elbow surgeries recommended by Dr. Rybalko and Dr. Ghodasra. (R.37) He also testified that he wished the Arbitrator to order the Respondent to authorize and pay for the left shoulder MRI ordered by Dr. Bedikian and the second opinion with Dr. Thorsness, recommended by Dr. Ghodasra. (Id.) Petitioner reviewed Exhibit Number 6 and testified that the bills remained outstanding to the best of his knowledge and testified that he wished the Arbitrator to order their payment by Respondent. (R.38)

Petitioner testified that his left elbow continued to be painful to the extent of 6-1/2 to 7/10, and that if he rested his elbow on a hard surface, it feels like he hits his funny bone and experiences numbness in the arm to the fifth and half of the ring finger on his left hand. (R.38-39)

On cross-examination, Petitioner testified he had a discussion with Christian Sanchez, the head of HR at Respondent, on July 29, 2021. (R.40) Petitioner initially testified that Christian asked him to come to the office and he never appeared, but he later clarified that Christian did not ask him to come into the office but said to come in to perform his regular job and to see how things go. (R. 41,44-45,50) For that reason, Petitioner did not accept the invitation. (R.50) He further directed Christian to contact his attorney regarding the matter. (R.44-45)

Petitioner testified he used the cane while performing the FCE, and he further testified that he did not get a release from his heart doctor prior to the FCE. (R.41-43) Petitioner started using the cane after getting out of Manor Care. (R.43) He did admit to falling while using the cane on at least one occasion, but testified he did not reinjure his left shoulder and elbow, and fell on his right side. (Id.)

Petitioner testified that while at Christ Hospital, he was put in a cloth sling, and his treatment was focused on his shoulder and elbow. (R.45-46) He admitted that he did not undergo

surgery while admitted to the hospital. (R.46) He was transferred from Christ Hospital to Manor Care because he was unable to walk. (Id.) He denied treating for a heart condition at Manor Care but insisted that the main course of treatment was due to his inability to walk, not due to his heart. (R.47-48) The Arbitrator noted on the record that no written job offer had been made to Petitioner or his attorney at any time, and he confirmed with Respondent's counsel that no such evidence would be submitted. (R.48-49) Finally, Petitioner testified that he was never told by a physician that his elbow condition was due to his cervical spine. (Id.)

On re-direct examination, Petitioner testified that when he was contacted by Christian Sanchez, he was told to come in and see how it goes at his regular job. (R.49-50) He again confirmed that neither his employer nor Travelers ever offered him light duty work. (R.50-51) He further confirmed that he was cleared for surgery for his shoulder, but it was never performed at Christ Hospital. (R.51) He also testified that after two weeks of not getting out of bed, he developed pneumonia and eventually became non-ambulatory. (R.52) He was sent to Manor Care to undergo therapy to walk again. (Id.)

II. CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below. Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the Petitioner bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his or her claim *O'Dette v. Industrial*

Commission, 79 Ill. 2d 249, 253 (1980) including that there is some causal relationship between the employment and the injury. *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 63 (1989). And, yet it also is well established that the Act is a humane law of remedial nature and is to be liberally construed to effect the purpose of the Act - that the burdens of caring for the casualties of industry should be borne by industry and not by the individuals whose misfortunes arise out of the industry, nor by the public. *Shell Oil v. Industrial Comm'n,* 2 Ill.2nd 590, 603 (1954). Decisions of an arbitrator shall be based exclusively on stipulation of the parties, the evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e

The Arbitrator, as the trier of fact in this case, has the responsibility to observe the witnesses testify, judge their credibility, and determine how much weight to afford their testimony and the other evidence presented. *Walker v. Chicago Housing Authority*, 2015 IL App (1st) 133788, ¶ 47 Petitioner's testimony is found to be credible. He does appear to be an unsophisticated individual and any inconsistencies in his testimony are not attributed to an attempt to deceive the finder of fact.

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S CURRENT CONDITIN OF ILL-BEING CAUSALLY RELATED TO T HE INJURY AND WITH RESPECT TO ISSUE (K) IS PETITIONER ENTIELD TO PROSPECTIVE MEDDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

The parties stipulated that Petitioner suffered an accident arising out of and in the course of her employment; however, Respondent disputes that Petitioner's current condition of ill-being is causally connected to his accident of October 9, 2020 (ArbX1.) The Arbitrator finds that Petitioner's has proven by a preponderance of the evidence that his current condition of ill-being to his left shoulder and left arm and arm are causally related to his work accident. The medical records demonstrate that Petitioner's injury resulted in medical treatment and subsequent

disability. The Arbitrator notes that there has been no superseding, intervening accident to break the chain of causation. Therefore, based on the foregoing, the Arbitrator concludes that Petitioner's current condition of ill-being relative the left shoulder and left arm/elbow to be causally connected to the work accident. The Arbitrator further finds that bilateral wrists are not

Io finding, the Arbitrator adopts the findings and conclusions of Petitioner's treating physicians and relies on Petitioner's testimony, which the Arbitrator finds credible in all aspects. The Arbitrator also relies on the report of Respondent's Section 12 examiner, Dr. Brian Cole, who also found that Petitioner's left shoulder and left elbow conditions were causally related to the accident. The Arbitrator differs with Dr. Cole's conclusion that these conditions had completely resolved and that Petitioner was at maximum medical improvement.

Dr. Bedikian first saw Petitioner while he was an inpatient at Christ Hospital. Dr. Bedikian originally recommended surgery for Petitioner's left shoulder, but first wanted to increase his platelet count and have him cleared by cardiology. The records from Christ Hospital reflect that Petitioner developed pneumonia, became critically ill but eventually recovered and was cleared by cardiology to undergo this shoulder surgery. Dr. Bedikian, for his own reasons, declined to perform the surgery despite this clearance. Instead, he had Petitioner undergo an extended course of physical therapy at ATI for his shoulder. On December 20, 2021, Petitioner was seen by Dr. Jason Ghodasra, an orthopedic surgeon at Hinsdale Orthopaedics. Dr. Ghodasra evaluated Petitioner's elbow, but also recommended that he get a second opinion concerning his shoulder from Dr. Thorsness, another physician at Hinsdale Orthopaedics. Dr. Ghodasra noted what the Arbitrator noted when Petitioner testified, that his left shoulder continued to droop, that Petitioner was limited in the use of his shoulder according to the therapy records and the FCE performed on August 24, 2021 and that Petitioner's left shoulder condition warranted additional evaluation.

When Petitioner saw Dr. Cole, he was complaining of pain at a level of 7/10 when he is active and a level of 4/10 when he is not active and indicated that not moving the shoulder was the only real alleviating factor. Dr. Cole recommended limited overhead use with nothing more than 10 pounds repetitively and opined that Petitioner was unable to physically conduct the full nature of his job with respect to his left shoulder.

Based on the foregoing, the Arbitrator finds that Petitioner's current condition of ill-being with respect to his left shoulder is causally related to his October 9, 2020 accident at work, and agrees with Dr. Ghodasra that Petitioner is in need of further evaluation of his left shoulder, including a left shoulder MRI that was ordered by Dr. Bedikian following the FCE and an evaluation by Dr. Thorsness.

The Arbitrator also finds that Petitioner's condition of ill-being with respect to his left elbow is causally related to the accident. There is no disagreement in the medical records between Dr. Rybalko, Dr. Ghodasra and Dr. Cole on this issue. Dr. Rybalko and Dr. Ghodasra were of the opinion that Petitioner is in need of surgical repair to the left elbow. Dr. Cole concluded that the left elbow injury had resolved. On February 11, 2021, Petitioner underwent an EMG/NCV by Dr. Metzler at MidAmerica Orthopaedics. Dr. Rybalko ordered this study. The test result was abnormal, showing denervation at the left deltoid, severe median mononeuropathy at the right wrist, moderate to severe mononeuropathy at the left wrist, polyneuropathy and chronic reinnervation in the left C7 myotomal distribution. This test is not recorded in the list of medical records that Dr. Cole reviewed. Both Dr. Rybalko and Dr. Ghodasra reviewed these test results, and based, in part, on these test results recommended that Petitioner undergo a left ulnar nerve release with possible transposition and debridement of the medial epicondyle and common flexor origin. The Arbitrator also notes that Dr. Rybalko reviewed Dr. Cole's report and was critical of

the fact that Petitioner's cubital tunnel symptoms were not discussed in the report and that Dr. Cole's examination was not consistent with his. Petitioner testified he continues to be symptomatic to the extent that simply resting the elbow on a hard surface causes the entire arm to go numb similar to hitting the funny bone.

The "chain of events" legal theory also supports a finding of causation. It well established under the law that 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). An accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury. *Int'l Harvester v. Indus. Comm'n*, 93 Ill. 2d 59, 63-64 (1982).

In this case, the evidence clearly reflects that Petitioner had no treatment to his left shoulder and left elbow before the accident. Respondent did not produce any evidence whatsoever to rebut her testimony. The evidence further supports that Petitioner worked for the Respondent for 13 years. He did so without incident or complaint to his left shoulder and left elbow. He did so without requesting or receiving medical care for her left shoulder and neck. Therefore, Petitioner was in a condition of "good health" relating to her low back prior to work accident as evidenced by Petitioner's credible and unrebutted testimony, his ability to work full-time and full duty prior to the accident, and, also the total absence of any medical evidence to the contrary. The medical evidence bolsters this causal link. Petitioner gave a consistent history of injury which is recorded in each of his medical records. Petitioner consistently related that his symptoms did not exist prior to the accident. He consistently related that since his accident he experienced pain from the date of accident through the date of hearing.

Based on the foregoing, the Arbitrator finds that Petitioner's current condition of ill-being with respect to his left elbow is causally related to his accident, based on the Petitioner's testimony, which the Arbitrator deems credible in all respects, and based on the medical opinions of Dr. Rybalko, Dr. Metzler and Dr. Ghodasra. The Arbitrator further awards Petitioner prospective medical in the form of the contemplated left elbow surgery with whichever surgeon Petitioner selects between Dr. Rybalko or Dr. Thorsness.

The EMG/NCV also revealed that Petitioner suffered from bilateral carpal tunnel syndrome. Petitioner underwent open left carpal tunnel release surgery by Dr. Rybalko at MidAmerica Orthopaedics on April 15, 2021. The Arbitrator finds that Petitioner's bilateral carpal tunnel syndrome is not causally related to the work accident due to a failure of proof. After a careful review of the medical records, Petitioner's medical providers were silent on the issue of causation regarding the bilateral CTS. None of Petitioner's treating physicians opined that the bilateral CTS was work related.

The Arbitrator finds that the Petitioner is entitled to prospective medical in the form the left elbow surgery. Having found that the accident is a cause of Petitioner's current left elbow condition, the Arbitrator finds that the elbow surgery as prescribed by Dr. Rybalko and Dr. Bedikian to be reasonable and necessary. The Arbitrator orders the Respondent to authorize and pay for that surgery and its sequelae and provide written authorization to surgeon in accordance with Bennett *Auto Rebuilders v. Industrial Comm'n (Siegele)* 306 Ill. App. 3d 650 (1999)

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

Petitioner claims he was temporarily totally disabled from October 10, 2020 through February 24, 2022, the date of arbitration. Respondent disputes this contention and claims Petitioner was temporarily totally disabled from November 18, 2020 through August 3, 2021. Based on the Arbitrator's findings concerning causation and based on Petitioner's credible testimony and his treating physicians, the Arbitrator finds that Petitioner was temporarily totally disabled from October 10, 2020 through February 24, 2022, representing 71-6/7 weeks.

Respondent disputes that Petitioner should be entitled to benefits between October 10, 2020 and November 18, 2020, when he was seen by Dr. Bedikian at Manor Care. Respondent did not provide any medical opinions in support of its claim that Petitioner was not temporarily totally disabled.

Petitioner was taken by ambulance to Christ Hospital, where he was immediately admitted for his condition. The Arbitrator finds that Petitioner's period of temporary total disability began with his inpatient admission at Christ Hospital. Petitioner remained in Christ Hospital through October 29, 2020, directly as a result of his fall at work and the complications that ensued as a result of the injury. But for Petitioner's injury at work, there is no evidence he would have developed pneumonia, AFib, or become non-ambulating. Petitioner was then transferred from Christ Hospital to Manor Care, where he was an inpatient from October 28, 2020 through November 22, 2020. As an inpatient, Petitioner was incapable of performing his work duties. Petitioner testified, and the records from Manor Care support his testimony, that he was sent to Manor Care because he had become non-ambulatory from remaining in bed at Christ Hospital, and his treatment at Manor Care was directed at making him ambulatory. But for Petitioner's fall at

work, his admission into Christ Hospital and his prolonged period of remaining in bed resulting in him becoming non-ambulating, Petitioner would not have been transferred to Manor Care for treatment to become ambulatory. Therefore, the Arbitrator awards temporary total disability benefits for this initial disputed period.

Respondent claims that Petitioner's temporary total disability ended on August 3, 2021. Respondent alleges that it offered Petitioner work with Respondent that Petitioner failed to appear for or to attempt. The Arbitrator finds that Respondent presented no persuasive evidence of this job offer being made to Petitioner. In addition, Petitioner remained under light duty restrictions by both Dr. Rybalko and Dr. Bedikian, restrictions which the Respondent was either never able to accommodate or that it refused to accommodate through the date that TTD benefits were terminated on August 3, 2021. In the absence of any proof of a light-duty or full duty job offer to Petitioner, and in light of Dr. Bedikian, Dr. Rybalko and Dr. Ghodasra all agreeing that Petitioner was restricted from his regular duties, and further based on the opinion of Dr. Cole that Petitioner was restricted from his regular employment, the Arbitrator finds that Petitioner remained temporarily totally disabled after August 3, 2021 through the date of arbitration on February 24, 2022.

Based on the foregoing, the Arbitrator awards Petitioner temporary total disability benefits from October 10, 2020 through February 24, 2022, representing 71-6/7 weeks.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Pursuant to Section 8(a) of the Act, the employer shall pay all necessary first-aid, medical and surgical services, and all necessary medical, surgical and hospital services, which are reasonably required to cure or relieve the employee from the effects of the accidental injury. The Arbitrator finds that Petitioner did provide, by a preponderance of the evidence, credible evidence that the medical treatment that Petitioner received after the accident was causally related to Petitioner's work-related injury with exception of the CTS release. For treatment of an employees' workplace injury to be compensable under the workers' compensation laws, Petitioner must establish that treatment is necessitated by the work injury, and not some other condition or conditions. *Hansel & Gretel Day Care Center vs. Industrial Comm'n,* 215 Ill.App.3d 284 (1991)

Petitioner alleges that the following bills remained outstanding at the time of arbitration (PX 6)

$8,336.30	ATI
$22,179.74	Manor Care
$3,714.00	MidAmerica Orthopaedics

The Arbitrator awards to following medical bills as being reasonable, necessary and causally related to the accident:

$8,336.30	ATI
$22,179.74	Manor Care
$931.00	MidAmerica Orthopaedics
$31,474.04	TOTAL

Based on the Arbitrator's findings with respect to causation and temporary total disability benefits, the Arbitrator further finds that the medical services provided to Petitioner were reasonable and necessary and awards Petitioner the outstanding medical bills totaling $31,474.04.

The Arbitrator does not award the charges for the April 15, 2021 left CTS release in the amount of $2,783.00 After deducting said amount, the balance due to MidAmerica Orthopedics is $931.00.

Dr. Cole reviewed Petitioner's medical records from ATI and MidAmerica Orthopaedics. In his report, he concluded that Petitioner's treatment has been reasonable, necessary and related to the injury in question. Petitioner concluded his treatment at ATI shortly after seeing Dr. Cole. Petitioner testified that he noticed improvement with this treatment. Petitioner testified he was referred to Manor Care because he had become non-ambulatory at Christ Hospital, and he was directed to Manor Care to undergo intensive therapy to become ambulatory. Based on the Arbitrator's findings above concerning causation, prospective medical care, and temporary total disability benefits, the Arbitrator finds that the treatment at ATI, Manor Care and MidAmerica Orthopaedics was reasonable and necessary to cure or relieve him from the effects of his injuries. Based on the foregoing, the Arbitrator awards Petitioner's outstanding unpaid medical bills in the amount of $31,474.04 for reasonable and necessary medical services pursuant to the medical fee schedule directly to the medical providers as provided by the Section 8(a) and 8.2 of the Act. The Arbitrator further awards the Respondent a credit under Section 8(j) of the Act in the amount of $21,316.66 for medical bills paid through its group medical plan. The Respondent is entitled to credit for medical bills previously paid pursuant to Section 8(a) and 8.2 of the Act.

The Respondent shall pay further sum of $31,474.04 for reasonable and necessary medical services pursuant to the medical fee schedule directly to the medical providers as provided by the Section 8(a) and 8.2 of the Act. The Respondent is entitled to credit for medical bills previously paid pursuant to Section 8(a) and 8.2 of the Act.

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

The Arbitrator finds that a claim has been made, but the evidence submitted and record as a whole, does not warrant the imposition of penalties and fees. As such, none are awarded. Respondent shall pay to Petitioner penalties of $ **0**, as provided in Section 16 of the Act; $ **0**, as provided in Section 19(k) of the Act; and $**0**, as provided in Section 19(l) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC015914
Case Name	William Gorski v. Pace Suburban Bus
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0277
Number of Pages of Decision	17
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Kevin Morrisson
Respondent Attorney	Brad Antonacci

DATE FILED: 6/26/2023

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS	)	☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
	) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF COOK	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☒ Modify Benefit Rate, Permanent Disability	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM GORSKI,

Petitioner,

vs. NO: 18 WC 15914

PACE SUBURBAN BUS,

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[1] of whether Petitioner's current left knee condition is causally related to the April 5, 2018 work injury, entitlement to temporary disability benefits as well as the applicable benefit rate, entitlement to incurred medical expenses, and the nature and extent of any permanent disability, and being advised of the facts and law, provides additional analysis and corrections as stated below, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

CONCLUSIONS OF LAW

I. Causal Connection

The Arbitrator concluded Petitioner sustained an accidental injury arising out of and occurring in the course of his employment on April 5, 2018, and his current left knee condition is causally related to his work accident. Our review of the evidence yields the same result. We write separately to detail our reasoning.

We begin with a review of the applicable legal standard. It is well established that an accident need not be the sole or primary cause—as long as employment is a cause—of a claimant's condition. *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 205 (2003). Furthermore, an employer takes

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

its employees as it finds them (*St. Elizabeth's Hospital v. Illinois Workers' Compensation Commission*, 371 Ill. App. 3d 882, 888 (5th Dist. 2007)), and a claimant with a pre-existing condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Commission*, 92 Ill. 2d 30, 36 (1982). As the Appellate Court held in *Schroeder v. Illinois Workers' Compensation Commission*, 2017 IL App (4th) 160192WC, the inquiry focuses on whether there has been a deterioration in the claimant's condition:

> That is, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition; it is the resulting deterioration from whatever the previous condition had been. *Schroeder* at ¶ 26.

It is with this standard in mind that we consider the competing causal connection opinions of Dr. Venkat Seshadri and Dr. M. Bryan Neal.

Dr. Seshadri, Petitioner's treating orthopedist, opined the April 5, 2018 accident aggravated Petitioner's underlying osteoarthritis. During his deposition, Dr. Seshadri acknowledged Petitioner had "fairly advanced" pre-existing arthritis, and this was likely a consequence of the prior anterior cruciate ligament ("ACL") reconstruction, which tends to accelerate the development of arthritis. Pet.'s Ex. 3, p. 11. Dr. Seshadri further testified degenerative tricompartmental arthritis can be aggravated by a blow or trauma to the knee and confirmed the direct strike on the fare box was a competent mechanism to cause such an aggravation. Pet.'s Ex. 3, p. 11, 16-17. While Dr. Seshadri's initial causation testimony was predicated on Petitioner's pre-accident symptoms being "nonexistent or minimal" (Pet.'s Ex. 3, p. 17-18), Dr. Seshadri was subsequently presented with a detailed clinical picture of Petitioner's pre-accident symptoms and the doctor again opined the accident permanently aggravated Petitioner's underlying condition. Pet.'s Ex. 3, p. 32-34. Dr. Seshadri further explained that although Petitioner was "probably" going to need a knee replacement at some point regardless of the April 5, 2018 accident, there is no way to predict when Petitioner's symptoms would have become so significant that he would have sought surgery. Pet.'s Ex. 3, p. 34-35.

Respondent's expert, Dr. Neal, disagreed that the accident aggravated Petitioner's arthritis. In his July 20, 2018 §12 report, Dr. Neal opined Petitioner was significantly symptomatic prior to April 5, 2018 and the work accident had no long-term effect on Petitioner's end-stage osteoarthritis. Dr. Neal acknowledged that following Dr. Weber's September 9, 2015 discharge from care there is no record of knee treatment until after the April 5, 2018 accident, but did not attach any significance to that fact as Petitioner "did not provide[] any records from [his primary care physician] which would document that he was not suffering end stage osteoarthritis before the April 5, 2018." Resp.'s Ex. 1. Dr. Neal concluded Petitioner sustained a soft tissue contusion and the accident did not materially change Petitioner's "destiny," which was to "suffer either painful left knee osteoarthritis or undergo total knee arthroplasty surgery." Resp.'s Ex. 1. The Commission finds Dr. Neal's opinions are largely speculative and unpersuasive.

In the Commission's view, Dr. Seshadri's opinions are persuasive and consistent with the clear evidence of a deterioration between Petitioner's pre- and post-accident left knee condition. There is no question Petitioner had pre-existing osteoarthritis, and as Dr. Seshadri explained, the advanced nature of the disease likely resulted from Petitioner's prior ACL reconstruction. The Commission observes, though, that on September 9, 2015, Dr. Weber placed Petitioner at maximum

medical improvement with no restrictions and released him to follow-up as needed. Resp.'s Ex. 2. Petitioner returned to work full duty and sought no further left knee treatment over the ensuing 18 months. Petitioner acknowledged he continued to have knee pain as well as symptoms with certain activities (T. 52-55), but his symptoms were tolerable and he was nonetheless able to perform his work duties. The video Respondent submitted from April 4, 2018 corroborates Petitioner's testimony: the Commission notes Petitioner limps and is deliberate in his movements, but he is seen moving about the bus performing his tasks, including squatting to inspect something at the rear of the bus. Resp.'s Ex. 6. Later that same shift, on April 5, 2018, Petitioner struck his left knee on a metal fare box, though video of the event was not submitted into evidence. Petitioner sought treatment that day and was immediately placed under significant restrictions; those restrictions remained in place while he underwent a brief, unsuccessful attempt at conservative care before proceeding with total knee replacement. Pet.'s Ex. 1, Pet.'s Ex. 2. As such, the work accident is *a* factor in Petitioner's current left knee condition. The Commission finds Petitioner's condition of ill-being remains causally related to the work accident.

II. Corrections

1 - The Arbitrator found Petitioner entitled to Temporary Total Disability ("TTD") benefits of $665.66 per week from April 6, 2018 through August 30, 2019. The Commission corrects the Decision to reflect Petitioner's TTD benefit rate is $665.33 ($997.99 / 3 x 2 = $665.33).

2 - The Arbitrator concluded Petitioner sustained 50% loss of use of the left leg. The Commission agrees with the permanence determination, however we observe the Decision fails to incorporate the prior left leg award as required by §8(e)17. *820 ILCS 305/8(e)17*. The Commission corrects the Decision to reflect Petitioner sustained 50% loss of use of the left leg subject to Respondent's credit for the award of 28% loss of use of the left leg in 15 WC 02320; this results in a net award of 22% loss of use of the left leg.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 1, 2022, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $665.33 per week for a period of 73 weeks, representing April 6, 2018 through August 30, 2019, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent shall have a credit of $11,434.55 for TTD benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses detailed in Petitioner's Exhibit 5, as provided in §8(a), subject to §8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $598.79 per week for a period of 47.3 weeks, as provided in §8(e)12 of the Act, for the reason that the injuries sustained caused a net 22% loss of use of the left leg.

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

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

Bond for 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.

June 26, 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	18WC015914
Case Name	Gorski, William v. Pace Suburban Bus
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Antara Nath Rivera, Arbitrator

Petitioner Attorney	Kevin Morrisson
Respondent Attorney	Brad Antonacci

DATE FILED: 7/1/2022

THE INTEREST RATE FOR THE WEEK OF JUNE 28, 2022 2.50%

/s/Antara Nath Rivera, 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

William Gorski
Employee/Petitioner

v.

Pace Suburban Bus
Employer/Respondent

Case # **18** WC **015914**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Antara Nath Rivera**, Arbitrator of the Commission, in the city of **Chicago**, on **March 25, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 5, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**51,895.48**; the average weekly wage was $**997.99**.

On the date of accident, Petitioner was **67** 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 $**11,434.55** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**3,881.17** for paid medical benefits by Workers' Compensation, for a total credit of $**15,315.72**.

Respondent is entitled to a credit of $**15,315.72** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services, provided by Dr. Seshadri, pursuant to the medical fee scheduled and as outlined in PX 5, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability of $665.66 per week for 73 weeks, commencing April 6, 2018, through August 30, 2019.

Respondent shall pay Petitioner PPD benefits of $598.79 per week for 107.50 weeks, because the injuries sustained caused a 50% loss of use of the leg 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.

JULY 1, 2022

Signature of Arbitrator

STATEMENT OF FACTS

William Gorski ("Petitioner') is a 70-year-old-male who was employed with Pace Suburban Bus ("Respondent") for 18 years until 2019. (Transcript "T." 14) Petitioner testified that he worked for Respondent as a mechanic. (T. 15) Petitioner testified that some of his job duties were to conduct inspections, change the oil, take care of electrical issues, repair buses, and change tires. (T. 15-18) On occasion, he would get a "road call" which is when a bus broke down while on the street and he was called to drive the bus back to the shop. (T. 16-18) If he was unable to drive the bus back to the shop, he would wait for a tow truck. *Id.* Petitioner testified that his job required him to kneel, bend down to check batteries, crawl underneath a bus if no lift or pit was available, and climb ladders to fix lights and get the natural gas tanks. (T. 19-21) Petitioner testified that he is a high school graduate with some trade school education. (T. 14-15) Petitioner also testified that he served in the U.S. Navy, during Vietnam, and worked as a director on the flight deck of a Constellation. (T. 15)

On April 5, 2018, Petitioner was 67 years old. (Arbitrator's Exhibit ("AX") 1 at line 6) Petitioner testified that his shift began the day before, on April 4, 2018, and ended the following morning. (T. 64) Petitioner testified that, in the early hours, of April 5, 2018, he was performing an inspection of a bus. (T. 28-29) Petitioner testified that he hit the fare box with his left knee, in the kneecap, as he was getting in the bus and swung his legs over. *Id.* He testified that he hit the fare box "pretty hard" because the fare box was made of steel, and it didn't move. (T. 28) Petitioner testified that his knee started to swell and was "hurting really bad" after the incident. (T. 30) Petitioner testified that he did not report the accident immediately because, initially, it was tolerable. *Id.* He testified that he finished his shift, left work, and drove about a half a block when he noticed the pain getting worse. *Id*. Petitioner testified that he saw that his left knee started to turn black and blue. *Id.* He testified that he drove back to work to report it. (T. 30-31) Petitioner testified that he finished his shift at 7:00am. (T. 31, 75) The accident report indicated that the accident happened around 12:30am on April 5, 2018. (Respondent's Exhibit ("RX") 1)

Petitioner testified that Respondent sent him to Ingalls Occupational Care ("Ingalls") on April 5, 2018. (T. 32) The records from Ingalls documented that Petitioner was climbing into a bus seat, swung in his legs, and his left knee struck a fare box, which caused a swelling and a grinding feeling. (Petitioner's Exhibit ("PX") 1) The records noted that Petitioner's injury was caused by the incident that day and that the pain was constant. *Id*. Petitioner rated his pain at eight on a ten-point scale. *Id*. The history also noted a meniscus repair on the left knee about four to five years ago.[1] *Id*. On examination, Petitioner was tender over the left patella. *Id*. Diffuse swelling was noted on the patella and bruising was initially noted to the lateral aspect of the patella, but the medical note later indicates no bruising was present. *Id*. Petitioner had limited flexion secondary to pain. *Id*. No abrasion or open wound was present. Petitioner's strength was normal, and the rest of the examination was normal. *Id*. Left knee x-rays revealed moderate to severe degenerative joint disease with small joint effusion. *Id.* at 8. Nurse Practitioner ("APN") Christy Davis diagnosed Petitioner with left knee pain, left knee effusion and a left knee contusion. *Id*. She recommended that Petitioner use an ace wrap and take Ibuprofen as prescribed. *Id*. She restricted Petitioner from kneeling or crawling. *Id.* at 9. Petitioner was given light duty restrictions. *Id.*

On April 10, 2018, Petitioner returned to Ingalls. (PX 1 at 17) Petitioner reported that he was not improving and rated his pain at a level of eight on a ten-point scale. *Id.* at 18. APN Jennifer Schnell noted that Petitioner was told at the time of his prior left knee surgery that he needed a knee replacement. *Id.* On

[1] Petitioner underwent a prior left knee arthroscopy in 1991 and a prior left ACL repair in 2015. (T. 47-49; PX 4 at 1; PX 3 at 17)

examination, APN Schnell noted that Petitioner's left knee appeared arthritic. *Id.* She kept Petitioner on restricted duty and advised him to return to the clinic in one week. *Id.* APN Schnell explained to Petitioner that Petitioner's injury appeared to be a contusion. *Id.* Petitioner was instructed to use an ace wrap on his knee and to avoid physical activities that would aggravate the problem. Petitioner was instructed to follow up in one week or sooner. *Id.* APN Schnell noted that if Petitioner was not better at the next visit that they would start physical therapy three times a week. It was also documented under medical causation that this problem is related to work activities. *Id.*

On April 17, 2018, Petitioner returned to Ingalls. (PX 1 at 23) Petitioner again noted he did not feel his left knee was improving. *Id*. APN Schnell recommended an MRI due to the severe degenerative appearance of Petitioner's knee and the metallic plate. (PX 1 at 24) APN Schnell noted Petitioner's knee was diffusely swollen and very arthritic appearing with no ecchymosis noted following the injury. (PX 1 at 24-25) She continued to recommend restricted work duty. *Id.* The records indicated that Petitioner was not working as there was no light duty available at his employer. *Id*. Physical therapy was delayed until an MRI was obtained given Petitioner's previous injury. *Id*. Petitioner was put on light duty again. *Id.*

On April 23, 2018, a left knee MRI was performed. (PX 1; RX 1 at 8) The MRI revealed swelling after an injury, tricompartment degenerative change greatest in the medial femoral tibial compartment, noted to be severe, complex degenerative tearing of the body and posterior horn of the medial meniscus, previous ACL repair with joint space narrowing, patchy bone edema in the fibular head which may represent a contusion small knee joint effusion, and small Baker's cyst with a component of rupture. (PX 1 at 38-39; RX 1 at 8) Petitioner was then referred for orthopedic consultation.

On May 2, 2018, Petitioner presented to Dr. John Kung at Illinois Premier Orthopedic and Hand Center, at the request of APN Schnell. (PX 2) Petitioner gave the history of the accident and indicated that his knee occasionally gave away while walking. *Id.* Petitioner complained of left knee pain due to an injury at work. *Id.* Dr. Kung reviewed the left knee exam and noted tenderness at the left knee lateral joint line, medial joint line, and crepitation of the patellofemoral and medial tibial plateaus. *Id.* Dr. Kung diagnosed left knee unilateral primary osteoarthritis, complex tear of the medial meniscus in the left knee, and a sprain of the posterior cruciate ligament of the left knee. *Id*. Dr. Kung administered an injection, a brace was given, and Petitioner was given work restrictions, specifically seated work only and no climbing stair or ladders. *Id.* Petitioner was sent for a surgical consultation with Dr. Venkat Seshadri. *Id.*

On May 9, 2018, Petitioner presented to Dr. Seshadri. *Id.* Dr. Seshadri noted that cortisone shot given last visit had worn off and that Petitioner was a possible candidate for Monovisc. *Id*.

On July 20, 2018, Petitioner attended an independent medical examination ("IME") with a Dr. Bryan Neal. (RX 1) Dr. Neal opined that Petitioner's severe left knee osteoarthritis was not causally related to the work accident on April 4, 2018. *Id.* Dr. Neal listed several factors as the basis for his conclusion regarding causation was that Petitioner was unable to verbalize a diagnosis of his condition. *Id.* Dr. Neal indicated that Petitioner did not admit he had a surgery prior to his 2014 accident, a knee surgery that occurred over 25 years prior to the current incident, that Petitioner did not immediately report his accident, and that Petitioner did not provide records between September 9, 2015, and April 5, 2018, from his primary care physicians. *Id*. Dr. Neal also did not find it plausible that Petitioner was pain free prior to the April 2018 accident. *Id*. Dr. Neal noted that Petitioner suffered from bone-on-bone arthritis following his 2014 work related accident. *Id*. Dr. Neal

indicated that Petitioner may have some soft tissue symptoms from striking the fare box. *Id*. Further, Dr. Neal opined that Petitioner was a candidate for knee replacement surgery. *Id*.

On September 10, 2018, Petitioner returned to Dr. Seshadri. (PX 2) After Petitioner's evaluation, Dr. Seshadri diagnosed Petitioner with end stage osteoarthritis. *Id.* Upon reviewing Dr. Neal's IME report, Dr. Seshadri agreed with the suggestion of a knee replacement. *Id.* Dr. Seshadri noted that while Petitioner underwent a cortisone shot, that was a temporary solution. *Id.* Additionally, Dr. Seshadri recommended that Petitioner request for surgical authorization through his own personal health insurance. (PX 2, PX 3 at 24)

On November 8, 2018, Dr. Seshadri performed a left total knee arthroplasty for an operative diagnosis of end stage osteoarthritis in the left knee. *Id.*

On November 21, 2018, Petitioner followed up with Dr. Seshadri. *Id.* Dr. Seshadri noted that Petitioner was doing well, to start physical therapy, and to follow up in three weeks. *Id.*

On December 31, 2018, Dr. Seshadri noted that Petitioner's active and passive left knee range of motion, stability and alignment of the tibial femoral joint were normal. *Id.*

On January 29, 2019, Dr. Seshadri documented Petitioner had good alignment and to continue physical therapy. *Id.*

On February 26, 2019, and March 26, 2019, Petitioner continued physical therapy.

On April 23, 2019, Dr. Seshadri recommended that Petitioner transition to a home exercise program, and formal physical therapy ended. *Id.*

On August 30, 2019, Petitioner returned to Dr. Seshadri. *Id*. Dr. Seshadri felt Petitioner was doing well overall from the left total knee replacement but noted some residual deficits. *Id*. He placed Petitioner at maximum medical improvement ("MMI"). *Id*. He restricted Petitioner to return to work with no squatting, no kneeling, and no climbing ladders. *Id*. Petitioner testified that prior to the alleged April 5, 2018, accident, he was not able to squat, kneel or climb ladders (T. 54, 63, 67)

Petitioner testified that, per doctor's orders, he was off work from the date of the accident. (T. 34-35) Petitioner testified that he has no follow-up appointment scheduled with any physician and he is not taking any prescription pain medications (T. 69) Petitioner testified that he never returned to work. (T. 35) Petitioner testified that he could not perform his job like he did before with the restrictions put in place because his job required him to squat, bend over, and climb ladders. (T. 37) Petitioner testified that he could do all his job duties before the second accident in April 2018 but after the accident he could no longer perform his job. (T. 38) He testified he was terminated for being off work too long, pursuant to union contract. (T. 38; 72-73)

At the time of trial, Petitioner testified that his left knee ached, was still numb in certain spots, and hurt "a lot." (T. 39) He testified he used to work on cars as a hobby but no longer does so because he cannot bend, kneel, or lay on the ground (T. 40-41) He then clarified that his work on cars before April 5, 2018, was limited to tasks like reaching over the fender, and he could not crawl on the ground to work on cars before April 5, 2018 (T. 41; 73) Petitioner testified he can perform his activities of daily living, although slowly (T. 69) He continues to take pain medications which have the same effect now on his symptoms as they did before April 5, 2018 (T. 74-75) Petitioner testified he noted some improved left knee range of motion and strength but no decreased pain levels following surgery (T. 68) He testified he has not performed a job search since being released from care (T. 72)

Petitioner's Past Medical History

Petitioner underwent a prior left knee arthroscopy in 1991 and a prior left ACL repair in 2015. (T. 47-49; PX 4 at 1; PX 3 at 17) The 2015 left ACL repair was a result of a work-related left knee injury, Petitioner sustained, while working for Respondent on July 26, 2014. (T. 49) Petitioner testified that he slipped on a wet and oily floor, lost his balance, and twisted his left leg and knee. (PX 4; T. 47-49) Petitioner received medical treatment from Dr. Weber, an orthopedic surgeon. (PX 4, RX 2) Dr. Weber performed surgery on December 23, 2014, in the form of a left knee arthroscopic anterior cruciate ligament reconstruction and partial medial meniscectomy. (RX 2 at 37) Petitioner testified that he was released from Dr. Weber for his left knee on September 9, 2015. *Id.* Petitioner testified that there were various things he noticed about his knee after that point like he walked with a limp and had difficulty with bending, kneeling, and squatting. (T. 24)

Petitioner testified that he returned to work full duty, thereafter. (T. 25) He testified that he had trouble doing certain things, like kneeling and lifting heavy stuff. *Id.* Petitioner testified that he did not see a doctor for his knee between his release for this injury, in 2016, and his April 5, 2018, injury. (T. 26) [2]

Deposition of Dr. Venkat Seshadri

On May 17, 2019, Dr. Venkat Seshadri gave his sworn testimony in a deposition. (PX 3) Dr. Seshadri testified that Petitioner's tricompartmental arthritis was further advanced than normal for someone who had the ACL surgery Petitioner had previously undergone. (PX 3 at 10-11) Dr. Seshadri testified that Petitioner's April 5, 2018, accident could have aggravated Petitioner's underlying left knee pre-existing osteoarthritis, assuming Petitioner's symptoms prior to the accident were nonexistent or minimal. (PX 3 at 17) Dr. Seshadri testified that he did not review any medical records from the year prior to April 5, 2018. (PX 3 at 26) He then testified it was "possible" that the April 5, 2018, injury aggravated the arthritis already in place from the prior ACL surgery. (PX 3 at 18, 28) He testified that the vast majority of the need for the left total knee replacement was related to the prior ACL injury. (PX 3 at 17-18) Dr. Seshadri testified that an ACL reconstruction, like Petitioner had undergone previously in 2014, can accelerate arthritis. (PX 3 at 17) He testified that striking one's knee on a fare box would not cause a meniscus tear and did not cause Petitioner's arthritis. (PX 3 at 19-22) The surgical recommendation was related to Petitioner's end stage osteoarthritis. (PX 3 at 24)

Dr. Seshadri further testified that Petitioner's severe, preexisting osteoarthritis and need for the total left knee replacement might possibly have been solely attributable to the result of the natural degenerative aging process of his pre-existing condition. (PX 3 at 27-28) Dr. Seshadri testified that Petitioner was probably going to require a total knee replacement, regardless of the April 5, 2018, injury. (PX 3 at 34) He noted it was only "possible' that the April 5, 2018, injury accelerated the need for the total knee replacement. (PX 3 at 34) Further, Dr. Seshadri reviewed the April 5, 2018, accident medical records and found that the presentation was consistent, specifically the bruising, was consistent with the mechanism described by Petitioner; that bruising would not be present if Petitioner just suffered from osteoarthritis. (PX 3 at 30-31)

[2] It should be noted that Petitioner filed an Application for Adjustment of Claim with the Workers' Compensation Commission for the July 26, 2014, injury. (PX 4) On March 18, 2016, the case proceeded to trial. *Id.* On July 27, 2016, Arbitrator Brian Cronin heard the case and awarded Petitioner 28% loss of use of a left leg. *Id.* The decision indicated that Petitioner had a work-related injury to his left knee that required an ACL reconstruction. *Id. The* Commission found that Petitioner sustained an accident that arose out of and in the course of employment and causally related his left knee condition to the accident. *Id.* The Commission awarded Petitioner 28% loss of use of the left leg. *Id.*

Examination Report of Dr. Bryan Neal

Dr. Neal examined Petitioner on July 5, 2018, and prepared a report following that examination dated July 20, 2018. (RX 1) After obtaining a detailed history, reviewing the complete records, and performing an extensive examination, Dr. Neal diagnosed Petitioner with severe, end stage symptomatic left knee osteoarthritis and radiographically confirmed advanced bone-on-bone medial compartment osteoarthritis with complete medial articular loss. (RX 1at 15) Dr. Neal opined that Petitioner's left knee condition was not causally connected to the work accident and provided a plethora of bases for his opinions. (RX 1 at 16-20) He noted Petitioner had end stage, Grade IV arthritis with exposed bone on both sides of the medial joint prior to the alleged accident, as noted in the 2014 operative report. (RX 1 at 18) He noted Petitioner's arthritis was symptomatic prior to striking his kneecap on the fare box, and that condition continued after the incident. (RX 1 at 17) He further noted Petitioner was able to complete his work shift, even though the alleged accident happened toward the beginning of the work shift. *Id*. He did not seek medical attention immediately after his shift. *Id.* Further, Petitioner was using a pain spray for two to three years prior to the alleged work accident (RX 1 at 18), which indicated that he had pain before the April 5, 2018, accident. Based on this, Dr. Neal did not find Petitioner's history of being asymptomatic in the year prior to April 5, 2018, to be plausible. *Id*. While the mechanism of injury might temporarily cause discomfort, it in no way changed the natural progression of his pre-existing degenerative osteoarthritis as documented in 2014. (RX 1 at 19) At most, Petitioner sustained a soft tissue contusion as a result of the April 5, 2018, alleged work injury. (RX 1 at 20) While Dr. Neal recommended a left total knee replacement surgery, he felt it was not causally connected to the April 5, 2018, work accident. He further noted Petitioner's left knee contusion had reached MMI. (RX 1 at 20)

CONCLUSIONS OF LAW

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

Decisions of an Arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission,* 44 Ill. 2d 214 (1969).

Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his testimony. Where a claimant's testimony is inconsistent with his actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972).

It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. *O'Dette v. Industrial Commission*, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); *Hosteny v. Workers' Compensation Commission*, 397 Ill. App. 3d 665, 674 (2009). Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's

testimony and medical records, may be taken to indicate unreliability. *Gilbert v. Martin & Bayley/Hucks,* 08 ILWC 004187 (2010).

In the case at hand, the Arbitrator observed Petitioner during the hearing and found him to be a credible witness. Petitioner was calm, well-mannered, composed, and spoke clearly. The Arbitrator took notice of Petitioner's movements and found them consistent with Petitioner's testimony. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable.

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

The Arbitrator finds that Petitioner credibly testified that, during his shift between April 4, 2018, and April 5, 2018, Petitioner performed work duties associated with his position as a bus mechanic for Respondent. (T. 28-30) Petitioner testified that, while inspecting a bus, Petitioner struck his left kneecap on a fare box. (T. 28-30) This was also corroborated by video footage. (RX 6) Based on the evidence presented, the Arbitrator finds an accident occurred that arose out of and in the course of Petitioner's employment by Respondent.

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

Petitioner bears the burden of proving, by a preponderance of the evidence, every element of the claim. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). To obtain compensation under the Illinois Workers' Compensation 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. Causation between the work-related accident and condition of ill-being can be established by showing prior history of good health, followed by a work-related accident in which petitioner is unable to perform his physical duties. *Kawa v. Illinois Workers' Comp. Comm'n*, 991 N.E.2d 430, 448 (2013). 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). 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. *Id*. at 205.

"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). A causal connection between work duties and a condition of ill-being may be established by a chain of events including Petitioner's ability to perform the duties before the date of the accident, and inability to perform the same duties following that date. *Pulliam Masonry v. Industrial Comm'n.,* 77 Ill.2d 469, 471 (1979). To be entitled to compensation for an injury, Petitioner need not prove that his injury was the sole causative factor in his subsequent treatment and disability, but only that it was a causative factor. If a pre-existing condition is aggravated exacerbated, or accelerated by an accidental injury, the

employee is entitled to benefits. *Rock Road Construction v. Industrial Commission*, 37 Ill.2d 123, 227 N.E.2d 65, 67-8 (1967).

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to the work accident. The Arbitrator notes that the medical records and Petitioner's current, and previously sworn testimony, indicated that he had symptomatic osteoarthritis prior to the April 5, 2018, accident. (PX 1, 2, 4) The Arbitrator notes that it was uncontested that prior to the accident, Petitioner was fully performing his job, albeit with restrictions, however, after the April 5, 2018, accident Petitioner was unable to perform his job at all.

The Arbitrator finds that Dr. Kung diagnosed left knee unilateral primary osteoarthritis, complex tear of the medial meniscus in the left knee, and a sprain of the posterior cruciate ligament of the left knee. (PX 2) The Arbitrator also finds that Dr. Seshadri opined that it was possible the April 5, 2018, work accident aggravated Petitioner's current knee condition. (PX 3 at 18) Dr. Seshadri further opined that the direct blow to Petitioner's knee, from hitting the fare box, aggravated his pain and symptoms of arthritis. (PX 3 at 22)

The Arbitrator notes that Dr. Neal indicated that Petitioner's osteoarthritis was not related to the incident in April of 2018, however noted that Petitioner may have some soft tissue symptoms from striking the fare box. (RX 1) The Arbitrator notes that Dr. Neal further opined that Petitioner was a candidate for knee replacement surgery. *Id*.

The Arbitrator finds the opinion of Dr. Kung and Dr. Seshadri to be more persuasive than that of Dr. Neal. The Arbitrator relies on the following in support of her findings: (1) Dr. Kungs's records; (2) Dr. Seshadri's records and testimony; and (3) Petitioner's testimony of complaints of pain and treatment.

Therefore, the Arbitrator finds that Petitioner's current condition of ill-being, in relation to Petitioner's left knee, was aggravated by the April 5, 2018, work accident.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

As the Arbitrator found that Petitioner's current condition of ill-being was aggravated by the April 5, 2018, work-related accident, the Arbitrator finds that the medical treatment and services Petitioner received by Dr. Seshadri were necessary. (PX 5) The Arbitrator finds that Respondent shall pay reasonable and necessary medical services, provided by Dr. Seshadri, pursuant to the medical fee scheduled and as outlined in PX 5, as provided in Sections 8(a) and 8.2 of the Act.

WITH RESPECT TO ISSUE (K), WHAT TEMPORARY BENEFITS ARE IN DISPUTE, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner credibly testified that he was off work since April 5, 2018. (T. 34) The Arbitrator concludes that Respondent shall pay Petitioner temporary total disability ("TTD") of $665.66 per week for 73 weeks, commencing April 6, 2018, through August 30, 2019.

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

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

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that an American Medical Association ("AMA") impairment rating was not performed in this case. As such, the Arbitrator relies on the other four factors of permanent partial disability ("PPD").

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the records revealed that Petitioner was employed as a light-duty bus mechanic at the time of the accident and was unable to return to work in his prior capacity as a result of said injury. As such, the Arbitrator gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 67 years old at the time of the accident. (AX 1, line 6) The Arbitrator notes that Petitioner was close to retirement. As such, the Arbitrator gives less weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that while Petitioner testified that he was in worse pain, after the April 5, 2018, injury, he was placed on similar work restrictions he had prior to the accident. However, as Petitioner was terminated by Respondent, Petitioner's future earning capacity was impacted. Thus, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner sustained an aggravation to his left knee as a result of the April 5, 2018, work accident. Petitioner credibly testified that he was kept off work throughout his treatment. (T. 34) Dr. Kung diagnosed left knee unilateral primary osteoarthritis, complex tear of the medial meniscus in the left knee, and a sprain of the posterior cruciate ligament of the left knee. *Id*. Dr. Seshadri noted that Petitioner's tricompartmental arthritis was further advanced than normal for someone who had the ACL surgery Petitioner had previously undergone. (PX 3 at 10-11) Dr. Seshadri opined that Petitioner's April 5, 2018, accident could have aggravated Petitioner's underlying left knee pre-existing osteoarthritis, assuming Petitioner's symptoms prior to the accident were nonexistent or minimal. (PX 3 at 17) Dr. Seshadri further indicated that it was "possible" that the April 5, 2018, injury aggravated the arthritis already in place from the prior ACL surgery. (PX 3 at 18, 28) IME Dr. Neal opined that Petitioner sustained a soft tissue contusion as a result of the April 5, 2018, alleged work injury. (PX 3 at 20) While Dr. Neal recommended a left total knee replacement surgery, he felt it was not causally connected to the April 5, 2018, work accident.

The Arbitrator notes that Petitioner testified that he could not climb tall ladders, kneel, or crawl due to his first knee surgery. (T. 24, 37, 39, 54, 63, 67) Petitioner testified that his left knee was stiff and achy before April 5, 2018. (T. 54-55) During the hearing, the Arbitrator observed the video footage taken from inside the bus Petitioner was working on. (RX 6) The Arbitrator notes that prior to the accident, Petitioner entered and exited the bus slowly. *Id.* Petitioner testified that he did so because of his left knee pain. (T. 60) The Arbitrator also noted, prior to the accident, that Petitioner limped when he walked alongside the bus. (RX 6) Petitioner testified that he did so because he was favoring his left knee. (T. 61) The Arbitrator notes that the video depicted the moment Petitioner hit his knee on the fare box. (RX 6) The Arbitrator notes that while Petitioner's left knee issues were existent and apparent, Petitioner's accident aggravated his left knee pain and symptoms.

If a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Sisbro supra.* While the Arbitrator considered the opinion of Dr. Neal, the Arbitrator found that Dr. Neal's testimony did not outweigh the opinions of treating physicians Dr. Kung and Dr. Seshadri. Therefore, the Arbitrator gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Respondent shall pay Petitioner PPD benefits of $598.79 per week for 107.50 weeks, because the injuries sustained caused a 50% loss of use of the leg as provided in Section 8(d)2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC013968
Case Name	Kelly Jo Lane v. City of Peoria
Consolidated Cases	19WC031054;
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	23IWCC0278
Number of Pages of Decision	52
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Stephen Kelly
Respondent Attorney	Kevin Day

DATE FILED: 6/26/2023

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kelley Lane,

Petitioner,

vs. No. 19 WC 13968

City of Peoria,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, medical expenses, prospective medical care, and wage calculations, and being advised of the facts and law, affirms with changes the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms and adopts the Arbitrator's conclusion that Petitioner failed to prove she sustained accidental injuries arising out of and in the course of her employment with Respondent. In doing so, the Commission affirms and adopts the credibility findings made by Arbitrator Gillespie, but not the credibility findings another Arbitrator and another Commission Panel made in case No. 08 WC 17751, *aff'd* 12 IWCC 1073.

The finding of no accident renders moot the remaining issues. The Commission does not adopt and strikes Arbitrator Gillespie's findings on all other issues.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 7, 2022, is hereby affirmed with changes.

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

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

June 26, 2023

SJM/sk
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	19WC013968
Case Name	Kelly Jo Lane v. City of Peoria
Consolidated Cases	19WC031054
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	49
Decision Issued By	Bradley Gillespie, Arbitrator

Petitioner Attorney	Stephen Kelly
Respondent Attorney	Gregory A. Nordstrom

DATE FILED: 9/7/2022

/s/Bradley Gillespie, Arbitrator
Signature

INTEREST RATE WEEK OF SEPTEMBER 7, 2022 3.32%

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

KELLEY LANE
Employee/Petitioner

v.

CITY OF PEORIA
Employer/Respondent

Case # **19** WC **013968**

Consolidated case:

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 **Bradley Gillespie**, Arbitrator of the Commission, in the city of **Peoria**, on **April 28, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ 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 **4/12/18**, Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

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

Timely notice of the **4/12/18** accident ***was*** given to Respondent.

Petitioner's current conditions of ill-being ***are not*** causally related to the alleged accidents.

In the year preceding the injuries, Petitioner earned $**75,878.40**; the average weekly wage was $**1,459.20**.

On the **4/12/18** date of accident, Petitioner was **54** 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**.

The Petitioner was off work for time periods: **N/A**.

Respondent is entitled to a credit under Section 8(j) for all payments made through group medical insurance.

ORDER

- Petitioner did not sustain an accident that arose out of and in the course of her employment with Respondent on April 12, 2018.
- Petitioner's conditions of ill-being at the time of arbitration are not causally related to the alleged work accident on April 12, 2018.
- Petitioner did provide proper notice of her alleged April 12, 2018, accident to Respondent.
- Petitioner's correct average weekly wage is $1,459.20.
- Respondent has paid all reasonable, necessary, and causally related medical expenses and is not responsible for any unpaid medical expenses alleged by Petitioner.
- Any prospective medical treatment for Petitioner's alleged accident of April 12, 2018 is denied. No other benefits are awarded.
- Please see attached 19(b) Decision of Arbitrator for consolidated cases 19WC013968 & 19WC031054.

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

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

Bradley D. Gillespie

Signature of Arbitrator

September 7, 2022

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KELLEY LANE, Petitioner,	)
v.	)Case No. 19 WC 13968; 19 WC 31054
CITY OF PEORIA, Respondent.	)

19(b) DECISION OF THE ARBITRATOR

These matters proceeded to hearing on April 28, 2022, in Peoria, Illinois (*See* Arb. 1 & Arb. 2). The following issues were in dispute at arbitration:

- Accident
- Causal Connection
- Notice
- Petitioner's Earnings and Average Weekly Wage
- Medical Expenses
- Prospective Medical Care

FINDINGS OF FACT

I. Applications for Adjustment of Claim

On May 7, 2018, Petitioner, Kelly Lane, filed an Application for Adjustment of Claim, alleging she injured her left and right wrist when she reached to pick-up EMD cards while working for Respondent, City of Peoria, on April 12, 2018. (Resp. Ex. 3, p. 1-3). She alleged an average weekly wage of $1,218.80.

Petitioner then filed a second Application for Adjustment of Claim on October 24, 2019, alleging an injury to her right wrist on April 11, 2018, as a result of repetitive trauma. (Resp. Ex. 3, p. 4-6). Petitioner amended this Application for Adjustment of Claim on December 9, 2019. (Resp. Ex. 3, p. 7-8). In her Amended Application, Petitioner changed the date of accident to April 22, 2019 and changed the affected body part from right wrist to bilateral wrists. (Resp. Ex. 3, p. 7).

On January 17, 2022, Petitioner filed two Amended Applications for Adjustment of Claim, amending both of the two above-described claims. (Resp. Ex. 3, p. 9-12). She amended the original Application for Adjustment of Claim, filed on May 7, 2018, to allege she sustained injuries to the

left wrist, left arm, and left ulna bone when she reached to pick up an EMD card on April 12, 2018. (Resp. Ex. 3, p. 9-10). Petitioner also amended her average weekly wage from $1,218.80 to $2,400.00. *Id*. In addition, Petitioner filed second Amended Application for Adjustment of Claim for her alleged April 22, 2019 accident, changing the affected body part from bilateral wrists to bilateral wrists, left arm, and ulna bone. (Resp. Ex. 3, p. 11-12).

II. Arbitration Testimony

A. Testimony of Petitioner

At the outset of arbitration, Petitioner, Kelly Lane, stated she was providing testimony concerning two (2) workers' compensation claims with accident dates of April 12, 2018 and April 22, 2019. (Arb. Tr. p. 15). She acknowledged she also had two other claims pending before the Commission for her left foot and neck. (Arb. Tr. p. 16). With regard to the April 12, 2018 accident, Petitioner filed an initial Application for Adjustment of Claim alleging she injured her right wrist. She testified that Application was inaccurate, and she later filed an amended Application for injuries to her left wrist, arm, and ulna bone. (Arb. Tr. p. 16-17; Pet. Ex. 1 p. 4-5). She then filed a second claim for alleged bilateral repetitive trauma injuries in April of 2019. (Arb. Tr. p. 17-18). Petitioner testified this Application was then amended, because she only injured her left wrist in April of 2019. (Arb. Tr. p. 18). She then altered her testimony and stated her work activities actually did bother her right wrist in April of 2019. *Id*.

On direct examination, Petitioner provided testimony regarding medical treatment to her bilateral hands, wrists, elbows, and shoulders in 1984, 1988, 1995, 2008, 2010, 2015, 2017, and 2018. (Arb. Tr. p. 19-30). She either recalled this treatment or indicated she would not dispute any medical records evidencing treatment during these time periods. (Arb. Tr. p. 19-30). On cross-examination, Petitioner summarized her surgical history in regard to her upper extremities. (Arb. Tr. p. 81). She underwent a right carpal tunnel surgery in 1988. (Arb. Tr. p. 81). In 1995, she underwent carpal tunnel surgeries on both of her wrists. *Id*. In 1995, she also had surgeries performed on both her elbows. *Id*. In 2009, she had carpal tunnel surgeries on both of her wrists. (Arb. Tr. p. 81-82). In 2009, she also underwent surgeries on both her elbows. (Arb. Tr. p. 82). Also in 2009, she underwent trigger thumb release surgeries on both of her thumbs. *Id*. She testified she has also undergone multiple right shoulder surgeries, with no surgeries to her left shoulder. *Id*. This medical treatment is more fully addressed and summarized in Section III below.

Petitioner also testified to multiple previous upper extremity injuries suffered by way of falls. (Arb. Tr. p. 79). In 1984, she injured one of her shoulders in a fall. *Id*. In 1987, she fell, injuring her right shoulder and wrist. *Id*. She testified she would not dispute the medical record showing her dog bumped her, causing her to fall down the stairs, landing on her left elbow, in 2007. (Arb. Tr. p. 79-80). On May 5, 2014, she fell at work, injuring her right wrist. (Arb. Tr. p. 80). She testified she would not dispute the medical record showing she fell again and landed on her right hand in early 2017. *Id*.

Petitioner indicated she previously filed workers' compensation cases against the City of Peoria for accidents on February 7, 2008 and February 1, 2010, involving alleged injuries to her right wrist and left hand. (Arb. Tr. p. 30-31). She proceeded to arbitration for those accidents and acknowledged the claims were denied by the Commission. (Arb. Tr. p. 31). According to Petitioner, she was not prepared for the 2008 arbitration and was very confused at that time. *Id*. She also settled a claim against the City of Peoria for a May 5, 2014 injury to her right hand. She was awarded four-and-a-half percent (4.5%) loss of use of the right hand in that claim. (Arb. Tr. p. 81).

She further acknowledged filing a workers' compensation claim in August of 1994 against Medforms, Inc. for injuries to her bilateral hands. (Arb. Tr. p. 32). Petitioner was awarded fifteen percent (15%) loss of use of her left hand and fifteen percent (15%) loss of use of her right hand as a result of that claim. *Id*.

Petitioner testified she saw Dr. San German approximately four (4) times leading up to her first alleged accident, starting in June of 2017. (Arb. Tr. p. 34). She testified she would agree with the records if they show she did not make any complaints regarding her left wrist or arm in June or July of 2017. *Id*. She returned on January 30, 2018 with no complaints to her left wrist or left hand or arm. (Arb. Tr. p. 35). Petitioner quit smoking on October 24, 2017, but she still vapes. *Id*. Petitioner does not dispute that the last time she visited Dr. San German before her first alleged accident was on March 13, 2018, and she indicated she had pain in her right hand. (Arb. Tr. p. 36). She then underwent an X-ray on her right hand. (Arb. Tr. p. 36-37). She testified she did not have left wrist complaints at that time. (Arb. Tr. p. 37).

With regard to the alleged April 12, 2018 accident, Petitioner testified she was sitting at her work station when she took a 911 medical call. (Arb. Tr. p. 37). She reached up with her left hand

and grabbed an EMD book. *Id*. Petitioner explained an EMD book is an Emergency Medical Dispatch book, which has a thick plastic base, and has medical cards attached to it for different medical conditions. (Arb. Tr. p. 38). The cards are metal plates with plastic over them. *Id*. These cards were used on every medical call. *Id*. Petitioner testified when she reached up to grab the EMD book, it twisted her left arm. *Id*. Petitioner testified the EMD book weighs fifteen (15) to twenty (20) pounds. (Arb. Tr. p. 39). Petitioner testified she told Dr. San German and Dr. Williams the EMD book weighed fifteen (15) to twenty (20) pounds. (Arb. Tr. p. 72).

Petitioner did not believe she had any appointments scheduled with any doctor for her left arm, wrist, or hand at the time of, or in the week leading up to, this alleged accident. (Arb. Tr. p. 39-40). She said she was not having any ongoing concerns, problems or complaints in regard to her left wrist or left arm in the week leading up to the alleged accident. (Arb. Tr. p. 40-41).

Petitioner did not immediately report this accident to her supervisor because she thought she just twisted her arm, and she would work through it, and it would get better. (Arb. Tr. p. 41). She eventually reported the accident to her supervisor, Jeanette Morse, on April 26, 2018. *Id*. She told Ms. Morse she had pulled down an EMD card file and twisted her arm two weeks earlier, and she was going to see a doctor because her complaints had not gone away. (Arb. Tr. p. 42). Petitioner's right wrist was not injured by the alleged April 12, 2018 accident. *Id*.

Petitioner then went to see Dr. San German. (Arb. Tr. p. 42-43). She testified if Dr. San German noted a history involving Petitioner lifting a heavy box, that history is inaccurate. (Arb. Tr. p. 43). She told Dr. San German she thought she may have pulled a muscle in the lower part of her left arm. (Arb. Tr. p. 73). Petitioner treated with Dr. San German in April and June of 2018, and on July 11, 2018, he referred her to Dr. Williams due to her left forearm pain and left wrist pain. (Arb. Tr. p. 43). Petitioner saw Dr. Williams on October 3, 2018 for pain over her left wrist and forearm, and Dr. Williams provided her with a wrist splint and an anti-inflammatory. (Arb. Tr. p. 44). He put her on restrictions for her left upper extremity. (Arb. Tr. p. 73). He never took Petitioner off work. (Arb. Tr. p. 45).

Petitioner underwent an MRI on or about December 7, 2018. (Arb. Tr. p. 45). On December 19, Dr. Williams diagnosed Petitioner with de Quervain's tenosynovitis in her left wrist. (Arb. Tr. p. 74). Dr. Williams then performed an injection into the thumb-side of her left wrist. (Arb. Tr. p. 45, 74). On January 17, 2019, Petitioner told Dr. Williams the injection helped a little bit, but wore

off. (Arb. Tr. p. 45-46). Petitioner testified Dr. Williams performed an injection into her right thumb. (Arb. Tr. p. 75).

Petitioner saw Dr. Williams again on April 22, 2019, which is the second alleged accident date at issue. (Arb. Tr. p. 46). She complained of pain in her left wrist. (Arb. Tr. p. 76). Petitioner testified she described her job description to Dr. Williams, and they discussed her work activities. (Arb. Tr. p. 46-47). Petitioner testified Dr. Williams recommended she undergo surgery to her left wrist at that time. (Arb. Tr. p. 47). Petitioner testified she still desires to undergo left wrist surgery, and the City has not approved it. *Id*. On cross-examination, Petitioner testified Dr. Williams actually recommended bilateral ulnar shortening surgeries. (Arb. Tr. p. 76). She further testified she never complained to Dr. Williams of any symptoms in her right wrist at any time between October 3, 2018 and April 22, 2019. (Arb. Tr. p. 77).

Petitioner followed up with Dr. Williams on August 17, 2020. (Arb. Tr. p. 48). At this appointment, Petitioner reported her right wrist was hurting worse than her left wrist. (Arb. Tr. p. 77). At that time, surgery was still recommended. (Arb. Tr. p. 48). As of the time of arbitration, Petitioner has still not undergone the recommended surgery. *Id*.

Petitioner attended an Independent Medical Examination with Dr. Lawrence Li on November 9, 2020. (Arb. Tr. p. 48, 78). Petitioner complained to Dr Li about pain in her left wrist which radiated into her elbow, as well as pain at the base of her right thumb. (Arb. Tr. p. 78). Dr. Li told her he also recommended surgery. (Arb. Tr. p. 49). She testified this examination took about forty-five (45) minutes. (Arb. Tr. p. 50). Petitioner also attended an Independent Medical Examination in Chicago with Dr. Hoepfner on June 4, 2020. (Arb. Tr. p. 49, 77). She said that examination took about fifteen (15) minutes. (Arb. Tr. p. 50). Petitioner told Dr. Hoepfner she was having pain in both forearms, swelling in both hands, and numbness and tingling in both hands. (Arb. Tr. p. 77-78).

Petitioner testified she was employed by the City of Peoria for twenty-four (24) years and one (1) month as an emergency telecommunicator. (Arb. Tr. p. 51). She took emergency phone calls and was responsible for getting information to the proper first responders. (Arb. Tr. p. 52).

Petitioner reviewed the City's Exhibit sixteen (16), which she identified as photographs of her work station. (Arb. Tr. p. 52-53). She said the photographs were an accurate representation of how her work station usually looked. (Arb. Tr. p. 83). She testified, as a 911 operator, she was

responsible for looking at six different monitors. (Arb. Tr. p. 53). She testified the photographs also show her own personal laptop, tablet, and cell phone at her work station. (Arb. Tr. p. 53-54, 84). Petitioner said, while working as a 911 operator, she would use Facebook on her laptop when she was not busy. (Arb. Tr. p. 54). Petitioner estimated during the time period from April 12, 2018 to April of 2019, she spent ten (10) to fifteen (15) percent of her time during her work shifts using her personal laptop, rather than performing work for the City. (Arb. Tr. p. 55). She testified she spent about 85% of her shifts during that time period performing work for the City. (Arb. Tr. p. 56).

Petitioner testified the photographs of her work station show a gel wrist pad, wrapped in duct tape, which she would rest her wrists on. (Arb. Tr. p. 56). She testified this helped her wrists. *Id*. This was Petitioner's own personal wrist rest, which she would bring in and set up on whichever computer she was going to be using for work on a given day. (Arb. Tr. p. 92-93). Petitioner did not have a wrist rest on her personal laptop. (Arb. Tr. p. 93).

Petitioner testified in the year from April of 2018 to April of 2019, she worked overtime. (Arb. Tr. p. 56). She said she worked twelve (12) hours per day, on average. (Arb. Tr. p. 57). Petitioner testified she agrees with the job description in evidence as the City's Exhibit four (4), which indicates up to seventy-five (75) percent of her day was spent performing computer work. *Id*.

Petitioner said when a call came in, she had to sit at the computer and type as she talked. (Arb. Tr. p. 58). She would enter the location and the code which would determine the priority level. *Id*. She would then type out a description of the situation and the caller's name and call-back number. *Id*. She would then send that off to whichever operator needed to take the call. *Id*. Every day, she got calls from the Prep 1 Radio Peoria Police Department Main Radio Frequency. (Arb. Tr. p. 58-59). She testified when she was on that radio, she was not supposed to answer the phone because she needed to give her full attention to the officers, who are constantly busy. (Arb. Tr. p. 59). If there was a call, this would prompt her to start doing computer work. *Id*.

Petitioner testified there were also a lot of entries for Prep 2 Peoria Police Department Secondary Radio Frequency. (Arb. Tr. p. 59). For this secondary frequency, Petitioner would enter calls for events such as runaways, missing people, and lost or stolen property. (Arb. Tr. p. 59-60). For CMED radio calls, Petitioner had to dispatch fire and volunteer ambulances and AMT. She

also answered fire department calls and calls for the Sheriff's Department. (Arb. Tr. p. 60-61). She also took calls for Chillicothe and Peoria Heights. (Arb. Tr. p. 61). When taking these different types of calls, Petitioner would use her hands and wrists to do computer work. *Id*.

Petitioner testified while taking these calls, her wrists would ache from sitting and typing. (Arb. Tr. p. 62). She testified when she typed at her work computer, she rested her wrists on her duct taped wrist rest, which helped. (Arb. Tr. p. 62-63). Petitioner testified her job also involved looking at four (4) by six (6) cards, as well as filing. (Arb. Tr. p. 63). She testified she used her hands for these activities, and also used her hands to dial phones. (Arb. Tr. p. 63-64).

Petitioner testified in 2018, she was disciplined for having her laptop out on her desk at work. (Arb. Tr. p. 65, 84-85). Petitioner testified she was allowed to use her personal electronic devices during her work shift, but this was a privilege that could be taken away by her supervisor if it was abused. (Arb. Tr. p. 84). Petitioner had this privilege temporarily taken away in 2018, and also served a one-day suspension. (Arb. Tr. p. 84-86). On cross-examination, Petitioner admitted this discipline did not result from just having her laptop out on her desk, as this is something she was allowed to do. (Arb. Tr. p. 86). However, she did not agree she was disciplined because her attentiveness to her laptop was causing her to be less attentive to her work duties. *Id*.

Petitioner then reviewed a document which she identified as a letter of suspension she received, signed, and dated on June 8, 2018. (Arb. Tr. p. 87). Petitioner testified the subject line of the letter said "Inattentive to duties, delays in dispatch of emergency calls." (Arb. Tr. p. 88). She testified the first two (2) paragraphs of the letter described issues she was having regarding delays in handling incoming calls. (Arb. Tr. p. 89). She further testified, in the fourth paragraph of the letter, her supervisor stated, "I believe you were distracted with your electronic devices and did not notice the calls for service holding in each case." (Arb. Tr. p. 89-90). The letter went on to say, "Therefore, until further notice, you are prohibited form utilizing all electronic devices while on duty in the ECC." (Arb. Tr. p. 90). Petitioner said her employer took her laptop away for thirty (30) days. (Arb. Tr. p. 66).

On January 30, 2019, Petitioner was suspended, again, for three (3) days. (Arb. Tr. p. 90). This second suspension was, in part, due to delays in handling incoming calls. (Arb. Tr. p. 91). Petitioner testified she had never been disciplined for laptop use prior to the time she filed her workers' compensation claim for her alleged April, 2018 work accident. (Arb. Tr. p. 99). She said

once she filed this case, her employer started disciplining her. *Id*. Petitioner said, if it is shown in the exhibit, she would not dispute the fact that one of the issues in her previous workers' compensation case, entered into evidence as the City's Exhibit fourteen (14), was her use of her personal laptop to play solitaire while she was supposed to be on keyboarding and data entry restrictions. (Arb. Tr. p. 107-108).

Petitioner testified she disagreed with the suspension she received on January 30, 2019, because at that time, they had just started taking calls for Peoria Heights and Chillicothe, and she was not used to the Prep 2 frequency being the main radio for any police agency. (Arb. Tr. p. 100-101). She said some people would turn those speakers down and then not turn them back up. (Arb. Tr. p. 101). She said the delay occurred because she did not know the speaker was turned down. (Arb. Tr. p. 104).

Petitioner testified she has not suffered any additional injury to her left wrist or arm since filing her workers' compensation claims. (Arb. Tr. p. 67). She also has not suffered any other injury to her right wrist or forearm since filing her April, 2019 claim. *Id*. Petitioner retired from her employment with the City on May 28, 2021. (Arb. Tr. p. 67-68). Petitioner said the fact the City offered her an early retirement incentive played a role in her choice to retire. (Arb. Tr. p. 68). She also testified she was getting slower at performing her work activities, and she could not type as fast as she used to. *Id*. At no time prior to her retirement did any doctor ever take her off work for her alleged wrist injuries. (Arb. Tr. p. 92).

In November, 2021, Petitioner got a seasonal job as a personal vehicle driver for UPS. (Arb. Tr. p. 68, 93). This job involved lifting and carrying many packages. (Arb. Tr. p. 93). Petitioner testified none of the packages she delivered were over thirty (30) pounds. (Arb. Tr. p. 94). She lifted these packages, carried them to people's front doors, and set them down, all without moving equipment, using only her hands. *Id*. Despite having to lift all those packages, Petitioner testified she felt great physically. *Id*. In fact, she said she felt the best she ever felt in her life, physically and mentally, while working for UPS. *Id*. While working for UPS, she never sustained an injury to either her right or left wrist. (Arb. Tr. p. 69). Her employment with UPS ended on January 14, 2022. *Id*.

On March 6, 2022, Petitioner got a job at Sam's Club as a front-line member. (Arb. Tr. p. 69). She still worked for Sam's Club as of the time of arbitration. (Arb. Tr. p. 95). As a front-line

member, Petitioner's duties include performing cashier duties, greeting customers, working the service membership desk, and processing returns. *Id*. She has to lift packages weighing up to twenty (20) pounds. *Id*. If a customer is purchasing a product weighing more than twenty (20) pounds, it stays in the cart, and Petitioner scans it with a scanning gun, which requires her to pinch a trigger. (Arb. Tr. p. 95-96). She said she is able to do this with either hand. (Arb. Tr. p. 96). She also operates a cash register with her hands. *Id*. She has not sustained any injuries to her right or left wrist while working at Sam's Club. (Arb. Tr. p. 69-70). While working for UPS and Sam's Club, Petitioner has never needed any work restrictions. (Arb. Tr. p. 96). She has not missed any work time at either UPS or Sam's Club due to wrist pain. (Arb. Tr. p. 97).

Petitioner said since the injury of 2018, the pain has never completely gone away in her left wrist or left forearm. (Arb. Tr. p. 70). She said since her repetitive trauma claim was filed, her pain in both wrists has never gone away. *Id*. Petitioner testified that, at the time of arbitration, her left wrist and forearm were very swollen. *Id*. She said they ache all the time and have ached ever since her accident. *Id*. Petitioner testified her right wrist also aches all the time and has ached since 2019. *Id*.

B. Testimony of Brandon Blayney

At arbitration, Brandon Blayney was called to testify on behalf of the City. Mr. Blayney testified he has worked for the City for almost the last eighteen (18) years. (Arb. Tr. p. 109). He currently works as an emergency communications center manager, which has been his position for the last two months prior to the date of arbitration. (Arb. Tr. p. 110). In this position, he oversees the 911 Center. *Id*. Prior to this, his position was that of emergency communications center operations supervisor for one year. *Id*. In that position, his job was to oversee the day-to-day operations of the 911 center and manager. *Id*. Before that, he was an emergency communications center supervisor. *Id*. He held that position for about five years, and was in that position on the dates of April 12, 2018 and April 22, 2019. (Arb. Tr. p. 111). In that position, Mr. Blayney was the supervisor of the dispatchers on duty during his shift. *Id*. He supervised Petitioner throughout the five years he worked as the emergency communications center supervisor. *Id*. He testified Petitioner worked as an emergency communications telecommunicator throughout that time, and for about twenty (20) years, total. *Id*.

Mr. Blayney formerly held the same position Petitioner held. (Arb. Tr. p. 111). He worked as an emergency communications telecommunicator for eleven (11) years. *Id*. As such, he testified he is very familiar with Petitioner's job duties during her employment with the City. (Arb. Tr. p. 112). He testified her job duties, generally, would be to process 911 calls and dispatch calls for service for police, fire, and EMS within Peoria County. *Id*. When taking an incoming call, Petitioner would need to enter some information into a computer system and then send that call off to the proper dispatcher. *Id*. He said this involves entering information into about six (6) fields. *Id*. He said taking one call involves about a paragraph worth of typing. (Arb. Tr. p. 112-113).

Mr. Blayney testified, on an average shift, an average dispatcher would take five (5) to six (6) calls per hour. (Arb. Tr. p. 113). Based on his experience supervising Petitioner, he observed her to be an employee who took an average to below average number of calls compared to other dispatchers. *Id*. He testified there are some shifts where a dispatcher would take very few calls or no calls at all. *Id*. These time periods would normally be early in the morning or late at night. *Id*. During those shifts, very little typing would be performed. (Arb. Tr. p. 113-114). Petitioner's shifts often encompassed part of the time when very few calls would usually come in. (Arb. Tr. p. 114).

Mr. Blayney testified Petitioner's job never required her to lift anything heavy. (Arb. Tr. p. 114). The heaviest thing she would ever be required to lift would be the EMD medical cards. *Id*. She did not have to lift these cards for every call she answered. *Id*. Mr. Blayney testified Petitioner's job did not require her to perform any forcible gripping, any pinching, or any forceful use of her hands at all. (Arb. Tr. p. 114-115).

Mr. Blayney said about twenty (20) percent of Petitioner's work time would be spent actually typing. (Arb. Tr. p. 115). On cross-examination, Mr. Blayney testified he did not review the written job description which states emergency communication telecommunicators performed computer work for up to seventy-five (75) percent of the day. (Arb. Tr. p. 121-122). However, Mr. Blayney testified his estimate of twenty (20) percent was specifically regarding typing, which is not the same as computer work. (Arb. Tr. p. 128-129). He said computer use would include not only typing, but also using the mouse or reading a screen. (Arb. Tr. p. 129). He further testified his estimate that about twenty (20) percent of Petitioner's work time was spent actually typing was based on both his own experience previously working as an emergency communications telecommunicator and his observations of Petitioner as her supervisor. (Arb. Tr. p. 129-130). He

also testified, if the job description references seventy-five (75) percent computer use, this does not mean Petitioner performed computer work for seventy-five (75) percent of her day, as he did not find her to be an extremely diligent employee, based on his time working as her supervisor. (Arb. Tr. p. 130). Mr. Blayney acknowledged there were times Petitioner was doing her job when he was not around. (Arb. Tr. p. 124). They often worked different shifts. *Id*. Mr. Blayney acknowledged the majority of the work performed by the emergency communication telecommunicators involves computer work. (Arb. Tr. p. 127).

In regard to the EMD cards, Mr. Blayney testified he is familiar with the EMD book, and he described it as a rectangular shaped item that holds about thirty-two (32) cards in clear sleeves. (Arb. Tr. p. 115). There is one (1) of these EMD books at every dispatch station. *Id*. They are all identical. *Id*. Mr. Blayney said the EMD books are the same today as they were on April 12, 2018. *Id*. Mr. Blayney testified each EMD book weighs five (5) pounds and three (3) ounces. (Arb. Tr. p. 115-116). He weighed one using a postal scale. (Arb. Tr. p. 116).

Mr. Blayney testified the regular shift for emergency communication telecommunicators is a forty (40) hour work week, and they are required to perform eight (8) hours of mandatory overtime each week. (Arb. Tr. p. 116).

During his time as Petitioner's supervisor, Mr. Blayney frequently observed her using her personal electronic devices during her work shifts. (Arb. Tr. p. 116). He said the dispatchers are allowed to use their personal electronic devices during their shifts, but it is a privilege which can be taken away. (Arb. Tr. p. 117). Petitioner's work duties would never require her to use her own personal laptop, tablet, or cell phone for any reason. *Id*. Mr. Blayney testified he had personal recollection of Petitioner being disciplined for her use of her personal electronic devices. *Id*. As a result, she was temporarily prohibited from using her personal electronic devices at work. *Id*. Mr. Blayney said this was not a commonly used form of discipline. (Arb. Tr. p. 118). In fact, Petitioner was the first person ever to be subject to this particular form of discipline, and only one other employee has been disciplined in this way since that time. *Id*.

Mr. Blayney testified he recently saw Petitioner working at Sam's Club. (Arb. Tr. p. 119). She was working as a cashier, picking up items, scanning items, and using a cash register. *Id*.

III. Medical Treatment

Petitioner has an extensive history of complaints, injuries, and surgeries in regard to her upper extremities. (Resp. Ex. 6, 7, 8, 9, 10, 11, & 12). This history begins, at the latest, in 1987, when Petitioner suffered a fall, injuring her right shoulder and wrist. (Resp. Ex. 10, p. 172). In 1988, Petitioner underwent a right carpal tunnel surgery in St. Louis. (Resp. Ex. 6, p. 1). In August of 1994, she developed pain in her hands and wrists, radiating to the medial forearms and elbows, with numbness and tingling in all digits of both hands. *Id*. On January 1, 1995, she underwent electroneuromyography testing with Dr. Xuan T. Truong, MD, and was diagnosed with recurrent right carpal tunnel syndrome, early left carpal tunnel syndrome, and bilateral cubital tunnel syndrome. *Id*.

On March 16, 1995, Petitioner underwent right upper extremity surgery, performed by Dr. David Conner at the Methodist Medical Center of Illinois. (Resp. Ex. 7, p. 1-2). Her preoperative diagnosis was recurrent right carpal tunnel syndrome and left cubital tunnel syndrome. *Id*. The surgery performed was an anterior transposition of the right ulnar nerve, exploration of the right carpal tunnel, neurolysis of the median nerve, and flexor tenosynovectomy. *Id*. On April 17, 1995, Dr. Conner performed surgery on Petitioner's left upper extremity. (Resp. Ex. 7, p. 3-4). Her preoperative diagnosis was left cubital tunnel syndrome and left carpal tunnel syndrome. *Id*. The surgery performed was an anterior transposition of the left ulnar nerve and an endoscopic decompression of the left median nerve. *Id*.

In 2004, while treating for other issues at Glas Chiropractic, Petitioner reported pain in her left wrist and thumb on March 3, 2004. (Resp. Ex. 8, p. 5). On September 22, 2004, she reported tingling in her right hand. (Resp. Ex. 8, p. 6).

On March 23, 2007, Petitioner underwent left shoulder arthroscopic subacromial decompression and acromioplasty surgery with Dr. Steven Below. (Resp. Ex. 9, p. 2-4). On September 27, 2007, Petitioner told Dr. Below her dog had bumped her from behind, and she had fallen down some steps, landing on her left elbow. (Resp. Ex. 9, p. 7-8).

Petitioner was seen by Dr. Moody at OSF Occupational Health on February 18, 2008. She reported she had worked for the City as a dispatcher since 1997. (Resp. Ex. 10, p. 74). She reported for approximately one (1) year, she had been having problems with bilateral wrist pain, her fingers falling asleep, and, more recently, bilateral thumb pain. *Id*. Dr. Moody diagnosed her with early

stenosing tenosynovitis of the thumbs, as well as suspected recurrence of carpal tunnel syndrome. *Id*.

On March 18, 2008, Petitioner underwent electrodiagnostic testing with Dr. Jeffery E. Stedwill, MD, for pain in her bilateral wrists. (Resp. Ex. 6, p. 4-5). Petitioner reported pain in both wrists with a component of tingling and said these symptoms had been present for about a year. *Id*. The study revealed normal findings with no evidence of right or left sided median or ulnar neuropathy. *Id*.

On March 26, 2008, Petitioner was seen by Dr. Moody at OSF Occupational Health. She reported she was continuing to experience pain in the volar right wrist, in the region of the carpal tunnel, as well as numbness and tingling in the right hand median nerve distribution. (Resp. Ex. 10, p. 65). She also reported pain along the left thumb. *Id*. Dr. Moody took X-rays of both wrists, and did not see any significant abnormality which would account for her symptoms. *Id*. The X-rays revealed mild flattening of the ulnar styloid process bilaterally. (Resp. Ex. 12, p. 1).

Petitioner was seen by Dr. Jeffrey Garst at Great Plains Orthopaedics on May 2, 2008. (Resp. Ex. 9, p. 9). She reported triggering in both thumbs, worse on the left than the right, tenderness in both elbows, worse on the right than the left, and numbness in both hands. *Id*. Dr. Garst diagnosed Petitioner with probable bilateral trigger thumbs, bilateral epicondylitis, and possible recurrent bilateral compressive carpal tunnel neuropathies. *Id*. He performed a right lateral epicondylar injection and recommended a repeat EMG/NCV study. *Id*.

Petitioner underwent an EMG/NCV study on May 7, 2008 with Dr. Xuan Truong. (Resp. Ex. 6, p. 6-7). Petitioner reported a year prior, she had developed pain in both wrists and hands, and numbness and tingling in the first four digits of both hands. *Id*. She further reported, in February of 2007, she had developed pain over the medial and lateral aspects of her right elbow, radiating to her forearm, as well as numbness and tingling of the right fifth digit. *Id*. The study performed by Dr. Truong showed a slight residual or recurrent right carpal tunnel syndrome and borderline to slight residual or recurrent left carpal tunnel syndrome. *Id*.

On May 16, 2008, Petitioner was seen again by Dr. Garst, who diagnosed her with bilateral trigger thumbs, bilateral lateral epicondylitis, and bilateral recurrent carpal tunnel syndrome. (Resp. Ex. 9, p. 13). Dr. Garst recommended Petitioner undergo bilateral carpal tunnel releases, trigger thumb releases, and lateral epicondylar releases. *Id*. Petitioner attended seven (7) more

visits with Dr. Garst from July 15, 2008 to April 21, 2009, during which she continued to consistently complain of symptoms in her elbows, wrists, and hands. (Resp. Ex. 9, p. 13-21). On November 11, 2008, Dr. Garst performed a right lateral epicondylar injection. (Resp. 9, p. 16).

On May 4, 2009, Dr. Garst performed a right lateral epicondylar release, a right open carpal tunnel release, and a right trigger thumb release. (Resp. Ex. 9, p. 23-25). At Petitioner's first follow up appointment on May 15, 2009, Dr. Garst recommended she begin physical therapy, and he performed a Lidocaine injection into her left elbow. (Resp. Ex. 9, p. 26).

On July 6, 2009, Dr. Garst performed a left lateral epicondylar release, a left open carpal tunnel release, and a left trigger thumb release. (Resp. Ex. 9, p. 31-33).

Petitioner was seen by Dr. Garst on October 9, 2009. (Resp. Ex. 9, p. 37). At this appointment, Dr. Garst declared Petitioner to have reached maximum medical improvement, despite some continuing symptoms. *Id*. Petitioner reported some soreness in her left upper extremity, especially over the lateral epicondylar release site. *Id*. Dr. Garst noted she had relatively good grip strength, but was still weaker on the left compared to the right. *Id*.

Petitioner returned to Dr. Garst on November 24, 2009 and complained of left lateral elbow pain. (Resp. Ex. 9, p. 38). Dr. Garst recommended Petitioner treat conservatively and avoid further surgery because she had already "had quite a bit done." *Id*. He performed a left lateral epicondylar injection. *Id*. Petitioner saw Dr. Garst again on December 29, 2009 and reported continued elbow pain with some numbness in both hands. (Resp. Ex. 9, p. 40). Dr. Garst recommended repeat EMG/NCV testing to check for recurrent bilateral cubital tunnel syndrome. *Id*.

On January 4, 2010, Petitioner underwent repeat EMG/NCV testing with Dr. Truong. (Resp. Ex. 6, p. 8-9). Petitioner reported she was still having pain in both elbows and numbness and tingling in the last two (2) digits of both hands. *Id*. She said her symptoms were more severe on the left and had been getting gradually worse. *Id*. She reported weakness in her grip and said she had been dropping things from both hands. *Id*. The testing performed on January 4, 2010 revealed bilateral ulnar cubital tunnel, probably recurrent. *Id*.

Petitioner was seen by Dr. Moody at OSF Occupational Health on January 15, 2010. (Resp. Ex. 10, p. 51). She reported left elbow pain and bilateral hand tingling, mainly in the palms and in the fourth and fifth digits. *Id*. Objectively, provocative testing of the carpal tunnels and ulnar nerves

was negative. *Id*. Dr. Moody noted, "Given the extensive surgery she has had of her upper extremities, I would recommend caution regarding proceeding with additional surgical interventions." *Id*.

On January 26, 2010, Petitioner saw Dr. Garst and complained of continued elbow pain with some numbness in both hands. (Resp. Ex. 9, p. 41). Dr. Garst noted Petitioner had undergone a lot of surgeries in the recent past, and he recommended she think about this before continuing with any more invasive treatment. *Id*. On February 23, 2010, Dr. Garst saw Petitioner again and recommended bilateral ulnar nerve transposition surgeries. (Resp. Ex. 9, p. 42). Petitioner was seen by Dr. Garst approximately eighteen (18) times between March 23, 2010 and October 2, 2012. (Resp. Ex. 9, p. 44-62). At these appointments, Petitioner continued to complain of bilateral elbow pain and hand numbness. *Id*.

On November 13, 2012, Petitioner reported to Dr. Garst that her pending workers' compensation claim had recently gone to arbitration, and she had lost her case. (Resp. Ex. 9, p. 63). Therefore, the surgeries recommended by Dr. Garst would not be covered by her workers' compensation insurance. *Id*. However, she reported she was still having symptoms and was considering having the surgeries covered under her group insurance plan. *Id*.

On May 16, 2014, Petitioner underwent an X-ray of her right wrist after suffering a fall. (Resp. Ex. 12, p. 2). The X-ray showed no fracture, dislocation, or other acute osseous abnormality. *Id*.

On December 11, 2014, Petitioner sought treatment with Dr. James Williams at Midwest Orthopaedic Center. (Resp. Ex. 11, p. 33). She reported she had been having pain in her right wrist for months since she fell and landed on it on May 5, 2014. (Resp. Ex. 11, p. 30, 33). She said this pain radiated up her right arm. (Resp. Ex. 11, p. 33). Dr. Williams recommended Petitioner undergo an MRI of her wrist. *Id*.

Petitioner underwent an MRI of her right wrist on December 19, 2014. (Resp. Ex. 11, p. 25-26). Findings of the MRI included degeneration of the scapholunate ligament, fraying of the body and ulnar-sided attachments of the triangular fibrocartilage with synovitis along the ulnar capsule, a small amount of fluid within the distal radiolunar joint, mild dorsal capsulitis, a small erosion involving the distal diaphysis of the first metacarpal, mild arthropathic changes of the first carpometacarpal joint space, areas of marrow edema, and dorsal subluxation of the ulna relative

to the radius with thinning and attenuation of the volar radiolunar ligament. *Id*. The conclusions of the MRI report were inflammation and a sprain of the ulnar-sided attachments of the triangular fibrocartilage complex with fraying of the body of the triangular fibrocartilage, mild arthropathic changes of the first carpometacarpal joint with erosion of the distal first metacarpal diaphysis, and patchy areas of marrow edema involving the base of the fourth metacarpal, hamate, capitate, and lunate. *Id*.

Petitioner followed up with Dr. Williams on January 12, 2015. (Resp. Ex. 11, p. 69-70). He diagnosed her with a sprain of her right wrist and hand. He noted there was no surgery he would recommend. *Id*. He told her to wear a splint and follow up in six (6) to eight (8) weeks. *Id*.

On February 16, 2015, Petitioner underwent an MRI of her right thumb, which showed mild capsulitis of the first metacarpophalangeal joint and mild peritendinitis of the first flexor and extensor tendons. (Resp. Ex. 11, p. 65).

Petitioner followed up with Dr. Williams on March 19, 2015. (Resp. Ex. 11, p. 62-63). He diagnosed her with primary osteoarthrosis in the right hand. *Id*. Dr. Williams performed a right thumb MCP injection. *Id*. On October 26, 2015, Dr. Williams performed another right thumb MCP injection for localized primary osteoarthritis of the right thumb MCP joint. (Resp. Ex. 11, p. 59-61). Dr. Williams performed another right thumb MCP injection on January 7, 2016. (Resp. Ex. 11, p. 53-54).

On March 28, 2017, Petitioner saw her primary care physician, Dr. Henry San German. (Pet. Ex. 3, p. 109). She presented with a chief complaint of a hand injury suffered two weeks prior when she fell and scraped her right hand. *Id*. She complained of lesions on her right hand which burned slightly. *Id*. She was diagnosed with dermatitis. (Pet. Ex. 3, p. 111).

Petitioner was seen by Dr. Williams on December 28, 2017 (Resp. Ex. 11, p. 50-51). She complained of recurrent right thumb pain. *Id*. Dr. Williams performed another right thumb MCP injection for localized primary osteoarthritis of the right hand. *Id*.

On March 13, 2018, Petitioner presented to Dr. San German and reported she had been experiencing swelling and discomfort in her right fourth finger for the previous three (3) to four (4) days. (Pet. Ex. 3, p. 149-152). She said she was having difficulty making a fist or grabbing things. *Id*. She denied suffering any injury to the area. *Id*. Dr. San German's physical exam

revealed swelling over the proximal fourth finger and a scaly rash over the palmar aspect of the right hand. *Id*. He diagnosed Petitioner with possible fourth MCP joint tendinitis as well as eczema/dermatitis over the right palm, and he ordered an X-ray. *Id*. Petitioner underwent an X-ray of her right hand on March 13, 2018, which showed no significant bony abnormalities of the right hand. (Resp. Ex. 12, p. 4-5).

Petitioner presented to Dr. San German on April 27, 2018 with a chief complaint of arm pain and a possible pulled muscle in the left arm. (Pet. Ex. 3, p. 158-160). She reported she had been experiencing pain in her left arm for the last month since she was carrying a heavy box and lost balance while trying to maintain her grip. *Id*. She stated her pain had increased over the last week. *Id*. On examination, Dr. San German noted there was pinpoint tenderness over the left lateral epicondyle and over the forearm. *Id*. There was good wrist movement and no significant swelling or erythema. *Id*. He diagnosed Petitioner with tendonitis of the elbow or forearm. *Id*. He recommended Petitioner treat with medication and a forearm brace. *Id*.

Petitioner followed up with Dr. San German on June 20, 2018. (Pet. Ex. 3, p. 168-170). Dr. San German noted the left elbow showed good extension and flexion. *Id*. Petitioner's grip was good. *Id*. Supination or pronation against resistance caused significant tenderness over the lateral epicondyle. *Id*. Dr. San German recommended she try a different medication and continue bracing for persistent left forearm tendinitis. *Id*.

On July 11, 2018, Petitioner was seen by Dr. San German again. (Pet. Ex. 3, p. 186-188). She reported, at times, she was still having left forearm tenderness with radiation to the left thumb as well as up to the biceps. *Id*. Dr. San German's physical examination revealed significant tenderness over the left lateral epicondyle and some tenderness over the forearm. *Id*.

Petitioner presented to Dr. Williams on October 3, 2018 with left forearm pain after picking up metal cards at work. (Pet. Ex. 2, p. 14-15). She complained of pain over the lateral aspect of the left wrist. *Id*. Objectively, Petitioner was noted to have no swelling, full range of motion, and good strength in her left wrist. She had a positive Finkelstein's Test and increased pain with hyperextension of the thumb. *Id*. Dr. Williams diagnosed Petitioner with de Quervain's tenosynovitis of the left wrist. He told Petitioner initial treatment might include immobilizing the thumb and/or wrist in a splint or brace, avoiding repetitive thumb movements when possible, avoiding pinching the thumb when moving the wrist from side to side, applying ice to the affected

area, nonsteroidal anti-inflammatory drugs or Tylenol, a cortisone injection, or surgery as a last resort. *Id*. Petitioner said she did not wish to proceed with any treatment. *Id*. Dr. Williams provided Petitioner with work restrictions of light duty only and no lifting, pulling, or carrying more than one pound with her left upper extremity. (Pet. Ex. 2, p. 12).

In conjunction with Petitioner's October 3, 2018 appointment with Dr. Williams, she was asked to fill out a medical history questionnaire. (Pet. Ex. 2, p. 17-19). On this form, Petitioner stated her injury occurred when she picked up a 911 tablet and it started to fall to the left and twisted her arm. *Id*. She provided a surgical history which included right shoulder in 1987 or 1988, a right wrist surgery in 1987 or 1988, right and left carpal tunnel surgeries in or around 2010, right and left cubital tunnel surgery in or around 1995, and right knee surgery in 1988. *Id*. Petitioner also noted she smoked a pack and a half of cigarettes per day for thirty-eight (38) years, before quitting on October 24, 2017. *Id*.

Petitioner followed up with Dr. Williams on October 18, 2018 for left wrist tendonitis. (Pet. Ex. 2, p. 10). She reported her symptoms had not improved, and the splint she was wearing had not provided any relief. *Id*. Dr. Williams noted his objective examination of the left wrist revealed tenderness over the top of the wrist and the dorsal compartment. *Id*. He recommended she undergo an MRI. *Id*.

Petitioner underwent an MRI of her left wrist on December 7, 2018. (Pet. Ex. 2, p. 24-25). The conclusions of the MRI report included a central perforation, likely degenerative, of the triangle fibrocartilage complex with synovitis along the ulnar-sided attachments, fluid distending the distal radiolunar joint, fenestration versus partial-thickness tearing of the scaphoid limb of the scapholunate ligament, a four (4) by five (5) millimeter ganglion cyst on the volar aspect of the wrist at the level of the capitate, small triquetrum and capitate erosions versus pseudocyst, and possible early erosive arthropathy. *Id*.

Petitioner was seen by Dr. Williams on December 19, 2018 for a recheck of her left wrist tendonitis and to discuss her MRI results. (Pet. Ex. 2, p. 27-28). Dr. Williams performed a left de Quervain's injection. *Id*.

On January 17, 2019, Petitioner presented to Dr. Williams with a chief complaint of right thumb pain. (Pet. Ex. 2, p. 30-31). She reported her level of pain in the right thumb was ten out of

ten (10/10). *Id*. Dr. Williams diagnosed her with localized primary osteoarthritis of the right hand, and he performed a cortisone injection into the right thumb. *Id*.

On April 22, 2019, Petitioner presented to Dr. Williams with continued left wrist pain due to arthritis. (Pet. Ex. 2, p. 32-33). She told Dr. Williams she had worked as a 911 dispatcher for twenty-two (22) years. *Id*. She reported her pain level was two out of ten (2/10). *Id*. Dr. Williams assessed Petitioner with localized primary osteoarthritis of the left wrist. *Id*. He reviewed X-rays of the bilateral wrists which revealed positive ulnar variance of three (3) millimeters on the right and two (2) millimeters on the left, as well as arthritis. *Id*. Dr. Williams provided a causation opinion, stating, "Kelley is doing well. Her pain is due to her bilateral ulnar variance. I believe her left wrist injury and pre-existing ulnocarpal impaction have been aggravated by her work activities as a 911 dispatcher for 22 years. I recommend surgical intervention." *Id*.

Petitioner presented to Dr. Williams on August 17, 2020 with continued bilateral wrist pain due to osteoarthritis, right worse than left. (Pet. Ex. 2, p. 34-35). Petitioner reported the right thumb injection she received on January 17, 2019 provided significant relief. *Id*. No subjective numbness or tingling was noted. *Id*. Objectively, she was tender to palpation at the ulnocarpal aspect of the bilateral wrists. She had weakness with gripping due to pain. *Id*. Dr. Williams continued to recommend surgery. *Id*.

IV. Evidence Deposition Testimony

A. Testimony of Dr. James Williams

Dr. James Williams is a board-certified orthopedic surgeon who practices at Midwest Orthopaedic Center in Peoria, Illinois. (Pet. Ex. 5, p. 7). He is Petitioner's treating physician. (Pet. Ex. 5, p. 8-9). Dr. Williams said his testimony in this case was given in reliance on his treating medical records. (Pet. Ex. 5, p. 34). Dr. Williams testified his medical treatment records are summaries of the relevant information related to a particular examination. *Id*. He said obtaining a complete and accurate patient history would be important to him in forming a diagnosis, and even more important in forming a causation opinion. (Pet. Ex. 5, p. 35). He also agreed having a complete and accurate patient history would be important in forming his treatment plan. (Pet. Ex. 5, p. 36). He said if a patient provided an incomplete or inaccurate history, it could affect his causation opinion. *Id*.

Dr. Williams provided treatment to Petitioner for the first time on December 11, 2014. (Pet. Ex. 5, p. 10). He assessed her as having pain in the joint involving the forearm. *Id*. Petitioner was having pain in her right wrist after falling backwards onto her extended wrist. *Id*. She had been having this right wrist pain since May 5, 2014. (Pet. Ex. 5, p. 53). Petitioner filled out a general medical history questionnaire associated with this visit. (Pet. Ex. 5, p. 51). On that form, Petitioner stated her hospitals and/or surgeries included right and left carpal tunnel, right and left cubital tunnel, right knee, trigger thumbs, C-section, hysterectomy. (Pet. Ex. 5, p. 52). Dr. Williams testified he knows Petitioner also had a right shoulder surgery, but he is unaware of any other prior surgeries Petitioner may have undergone. (Pet. Ex. 5, p. 53). Dr. Williams ordered an MRI which was performed on December 19, 2014. (Pet. Ex. 5, p. 11).

Petitioner followed up on January 12, 2015, after her MRI, and Dr. Williams provided a diagnosis of a sprained right wrist and hand. (Pet. Ex. 5, p. 11) The MRI also showed arthritic changes. (Pet. Ex. 5, p.54-55). Petitioner followed up again two months later on March 19, 2015, after undergoing an MRI on her right thumb on February 16, 2015. (Pet. Ex. 5, p. 11, 55). The MRI showed capsulitis of the right thumb MCP joint, peritendinitis, and a sprain of the ulnar collateral ligament. *Id*. Petitioner complained of right wrist and thumb pain. (Pet. Ex. 5, p. 12). Dr. Williams' diagnosis at this appointment was primary osteoarthritis of the right hand. (Pet. Ex. 5, p. 55). He provided a cortisone injection into the right thumb MCP joint. (Pet. Ex. 5, p. 12).

Dr. Williams testified consistently with his treating medical records in regard to Petitioner's appointments on October 26, 2015, January 7, 2016, and December 28, 2017. (Pet. Ex. 5, p. 12-13, 56).

On October 3, 2018, Petitioner complained to Dr. Williams of left forearm pain. (Pet. Ex. 5, p. 57). She reported this pain started when she picked up a 911 tablet which started to fall. (Pet. Ex. 5, p. 57-58). She went to grab it with her left hand, and it twisted her left arm as it fell. *Id*. She reported this occurred on April 12, 2018. (Pet. Ex. 5, p. 58). The October 3, 2018 appointment, about six months after the described incident, is the first time Dr. Williams saw Petitioner in regard to the alleged injury. *Id*. Dr. Williams testified Petitioner did not tell him how much the 911 tablet weighed, nor did he have any independent knowledge of the weight of the tablet. (Pet. Ex. 5, p. 59). Dr. Williams did not know exactly what a 911 tablet was but speculated it might be some type of tablet containing sheets of information regarding 911 calls. *Id*.

At the October 3, 2018 appointment, Dr. Williams performed an objective examination, which revealed tenderness over the extensor tendons in the left wrist, full range of motion, and no swelling. (Pet. Ex. 5, p. 18). Petitioner had tenderness over the abductor pollicis longus as well as extensor pollicis brevis, which is considered the first dorsal compartment of the left wrist. *Id*. She had a positive Finkelstein's, which helps diagnose de Quervain's tenosynovitis. *Id*. She also had increased pain with hyperextension of the thumb. *Id*. Dr. Williams' assessment was tendinitis of the left wrist, also known as de Quervain's tenosynovitis, which was a new diagnosis for Petitioner. *Id*.

Dr. Williams testified a mechanism of injury involving twisting at the wrist could result in the type of diagnosis he provided to Petitioner. (Pet. Ex. 5, p.18-19). Dr. Williams provided Petitioner with treatment options including an anti-inflammatory, a forearm-based thumb spica splint, activity modification, ice, cortisone injection, and, as a last resort, surgery. (Pet. Ex. 5, p. 19). At that time, Petitioner elected to do nothing. *Id*. Dr. Williams recommended she avoid pinching the thumb and moving the wrist from side to side because that motion can stretch and enflame the tendons which control the thumb. (Pet. Ex. 5, p. 20).

On October 3, 2018, Dr. Williams provided Petitioner with restrictions of light duty work with no lifting, pulling, or carrying more than one pound with her left hand, and full use of her right hand. (Pet. Ex. 5, p. 21). Petitioner followed up on October 18, 2018, and reported the splint had not provided relief. *Id*. She was still tender over the first dorsal compartment, so Dr. Williams recommended an MRI. *Id*.

Petitioner underwent an MRI on or about December 7, 2018. (Pet. Ex. 5, p. 22). The MRI showed some TFCC complex degeneration and inflammation with some tearing present, some partial thickness tearing of the scapholunate ligament, a ganglion cyst at the level of the capitate within the wrist, and some early arthritis formation within the wrist. (Pet. Ex. 5, p. 22-23). Dr. Williams opined the only finding on this MRI which was related to the described work injury of April, 2018 was the inflammation. (Pet. Ex. 5, p. 23). Dr. Williams said the erosions and cysts shown within the triquetrum are indicative of ulnocarpal impaction. (Pet. Ex. 5, p. 61). The diagnosis of a central perforation would not be caused by Petitioner's work. *Id*. The finding of fenestration versus partial thickness tearing of the scaphoid limb of the scapholunate ligament was also not caused by her employment. (Pet. Ex. 5, p. 62). The finding of early erosive arthropathy

would be an arthritis type condition, also not caused by her employment. *Id*. Dr. Williams testified it is possible for a degenerative condition such as the ones shown by this MRI to be aggravated by the type of injury Petitioner had described. (Pet. Ex. 5, p. 23).

Dr. Williams saw Petitioner again on December 19, 2018. (Pet. Ex. 5, p. 23). She presented with a history of left wrist tendinitis with essentially unchanged symptoms. (Pet. Ex. 5, p. 24). She had tried the splint with no relief, and she was in to discuss her MRI findings. *Id*. The diagnostic assessment was arthritis of the left wrist, and she still had some de Quervain's tenosynovitis of the left wrist. *Id*. Dr. Williams performed a cortisone injection into the first dorsal compartment of the left wrist. *Id*. Dr. Williams told Petitioner her MRI report showed some central tearing to the TFCC, which is usually due to either ulnocarpal abutment, or due to some degenerative change, along with synovitis, which is the acute inflammation of that area along the ulnar attachment of the TFCC. (Pet. Ex. 5, p. 24-25). She also had some partial thickness tearing of the scaphoid attachment portion of the scapholunate ligament. (Pet. Ex. 5, p. 25). She also had a ganglion cyst and small erosions, which are arthritic changes within the capitate as well as the triquetrum on the wrist. *Id*. Dr. Williams performed a cortisone injection. (Pet. Ex. 5, p. 26).

Dr. Williams next saw Petitioner on January 17, 2019. (Pet. Ex. 5, p. 26). She complained of pain in the right thumb. *Id*. She was very tender over the MCP joint of the thumb with swelling, and at that point, Dr. Williams performed a steroid injection in the right thumb. *Id*. Dr. Williams' diagnosis was localized primary osteoarthritis of the right hand, involving the MCP joint of the right thumb. (Pet. Ex. 5, p. 63). At this appointment, Dr. Williams did not provide any work restrictions or any causation opinion, and he told her she could follow up as needed. (Pet. Ex. 5, p. 64). No follow up appointment was scheduled at that time. *Id*.

Dr. Williams next saw Petitioner on April 22, 2019. (Pet. Ex. 5, p. 26). At that appointment, Petitioner said she was having left wrist pain, which she rated at two out of ten (2/10). (Pet. Ex. 5, p. 26, 65). Petitioner told Dr. Williams she had worked as a 911 dispatcher for 22 years. (Pet. Ex. 5, p. 26). At that point, Dr. Williams was concerned, as he had gotten new x-rays of both wrists, which showed Petitioner had positive ulnar variance. *Id*.

Dr. Williams was concerned that the MRI showed some erosion within the triquetrum, as well as with the central tearing of the TFCC, which can be found in cases of ulnocarpal impaction syndrome. (Pet. Ex. 5, p. 27). With that problem, it is important to note the ulnar variance of the

wrist. *Id*. Dr. Williams explained normally, the pressure seen by the radius in a neutral ulnar variance is eighty-five (85) percent, and the ulna sees fifteen (15) percent. *Id*. When the ulnar variance changes even two (2) millimeters, those pressures can change dramatically. *Id*. With positive ulnar variance, that pressure changes, and up to forty (40) percent of the pressure is seen on the ulnar side of the wrist with sixty (60) percent on the radial side of the wrist, so when she grabs something or picks something up or uses any force with that wrist, the pressure on the ulnar side of the wrist is dramatically increased which can lead to the erosions within the ulnar aspect of the wrist, namely being the ulnar aspect of the lunate and the triquetrum, which are the wrist bones on the ulnar side of the wrist. (Pet. Ex. 5, p. 27-28). This can lead to degeneration in the central portion of the TFCC and the synovitis which was seen in Petitioner's wrist. (Pet. Ex. 5, p. 28).

Dr. Williams testified Petitioner had three (3) millimeters of positive ulnar variance on the right side and two (2) millimeters of positive ulnar variance on the left. (Pet. Ex. 5, p. 28). Dr. Williams felt Petitioner's pain was a result of ulnocarpal impaction, and her left wrist injury and her pre-existing ulnocarpal impaction could have been aggravated throughout her work activities as a 911 dispatcher for twenty-two (22) years. *Id*. Dr. Williams explained the ulna is on the pinky side of the wrist. (Pet. Ex. 5, p. 28-29).

Dr. Williams testified April 22, 2019 was the last time he saw Petitioner. (Pet. Ex. 5, p. 29). At that time, his recommendation was for Petitioner to undergo ulnar shortening osteotomies. *Id*. The reason for this was, with the change in the biomechanics of the wrists due to her positive ulnar variance, by shortening the ulna, he could bring Petitioner's wrists back to neutral or negative ulnar variance, which would unload the pressure on the ulnar aspect of her wrists. (Pet. Ex. 5, p. 29-30). He said this would decrease her pain and decrease her chances of further worsening the arthritis on the ulnar sides of her wrists. *Id*.

Dr. Williams testified if Petitioner underwent the ulnar shortening osteotomy surgeries, she would be able to return to light duty work, typing only, in three or four weeks after surgery. (Pet. Ex. 5, p. 30-31). Return to full duty with no restrictions would be at approximately six months following surgery. (Pet. Ex. 5, p. 31). He opined Petitioner would reach maximum medical improvement about six months after surgery. *Id*. Dr. Williams did not recommend any work restrictions during the April 22, 2019 appointment. (Pet. Ex. 5, p. 66).

Dr. Williams testified he feels Petitioner's work duties over twenty-two (22) years did not cause her ulnocarpal impaction, but at least aggravated her ulnocarpal impaction in the left wrist. (Pet. Ex. 5, p. 32). He testified the first time he provided a causation opinion in this case was on April 22, 2019. (Pet. Ex. 5, p. 36-37). Dr. Williams also testified his surgical recommendations were related to Petitioner's work activities. (Pet. Ex. 5, p. 32).

Dr. Williams testified any type of activity which involved gripping, pinching, or lifting would be the type of activities which would aggravate Petitioner's pre-existing condition. (Pet. Ex. 5, p. 32). Dr. Williams testified the arthritis in Petitioner's thumb is a condition which could be aggravated by typing, pinching-type activities, and gripping-type activities. (Pet. Ex. 5, p. 76). However, Dr. Williams testified he did not have any information regarding how much, if any, gripping, pinching, or lifting Petitioner performed during her work for the City. (Pet. Ex. 5, p. 43, 78). He also testified he has no knowledge of how much typing Petitioner performed during her work for the City. (Pet. Ex. 5, p. 78). As of April 22, 2019, Dr. Williams had not reviewed Petitioner's job description. (Pet. Ex. 5, p. 37). He also had not reviewed any work hours history reports, photographs or descriptions of her work station, ergonomic assessments, or information regarding the number of reports she generated or the amount of typing, mouse clicks, or phone calls she performed at work. (Pet. Ex. 5, p. 45-47). He agreed none of his treating records indicate he had any discussion with Petitioner about her specific job duties. (Pet. Ex. 5, p. 37).

Dr. Williams agreed all relevant information regarding his examination of Petitioner on April 22, 2019 would be in his corresponding treatment note of April 22, 2019. (Pet. Ex. 5, p. 37). He acknowledged his treatment record from April 22, 2019, in the history portion of the note, says Petitioner presented with continued left wrist pain due to arthritis. (Pet. Ex. 5, p. 38). The note says Dr. Williams' assessment was that Petitioner had localized primary osteoarthritis of the left wrist. *Id*. Petitioner no longer had symptoms of de Quervain's tenosynovitis. *Id*. On April 22, 2019, Petitioner did not complain of any pain or symptoms in her right wrist. (Pet. Ex. 5, p. 39). Dr. Williams did not perform a physical examination of Petitioner's right wrist on April 22, 2019. (Pet. Ex. 5, p. 39-40).

On April 22, 2019, Dr. Williams recommended surgical intervention in the form of bilateral ulnar shortening osteotomies. (Pet. Ex. 5, p. 66-67). He clarified the term bilateral means he recommended the ulnar shortening osteotomy surgery on both Petitioner's left and right wrist. (Pet.

Ex. 5, p. 67). Dr. Williams testified this surgical recommendation was based on the history Petitioner provided on April 22, 2019, as well as his objective examination performed on April 22, 2019. *Id*. He acknowledged Petitioner only complained of left wrist pain at that appointment, which he noted was due to arthritis as well as ulnocarpal impaction. *Id*. He further testified, leading up to the April 22, 2019 appointment during which he made his surgical recommendation, the most recent date any of his treatment notes mention any complaints specifically of right wrist pain was the note of March 19, 2015. (Pet. Ex. 5, p. 68). Dr. Williams never gave Petitioner any work restrictions for her right upper extremity. *Id*.

Dr. Williams described an ulnar shortening osteotomy surgery, saying he makes an incision along the ulna, on the ulnar side of the forearm, and uses a device to take out a certain number of millimeters of bone, then uses plates and screws to put the bone back together. (Pet. Ex. 5, p. 68-69). Dr. Williams testified some risks involved with this surgery include persistent swelling and infection. (Pet. Ex. 5, p. 69). There is also a chance of non-union of the bone, which would then require another surgery. *Id*. Dr. Williams testified this operation rarely gives patients total pain relief. *Id*. He said if Petitioner was to have the surgeries, she would likely still have symptoms afterwards. (Pet. Ex. 5, p. 69-70). Dr. Williams testified it is possible someone with a history of multiple surgeries to both wrists and elbows, as well as surgery on to each of their hands, would have some residual symptoms as a result of those surgeries, but he did not feel Petitioner's present symptomology was the result of her surgical history. (Pet. Ex. 5, p. 70).

Dr. Williams testified ulnar variance and ulnocarpal impaction are non-occupational conditions which were not caused by Petitioner's work activities. (Pet. Ex. 5, p. 42, 44). Ulnar variance causes ulnocarpal impaction. (Pet. Ex. 5, p. 44). Dr. Williams testified ulnocarpal impaction is a degenerative condition. (Pet. Ex. 5, p. 43). He further testified ulnocarpal impaction is a condition which naturally gets worse over time for some people. *Id*. He said the degree of ulnar variance will not change, but some people's symptoms will worsen over time. (Pet. Ex. 5, p. 44. He said this degenerative condition usually involves eventual tearing of the TFCC, which was shown on Petitioner's MRI. (Pet. Ex. 5, p. 43).

Dr. Williams testified ulnar variance can develop naturally as a congenital condition or as a person's bones stop growing when he or she reaches skeletal maturity. (Pet. Ex. 5, p. 45). Females usually reach skeletal maturity in their wrists around the age of eighteen (18). *Id*. Dr. Williams

testified Petitioner has the same level of ulnar variance today as she did when she was approximately eighteen (18) years old. *Id*.

During Petitioner's treatment with Dr. Williams, she never complained of numbness or tingling in her fingers. (Pet. Ex. 5, p. 39). At no time during Petitioner's treatment with Dr. Williams did she ever suffer from carpal tunnel syndrome in either wrist. *Id*. He testified smoking is a non-occupational risk factor for any nerve problem, including carpal tunnel syndrome and cubital tunnel syndrome. (Pet. Ex. 5, p. 47). Dr. Williams testified, sometimes, ulnar variance problems can be due to growth arrest caused by a previous injury. (Pet. Ex. 5, p. 40). Dr. Williams testified he has never reviewed Petitioner's treating medical records or surgical reports from other providers she treated with prior to treating with him. (Pet. Ex. 5, p.42, 52).

Dr. Williams testified multiple times he had not seen Petitioner since April 22, 2019. (Pet. Ex. 5, p. 67, 71). However, he then testified he actually saw Petitioner on August 17, 2020. (Pet. Ex. 5, p. 71). Petitioner presented with continued wrist pain due to osteoarthritis. *Id*. Dr. Williams noted she was now having this problem in the right wrist worse than the left wrist. (Pet. Ex. 5, p. 72). Dr. Williams said he has no information as to the status of Petitioner's upper extremity symptoms at any time after August 17, 2020. *Id*. He testified since the time he started treating Petitioner for her upper extremities, she has not undergone any physical therapy or occupational therapy. (Pet. Ex. 5, p. 73). Dr. Williams testified he has no knowledge of any non-occupational activities Petitioner may enjoy, except that she enjoys walking. (Pet. Ex. 5, p. 73-74).

B. Testimony of Dr. Peter Hoepfner

Dr. Peter Hoepfner is a board-certified orthopedic surgeon with subspecialty training in hand and upper extremity surgery. (Resp. Ex. 5, p. 5, 7). About two (2) percent of his work is dedicated to workers' compensation. (Resp. Ex. 5, p. 11). He performs about sixty (60) percent of his IME exams for respondents and about forty (40) percent for Petitioners. (Resp. Ex. 5, p. 11-12).

Dr. Hoepfner testified he has regularly treated patients with ulnar variance and ulnocarpal impaction over his twenty (20) years as an orthopedic surgeon. (Resp. Ex. 5, p. 10). He explained in patients with ulnar positive variance, the ulna is just a little longer than the radius. *Id*. This is important because, as the patient bends her wrist side to side, the small bones of the wrist can experience microtraumas over time from hitting against the slightly longer ulna. *Id*.

Dr. Hoepfner saw Petitioner in his office for an Independent Medical Examination on June 4, 2020. (Resp. Ex. 5, p. 16). In conjunction with his Independent Medical Examination of Petitioner, Dr. Hoepfner reviewed a collection of records including a written job description, a work hours history report, a keystroke report and related computer aided dispatch reports, photographs of Petitioner's workstation, and medical records regarding Petitioner's medical treatment dating back to 1995, including surgical reports, imaging films, and previous IME reports from other doctors. (Resp. Ex. 5, p. 13, 15-16, 38).

On June 4, 2020, Petitioner provided a history. (Resp. Ex. 5, p. 16). Her chief complaints were bilateral forearm pain, bilateral hand swelling, and bilateral hand numbness and tingling. *Id*. Petitioner reported she was a fifty-seven (57) year old right-handed emergency telecommunicator for the City. *Id*. She had been working in this position for approximately twenty-three (23) years. *Id*. At her workstation, she wore a headset. *Id*. She had an adjustable keyboard with medical cards which were used to answer medical questions from callers. *Id*. Petitioner described her job duties to Dr. Hoepfner as office sedentary-type work involving typing, stapling, filing, data entry, customer service work, and answering phone calls. (Resp. Ex. 5, p. 17-18). Based on his review of Petitioner's written job description, as well as the verbal description Petitioner provided of her job duties, Dr. Hoepfner testified her job duties did not involve a significant amount of gripping, pinching, or lifting. (Resp. Ex. 5, p. 18-19). Dr. Hoepfner further testified Petitioner's work did not require sustained forceful wrist flexion, wrist extension, squeezing, or gripping. (Resp. Ex. 5, p. 19). Petitioner denied tobacco use. (Resp. Ex. 5, p. 23).

Dr. Hoepfner testified Petitioner had previously undergone three right carpal tunnel release surgeries and two left carpal tunnel release surgeries. (Resp. Ex. 5, p. 20). She had also undergone bilateral cubital tunnel surgeries, bilateral epicondylar releases, and bilateral trigger thumb surgeries. *Id*. Petitioner underwent some of these surgeries prior to beginning her employment with the City. (Resp. Ex. 5, p. 63).

Petitioner reported she developed symptoms in April of 2018. (Resp. Ex. 5, p. 17). During a medical call, she reached above her shoulder, using her left arm, to grab the medical card book when her left arm was in a supinated position. *Id*. At that time, she experienced pain in her left arm. *Id*. Petitioner estimated the medical card book weighed fifteen (15) pounds. (Resp. Ex. 5, p. 18). Approximately one week later, she saw her doctor and reported her forearm was aching. *Id*.

She was referred to Dr. Williams, who she saw in October of 2018. (Resp. Ex. 5, p. 17). Petitioner further provided a history stating Dr. Williams ultimately recommended she undergo bilateral carpal tunnel release surgeries and bilateral wrist bone shortening procedures. (Resp. Ex. 5, p. 18).

Dr. Hoepfner reviewed an MRI which was performed on December 7, 2018. (Resp. Ex. 5, p. 20). The findings revealed a center perforation, likely degenerative, of the triangular fibrocartilage complex with synovitis over the ulnar side of the wrist, some fluid distending the distal radiolunar joint, fenestration and partial thickness tearing of the scaphoid limb of the scapholunate ligament, a ganglion cyst over the volar aspect of the wrist at the level of the capitate, and early erosive arthropathy affecting the triquetrum and the capitate. (Resp. Ex. 5, p. 19-20). Dr. Hoepfner testified the findings regarding the triangular fibrocartilage complex are degenerative and unrelated to Petitioner's work. (Resp. Ex. 5, p. 21). He explained the triangular fibrocartilage complex is on the ulnar side, or pinky side, of the wrist, and overlies the head of the ulna. *Id*. Dr. Hoepfner testified the finding of early erosive arthropathy of the triquetrum is also degenerative and unrelated to Petitioner's employment. (Resp. Ex. 5, p. 21-22). The triquetrum is also on the ulnar side of the wrist. (Resp. Ex. 5, p. 22). Dr. Hoepfner opined these findings could cause Petitioner to have pain or discomfort in the ulnar aspect of her wrist. *Id*. Dr. Hoepfner also testified these degenerative findings might naturally get worse over time. *Id*.

On June 4, 2020, Dr. Hoepfner performed X-rays of Petitioner's right and left wrists. (Resp. Ex. 5, p. 23). The X-rays revealed two (2) millimeters of ulnar positive variance in both wrists. *Id*. Some arthritic changes were seen in the thumb. (Resp. Ex. 5, p. 24). There was no evidence of a lunate cyst forming. (Resp. Ex. 5, p. 23). Dr. Hoepfner explained the absence of a lunate cyst is notable because, in advanced cases of ulnocarpal impaction, large cysts can form in the lunate. (Resp. Ex. 5, p. 24).

Dr. Hoepfner performed a physical examination of Petitioner's bilateral upper extremities, from her neck down to her finger tips. (Resp. Ex. 5, p. 24). In the elbows, Petitioner had a mildly positive elbow flexion test on the right side. (Resp. Ex. 5, p. 25). She had no pain over the medial or lateral epicondyles in either elbow. *Id*. In the forearms, Petitioner had some tenderness over the first dorsal compartment in both the right and left wrist. *Id*. A Finkelstein's test for de Quervain's tendonitis was negative in both wrists. *Id*. There was no carpal instability. *Id*. There was mild tenderness over the TFCC bilaterally. *Id*. The ulnar grind test was negative bilaterally. *Id*. There

was no instability with testing of the ligaments on the ulnar side of the wrist. *Id*. Dr. Hoepfner performed provocative tests for carpal tunnel syndrome, and there was only mild tenderness over the median nerve and Tinel's sign at both wrists. (Resp. Ex. 5, p. 25-26). There was tenderness over the right middle finger A1 pulley and mild tenderness over the left middle finger A1 pulley. (Resp. Ex. 5, p.26).

Petitioner's grip strength was forty-two (42) pounds on the right and forty-seven (47) pounds on the left. (Resp. Ex. 5, p. 25). Her rapid exchange grip strength was sixty-five (65) pounds bilaterally. *Id*. Given the dramatic difference between Petitioner's static grip strength and her rapid exchange grip strength, Dr. Hoepfner identified she provided sub-maximal effort during the static grip strength testing. *Id*.

Dr. Hoepfner testified Petitioner did not put forth a full effort during her physical examination testing, based on the rapid exchange grip strength test. (Resp. Ex. 5, p. 26). He explained Petitioner was first asked to squeeze a grip strength meter once to measure static grip strength. *Id*. Later in the exam, she was then asked to perform grip strength testing again, but alternating quickly from one side to the next, grabbing the meter five times on each side. *Id*. He encouraged her to use her best effort each time. *Id*. Petitioner provided substantially higher grip strength with the rapid exchange testing. (Resp. Ex. 5, p. 26-27). Dr. Hoepfner explained studies show it is more difficult for patients to feign weakness in their hands during rapid exchange grip strength testing. *Id*. Petitioner's results suggested she did not provide maximum effort during the static grip strength testing. (Resp. Ex. 5, p. 27). During a previous Independent Medical Examination Petitioner attended with Dr. Robert Schenck on April 30, 2008, Dr. Schenck also noted Petitioner did not provide a full and valid effort during her physical examination. (Resp. Ex. 5, p. 95).

Dr. Hoepfner testified Petitioner showed signs of symptom magnification during his examination. (Resp. Ex. 5, p. 27). Dr. Hoepfner also felt Petitioner's subjective history was not consistent with the objective findings. *Id*. He opined Petitioner's subjective complaints of severe wrist pain were out of proportion to her objective exam findings, which were relatively minor. *Id*. Petitioner had full range of motion and full strength in her upper extremities. (Resp. Ex. 5, p. 28). Dr. Hoepfner's objective examination did not reveal any functional deficits in Petitioner's upper extremities. *Id*.

Dr. Hoepfner testified, at the time of his examination of Petitioner, she did not have any specific diagnosis affecting her hands, other than being status post multiple prior surgeries. (Resp. Ex. 5, p. 29). There were no specific localized substantial anatomic deficits or findings on her exam other than minor discomfort in multiple locations, which one would expect after having upwards of ten (10) surgeries involving her upper extremities. *Id*. Dr. Hoepfner noted Petitioner had positive ulnar variance and low-grade arthritis. *Id*.

Dr. Hoepfner testified Petitioner's ulnar variance was not caused or aggravated by her employment for the City. (Resp. Ex. 5, p. 29-30). He further testified the symptoms Petitioner reported were not causally related to her employment for the City. (Resp. Ex. 5, p. 30). Dr. Hoepfner testified Petitioner's bilateral ulnocarpal impaction was not aggravated by her work activities as a 911 dispatcher for twenty-two (22) years. *Id*. Dr. Hoepfner opined Petitioner's job duties did not require sufficient forceful use of her hands to aggravate her ulnocarpal impaction. (Resp. Ex. 5, p. 65-66). Based on the mechanism Petitioner described and the amount of force involved, Dr. Hoepfner further testified Petitioner's bilateral ulnocarpal impaction was not aggravated by the twisting injury alleged to have occurred in April of 2018 while retrieving the medical cards. (Resp. Ex. 5, p. 31). Dr. Hoepfner testified the treatment Petitioner has received to this point has not been related to her employment for the City. (Resp. Ex. 5, p.33). He further testified the surgeries proposed by Dr. Williams are not related to Petitioner's employment for the City. (Resp. Ex. 5, p. 33-34). Dr. Hoepfner testified Petitioner's employment for the City did not cause or aggravate her wrist tendonitis, trigger fingers, or arthritis. (Resp. Ex. 5, p. 41-42).

Dr. Hoepfner testified ulnocarpal impaction is the type of condition which could be aggravated by activities of daily life requiring more vigorous use of the hands, such as yard work, mowing, or lifting heavy boxes weighing over forty (40) to fifty (50) pounds. (Resp. Ex. 5, p. 32-33).

Dr. Hoepfner testified the likelihood of success would be very low in regard to Petitioner undergoing any further surgeries on her wrists and hands. (Resp. Ex. 5, p. 34). In his entire career as a treating physician, he has never performed so many surgeries on a single patient as Petitioner has undergone for her upper extremities. *Id*. Dr. Hoepfner said he would be very hesitant in regard to Petitioner undergoing any further surgeries for what he considered to be a relatively mild presentation of ulnocarpal impaction syndrome. *Id*. He testified he most recently

treated a patient with five (5) millimeters of ulnar positive variance with extreme symptoms, and he felt patients for this operation need to be selected very carefully *Id*. Dr. Hoepfner normally reserves the ulnar shortening surgery for patients with a greater degree of ulnar variance than the variance in Petitioner's wrists, as well as more severe symptoms than the symptoms Petitioner reported. (Resp. Ex. 5, p. 62).

Dr. Hoepfner described the ulnar shortening surgery, saying it involves essentially taking a wedge of bone out with a saw, then pulling the bone back together and placing a plate and screws in order to change the shape and length of the ulna to create a more anatomic alignment. (Resp. Ex. 5, p. 34-35). Risks of this surgery include infection, hardware failure, and failure of the bone to heal. (Resp. Ex. 5, p. 35). If the bone fails to heal properly, a fair number of patients experience a "nonunion", which then requires a revision surgery. *Id*. There is also a risk of neuroma as well as a risk of irritation and pain associated with the presence of hardware. (Resp. Ex. 5, p. 34-35).

Dr. Hoepfner testified he does not believe the proposed surgeries would eliminate, or even significantly reduce, Petitioner's symptoms. (Resp. Ex. 5, p. 36). He would not recommend any further surgery. *Id*.

Dr. Hoepfner is certified to provide impairment ratings. (Resp. Ex. 5, p. 36). He provided an impairment rating of zero (0) percent in regard to Petitioner's upper extremities. *Id*. He testified Petitioner has had likely ten (10) different diagnoses which have affected her hands, but the surgeries she has undergone have not resulted in any lack of motion or asymmetry in her strength. (Resp. Ex. 5, p. 36-37). She has no functional impairment, despite the surgeries she has undergone and the subjective complaints she describes. (Resp. Ex. 5, p. 37).

Dr. Hoepfner did not see Petitioner again after his June 4, 2020 Independent Medical Examination. (Resp. Ex. 5, p. 59). He did not have any awareness of what work duties Petitioner may have performed after June 4, 2020. *Id*.

C. Testimony of Dr. Lawrence Li

Dr. Lawrence Li is a board-certified orthopedic surgeon who focuses on shoulders, hands, and knees. (Pet. Ex. 4, p. 6). He saw Petitioner for an Independent Medical Examination on November 9, 2020. (Pet. Ex. 5, p. 7). He said he would be testifying from his IME report in this

matter. (Pet. Ex. 5, p. 8). Dr. Li testified his IME report is a summary of all the important information regarding his November 9, 2020 examination of Petitioner. (Pet. Ex. 5, p. 16). He agreed having a complete and accurate patient history would be important to him in forming his diagnosis, causation opinion, and treatment recommendation. *Id*. Dr. Li did not review the records regarding any of Petitioner's treatment occurring prior to February 1, 2007. (Pet. Ex. 5, p. 19). Dr. Li did not review a written job description. *Id*. He relied on Petitioner's subjective representations as to her job duties. *Id*.

Petitioner provided a history to Dr. Li on November 9, 2020, stating she was fifty-seven (57) years old and had worked as a dispatcher for the City for twenty-four (24) years. (Pet. Ex. 5, p. 10). She was right-handed. *Id*. She had a long history of bilateral upper extremity conditions, including multiple carpal tunnel surgeries bilaterally, bilateral trigger thumb releases, bilateral lateral epicondyle releases, and bilateral cubital tunnel releases. *Id*. She reported in May of 2018, she twisted her left wrist while pulling an end book. *Id*. Dr. Li testified he has no knowledge as to the weight of the end book. (Pet. Ex. 5, p. 24). Petitioner did not provide him with any description of the end book. *Id*. Petitioner further reported Dr. Williams diagnosed her with de Quervain's tendinitis and performed a cortisone injection. (Pet. Ex. 5, p. 10). She got relief from the de Quervain's pain, but has had persistent pain over the ulnar aspect of the wrist. *Id*. Dr. Williams diagnosed her with pre-existing ulnocarpal impaction, aggravated by her work activities, and recommended ulnar shortening surgery. *Id*.

At the time Dr. Li saw Petitioner, her complaints consisted of left wrist pain in distal ulna, radiating into her elbow, as well as first CMC joint pain. (Pet. Ex. 5, p. 11). Dr. Li testified Petitioner had a pre-existing condition of positive ulnar variance. *Id*. As a result of the relatively long ulna, she has ulnocarpal impaction. (Pet. Ex. 5, p. 17). The ulnocarpal impaction is also a pre-existing condition, unrelated to Petitioner's employment. (Pet. Ex. 5, p. 18). Dr. Li testified Petitioner denied a history of smoking tobacco. *Id*. Petitioner was working full duty at the time of the examination. (Pet. Ex. 5, p. 11). Dr. Li testified he did not have any knowledge as to what non-occupational activities Petitioner participates in. (Pet. Ex. 5, p. 33).

Dr. Li noted Petitioner's significant past history included multiple prior upper extremity surgeries, but he opined none of those surgeries relate to the current complaints. (Pet. Ex. 5, p. 12).

He further testified, in spite of all the multiple problems Petitioner has in her upper extremities, this problem is independent of those. *Id*.

Dr. Li performed a physical examination, which revealed tenderness over the right first CMC joint and over the distal ulna. (Pet. Ex. 5, p. 12, 20). She had no significant swelling in the wrist. (Pet. Ex. 5, p. 12). She had decreased two-point discrimination in both the median and ulnar nerve distributions. *Id*. Her range of motion was equal in both wrists. *Id*. She had no tenderness over the left CMC joint, but exquisite tenderness over the TFC and distal ulna. *Id*. She had decreased sensation in the median nerve distribution and intact sensation in the ulnar nerve distribution. *Id*. Dr. Li opined the decreased sensation was due to her previous carpal tunnel and cubital tunnel nerve surgeries and not related to the alleged injuries. (Pet. Ex. 5, p. 13). Dr. Li did not perform any provocative testing other than palpating the CMC joints. (Pet. Ex. 5, p. 20).

Dr. Li reviewed the MRI report corresponding to an MRI performed on December 7, 2018. (Pet. Ex. 5, p. 13). He testified the MRI report showed TFC synovitis, a tear of the TFC, and a partial tear in the scapholunate ligament without instability. *Id*.

Dr. Li testified he believes Petitioner's current problems stem from her ulnar impaction syndrome and also stem from her TFC, which is also connected to the ulna. (Pet. Ex. 5, p. 13). He further testified Petitioner had a pre-existing long ulna, but it was aggravated by the April, 2018 accident. *Id*. He testified treatment Petitioner had received to date was reasonable and necessary. (Pet. Ex. 5, p. 14).

Dr. Li testified smoking negatively affects healing in any surgical condition. (Pet. Ex. 5, p. 22). He further testified Petitioner has undergone multiple surgeries on both of her elbows and both of her wrists, as well as a surgery on each of her thumbs. (Pet. Ex. 5, p. 25). Dr. Li testified her past surgical history may be related to her current complaints, but those complaints would be independent of the ulnocarpal impaction. (Pet. Ex. 5, p. 27).

Dr. Li testified Petitioner's ulnocarpal impaction was aggravated by her specific work injury involving pulling down the end book. (Pet. Ex. 5, p. 23). He further testified Petitioner's ulnocarpal impaction was not aggravated by her other work as a dispatcher. *Id*. He testified her condition was not aggravated by talking on the phone and typing. *Id*. Dr. Li did not believe repetitive trauma was an aggravating factor to Petitioner's wrists. (Pet. Ex. 5, p. 23-24). Dr. Li opined any alleged repetitive trauma unrelated to the end book incident was not an aggravating factor of Petitioner's

ulnocarpal impaction. (Pet. Ex. 5, p. 25). Dr. Li did not provide any opinion relating Petitioner's right wrist injury to her employment. (Pet. Ex. 5, p. 24). Dr. Li agreed ulnocarpal impaction could be aggravated by non-occupational activities. (Pet. Ex. 5, p. 32-33). Nevertheless, Dr. Li testified Petitioner's pre-existing ulnar variance could not have necessitated medical treatment, including potential surgical fixation, unless she aggravated the condition at work. (Pet. Ex. 5, p. 33).

Dr. Li recommended Petitioner undergo a left wrist arthroscopy, ulnar shortening, and post-operative therapy for three to four months. (Pet. Ex. 5, p. 14). He testified possible complications of this surgery include persistent swelling and stiffness, infection, and nerve damage. (Pet. Ex. 5, p. 28). He agreed this operation rarely gives patients total pain relief, and Petitioner would likely still have symptoms even after surgery. (Pet. Ex. 5, p. 29).

Dr. Li testified Petitioner had failed conservative treatment. (Pet. Ex. 5, p.14). He said this opinion was based on Petitioner's subjective pain complaints. (Pet. Ex. 5, p. 33). He further testified Petitioner did not need any work restrictions. *Id*. He said she has not reached maximum medical improvement. (Pet. Ex. 5, p. 14-15). He also opined Petitioner has not suffered any permanent impairment as a result of the injury which is the subject of this case. (Pet. Ex. 5, p. 24). Dr. Li did not recommend Petitioner undergo any surgery for her right wrist. (Pet. Ex. 5, p. 26). Dr. Li has not seen Petitioner or reviewed any additional medical treatment records since November 9, 2020, and does not have any information as to the current status of her symptoms. (Pet. Ex. 5, p. 34).

V. Petitioner's Previous Workers' Compensation Claims

Petitioner has previously filed multiple workers' compensation claims regarding injuries to her hands, wrists, and arms. (Resp. Ex. 13, p. 1-4, Pet. Ex. 14, p. 1-14). Workers' compensation case number 95-WC-003839 was filed on January 24, 1995, alleging injuries to the left and right hands. (Resp. Ex. 13, p. 1). A settlement contract was approved on February 19, 1996, awarding Petitioner fifteen (15) percent loss of use of her left hand and fifteen (15) percent loss of use of her right hand. (Resp. Ex. 13, p. 2). Workers' compensation case number 14-WC-024827 was filed on July 24, 2014, alleging injuries to the right hand and right arm. (Resp. Ex. 13, p. 3). A settlement contract was approved on December 20, 2017, awarding Petitioner four and a half (4.5) percent loss of use of the right hand. (Resp. Ex. 13, p. 4).

Workers' compensation case number 08-WC-017751 was filed April 22, 2008, alleging injury to the right and left arms and hands. (Resp. Ex. 14). The case was arbitrated on September 27, 2011. (Resp. Ex. 14, p. 2). The arbitrator found Petitioner did not sustain an accident that arose out of and in the course of employment, and her condition of ill-being was not causally related to her alleged work accident. (Resp. Ex. 14, p. 2-3). Petitioner's claim for compensation was denied. (Resp. Ex. 14, p. 13). The Arbitrator's Decision was appealed to the Illinois Workers' Compensation Commission. (Resp. Ex. 14, p. 1). The Commission affirmed and adopted the Decision of the Arbitrator. (Resp. Ex. 14, p. 1). The arbitration Decision, affirmed and adopted by the Commission, found Petitioner lacked credibility, stating as follows:

> Petitioner's credibility should be called into question due to her continued and unpervasive [sic] statements at arbitration that her medical providers' records were inaccurate with regard to her statements to them. Simply put, an error by one of the physicians may be explainable, but Petitioner's testimony indicated that her physicians made a continual stream of errors in their records relating to the history which Petitioner provided to them. The idea that her own treating physicians made all of these errors relating to Petitioner's history calls into question the Petitioner's credibility. With her credibility in doubt, the Petitioner's statements regarding her level of function, her symptoms, her pain and her recitation of her medical history must be disregarded. Petitioner's lack of credibility is supported by her failure to disclose to Dr. Garst an accurate history with regard to her upper extremity problems. Also, Dr. Garst specifically testified that the Petitioner's credibility is shaky given her failure to disclose to him Dr. Stedwill's EMG/NCV test results, her recitation to Dr. Below of a prior elbow trauma, and her consistent violation of her work restrictions. (Resp. Ex. 14, p. 13. *Lane v. City of Peoria*, 08 IL.W.C. 17751 (Ill.Indus.Com'n), 12 I.W.C.C. 1073, 2012 WL 5878713).

CONCLUSIONS OF LAW

In support of the Arbitrator's Decision relating to (C). Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? and (F). Is Petitioner's current condition of ill-being causally related to the injury?, the Arbitrator finds the following:

Under the Illinois Workers' Compensation Act, Petitioner has the burden of establishing she suffered an accident arising out of and in the course of employment by a preponderance of the evidence. *Great American Indemnity Co. v. Industrial Com'n.*, 367 Ill. 241 (1937). The words "arising out of" refer to the origin or cause of the accident and are descriptive of its character,

while the words "in the course of" refer to the time, place and circumstances under which the accident occurs. *Vincennes Bridge Co. v. Industrial Com'n.*, 351 Ill. 444 (1933). Both elements must be present at the time of the injury in order to justify compensation. *Borgeson v. Industrial Com'n.*, 368 Ill. 188 (1938).

The causal relationship between Petitioner's current condition of ill-being and the alleged April 12, 2018, and April 22, 2019, accidents was also placed at issue by the parties. Petitioner bears the burden to prove, by a preponderance of evidence, her conditions are causally related to the alleged work accidents. *Hansel & Gretel Day Care Center v. Industrial Com'n*, 215 Ill. App. 3d 284 (1991). A complete review of the evidence establishes Petitioner failed to meet his burden.

With regard to the alleged April 22, 2019, accident, the Arbitrator finds Petitioner failed to meet her burden of establishing an accident occurred, by a preponderance of the evidence. This conclusion is supported by the medical records in evidence and the testimony of Dr. Hoepfner and Dr. Li.

Petitioner has failed to meet her burden in regard to proving her alleged work injuries of April 12, 2018, and April 22, 2019, were causally related to her employment for the City.

It is undisputed Petitioner has pre-existing, degenerative conditions of ulnar variance and ulnocarpal impaction in her bilateral wrists. It is also undisputed these conditions are not caused by Petitioner's employment for the City. Petitioner's treating medical records show a long and substantial history of injuries, conditions, surgeries, and other treatment to her bilateral wrists, dating back as far as 1987. Over the years, Petitioner has undergone three surgeries on the right wrist, two surgeries on the left wrist, two surgeries on the right elbow, two surgeries on the left elbow, one surgery on the right thumb, one surgery on the left thumb, and at least one surgery on the right shoulder. Petitioner complained to her treating physicians regarding symptoms in her wrists and/or hands in 1987, 1988, 1995, 2004, 2008, 2009, 2010, 2011, 2012, 2014, 2015, 2016, 2017, and in 2018 prior to her first alleged accident date. This pattern of symptoms and treatment is indicative of a degenerative condition progressing naturally over time more so than an acute aggravation in April of 2018 or twenty-two (22) years of employment aggravating a pre-existing condition.

Petitioner's treating doctor, Dr. Williams, testified symptoms resulting from ulnar variance will naturally get worse over time for some people. Dr. Hoepfner, who performed an Independent

Medical Examination, also testified the conditions seen in Petitioner's wrist are of the type which might get naturally worse over time. Dr. Hoepfner testified, at the time of his examination of Petitioner, she did not have any specific diagnosis affecting her hands, other than being status post multiple prior surgeries. He found Petitioner had no specific localized substantial anatomic deficits or findings on her exam other than minor discomfort in multiple locations, which would be expected after undergoing more than ten (10) surgeries involving her upper extremities. Dr. Williams and Dr. Li both testified it is possible a person with Petitioner's surgical history might have some residual symptoms as a result of those prior surgeries.

The Arbitrator finds significant the MRI of December 7, 2018, which, among other findings, showed a central perforation, likely degenerative, of the triangle fibrocartilage complex, fenestration versus partial-thickness tearing of the scaphoid limb of the scapholunate ligament, small triquetrum and capitate erosions, and early erosive arthropathy. Dr. Hoepfner and Dr. Williams both testified these findings were degenerative and not related to Petitioner's employment for the City. Dr. Williams testified ulnocarpal impaction is a degenerative condition which usually involves eventual tearing of the TFCC, which was shown on Petitioner's MRI. Dr. Hoepfner testified the triangular fibrocartilage complex is on the ulnar side of the wrist and overlies the head of the ulna, and the triquetrum is also on the ulnar side of the wrist. Dr. Hoepfner opined the findings regarding the TFCC and the triquetrum were the type of findings which could cause pain or discomfort in the ulnar aspect of the wrist, and he further testified these degenerative findings might naturally get worse over time. Dr. Li opined some of Petitioner's symptoms are related to her previous surgeries. Dr. Li testified Petitioner's symptoms stemmed from her ulnocarpal impaction and also from the findings seen in the triangular fibrocartilage complex. The Arbitrator finds it significant that Petitioner's right wrist MRI, performed on December 19, 2014, prior to either of her alleged work injuries, showed fraying of the body and ulnar-sided attachments of the triangular fibrocartilage with synovitis along the ulnar capsule. The evidence regarding these MRI findings further suggests Petitioner's symptoms are caused by the natural progression of her pre-existing degenerative condition.

The Arbitrator finds Petitioner is not credible regarding these claims. First, Petitioner's subjective reports of symptoms were inconsistent. After her first alleged injury, when Petitioner sought treatment with Dr. San German on April 27, 2018, she reported left arm pain and was found to be tender over her left elbow and forearm. Dr. San German provided a diagnosis of tendonitis

of the elbow or forearm. On July 11, 2018, she told Dr. San German her left forearm pain radiated into her thumb as well as up to the biceps. When she then sought treatment with Dr. Williams on October 3, 2018, she complained of pain over the lateral aspect of the left wrist. Dr. Williams testified, during his treatment of Petitioner, she never complained of numbness or tingling. When she saw Dr. Hoepfner, Petitioner complained of bilateral hand numbness and tingling. When she saw Dr. Li, Petitioner complained of left wrist pain in distal ulna, radiating into her elbow. Dr. Li and Dr. Hoepfner both testified Petitioner denied a history of tobacco use, even though her medical records show she smoked a pack and a half of cigarettes per day for thirty-eight (38) years, before quitting in 2017.

Petitioner's credibility is further called into question by the objective examination performed by Dr. Hoepfner. During this examination, Petitioner provided substantially higher grip strength with the rapid exchange grip strength testing, compared to static grip strength testing. Dr. Hoepfner testified this is an indication Petitioner was feigning weakness during the static grip strength test. He felt she did not put forth a full effort, and there was an element of symptom magnification. Dr. Hoepfner's IME Report stated Petitioner was also found to have not provided a full and valid effort during a physical examination she underwent during a previous Independent Medical Examination with Dr. Robert Schenck on April 30, 2008.

Additionally, at arbitration Petitioner testified the 911 tablet which she claims caused her left wrist injury of April 12, 2018 weighed fifteen (15) to twenty (20) pounds. Her supervisor, Mr. Blayney, testified he weighed the 911 tablet with a postage scale, and the true weight is five (5) pounds and three (3) ounces. Petitioner testified she told Dr. Williams the 911 tablet weighed fifteen (15) to twenty (20) pounds, but Dr. Williams testified Petitioner did not tell him how much the 911 tablet weighed. He further testified he could only speculate as to what a 911 tablet actually is. Petitioner also testified she described her job duties to Dr. Williams, but Dr. Williams testified none of his treating records indicate he had any discussion with Petitioner about her specific job duties.

Petitioner testified she had never been disciplined for use of her personal laptop prior to the time she filed her workers' compensation claim for her alleged April, 2018 work accident. However, her testimony shows the described discipline was issued to Petitioner on June 8, 2018. Petitioner's first Application for Adjustment of Claim in regard to the alleged April, 2018 work

accident was not filed until May 7, 2019. Petitioner was not forthcoming about the reason she was disciplined on June 8, 2018. She initially testified she was disciplined for having her personal laptop out on her desk. She then admitted this was not the reason for the discipline, as she was allowed to have her laptop on her desk. Still, Petitioner did not agree she was disciplined because her attentiveness to her laptop causing her to be less attentive to her work duties. She then reviewed the letter of suspension she received on June 8, 2018, and admitted the subject line of the letter said "Inattentiveness to duties, delays in dispatch of emergency calls", the first two paragraphs described issues she was having regarding delays in handling incoming calls, and the fourth paragraph stated, "I believe you were distracted with your electronic devices and did not notice the calls for service holding in each case."

Finally, as to Petitioner's credibility, the Arbitrator finds it significant that Petitioner was found to be non-credible by the Arbitrator and the Commission in regard to her previous workers' compensation claim, due to her testimony claiming her medical providers made a continual stream of errors in their records relating to the history she provided them, her failure to disclose an accurate history to her treating doctor, and her consistent violation of her work restrictions. Her own treating physician in that case testified her credibility was shaky. With Petitioner's credibility in doubt, the Arbitrator and the Commission found her statements regarding her level of function, her symptoms, her pain, and her recitation of her medical history had to be disregarded. In regard to the immediate claims, Petitioner's credibility remains questionable.

The Arbitrator finds the opinions of Dr. Hoepfner should be given greater weight than the opinions of Dr. Williams or Dr. Li. In forming his opinions, Dr. Hoepfner reviewed a written job description, a work hours history report, a keystroke report and related computer aided dispatch reports, photographs of Petitioner's workstation, and medical records regarding Petitioner's medical treatment dating back to 1995, including surgical reports and imaging films. Dr. Williams testified he never reviewed Petitioner's treating medical records or surgical reports from other providers she treated with prior to treating with him. Dr. Williams also did not review a written job description, work hours history report, photographs of Petitioner's workstation, or any information regarding the number of reports she generated or the amount of typing she performed at work. Dr. Williams agreed none of his treating records indicate he had any discussion with Petitioner about her specific job duties. Dr. Li reviewed medical records dating back only as far as February 1, 2007. He did not review a written job description.

Dr. Williams testified activities which involved gripping, pinching, or lifting would be the type of activities which could aggravate Petitioner's pre-existing condition. However, Dr. Williams testified he did not have any information regarding how much, if any, gripping, pinching, or lifting Petitioner performed during her work for the City. Mr. Blayney, who supervised Petitioner and also used to be an emergency communications telecommunicator himself, testified the job duties did not involve any forcible gripping, any pinching, or any forceful use of the hands at all. Mr. Blayney testified Petitioner's job never required her to lift anything heavy. The heaviest thing she would have ever been required to lift would be the EMD medical cards, which weighed five (5) pounds and three (3) ounces, and she did not have to lift these cards for every call she answered. Dr. Hoepfner testified, based on both a written job description and Petitioner's own subjective description of her job duties, her duties did not involve a significant amount of gripping, pinching, lifting, squeezing, or sustained forceful wrist flexion or extension.

Further, the opinions of Dr. Williams and Dr. Li conflict with one another. Dr. Williams testified Petitioner's left wrist injury and her pre-existing ulnocarpal impaction could have been aggravated by her work activities as a 911 dispatcher for twenty-two (22) years. However, Dr. Li testified Petitioner's ulnocarpal impaction was not aggravated by her work duties as a dispatcher. Dr. Li did not believe repetitive trauma was an aggravating factor to Petitioner's wrists. While Dr. Williams recommended bilateral ulnar shortening surgeries, Dr. Li only recommended surgery for the left wrist. Dr. Li also did not provide any opinion relating Petitioner's alleged right wrist injury to her employment.

In regard to Petitioner's alleged left wrist injury of April 12, 2018, the Arbitrator finds the alleged mechanism of injury did not involve sufficient force to aggravate Petitioner's pre-existing ulnocarpal impaction. Petitioner had a long, substantial history of complaints in her left wrist prior to this alleged work accident. While Petitioner testified the EMD book weighed fifteen (15) to twenty (20) pounds, Mr. Blayney weighed the book and found it only weighed five (5) pounds and three (3) ounces. Petitioner testified she told Dr. Williams the EMD book weighed fifteen (15) to twenty (20) pounds, but Dr. Williams denied being told the weight of the EMD book. Therefore, Dr. Williams' opinion that grabbing the EMD book aggravated Petitioner's condition is either based on false information or lacking foundational knowledge. Dr. Hoepfner testified even if the EMD book weighed fifteen (15) pounds, the mechanism of injury described by Petitioner was insufficient to aggravate her condition.

The Arbitrator also finds significant the fact Petitioner did not seek treatment until more than two (2) weeks after the alleged accident. When she did seek treatment on April 27, 2018, Dr. San German found no significant swelling. When Petitioner followed up on July 11, 2018, she complained of forearm tenderness with radiation into the thumb. This history is inconsistent with an acute injury or aggravation to the ulnar/pinky side of the wrist.

In regard to Petitioner's alleged bilateral repetitive trauma injuries of April 22, 2019, Petitioner has the burden of proving her injury was work related and not the result of a normal degenerative aging process or the result of some other non-work-related condition. *Peoria County Belwood Nursing Home v. Industrial Com'n*, 115 Ill.2d 524, 530. The Arbitrator finds Petitioner has not met this burden.

Petitioner's job duties did not require sufficient forceful use of her hands to aggravate her ulnocarpal impaction or any of the other pre-existing degenerative conditions present in her wrists. Based on Petitioner's own subjective description of her job duties reported to Dr. Hoepfner, Petitioner's job duties were sedentary office-type duties, involving typing, stapling, filing, data entry, and answering phone calls.

Dr. Williams testified the pre-existing conditions in Petitioner's wrist could be aggravated by gripping, pinching or lifting. However, he admitted he had no information as to how much, if any, gripping, pinching, or lifting Petitioner performed at work. Mr. Blayney testified her job duties did not require any forcible gripping, any pinching, or any forceful use of the hands at all, and she was never required to lift anything heavier than the EMD book which weighed approximately five pounds. Dr. Hoepfner also testified, based on both a written job description and Petitioner's subjective description of her job duties, her work did not involve a significant amount of gripping, pinching, lifting, squeezing, or sustained forceful wrist flexion or extension.

Further, Petitioner testified she spent ten (10) to fifteen (15) percent of her workday using her personal laptop for non-work-related activities. Mr. Blayney estimated, based on his own experience performing Petitioner's job as well as his observations of Petitioner as her supervisor, she spent about twenty (20) percent of her workday actually typing on her work computer. Petitioner had a gel wrist rest on her work computer, which she testified helped in reducing her wrist issues. She did not have a wrist rest on her personal laptop. Petitioner's use of her personal laptop during work hours was so pervasive, she was disciplined in June of 2018 for inattentiveness

to her duties and delays in dispatch of emergency calls due to being distracted by her personal electronic devices. None of the three doctors who testified in this case provided an opinion that typing aggravated Petitioner's ulnar variance or ulnocarpal impaction syndrome.

Finally, after retiring from her employment with the City, Petitioner worked as a delivery driver for UPS, carrying many packages, weighing up to thirty (30) pounds, without the use of any moving equipment. Petitioner testified she never felt better physically in her entire life than while working for UPS in this capacity. As of the time of arbitration, Petitioner worked for Sam's Club, where she performs cashier duties, including lifting items weighing up to twenty (20) pounds, operating a cash register with her hands, and operating a scanning gun which requires her to pinch a trigger. Throughout her employment for UPS and Sam's Club, Petitioner has not required any work restrictions and has not missed any time from work due to wrist pain.

Based on the facts in evidence, the Arbitrator finds Petitioner's current conditions of ill-being are neither causally related to her alleged April 12, 2018, work accident involving grabbing the EMD book nor the alleged repetitive trauma with a manifestation date of April 22, 2019.

In support of the Arbitrator's Decision relating to (J). Where the services provided to Petitioner Reasonable and Necessary, has Respondent paid all appropriate charges for said services, and is the Petitioner entitled to any prospective medical care?, the Arbitrator finds the following:

Petitioner has not met her burden of proving her alleged injuries are related to her employment for Respondent. As such, the Arbitrator finds the medical expenses Petitioner has incurred relating to treatment she has undergone for her alleged upper extremity injuries are not work related and are not the responsibility of the Respondent.

On April 22, 2019, Dr. Williams recommended Petitioner undergo bilateral wrist surgeries. Dr. Williams testified he recommended bilateral ulnar shortening osteotomy surgeries. Dr. Williams testified his surgical recommendation was based on the subjective history provided and objective examination performed on April 22, 2019. The Arbitrator finds it significant that Dr. Williams recommended surgery for Petitioner's right wrist, despite the fact Petitioner did not report right wrist symptoms on April 22, 2019, nor did Dr. Williams perform an objective examination of her right wrist at that appointment. Interestingly, Dr. Williams testified, and the medical records in evidence confirm, leading up to the April 22, 2019, surgical recommendation,

Petitioner had not complained to Dr. Williams of pain in her right wrist since March 19, 2015. Petitioner also provided testimony confirming she did not complain to Dr. Williams of symptoms in her right wrist during the time leading up to April 22, 2019. Dr. Williams never provided Petitioner with any work restrictions for her right upper extremity. On April 22, 2019, Petitioner rated the severity of her left wrist pain as two out of ten (2/10).

Dr. Williams testified the recommended surgery involves taking out a certain number of millimeters of the ulna bone, then using plates and screws to put the bone back together. He testified the risks involved with this surgery include persistent swelling and infection. There is also a chance of non-union of the bone, which would require revision surgery. Dr. Williams testified this operation rarely gives patients total pain relief, and Petitioner would likely still have symptoms after undergoing the operation.

Dr. Li recommended Petitioner undergo the ulnar shortening procedure for her left wrist. He did not provide a surgical recommendation in regard to her right wrist. He testified possible complications of this surgery include persistent swelling and stiffness, infection, and nerve damage. He agreed this operation rarely gives patients total pain relief, and Petitioner would likely still have symptoms even after surgery. Dr. Li testified Petitioner did not need any work restrictions. He also opined Petitioner has not suffered any permanent impairment as a result of her alleged injuries.

Dr. Hoepfner testified the surgeries proposed by Dr. Williams would not be related to Petitioner's employment for the Respondent. Dr. Hoepfner testified he would not recommend any further surgery for Petitioner. He said he would be very hesitant in regard to Petitioner undergoing any further surgeries for what he considered to be a relatively mild presentation of ulnocarpal impaction syndrome. He testified he would reserve ulnar shortening surgery for patients with a greater degree of ulnar variance and more severe symptoms than seen in Petitioner. Dr. Hoepfner further testified the likelihood of success would be very low in regard to Petitioner undergoing any further surgeries on her wrists and hands, and he did not believe the proposed surgery would eliminate, or even significantly reduce, Petitioner's symptoms.

At least two of Petitioner's previous treating physicians have expressed similar concerns in regard to Petitioner undergoing any further upper extremity surgeries. On November 24, 2009, Dr. Garst recommended Petitioner treat conservatively and avoid further surgery because she had

already "had quite a bit done." On January 15, 2010, Dr. Moody noted, "Given the extensive surgery she has had of her upper extremities, I would recommend caution regarding proceeding with additional surgical interventions."

After retiring from her employment with the City, Petitioner worked as a delivery driver for UPS, carrying many packages, weighing up to thirty (30) pounds, without the use of any moving equipment. Petitioner testified she never felt better physically in her entire life than while working for UPS in this capacity. As of the time of arbitration, Petitioner works for Sam's Club, where she performs cashier duties, including lifting packages weighing up to twenty (20) pounds, operating a cash register with her hands, and operating a scanning gun which requires her to pinch a trigger. Throughout her employment for UPS and Sam's Club, Petitioner has not required any work restrictions and has not missed any work time due to wrist pain.

The Arbitrator finds the proposed bilateral ulnar shortening osteotomies are not reasonable nor necessary, and are not related to Petitioner's employment. All three doctors providing testimony in this case agreed surgery was unlikely to provide total relief of Petitioner's symptoms. Without surgery, Petitioner has been able to perform employment tasks for UPS and Sam's Club which require more lifting, pinching, and gripping, and more forceful use of her hands and wrists, than her employment with the Respondent required. Yet, her symptoms have not become severe enough to require work restrictions, or time off work. In fact, Petitioner testified she never felt better, physically, than while delivering packages for UPS. Multiple doctors have recommended Petitioner avoid any further surgeries. The Arbitrator gives greater weight to the opinion provided by Dr. Hoepfner that the recommended ulnar shortening surgeries seem to present an unreasonable level of risk in regard to potential complications or failure to provide significant relief, given Petitioner's relatively minor presentation of symptoms. Dr. Williams surgical recommendation in regard to the right wrist seems especially unreasonable and unnecessary, given Petitioner's lack of right wrist symptoms for over four years leading up to the date the recommendation was made.

Finally, as the Arbitrator finds Petitioner's current condition of ill-being is not causally related to her employment for the Respondent, the Arbitrator similarly finds any need for the proposed surgeries, or any other prospective treatment in regard to Petitioner's alleged wrist injuries, is not causally related to her employment for the Respondent.

In support of the Arbitrator's Decision relating to (E). Was timely notice of the accident given to Respondent? the Arbitrator finds the following:

A supervisor's accident investigation report was submitted into evidence which shows Petitioner reported her alleged April 12, 2018, work accident to one of her supervisors, Jeanette Morse, on April 26, 2018. (Resp. Ex. 15). Notwithstanding the Arbitrator's finding that Petitioner did not suffer a work related injury on April 12, 2018, this supervisor's accident investigation report shows she provided timely notice of the accident alleged to have occurred on April 12, 2018.

There is no evidence in the record showing Petitioner provided timely notice to her employer in regard to the alleged repetitive trauma claim. As such, her claim for compensation is jurisdictionally barred. Her failure to provide timely notice is an absolute bar to her claim, with no discretion for the Arbitrator or the Commission to excuse her failure to provide notice. 820 ILCS 305/6(c); *Ristow v. Industrial Com'n*, 39 Ill. 2d 410, 413; *White v. Workers' Compensation Com'n*, 374 Ill. App. 3d 907, 910. As the appellate court stated in *White:*

> Regarding notice, the statutory element of undue prejudice to the employer is pertinent only where some notice is given in the first place. We need not address whether [the employer] suffered undue prejudice because, as noted above, the prejudice inquiry does not pertain unless some notice was given in the first place. The instant case does not involve timely but defective notice, it involves lack of timely notice altogether. *White*, 374 Ill. App. 3d, at 910- 911 (internal citations omitted).

The original Application for Adjustment of Claim, showing an accident date of April 11, 2018, was filed on October 24, 2019. (Resp. Ex. #3) Her amended Application for Adjustment of Claim was filed on December 9, 2019, alleging an accident date of April 22, 2019. *Id.* No testimony was adduced at arbitration indicating that Petitioner notified Respondent that she was alleging injuries to her bilateral wrist as a result of repetitive trauma in a timely manner. Accordingly, as Petitioner failed entirely to provide timely notice, this is an absolute bar to case number 19WC031054.

In support of the Arbitrator's Decision relating to (G). What were Petitioner's earnings? the Arbitrator finds the following:

Petitioner submitted a collection of paystubs, dating from December 30, 2017, to November 30, 2019, into evidence as Petitioner's Exhibit six (6). All of these paystubs show Petitioner's hourly rate of pay as thirty dollars and forty cents ($30.40). Petitioner's former supervisor, Mr. Blayney, testified emergency communication telecommunicators work a regular shift of forty (40)

hours per week, and an additional eight (8) hours of mandatory overtime each week. (Arb. Tr. p. 116).

Section 10 of the Illinois Workers' Compensation Act states overtime is excluded in calculating a Petitioner's average weekly wage. In regard to this exclusion of overtime, the courts have held overtime includes those hours in excess of an employee's regular weekly hours of employment 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 Exp., Inc. v. Ill. Workers' Compensation Com'n*, 372 Ill.App.3d 549, 554. While the evidence shows Petitioner worked substantial overtime, there is no evidence showing Petitioner consistently worked a set number of overtime hours each week, or that her overtime hours were part of her regular hours of employment. The evidence does show eight (8) hours of Petitioner's overtime each week were mandatory as a condition of her employment. (Arb. Tr. p. 116). She worked these eight (8) hours of mandatory overtime in addition to a standard forty (40) hour week. As such, Petitioner's average weekly wage should be calculated on the basis of forty-eight (48) hours per week, paid at a wage rate of $30.40 per hour. This equates to an average weekly wage of $1,459.20.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC031054
Case Name	Kelly Jo Lane v. City of Peoria
Consolidated Cases	19WC013968;
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	23IWCC0279
Number of Pages of Decision	52
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Stephen Kelly
Respondent Attorney	Kevin Day

DATE FILED: 6/26/2023

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kelley Lane,

Petitioner,

vs. No. 19 WC 31054

City of Peoria,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, medical expenses, prospective medical care, and wage calculations, and being advised of the facts and law, affirms with changes the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms and adopts the Arbitrator's conclusion that Petitioner failed to prove she sustained accidental injuries or repetitive trauma arising out of and in the course of her employment with Respondent. In doing so, the Commission affirms and adopts the credibility findings made by Arbitrator Gillespie, but not the credibility findings another Arbitrator and another Commission Panel made in case No. 08 WC 17751, *aff'd* 12 IWCC 1073.

The finding of no accident/repetitive trauma renders moot the remaining issues. The Commission does not adopt and strikes Arbitrator Gillespie's findings on all other issues.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 7, 2022, is hereby affirmed with changes.

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

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

June 26, 2023

SJM/sk
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	19WC031054
Case Name	Kelly Jo Lane v. City of Peoria
Consolidated Cases	19WC013968
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	49
Decision Issued By	Bradley Gillespie, Arbitrator

Petitioner Attorney	Stephen Kelly
Respondent Attorney	Gregory A. Nordstrom

DATE FILED: 9/7/2022

/s/Bradley Gillespie, Arbitrator

Signature

INTEREST RATE WEEK OF SEPTEMBER 7, 2022 3.32%

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

KELLEY LANE
Employee/Petitioner

v.

CITY OF PEORIA
Employer/Respondent

Case # **19** WC **031054**

Consolidated case:

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 **Bradley Gillespie**, Arbitrator of the Commission, in the city of **Peoria**, on **April 28, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ 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 **4/22/19**, Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

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

Timely notice of the **4/22/19** accident ***was not*** given to Respondent.

Petitioner's current conditions of ill-being ***are not*** causally related to the alleged accidents.

In the year preceding the injuries, Petitioner earned $**75,878.40**; the average weekly wage was $**1,459.20**.

On the **4/22/19** date of accident, Petitioner was **54** 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**.

The Petitioner was off work for time periods: **N/A**.

Respondent is entitled to a credit under Section 8(j) for all payments made through group medical insurance.

ORDER

- Petitioner did not sustain an accident that arose out of and in the course of her employment with Respondent on April 22, 2019.
- Petitioner's conditions of ill-being at the time of arbitration are not causally related to the alleged work accident on April 22, 2019.
- Petitioner did not provide proper notice of her alleged April 22, 2019, accident to Respondent.
- Petitioner's correct average weekly wage is $1,459.20.
- Respondent has paid all reasonable, necessary, and causally related medical expenses and is not responsible for any unpaid medical expenses alleged by Petitioner.
- Any prospective medical treatment for Petitioner's alleged accident of April 22, 2019 claim is denied. No other benefits are awarded.
- Please see attached 19(b) Decision of Arbitrator for consolidated cases 19WC013968 & 19WC031054.

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

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

Bradley D. Gillespie

Signature of Arbitrator

September 7, 2022

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KELLEY LANE, Petitioner,	)
v.	)Case No. 19 WC 13968; 19 WC 31054
CITY OF PEORIA, Respondent.	)

19(b) DECISION OF THE ARBITRATOR

These matters proceeded to hearing on April 28, 2022, in Peoria, Illinois (*See* Arb. 1 & Arb. 2). The following issues were in dispute at arbitration:

- Accident
- Causal Connection
- Notice
- Petitioner's Earnings and Average Weekly Wage
- Medical Expenses
- Prospective Medical Care

FINDINGS OF FACT

I. Applications for Adjustment of Claim

On May 7, 2018, Petitioner, Kelly Lane, filed an Application for Adjustment of Claim, alleging she injured her left and right wrist when she reached to pick-up EMD cards while working for Respondent, City of Peoria, on April 12, 2018. (Resp. Ex. 3, p. 1-3). She alleged an average weekly wage of $1,218.80.

Petitioner then filed a second Application for Adjustment of Claim on October 24, 2019, alleging an injury to her right wrist on April 11, 2018, as a result of repetitive trauma. (Resp. Ex. 3, p. 4-6). Petitioner amended this Application for Adjustment of Claim on December 9, 2019. (Resp. Ex. 3, p. 7-8). In her Amended Application, Petitioner changed the date of accident to April 22, 2019 and changed the affected body part from right wrist to bilateral wrists. (Resp. Ex. 3, p. 7).

On January 17, 2022, Petitioner filed two Amended Applications for Adjustment of Claim, amending both of the two above-described claims. (Resp. Ex. 3, p. 9-12). She amended the original Application for Adjustment of Claim, filed on May 7, 2018, to allege she sustained injuries to the

left wrist, left arm, and left ulna bone when she reached to pick up an EMD card on April 12, 2018. (Resp. Ex. 3, p. 9-10). Petitioner also amended her average weekly wage from $1,218.80 to $2,400.00. *Id*. In addition, Petitioner filed second Amended Application for Adjustment of Claim for her alleged April 22, 2019 accident, changing the affected body part from bilateral wrists to bilateral wrists, left arm, and ulna bone. (Resp. Ex. 3, p. 11-12).

II. Arbitration Testimony

A. Testimony of Petitioner

At the outset of arbitration, Petitioner, Kelly Lane, stated she was providing testimony concerning two (2) workers' compensation claims with accident dates of April 12, 2018 and April 22, 2019. (Arb. Tr. p. 15). She acknowledged she also had two other claims pending before the Commission for her left foot and neck. (Arb. Tr. p. 16). With regard to the April 12, 2018 accident, Petitioner filed an initial Application for Adjustment of Claim alleging she injured her right wrist. She testified that Application was inaccurate, and she later filed an amended Application for injuries to her left wrist, arm, and ulna bone. (Arb. Tr. p. 16-17; Pet. Ex. 1 p. 4-5). She then filed a second claim for alleged bilateral repetitive trauma injuries in April of 2019. (Arb. Tr. p. 17-18). Petitioner testified this Application was then amended, because she only injured her left wrist in April of 2019. (Arb. Tr. p. 18). She then altered her testimony and stated her work activities actually did bother her right wrist in April of 2019. *Id*.

On direct examination, Petitioner provided testimony regarding medical treatment to her bilateral hands, wrists, elbows, and shoulders in 1984, 1988, 1995, 2008, 2010, 2015, 2017, and 2018. (Arb. Tr. p. 19-30). She either recalled this treatment or indicated she would not dispute any medical records evidencing treatment during these time periods. (Arb. Tr. p. 19-30). On cross-examination, Petitioner summarized her surgical history in regard to her upper extremities. (Arb. Tr. p. 81). She underwent a right carpal tunnel surgery in 1988. (Arb. Tr. p. 81). In 1995, she underwent carpal tunnel surgeries on both of her wrists. *Id*. In 1995, she also had surgeries performed on both her elbows. *Id*. In 2009, she had carpal tunnel surgeries on both of her wrists. (Arb. Tr. p. 81-82). In 2009, she also underwent surgeries on both her elbows. (Arb. Tr. p. 82). Also in 2009, she underwent trigger thumb release surgeries on both of her thumbs. *Id*. She testified she has also undergone multiple right shoulder surgeries, with no surgeries to her left shoulder. *Id*. This medical treatment is more fully addressed and summarized in Section III below.

Petitioner also testified to multiple previous upper extremity injuries suffered by way of falls. (Arb. Tr. p. 79). In 1984, she injured one of her shoulders in a fall. *Id*. In 1987, she fell, injuring her right shoulder and wrist. *Id*. She testified she would not dispute the medical record showing her dog bumped her, causing her to fall down the stairs, landing on her left elbow, in 2007. (Arb. Tr. p. 79-80). On May 5, 2014, she fell at work, injuring her right wrist. (Arb. Tr. p. 80). She testified she would not dispute the medical record showing she fell again and landed on her right hand in early 2017. *Id*.

Petitioner indicated she previously filed workers' compensation cases against the City of Peoria for accidents on February 7, 2008 and February 1, 2010, involving alleged injuries to her right wrist and left hand. (Arb. Tr. p. 30-31). She proceeded to arbitration for those accidents and acknowledged the claims were denied by the Commission. (Arb. Tr. p. 31). According to Petitioner, she was not prepared for the 2008 arbitration and was very confused at that time. *Id*. She also settled a claim against the City of Peoria for a May 5, 2014 injury to her right hand. She was awarded four-and-a-half percent (4.5%) loss of use of the right hand in that claim. (Arb. Tr. p. 81).

She further acknowledged filing a workers' compensation claim in August of 1994 against Medforms, Inc. for injuries to her bilateral hands. (Arb. Tr. p. 32). Petitioner was awarded fifteen percent (15%) loss of use of her left hand and fifteen percent (15%) loss of use of her right hand as a result of that claim. *Id*.

Petitioner testified she saw Dr. San German approximately four (4) times leading up to her first alleged accident, starting in June of 2017. (Arb. Tr. p. 34). She testified she would agree with the records if they show she did not make any complaints regarding her left wrist or arm in June or July of 2017. *Id*. She returned on January 30, 2018 with no complaints to her left wrist or left hand or arm. (Arb. Tr. p. 35). Petitioner quit smoking on October 24, 2017, but she still vapes. *Id*. Petitioner does not dispute that the last time she visited Dr. San German before her first alleged accident was on March 13, 2018, and she indicated she had pain in her right hand. (Arb. Tr. p. 36). She then underwent an X-ray on her right hand. (Arb. Tr. p. 36-37). She testified she did not have left wrist complaints at that time. (Arb. Tr. p. 37).

With regard to the alleged April 12, 2018 accident, Petitioner testified she was sitting at her work station when she took a 911 medical call. (Arb. Tr. p. 37). She reached up with her left hand

and grabbed an EMD book. *Id*. Petitioner explained an EMD book is an Emergency Medical Dispatch book, which has a thick plastic base, and has medical cards attached to it for different medical conditions. (Arb. Tr. p. 38). The cards are metal plates with plastic over them. *Id*. These cards were used on every medical call. *Id*. Petitioner testified when she reached up to grab the EMD book, it twisted her left arm. *Id*. Petitioner testified the EMD book weighs fifteen (15) to twenty (20) pounds. (Arb. Tr. p. 39). Petitioner testified she told Dr. San German and Dr. Williams the EMD book weighed fifteen (15) to twenty (20) pounds. (Arb. Tr. p. 72).

Petitioner did not believe she had any appointments scheduled with any doctor for her left arm, wrist, or hand at the time of, or in the week leading up to, this alleged accident. (Arb. Tr. p. 39-40). She said she was not having any ongoing concerns, problems or complaints in regard to her left wrist or left arm in the week leading up to the alleged accident. (Arb. Tr. p. 40-41).

Petitioner did not immediately report this accident to her supervisor because she thought she just twisted her arm, and she would work through it, and it would get better. (Arb. Tr. p. 41). She eventually reported the accident to her supervisor, Jeanette Morse, on April 26, 2018. *Id*. She told Ms. Morse she had pulled down an EMD card file and twisted her arm two weeks earlier, and she was going to see a doctor because her complaints had not gone away. (Arb. Tr. p. 42). Petitioner's right wrist was not injured by the alleged April 12, 2018 accident. *Id*.

Petitioner then went to see Dr. San German. (Arb. Tr. p. 42-43). She testified if Dr. San German noted a history involving Petitioner lifting a heavy box, that history is inaccurate. (Arb. Tr. p. 43). She told Dr. San German she thought she may have pulled a muscle in the lower part of her left arm. (Arb. Tr. p. 73). Petitioner treated with Dr. San German in April and June of 2018, and on July 11, 2018, he referred her to Dr. Williams due to her left forearm pain and left wrist pain. (Arb. Tr. p. 43). Petitioner saw Dr. Williams on October 3, 2018 for pain over her left wrist and forearm, and Dr. Williams provided her with a wrist splint and an anti-inflammatory. (Arb. Tr. p. 44). He put her on restrictions for her left upper extremity. (Arb. Tr. p. 73). He never took Petitioner off work. (Arb. Tr. p. 45).

Petitioner underwent an MRI on or about December 7, 2018. (Arb. Tr. p. 45). On December 19, Dr. Williams diagnosed Petitioner with de Quervain's tenosynovitis in her left wrist. (Arb. Tr. p. 74). Dr. Williams then performed an injection into the thumb-side of her left wrist. (Arb. Tr. p. 45, 74). On January 17, 2019, Petitioner told Dr. Williams the injection helped a little bit, but wore

off. (Arb. Tr. p. 45-46). Petitioner testified Dr. Williams performed an injection into her right thumb. (Arb. Tr. p. 75).

Petitioner saw Dr. Williams again on April 22, 2019, which is the second alleged accident date at issue. (Arb. Tr. p. 46). She complained of pain in her left wrist. (Arb. Tr. p. 76). Petitioner testified she described her job description to Dr. Williams, and they discussed her work activities. (Arb. Tr. p. 46-47). Petitioner testified Dr. Williams recommended she undergo surgery to her left wrist at that time. (Arb. Tr. p. 47). Petitioner testified she still desires to undergo left wrist surgery, and the City has not approved it. *Id*. On cross-examination, Petitioner testified Dr. Williams actually recommended bilateral ulnar shortening surgeries. (Arb. Tr. p. 76). She further testified she never complained to Dr. Williams of any symptoms in her right wrist at any time between October 3, 2018 and April 22, 2019. (Arb. Tr. p. 77).

Petitioner followed up with Dr. Williams on August 17, 2020. (Arb. Tr. p. 48). At this appointment, Petitioner reported her right wrist was hurting worse than her left wrist. (Arb. Tr. p. 77). At that time, surgery was still recommended. (Arb. Tr. p. 48). As of the time of arbitration, Petitioner has still not undergone the recommended surgery. *Id*.

Petitioner attended an Independent Medical Examination with Dr. Lawrence Li on November 9, 2020. (Arb. Tr. p. 48, 78). Petitioner complained to Dr Li about pain in her left wrist which radiated into her elbow, as well as pain at the base of her right thumb. (Arb. Tr. p. 78). Dr. Li told her he also recommended surgery. (Arb. Tr. p. 49). She testified this examination took about forty-five (45) minutes. (Arb. Tr. p. 50). Petitioner also attended an Independent Medical Examination in Chicago with Dr. Hoepfner on June 4, 2020. (Arb. Tr. p. 49, 77). She said that examination took about fifteen (15) minutes. (Arb. Tr. p. 50). Petitioner told Dr. Hoepfner she was having pain in both forearms, swelling in both hands, and numbness and tingling in both hands. (Arb. Tr. p. 77-78).

Petitioner testified she was employed by the City of Peoria for twenty-four (24) years and one (1) month as an emergency telecommunicator. (Arb. Tr. p. 51). She took emergency phone calls and was responsible for getting information to the proper first responders. (Arb. Tr. p. 52).

Petitioner reviewed the City's Exhibit sixteen (16), which she identified as photographs of her work station. (Arb. Tr. p. 52-53). She said the photographs were an accurate representation of how her work station usually looked. (Arb. Tr. p. 83). She testified, as a 911 operator, she was

responsible for looking at six different monitors. (Arb. Tr. p. 53). She testified the photographs also show her own personal laptop, tablet, and cell phone at her work station. (Arb. Tr. p. 53-54, 84). Petitioner said, while working as a 911 operator, she would use Facebook on her laptop when she was not busy. (Arb. Tr. p. 54). Petitioner estimated during the time period from April 12, 2018 to April of 2019, she spent ten (10) to fifteen (15) percent of her time during her work shifts using her personal laptop, rather than performing work for the City. (Arb. Tr. p. 55). She testified she spent about 85% of her shifts during that time period performing work for the City. (Arb. Tr. p. 56).

Petitioner testified the photographs of her work station show a gel wrist pad, wrapped in duct tape, which she would rest her wrists on. (Arb. Tr. p. 56). She testified this helped her wrists. *Id*. This was Petitioner's own personal wrist rest, which she would bring in and set up on whichever computer she was going to be using for work on a given day. (Arb. Tr. p. 92-93). Petitioner did not have a wrist rest on her personal laptop. (Arb. Tr. p. 93).

Petitioner testified in the year from April of 2018 to April of 2019, she worked overtime. (Arb. Tr. p. 56). She said she worked twelve (12) hours per day, on average. (Arb. Tr. p. 57). Petitioner testified she agrees with the job description in evidence as the City's Exhibit four (4), which indicates up to seventy-five (75) percent of her day was spent performing computer work. *Id*.

Petitioner said when a call came in, she had to sit at the computer and type as she talked. (Arb. Tr. p. 58). She would enter the location and the code which would determine the priority level. *Id*. She would then type out a description of the situation and the caller's name and call-back number. *Id*. She would then send that off to whichever operator needed to take the call. *Id*. Every day, she got calls from the Prep 1 Radio Peoria Police Department Main Radio Frequency. (Arb. Tr. p. 58-59). She testified when she was on that radio, she was not supposed to answer the phone because she needed to give her full attention to the officers, who are constantly busy. (Arb. Tr. p. 59). If there was a call, this would prompt her to start doing computer work. *Id*.

Petitioner testified there were also a lot of entries for Prep 2 Peoria Police Department Secondary Radio Frequency. (Arb. Tr. p. 59). For this secondary frequency, Petitioner would enter calls for events such as runaways, missing people, and lost or stolen property. (Arb. Tr. p. 59-60). For CMED radio calls, Petitioner had to dispatch fire and volunteer ambulances and AMT. She

also answered fire department calls and calls for the Sheriff's Department. (Arb. Tr. p. 60-61). She also took calls for Chillicothe and Peoria Heights. (Arb. Tr. p. 61). When taking these different types of calls, Petitioner would use her hands and wrists to do computer work. *Id*.

Petitioner testified while taking these calls, her wrists would ache from sitting and typing. (Arb. Tr. p. 62). She testified when she typed at her work computer, she rested her wrists on her duct taped wrist rest, which helped. (Arb. Tr. p. 62-63). Petitioner testified her job also involved looking at four (4) by six (6) cards, as well as filing. (Arb. Tr. p. 63). She testified she used her hands for these activities, and also used her hands to dial phones. (Arb. Tr. p. 63-64).

Petitioner testified in 2018, she was disciplined for having her laptop out on her desk at work. (Arb. Tr. p. 65, 84-85). Petitioner testified she was allowed to use her personal electronic devices during her work shift, but this was a privilege that could be taken away by her supervisor if it was abused. (Arb. Tr. p. 84). Petitioner had this privilege temporarily taken away in 2018, and also served a one-day suspension. (Arb. Tr. p. 84-86). On cross-examination, Petitioner admitted this discipline did not result from just having her laptop out on her desk, as this is something she was allowed to do. (Arb. Tr. p. 86). However, she did not agree she was disciplined because her attentiveness to her laptop was causing her to be less attentive to her work duties. *Id*.

Petitioner then reviewed a document which she identified as a letter of suspension she received, signed, and dated on June 8, 2018. (Arb. Tr. p. 87). Petitioner testified the subject line of the letter said "Inattentive to duties, delays in dispatch of emergency calls." (Arb. Tr. p. 88). She testified the first two (2) paragraphs of the letter described issues she was having regarding delays in handling incoming calls. (Arb. Tr. p. 89). She further testified, in the fourth paragraph of the letter, her supervisor stated, "I believe you were distracted with your electronic devices and did not notice the calls for service holding in each case." (Arb. Tr. p. 89-90). The letter went on to say, "Therefore, until further notice, you are prohibited form utilizing all electronic devices while on duty in the ECC." (Arb. Tr. p. 90). Petitioner said her employer took her laptop away for thirty (30) days. (Arb. Tr. p. 66).

On January 30, 2019, Petitioner was suspended, again, for three (3) days. (Arb. Tr. p. 90). This second suspension was, in part, due to delays in handling incoming calls. (Arb. Tr. p. 91). Petitioner testified she had never been disciplined for laptop use prior to the time she filed her workers' compensation claim for her alleged April, 2018 work accident. (Arb. Tr. p. 99). She said

once she filed this case, her employer started disciplining her. *Id*. Petitioner said, if it is shown in the exhibit, she would not dispute the fact that one of the issues in her previous workers' compensation case, entered into evidence as the City's Exhibit fourteen (14), was her use of her personal laptop to play solitaire while she was supposed to be on keyboarding and data entry restrictions. (Arb. Tr. p. 107-108).

Petitioner testified she disagreed with the suspension she received on January 30, 2019, because at that time, they had just started taking calls for Peoria Heights and Chillicothe, and she was not used to the Prep 2 frequency being the main radio for any police agency. (Arb. Tr. p. 100-101). She said some people would turn those speakers down and then not turn them back up. (Arb. Tr. p. 101). She said the delay occurred because she did not know the speaker was turned down. (Arb. Tr. p. 104).

Petitioner testified she has not suffered any additional injury to her left wrist or arm since filing her workers' compensation claims. (Arb. Tr. p. 67). She also has not suffered any other injury to her right wrist or forearm since filing her April, 2019 claim. *Id*. Petitioner retired from her employment with the City on May 28, 2021. (Arb. Tr. p. 67-68). Petitioner said the fact the City offered her an early retirement incentive played a role in her choice to retire. (Arb. Tr. p. 68). She also testified she was getting slower at performing her work activities, and she could not type as fast as she used to. *Id*. At no time prior to her retirement did any doctor ever take her off work for her alleged wrist injuries. (Arb. Tr. p. 92).

In November, 2021, Petitioner got a seasonal job as a personal vehicle driver for UPS. (Arb. Tr. p. 68, 93). This job involved lifting and carrying many packages. (Arb. Tr. p. 93). Petitioner testified none of the packages she delivered were over thirty (30) pounds. (Arb. Tr. p. 94). She lifted these packages, carried them to people's front doors, and set them down, all without moving equipment, using only her hands. *Id*. Despite having to lift all those packages, Petitioner testified she felt great physically. *Id*. In fact, she said she felt the best she ever felt in her life, physically and mentally, while working for UPS. *Id*. While working for UPS, she never sustained an injury to either her right or left wrist. (Arb. Tr. p. 69). Her employment with UPS ended on January 14, 2022. *Id*.

On March 6, 2022, Petitioner got a job at Sam's Club as a front-line member. (Arb. Tr. p. 69). She still worked for Sam's Club as of the time of arbitration. (Arb. Tr. p. 95). As a front-line

member, Petitioner's duties include performing cashier duties, greeting customers, working the service membership desk, and processing returns. *Id*. She has to lift packages weighing up to twenty (20) pounds. *Id*. If a customer is purchasing a product weighing more than twenty (20) pounds, it stays in the cart, and Petitioner scans it with a scanning gun, which requires her to pinch a trigger. (Arb. Tr. p. 95-96). She said she is able to do this with either hand. (Arb. Tr. p. 96). She also operates a cash register with her hands. *Id*. She has not sustained any injuries to her right or left wrist while working at Sam's Club. (Arb. Tr. p. 69-70). While working for UPS and Sam's Club, Petitioner has never needed any work restrictions. (Arb. Tr. p. 96). She has not missed any work time at either UPS or Sam's Club due to wrist pain. (Arb. Tr. p. 97).

Petitioner said since the injury of 2018, the pain has never completely gone away in her left wrist or left forearm. (Arb. Tr. p. 70). She said since her repetitive trauma claim was filed, her pain in both wrists has never gone away. *Id*. Petitioner testified that, at the time of arbitration, her left wrist and forearm were very swollen. *Id*. She said they ache all the time and have ached ever since her accident. *Id*. Petitioner testified her right wrist also aches all the time and has ached since 2019. *Id*.

B. Testimony of Brandon Blayney

At arbitration, Brandon Blayney was called to testify on behalf of the City. Mr. Blayney testified he has worked for the City for almost the last eighteen (18) years. (Arb. Tr. p. 109). He currently works as an emergency communications center manager, which has been his position for the last two months prior to the date of arbitration. (Arb. Tr. p. 110). In this position, he oversees the 911 Center. *Id*. Prior to this, his position was that of emergency communications center operations supervisor for one year. *Id*. In that position, his job was to oversee the day-to-day operations of the 911 center and manager. *Id*. Before that, he was an emergency communications center supervisor. *Id*. He held that position for about five years, and was in that position on the dates of April 12, 2018 and April 22, 2019. (Arb. Tr. p. 111). In that position, Mr. Blayney was the supervisor of the dispatchers on duty during his shift. *Id*. He supervised Petitioner throughout the five years he worked as the emergency communications center supervisor. *Id*. He testified Petitioner worked as an emergency communications telecommunicator throughout that time, and for about twenty (20) years, total. *Id*.

Mr. Blayney formerly held the same position Petitioner held. (Arb. Tr. p. 111). He worked as an emergency communications telecommunicator for eleven (11) years. *Id*. As such, he testified he is very familiar with Petitioner's job duties during her employment with the City. (Arb. Tr. p. 112). He testified her job duties, generally, would be to process 911 calls and dispatch calls for service for police, fire, and EMS within Peoria County. *Id*. When taking an incoming call, Petitioner would need to enter some information into a computer system and then send that call off to the proper dispatcher. *Id*. He said this involves entering information into about six (6) fields. *Id*. He said taking one call involves about a paragraph worth of typing. (Arb. Tr. p. 112-113).

Mr. Blayney testified, on an average shift, an average dispatcher would take five (5) to six (6) calls per hour. (Arb. Tr. p. 113). Based on his experience supervising Petitioner, he observed her to be an employee who took an average to below average number of calls compared to other dispatchers. *Id*. He testified there are some shifts where a dispatcher would take very few calls or no calls at all. *Id*. These time periods would normally be early in the morning or late at night. *Id*. During those shifts, very little typing would be performed. (Arb. Tr. p. 113-114). Petitioner's shifts often encompassed part of the time when very few calls would usually come in. (Arb. Tr. p. 114).

Mr. Blayney testified Petitioner's job never required her to lift anything heavy. (Arb. Tr. p. 114). The heaviest thing she would ever be required to lift would be the EMD medical cards. *Id*. She did not have to lift these cards for every call she answered. *Id*. Mr. Blayney testified Petitioner's job did not require her to perform any forcible gripping, any pinching, or any forceful use of her hands at all. (Arb. Tr. p. 114-115).

Mr. Blayney said about twenty (20) percent of Petitioner's work time would be spent actually typing. (Arb. Tr. p. 115). On cross-examination, Mr. Blayney testified he did not review the written job description which states emergency communication telecommunicators performed computer work for up to seventy-five (75) percent of the day. (Arb. Tr. p. 121-122). However, Mr. Blayney testified his estimate of twenty (20) percent was specifically regarding typing, which is not the same as computer work. (Arb. Tr. p. 128-129). He said computer use would include not only typing, but also using the mouse or reading a screen. (Arb. Tr. p. 129). He further testified his estimate that about twenty (20) percent of Petitioner's work time was spent actually typing was based on both his own experience previously working as an emergency communications telecommunicator and his observations of Petitioner as her supervisor. (Arb. Tr. p. 129-130). He

also testified, if the job description references seventy-five (75) percent computer use, this does not mean Petitioner performed computer work for seventy-five (75) percent of her day, as he did not find her to be an extremely diligent employee, based on his time working as her supervisor. (Arb. Tr. p. 130). Mr. Blayney acknowledged there were times Petitioner was doing her job when he was not around. (Arb. Tr. p. 124). They often worked different shifts. *Id*. Mr. Blayney acknowledged the majority of the work performed by the emergency communication telecommunicators involves computer work. (Arb. Tr. p. 127).

In regard to the EMD cards, Mr. Blayney testified he is familiar with the EMD book, and he described it as a rectangular shaped item that holds about thirty-two (32) cards in clear sleeves. (Arb. Tr. p. 115). There is one (1) of these EMD books at every dispatch station. *Id*. They are all identical. *Id*. Mr. Blayney said the EMD books are the same today as they were on April 12, 2018. *Id*. Mr. Blayney testified each EMD book weighs five (5) pounds and three (3) ounces. (Arb. Tr. p. 115-116). He weighed one using a postal scale. (Arb. Tr. p. 116).

Mr. Blayney testified the regular shift for emergency communication telecommunicators is a forty (40) hour work week, and they are required to perform eight (8) hours of mandatory overtime each week. (Arb. Tr. p. 116).

During his time as Petitioner's supervisor, Mr. Blayney frequently observed her using her personal electronic devices during her work shifts. (Arb. Tr. p. 116). He said the dispatchers are allowed to use their personal electronic devices during their shifts, but it is a privilege which can be taken away. (Arb. Tr. p. 117). Petitioner's work duties would never require her to use her own personal laptop, tablet, or cell phone for any reason. *Id*. Mr. Blayney testified he had personal recollection of Petitioner being disciplined for her use of her personal electronic devices. *Id*. As a result, she was temporarily prohibited from using her personal electronic devices at work. *Id*. Mr. Blayney said this was not a commonly used form of discipline. (Arb. Tr. p. 118). In fact, Petitioner was the first person ever to be subject to this particular form of discipline, and only one other employee has been disciplined in this way since that time. *Id*.

Mr. Blayney testified he recently saw Petitioner working at Sam's Club. (Arb. Tr. p. 119). She was working as a cashier, picking up items, scanning items, and using a cash register. *Id*.

III. Medical Treatment

Petitioner has an extensive history of complaints, injuries, and surgeries in regard to her upper extremities. (Resp. Ex. 6, 7, 8, 9, 10, 11, & 12). This history begins, at the latest, in 1987, when Petitioner suffered a fall, injuring her right shoulder and wrist. (Resp. Ex. 10, p. 172). In 1988, Petitioner underwent a right carpal tunnel surgery in St. Louis. (Resp. Ex. 6, p. 1). In August of 1994, she developed pain in her hands and wrists, radiating to the medial forearms and elbows, with numbness and tingling in all digits of both hands. *Id*. On January 1, 1995, she underwent electroneuromyography testing with Dr. Xuan T. Truong, MD, and was diagnosed with recurrent right carpal tunnel syndrome, early left carpal tunnel syndrome, and bilateral cubital tunnel syndrome. *Id*.

On March 16, 1995, Petitioner underwent right upper extremity surgery, performed by Dr. David Conner at the Methodist Medical Center of Illinois. (Resp. Ex. 7, p. 1-2). Her preoperative diagnosis was recurrent right carpal tunnel syndrome and left cubital tunnel syndrome. *Id*. The surgery performed was an anterior transposition of the right ulnar nerve, exploration of the right carpal tunnel, neurolysis of the median nerve, and flexor tenosynovectomy. *Id*. On April 17, 1995, Dr. Conner performed surgery on Petitioner's left upper extremity. (Resp. Ex. 7, p. 3-4). Her preoperative diagnosis was left cubital tunnel syndrome and left carpal tunnel syndrome. *Id*. The surgery performed was an anterior transposition of the left ulnar nerve and an endoscopic decompression of the left median nerve. *Id*.

In 2004, while treating for other issues at Glas Chiropractic, Petitioner reported pain in her left wrist and thumb on March 3, 2004. (Resp. Ex. 8, p. 5). On September 22, 2004, she reported tingling in her right hand. (Resp. Ex. 8, p. 6).

On March 23, 2007, Petitioner underwent left shoulder arthroscopic subacromial decompression and acromioplasty surgery with Dr. Steven Below. (Resp. Ex. 9, p. 2-4). On September 27, 2007, Petitioner told Dr. Below her dog had bumped her from behind, and she had fallen down some steps, landing on her left elbow. (Resp. Ex. 9, p. 7-8).

Petitioner was seen by Dr. Moody at OSF Occupational Health on February 18, 2008. She reported she had worked for the City as a dispatcher since 1997. (Resp. Ex. 10, p. 74). She reported for approximately one (1) year, she had been having problems with bilateral wrist pain, her fingers falling asleep, and, more recently, bilateral thumb pain. *Id*. Dr. Moody diagnosed her with early

stenosing tenosynovitis of the thumbs, as well as suspected recurrence of carpal tunnel syndrome. *Id*.

On March 18, 2008, Petitioner underwent electrodiagnostic testing with Dr. Jeffery E. Stedwill, MD, for pain in her bilateral wrists. (Resp. Ex. 6, p. 4-5). Petitioner reported pain in both wrists with a component of tingling and said these symptoms had been present for about a year. *Id*. The study revealed normal findings with no evidence of right or left sided median or ulnar neuropathy. *Id*.

On March 26, 2008, Petitioner was seen by Dr. Moody at OSF Occupational Health. She reported she was continuing to experience pain in the volar right wrist, in the region of the carpal tunnel, as well as numbness and tingling in the right hand median nerve distribution. (Resp. Ex. 10, p. 65). She also reported pain along the left thumb. *Id*. Dr. Moody took X-rays of both wrists, and did not see any significant abnormality which would account for her symptoms. *Id*. The X-rays revealed mild flattening of the ulnar styloid process bilaterally. (Resp. Ex. 12, p. 1).

Petitioner was seen by Dr. Jeffrey Garst at Great Plains Orthopaedics on May 2, 2008. (Resp. Ex. 9, p. 9). She reported triggering in both thumbs, worse on the left than the right, tenderness in both elbows, worse on the right than the left, and numbness in both hands. *Id*. Dr. Garst diagnosed Petitioner with probable bilateral trigger thumbs, bilateral epicondylitis, and possible recurrent bilateral compressive carpal tunnel neuropathies. *Id*. He performed a right lateral epicondylar injection and recommended a repeat EMG/NCV study. *Id*.

Petitioner underwent an EMG/NCV study on May 7, 2008 with Dr. Xuan Truong. (Resp. Ex. 6, p. 6-7). Petitioner reported a year prior, she had developed pain in both wrists and hands, and numbness and tingling in the first four digits of both hands. *Id*. She further reported, in February of 2007, she had developed pain over the medial and lateral aspects of her right elbow, radiating to her forearm, as well as numbness and tingling of the right fifth digit. *Id*. The study performed by Dr. Truong showed a slight residual or recurrent right carpal tunnel syndrome and borderline to slight residual or recurrent left carpal tunnel syndrome. *Id*.

On May 16, 2008, Petitioner was seen again by Dr. Garst, who diagnosed her with bilateral trigger thumbs, bilateral lateral epicondylitis, and bilateral recurrent carpal tunnel syndrome. (Resp. Ex. 9, p. 13). Dr. Garst recommended Petitioner undergo bilateral carpal tunnel releases, trigger thumb releases, and lateral epicondylar releases. *Id*. Petitioner attended seven (7) more

visits with Dr. Garst from July 15, 2008 to April 21, 2009, during which she continued to consistently complain of symptoms in her elbows, wrists, and hands. (Resp. Ex. 9, p. 13-21). On November 11, 2008, Dr. Garst performed a right lateral epicondylar injection. (Resp. 9, p. 16).

On May 4, 2009, Dr. Garst performed a right lateral epicondylar release, a right open carpal tunnel release, and a right trigger thumb release. (Resp. Ex. 9, p. 23-25). At Petitioner's first follow up appointment on May 15, 2009, Dr. Garst recommended she begin physical therapy, and he performed a Lidocaine injection into her left elbow. (Resp. Ex. 9, p. 26).

On July 6, 2009, Dr. Garst performed a left lateral epicondylar release, a left open carpal tunnel release, and a left trigger thumb release. (Resp. Ex. 9, p. 31-33).

Petitioner was seen by Dr. Garst on October 9, 2009. (Resp. Ex. 9, p. 37). At this appointment, Dr. Garst declared Petitioner to have reached maximum medical improvement, despite some continuing symptoms. *Id*. Petitioner reported some soreness in her left upper extremity, especially over the lateral epicondylar release site. *Id*. Dr. Garst noted she had relatively good grip strength, but was still weaker on the left compared to the right. *Id*.

Petitioner returned to Dr. Garst on November 24, 2009 and complained of left lateral elbow pain. (Resp. Ex. 9, p. 38). Dr. Garst recommended Petitioner treat conservatively and avoid further surgery because she had already "had quite a bit done." *Id*. He performed a left lateral epicondylar injection. *Id*. Petitioner saw Dr. Garst again on December 29, 2009 and reported continued elbow pain with some numbness in both hands. (Resp. Ex. 9, p. 40). Dr. Garst recommended repeat EMG/NCV testing to check for recurrent bilateral cubital tunnel syndrome. *Id*.

On January 4, 2010, Petitioner underwent repeat EMG/NCV testing with Dr. Truong. (Resp. Ex. 6, p. 8-9). Petitioner reported she was still having pain in both elbows and numbness and tingling in the last two (2) digits of both hands. *Id*. She said her symptoms were more severe on the left and had been getting gradually worse. *Id*. She reported weakness in her grip and said she had been dropping things from both hands. *Id*. The testing performed on January 4, 2010 revealed bilateral ulnar cubital tunnel, probably recurrent. *Id*.

Petitioner was seen by Dr. Moody at OSF Occupational Health on January 15, 2010. (Resp. Ex. 10, p. 51). She reported left elbow pain and bilateral hand tingling, mainly in the palms and in the fourth and fifth digits. *Id*. Objectively, provocative testing of the carpal tunnels and ulnar nerves

was negative. *Id*. Dr. Moody noted, "Given the extensive surgery she has had of her upper extremities, I would recommend caution regarding proceeding with additional surgical interventions." *Id*.

On January 26, 2010, Petitioner saw Dr. Garst and complained of continued elbow pain with some numbness in both hands. (Resp. Ex. 9, p. 41). Dr. Garst noted Petitioner had undergone a lot of surgeries in the recent past, and he recommended she think about this before continuing with any more invasive treatment. *Id*. On February 23, 2010, Dr. Garst saw Petitioner again and recommended bilateral ulnar nerve transposition surgeries. (Resp. Ex. 9, p. 42). Petitioner was seen by Dr. Garst approximately eighteen (18) times between March 23, 2010 and October 2, 2012. (Resp. Ex. 9, p. 44-62). At these appointments, Petitioner continued to complain of bilateral elbow pain and hand numbness. *Id*.

On November 13, 2012, Petitioner reported to Dr. Garst that her pending workers' compensation claim had recently gone to arbitration, and she had lost her case. (Resp. Ex. 9, p. 63). Therefore, the surgeries recommended by Dr. Garst would not be covered by her workers' compensation insurance. *Id*. However, she reported she was still having symptoms and was considering having the surgeries covered under her group insurance plan. *Id*.

On May 16, 2014, Petitioner underwent an X-ray of her right wrist after suffering a fall. (Resp. Ex. 12, p. 2). The X-ray showed no fracture, dislocation, or other acute osseous abnormality. *Id*.

On December 11, 2014, Petitioner sought treatment with Dr. James Williams at Midwest Orthopaedic Center. (Resp. Ex. 11, p. 33). She reported she had been having pain in her right wrist for months since she fell and landed on it on May 5, 2014. (Resp. Ex. 11, p. 30, 33). She said this pain radiated up her right arm. (Resp. Ex. 11, p. 33). Dr. Williams recommended Petitioner undergo an MRI of her wrist. *Id*.

Petitioner underwent an MRI of her right wrist on December 19, 2014. (Resp. Ex. 11, p. 25-26). Findings of the MRI included degeneration of the scapholunate ligament, fraying of the body and ulnar-sided attachments of the triangular fibrocartilage with synovitis along the ulnar capsule, a small amount of fluid within the distal radiolunar joint, mild dorsal capsulitis, a small erosion involving the distal diaphysis of the first metacarpal, mild arthropathic changes of the first carpometacarpal joint space, areas of marrow edema, and dorsal subluxation of the ulna relative

to the radius with thinning and attenuation of the volar radiolunar ligament. *Id*. The conclusions of the MRI report were inflammation and a sprain of the ulnar-sided attachments of the triangular fibrocartilage complex with fraying of the body of the triangular fibrocartilage, mild arthropathic changes of the first carpometacarpal joint with erosion of the distal first metacarpal diaphysis, and patchy areas of marrow edema involving the base of the fourth metacarpal, hamate, capitate, and lunate. *Id*.

Petitioner followed up with Dr. Williams on January 12, 2015. (Resp. Ex. 11, p. 69-70). He diagnosed her with a sprain of her right wrist and hand. He noted there was no surgery he would recommend. *Id*. He told her to wear a splint and follow up in six (6) to eight (8) weeks. *Id*.

On February 16, 2015, Petitioner underwent an MRI of her right thumb, which showed mild capsulitis of the first metacarpophalangeal joint and mild peritendinitis of the first flexor and extensor tendons. (Resp. Ex. 11, p. 65).

Petitioner followed up with Dr. Williams on March 19, 2015. (Resp. Ex. 11, p. 62-63). He diagnosed her with primary osteoarthrosis in the right hand. *Id*. Dr. Williams performed a right thumb MCP injection. *Id*. On October 26, 2015, Dr. Williams performed another right thumb MCP injection for localized primary osteoarthritis of the right thumb MCP joint. (Resp. Ex. 11, p. 59-61). Dr. Williams performed another right thumb MCP injection on January 7, 2016. (Resp. Ex. 11, p. 53-54).

On March 28, 2017, Petitioner saw her primary care physician, Dr. Henry San German. (Pet. Ex. 3, p. 109). She presented with a chief complaint of a hand injury suffered two weeks prior when she fell and scraped her right hand. *Id*. She complained of lesions on her right hand which burned slightly. *Id*. She was diagnosed with dermatitis. (Pet. Ex. 3, p. 111).

Petitioner was seen by Dr. Williams on December 28, 2017 (Resp. Ex. 11, p. 50-51). She complained of recurrent right thumb pain. *Id*. Dr. Williams performed another right thumb MCP injection for localized primary osteoarthritis of the right hand. *Id*.

On March 13, 2018, Petitioner presented to Dr. San German and reported she had been experiencing swelling and discomfort in her right fourth finger for the previous three (3) to four (4) days. (Pet. Ex. 3, p. 149-152). She said she was having difficulty making a fist or grabbing things. *Id*. She denied suffering any injury to the area. *Id*. Dr. San German's physical exam

revealed swelling over the proximal fourth finger and a scaly rash over the palmar aspect of the right hand. *Id*. He diagnosed Petitioner with possible fourth MCP joint tendinitis as well as eczema/dermatitis over the right palm, and he ordered an X-ray. *Id*. Petitioner underwent an X-ray of her right hand on March 13, 2018, which showed no significant bony abnormalities of the right hand. (Resp. Ex. 12, p. 4-5).

Petitioner presented to Dr. San German on April 27, 2018 with a chief complaint of arm pain and a possible pulled muscle in the left arm. (Pet. Ex. 3, p. 158-160). She reported she had been experiencing pain in her left arm for the last month since she was carrying a heavy box and lost balance while trying to maintain her grip. *Id*. She stated her pain had increased over the last week. *Id*. On examination, Dr. San German noted there was pinpoint tenderness over the left lateral epicondyle and over the forearm. *Id*. There was good wrist movement and no significant swelling or erythema. *Id*. He diagnosed Petitioner with tendonitis of the elbow or forearm. *Id*. He recommended Petitioner treat with medication and a forearm brace. *Id*.

Petitioner followed up with Dr. San German on June 20, 2018. (Pet. Ex. 3, p. 168-170). Dr. San German noted the left elbow showed good extension and flexion. *Id*. Petitioner's grip was good. *Id*. Supination or pronation against resistance caused significant tenderness over the lateral epicondyle. *Id*. Dr. San German recommended she try a different medication and continue bracing for persistent left forearm tendinitis. *Id*.

On July 11, 2018, Petitioner was seen by Dr. San German again. (Pet. Ex. 3, p. 186-188). She reported, at times, she was still having left forearm tenderness with radiation to the left thumb as well as up to the biceps. *Id*. Dr. San German's physical examination revealed significant tenderness over the left lateral epicondyle and some tenderness over the forearm. *Id*.

Petitioner presented to Dr. Williams on October 3, 2018 with left forearm pain after picking up metal cards at work. (Pet. Ex. 2, p. 14-15). She complained of pain over the lateral aspect of the left wrist. *Id*. Objectively, Petitioner was noted to have no swelling, full range of motion, and good strength in her left wrist. She had a positive Finkelstein's Test and increased pain with hyperextension of the thumb. *Id*. Dr. Williams diagnosed Petitioner with de Quervain's tenosynovitis of the left wrist. He told Petitioner initial treatment might include immobilizing the thumb and/or wrist in a splint or brace, avoiding repetitive thumb movements when possible, avoiding pinching the thumb when moving the wrist from side to side, applying ice to the affected

area, nonsteroidal anti-inflammatory drugs or Tylenol, a cortisone injection, or surgery as a last resort. *Id*. Petitioner said she did not wish to proceed with any treatment. *Id*. Dr. Williams provided Petitioner with work restrictions of light duty only and no lifting, pulling, or carrying more than one pound with her left upper extremity. (Pet. Ex. 2, p. 12).

In conjunction with Petitioner's October 3, 2018 appointment with Dr. Williams, she was asked to fill out a medical history questionnaire. (Pet. Ex. 2, p. 17-19). On this form, Petitioner stated her injury occurred when she picked up a 911 tablet and it started to fall to the left and twisted her arm. *Id*. She provided a surgical history which included right shoulder in 1987 or 1988, a right wrist surgery in 1987 or 1988, right and left carpal tunnel surgeries in or around 2010, right and left cubital tunnel surgery in or around 1995, and right knee surgery in 1988. *Id*. Petitioner also noted she smoked a pack and a half of cigarettes per day for thirty-eight (38) years, before quitting on October 24, 2017. *Id*.

Petitioner followed up with Dr. Williams on October 18, 2018 for left wrist tendonitis. (Pet. Ex. 2, p. 10). She reported her symptoms had not improved, and the splint she was wearing had not provided any relief. *Id*. Dr. Williams noted his objective examination of the left wrist revealed tenderness over the top of the wrist and the dorsal compartment. *Id*. He recommended she undergo an MRI. *Id*.

Petitioner underwent an MRI of her left wrist on December 7, 2018. (Pet. Ex. 2, p. 24-25). The conclusions of the MRI report included a central perforation, likely degenerative, of the triangle fibrocartilage complex with synovitis along the ulnar-sided attachments, fluid distending the distal radiolunar joint, fenestration versus partial-thickness tearing of the scaphoid limb of the scapholunate ligament, a four (4) by five (5) millimeter ganglion cyst on the volar aspect of the wrist at the level of the capitate, small triquetrum and capitate erosions versus pseudocyst, and possible early erosive arthropathy. *Id*.

Petitioner was seen by Dr. Williams on December 19, 2018 for a recheck of her left wrist tendonitis and to discuss her MRI results. (Pet. Ex. 2, p. 27-28). Dr. Williams performed a left de Quervain's injection. *Id*.

On January 17, 2019, Petitioner presented to Dr. Williams with a chief complaint of right thumb pain. (Pet. Ex. 2, p. 30-31). She reported her level of pain in the right thumb was ten out of

ten (10/10). *Id*. Dr. Williams diagnosed her with localized primary osteoarthritis of the right hand, and he performed a cortisone injection into the right thumb. *Id*.

On April 22, 2019, Petitioner presented to Dr. Williams with continued left wrist pain due to arthritis. (Pet. Ex. 2, p. 32-33). She told Dr. Williams she had worked as a 911 dispatcher for twenty-two (22) years. *Id*. She reported her pain level was two out of ten (2/10). *Id*. Dr. Williams assessed Petitioner with localized primary osteoarthritis of the left wrist. *Id*. He reviewed X-rays of the bilateral wrists which revealed positive ulnar variance of three (3) millimeters on the right and two (2) millimeters on the left, as well as arthritis. *Id*. Dr. Williams provided a causation opinion, stating, "Kelley is doing well. Her pain is due to her bilateral ulnar variance. I believe her left wrist injury and pre-existing ulnocarpal impaction have been aggravated by her work activities as a 911 dispatcher for 22 years. I recommend surgical intervention." *Id*.

Petitioner presented to Dr. Williams on August 17, 2020 with continued bilateral wrist pain due to osteoarthritis, right worse than left. (Pet. Ex. 2, p. 34-35). Petitioner reported the right thumb injection she received on January 17, 2019 provided significant relief. *Id*. No subjective numbness or tingling was noted. *Id*. Objectively, she was tender to palpation at the ulnocarpal aspect of the bilateral wrists. She had weakness with gripping due to pain. *Id*. Dr. Williams continued to recommend surgery. *Id*.

IV. Evidence Deposition Testimony

A. Testimony of Dr. James Williams

Dr. James Williams is a board-certified orthopedic surgeon who practices at Midwest Orthopaedic Center in Peoria, Illinois. (Pet. Ex. 5, p. 7). He is Petitioner's treating physician. (Pet. Ex. 5, p. 8-9). Dr. Williams said his testimony in this case was given in reliance on his treating medical records. (Pet. Ex. 5, p. 34). Dr. Williams testified his medical treatment records are summaries of the relevant information related to a particular examination. *Id*. He said obtaining a complete and accurate patient history would be important to him in forming a diagnosis, and even more important in forming a causation opinion. (Pet. Ex. 5, p. 35). He also agreed having a complete and accurate patient history would be important in forming his treatment plan. (Pet. Ex. 5, p. 36). He said if a patient provided an incomplete or inaccurate history, it could affect his causation opinion. *Id*.

Dr. Williams provided treatment to Petitioner for the first time on December 11, 2014. (Pet. Ex. 5, p. 10). He assessed her as having pain in the joint involving the forearm. *Id*. Petitioner was having pain in her right wrist after falling backwards onto her extended wrist. *Id*. She had been having this right wrist pain since May 5, 2014. (Pet. Ex. 5, p. 53). Petitioner filled out a general medical history questionnaire associated with this visit. (Pet. Ex. 5, p. 51). On that form, Petitioner stated her hospitals and/or surgeries included right and left carpal tunnel, right and left cubital tunnel, right knee, trigger thumbs, C-section, hysterectomy. (Pet. Ex. 5, p. 52). Dr. Williams testified he knows Petitioner also had a right shoulder surgery, but he is unaware of any other prior surgeries Petitioner may have undergone. (Pet. Ex. 5, p. 53). Dr. Williams ordered an MRI which was performed on December 19, 2014. (Pet. Ex. 5, p. 11).

Petitioner followed up on January 12, 2015, after her MRI, and Dr. Williams provided a diagnosis of a sprained right wrist and hand. (Pet. Ex. 5, p. 11) The MRI also showed arthritic changes. (Pet. Ex. 5, p.54-55). Petitioner followed up again two months later on March 19, 2015, after undergoing an MRI on her right thumb on February 16, 2015. (Pet. Ex. 5, p. 11, 55). The MRI showed capsulitis of the right thumb MCP joint, peritendinitis, and a sprain of the ulnar collateral ligament. *Id*. Petitioner complained of right wrist and thumb pain. (Pet. Ex. 5, p. 12). Dr. Williams' diagnosis at this appointment was primary osteoarthritis of the right hand. (Pet. Ex. 5, p. 55). He provided a cortisone injection into the right thumb MCP joint. (Pet. Ex. 5, p. 12).

Dr. Williams testified consistently with his treating medical records in regard to Petitioner's appointments on October 26, 2015, January 7, 2016, and December 28, 2017. (Pet. Ex. 5, p. 12-13, 56).

On October 3, 2018, Petitioner complained to Dr. Williams of left forearm pain. (Pet. Ex. 5, p. 57). She reported this pain started when she picked up a 911 tablet which started to fall. (Pet. Ex. 5, p. 57-58). She went to grab it with her left hand, and it twisted her left arm as it fell. *Id*. She reported this occurred on April 12, 2018. (Pet. Ex. 5, p. 58). The October 3, 2018 appointment, about six months after the described incident, is the first time Dr. Williams saw Petitioner in regard to the alleged injury. *Id*. Dr. Williams testified Petitioner did not tell him how much the 911 tablet weighed, nor did he have any independent knowledge of the weight of the tablet. (Pet. Ex. 5, p. 59). Dr. Williams did not know exactly what a 911 tablet was but speculated it might be some type of tablet containing sheets of information regarding 911 calls. *Id*.

At the October 3, 2018 appointment, Dr. Williams performed an objective examination, which revealed tenderness over the extensor tendons in the left wrist, full range of motion, and no swelling. (Pet. Ex. 5, p. 18). Petitioner had tenderness over the abductor pollicis longus as well as extensor pollicis brevis, which is considered the first dorsal compartment of the left wrist. *Id*. She had a positive Finkelstein's, which helps diagnose de Quervain's tenosynovitis. *Id*. She also had increased pain with hyperextension of the thumb. *Id*. Dr. Williams' assessment was tendinitis of the left wrist, also known as de Quervain's tenosynovitis, which was a new diagnosis for Petitioner. *Id*.

Dr. Williams testified a mechanism of injury involving twisting at the wrist could result in the type of diagnosis he provided to Petitioner. (Pet. Ex. 5, p.18-19). Dr. Williams provided Petitioner with treatment options including an anti-inflammatory, a forearm-based thumb spica splint, activity modification, ice, cortisone injection, and, as a last resort, surgery. (Pet. Ex. 5, p. 19). At that time, Petitioner elected to do nothing. *Id*. Dr. Williams recommended she avoid pinching the thumb and moving the wrist from side to side because that motion can stretch and enflame the tendons which control the thumb. (Pet. Ex. 5, p. 20).

On October 3, 2018, Dr. Williams provided Petitioner with restrictions of light duty work with no lifting, pulling, or carrying more than one pound with her left hand, and full use of her right hand. (Pet. Ex. 5, p. 21). Petitioner followed up on October 18, 2018, and reported the splint had not provided relief. *Id*. She was still tender over the first dorsal compartment, so Dr. Williams recommended an MRI. *Id*.

Petitioner underwent an MRI on or about December 7, 2018. (Pet. Ex. 5, p. 22). The MRI showed some TFCC complex degeneration and inflammation with some tearing present, some partial thickness tearing of the scapholunate ligament, a ganglion cyst at the level of the capitate within the wrist, and some early arthritis formation within the wrist. (Pet. Ex. 5, p. 22-23). Dr. Williams opined the only finding on this MRI which was related to the described work injury of April, 2018 was the inflammation. (Pet. Ex. 5, p. 23). Dr. Williams said the erosions and cysts shown within the triquetrum are indicative of ulnocarpal impaction. (Pet. Ex. 5, p. 61). The diagnosis of a central perforation would not be caused by Petitioner's work. *Id*. The finding of fenestration versus partial thickness tearing of the scaphoid limb of the scapholunate ligament was also not caused by her employment. (Pet. Ex. 5, p. 62). The finding of early erosive arthropathy

would be an arthritis type condition, also not caused by her employment. *Id*. Dr. Williams testified it is possible for a degenerative condition such as the ones shown by this MRI to be aggravated by the type of injury Petitioner had described. (Pet. Ex. 5, p. 23).

Dr. Williams saw Petitioner again on December 19, 2018. (Pet. Ex. 5, p. 23). She presented with a history of left wrist tendinitis with essentially unchanged symptoms. (Pet. Ex. 5, p. 24). She had tried the splint with no relief, and she was in to discuss her MRI findings. *Id*. The diagnostic assessment was arthritis of the left wrist, and she still had some de Quervain's tenosynovitis of the left wrist. *Id*. Dr. Williams performed a cortisone injection into the first dorsal compartment of the left wrist. *Id*. Dr. Williams told Petitioner her MRI report showed some central tearing to the TFCC, which is usually due to either ulnocarpal abutment, or due to some degenerative change, along with synovitis, which is the acute inflammation of that area along the ulnar attachment of the TFCC. (Pet. Ex. 5, p. 24-25). She also had some partial thickness tearing of the scaphoid attachment portion of the scapholunate ligament. (Pet. Ex. 5, p. 25). She also had a ganglion cyst and small erosions, which are arthritic changes within the capitate as well as the triquetrum on the wrist. *Id*. Dr. Williams performed a cortisone injection. (Pet. Ex. 5, p. 26).

Dr. Williams next saw Petitioner on January 17, 2019. (Pet. Ex. 5, p. 26). She complained of pain in the right thumb. *Id*. She was very tender over the MCP joint of the thumb with swelling, and at that point, Dr. Williams performed a steroid injection in the right thumb. *Id*. Dr. Williams' diagnosis was localized primary osteoarthritis of the right hand, involving the MCP joint of the right thumb. (Pet. Ex. 5, p. 63). At this appointment, Dr. Williams did not provide any work restrictions or any causation opinion, and he told her she could follow up as needed. (Pet. Ex. 5, p. 64). No follow up appointment was scheduled at that time. *Id*.

Dr. Williams next saw Petitioner on April 22, 2019. (Pet. Ex. 5, p. 26). At that appointment, Petitioner said she was having left wrist pain, which she rated at two out of ten (2/10). (Pet. Ex. 5, p. 26, 65). Petitioner told Dr. Williams she had worked as a 911 dispatcher for 22 years. (Pet. Ex. 5, p. 26). At that point, Dr. Williams was concerned, as he had gotten new x-rays of both wrists, which showed Petitioner had positive ulnar variance. *Id*.

Dr. Williams was concerned that the MRI showed some erosion within the triquetrum, as well as with the central tearing of the TFCC, which can be found in cases of ulnocarpal impaction syndrome. (Pet. Ex. 5, p. 27). With that problem, it is important to note the ulnar variance of the

wrist. *Id*. Dr. Williams explained normally, the pressure seen by the radius in a neutral ulnar variance is eighty-five (85) percent, and the ulna sees fifteen (15) percent. *Id*. When the ulnar variance changes even two (2) millimeters, those pressures can change dramatically. *Id*. With positive ulnar variance, that pressure changes, and up to forty (40) percent of the pressure is seen on the ulnar side of the wrist with sixty (60) percent on the radial side of the wrist, so when she grabs something or picks something up or uses any force with that wrist, the pressure on the ulnar side of the wrist is dramatically increased which can lead to the erosions within the ulnar aspect of the wrist, namely being the ulnar aspect of the lunate and the triquetrum, which are the wrist bones on the ulnar side of the wrist. (Pet. Ex. 5, p. 27-28). This can lead to degeneration in the central portion of the TFCC and the synovitis which was seen in Petitioner's wrist. (Pet. Ex. 5, p. 28).

Dr. Williams testified Petitioner had three (3) millimeters of positive ulnar variance on the right side and two (2) millimeters of positive ulnar variance on the left. (Pet. Ex. 5, p. 28). Dr. Williams felt Petitioner's pain was a result of ulnocarpal impaction, and her left wrist injury and her pre-existing ulnocarpal impaction could have been aggravated throughout her work activities as a 911 dispatcher for twenty-two (22) years. *Id*. Dr. Williams explained the ulna is on the pinky side of the wrist. (Pet. Ex. 5, p. 28-29).

Dr. Williams testified April 22, 2019 was the last time he saw Petitioner. (Pet. Ex. 5, p. 29). At that time, his recommendation was for Petitioner to undergo ulnar shortening osteotomies. *Id*. The reason for this was, with the change in the biomechanics of the wrists due to her positive ulnar variance, by shortening the ulna, he could bring Petitioner's wrists back to neutral or negative ulnar variance, which would unload the pressure on the ulnar aspect of her wrists. (Pet. Ex. 5, p. 29-30). He said this would decrease her pain and decrease her chances of further worsening the arthritis on the ulnar sides of her wrists. *Id*.

Dr. Williams testified if Petitioner underwent the ulnar shortening osteotomy surgeries, she would be able to return to light duty work, typing only, in three or four weeks after surgery. (Pet. Ex. 5, p. 30-31). Return to full duty with no restrictions would be at approximately six months following surgery. (Pet. Ex. 5, p. 31). He opined Petitioner would reach maximum medical improvement about six months after surgery. *Id*. Dr. Williams did not recommend any work restrictions during the April 22, 2019 appointment. (Pet. Ex. 5, p. 66).

Dr. Williams testified he feels Petitioner's work duties over twenty-two (22) years did not cause her ulnocarpal impaction, but at least aggravated her ulnocarpal impaction in the left wrist. (Pet. Ex. 5, p. 32). He testified the first time he provided a causation opinion in this case was on April 22, 2019. (Pet. Ex. 5, p. 36-37). Dr. Williams also testified his surgical recommendations were related to Petitioner's work activities. (Pet. Ex. 5, p. 32).

Dr. Williams testified any type of activity which involved gripping, pinching, or lifting would be the type of activities which would aggravate Petitioner's pre-existing condition. (Pet. Ex. 5, p. 32). Dr. Williams testified the arthritis in Petitioner's thumb is a condition which could be aggravated by typing, pinching-type activities, and gripping-type activities. (Pet. Ex. 5, p. 76). However, Dr. Williams testified he did not have any information regarding how much, if any, gripping, pinching, or lifting Petitioner performed during her work for the City. (Pet. Ex. 5, p. 43, 78). He also testified he has no knowledge of how much typing Petitioner performed during her work for the City. (Pet. Ex. 5, p. 78). As of April 22, 2019, Dr. Williams had not reviewed Petitioner's job description. (Pet. Ex. 5, p. 37). He also had not reviewed any work hours history reports, photographs or descriptions of her work station, ergonomic assessments, or information regarding the number of reports she generated or the amount of typing, mouse clicks, or phone calls she performed at work. (Pet. Ex. 5, p. 45-47). He agreed none of his treating records indicate he had any discussion with Petitioner about her specific job duties. (Pet. Ex. 5, p. 37).

Dr. Williams agreed all relevant information regarding his examination of Petitioner on April 22, 2019 would be in his corresponding treatment note of April 22, 2019. (Pet. Ex. 5, p. 37). He acknowledged his treatment record from April 22, 2019, in the history portion of the note, says Petitioner presented with continued left wrist pain due to arthritis. (Pet. Ex. 5, p. 38). The note says Dr. Williams' assessment was that Petitioner had localized primary osteoarthritis of the left wrist. *Id*. Petitioner no longer had symptoms of de Quervain's tenosynovitis. *Id*. On April 22, 2019, Petitioner did not complain of any pain or symptoms in her right wrist. (Pet. Ex. 5, p. 39). Dr. Williams did not perform a physical examination of Petitioner's right wrist on April 22, 2019. (Pet. Ex. 5, p. 39-40).

On April 22, 2019, Dr. Williams recommended surgical intervention in the form of bilateral ulnar shortening osteotomies. (Pet. Ex. 5, p. 66-67). He clarified the term bilateral means he recommended the ulnar shortening osteotomy surgery on both Petitioner's left and right wrist. (Pet.

Ex. 5, p. 67). Dr. Williams testified this surgical recommendation was based on the history Petitioner provided on April 22, 2019, as well as his objective examination performed on April 22, 2019. *Id*. He acknowledged Petitioner only complained of left wrist pain at that appointment, which he noted was due to arthritis as well as ulnocarpal impaction. *Id*. He further testified, leading up to the April 22, 2019 appointment during which he made his surgical recommendation, the most recent date any of his treatment notes mention any complaints specifically of right wrist pain was the note of March 19, 2015. (Pet. Ex. 5, p. 68). Dr. Williams never gave Petitioner any work restrictions for her right upper extremity. *Id*.

Dr. Williams described an ulnar shortening osteotomy surgery, saying he makes an incision along the ulna, on the ulnar side of the forearm, and uses a device to take out a certain number of millimeters of bone, then uses plates and screws to put the bone back together. (Pet. Ex. 5, p. 68-69). Dr. Williams testified some risks involved with this surgery include persistent swelling and infection. (Pet. Ex. 5, p. 69). There is also a chance of non-union of the bone, which would then require another surgery. *Id*. Dr. Williams testified this operation rarely gives patients total pain relief. *Id*. He said if Petitioner was to have the surgeries, she would likely still have symptoms afterwards. (Pet. Ex. 5, p. 69-70). Dr. Williams testified it is possible someone with a history of multiple surgeries to both wrists and elbows, as well as surgery on to each of their hands, would have some residual symptoms as a result of those surgeries, but he did not feel Petitioner's present symptomology was the result of her surgical history. (Pet. Ex. 5, p. 70).

Dr. Williams testified ulnar variance and ulnocarpal impaction are non-occupational conditions which were not caused by Petitioner's work activities. (Pet. Ex. 5, p. 42, 44). Ulnar variance causes ulnocarpal impaction. (Pet. Ex. 5, p. 44). Dr. Williams testified ulnocarpal impaction is a degenerative condition. (Pet. Ex. 5, p. 43). He further testified ulnocarpal impaction is a condition which naturally gets worse over time for some people. *Id*. He said the degree of ulnar variance will not change, but some people's symptoms will worsen over time. (Pet. Ex. 5, p. 44. He said this degenerative condition usually involves eventual tearing of the TFCC, which was shown on Petitioner's MRI. (Pet. Ex. 5, p. 43).

Dr. Williams testified ulnar variance can develop naturally as a congenital condition or as a person's bones stop growing when he or she reaches skeletal maturity. (Pet. Ex. 5, p. 45). Females usually reach skeletal maturity in their wrists around the age of eighteen (18). *Id*. Dr. Williams

testified Petitioner has the same level of ulnar variance today as she did when she was approximately eighteen (18) years old. *Id*.

During Petitioner's treatment with Dr. Williams, she never complained of numbness or tingling in her fingers. (Pet. Ex. 5, p. 39). At no time during Petitioner's treatment with Dr. Williams did she ever suffer from carpal tunnel syndrome in either wrist. *Id*. He testified smoking is a non-occupational risk factor for any nerve problem, including carpal tunnel syndrome and cubital tunnel syndrome. (Pet. Ex. 5, p. 47). Dr. Williams testified, sometimes, ulnar variance problems can be due to growth arrest caused by a previous injury. (Pet. Ex. 5, p. 40). Dr. Williams testified he has never reviewed Petitioner's treating medical records or surgical reports from other providers she treated with prior to treating with him. (Pet. Ex. 5, p.42, 52).

Dr. Williams testified multiple times he had not seen Petitioner since April 22, 2019. (Pet. Ex. 5, p. 67, 71). However, he then testified he actually saw Petitioner on August 17, 2020. (Pet. Ex. 5, p. 71). Petitioner presented with continued wrist pain due to osteoarthritis. *Id*. Dr. Williams noted she was now having this problem in the right wrist worse than the left wrist. (Pet. Ex. 5, p. 72). Dr. Williams said he has no information as to the status of Petitioner's upper extremity symptoms at any time after August 17, 2020. *Id*. He testified since the time he started treating Petitioner for her upper extremities, she has not undergone any physical therapy or occupational therapy. (Pet. Ex. 5, p. 73). Dr. Williams testified he has no knowledge of any non-occupational activities Petitioner may enjoy, except that she enjoys walking. (Pet. Ex. 5, p. 73-74).

B. Testimony of Dr. Peter Hoepfner

Dr. Peter Hoepfner is a board-certified orthopedic surgeon with subspecialty training in hand and upper extremity surgery. (Resp. Ex. 5, p. 5, 7). About two (2) percent of his work is dedicated to workers' compensation. (Resp. Ex. 5, p. 11). He performs about sixty (60) percent of his IME exams for respondents and about forty (40) percent for Petitioners. (Resp. Ex. 5, p. 11-12).

Dr. Hoepfner testified he has regularly treated patients with ulnar variance and ulnocarpal impaction over his twenty (20) years as an orthopedic surgeon. (Resp. Ex. 5, p. 10). He explained in patients with ulnar positive variance, the ulna is just a little longer than the radius. *Id*. This is important because, as the patient bends her wrist side to side, the small bones of the wrist can experience microtraumas over time from hitting against the slightly longer ulna. *Id*.

Dr. Hoepfner saw Petitioner in his office for an Independent Medical Examination on June 4, 2020. (Resp. Ex. 5, p. 16). In conjunction with his Independent Medical Examination of Petitioner, Dr. Hoepfner reviewed a collection of records including a written job description, a work hours history report, a keystroke report and related computer aided dispatch reports, photographs of Petitioner's workstation, and medical records regarding Petitioner's medical treatment dating back to 1995, including surgical reports, imaging films, and previous IME reports from other doctors. (Resp. Ex. 5, p. 13, 15-16, 38).

On June 4, 2020, Petitioner provided a history. (Resp. Ex. 5, p. 16). Her chief complaints were bilateral forearm pain, bilateral hand swelling, and bilateral hand numbness and tingling. *Id*. Petitioner reported she was a fifty-seven (57) year old right-handed emergency telecommunicator for the City. *Id*. She had been working in this position for approximately twenty-three (23) years. *Id*. At her workstation, she wore a headset. *Id*. She had an adjustable keyboard with medical cards which were used to answer medical questions from callers. *Id*. Petitioner described her job duties to Dr. Hoepfner as office sedentary-type work involving typing, stapling, filing, data entry, customer service work, and answering phone calls. (Resp. Ex. 5, p. 17-18). Based on his review of Petitioner's written job description, as well as the verbal description Petitioner provided of her job duties, Dr. Hoepfner testified her job duties did not involve a significant amount of gripping, pinching, or lifting. (Resp. Ex. 5, p. 18-19). Dr. Hoepfner further testified Petitioner's work did not require sustained forceful wrist flexion, wrist extension, squeezing, or gripping. (Resp. Ex. 5, p. 19). Petitioner denied tobacco use. (Resp. Ex. 5, p. 23).

Dr. Hoepfner testified Petitioner had previously undergone three right carpal tunnel release surgeries and two left carpal tunnel release surgeries. (Resp. Ex. 5, p. 20). She had also undergone bilateral cubital tunnel surgeries, bilateral epicondylar releases, and bilateral trigger thumb surgeries. *Id*. Petitioner underwent some of these surgeries prior to beginning her employment with the City. (Resp. Ex. 5, p. 63).

Petitioner reported she developed symptoms in April of 2018. (Resp. Ex. 5, p. 17). During a medical call, she reached above her shoulder, using her left arm, to grab the medical card book when her left arm was in a supinated position. *Id*. At that time, she experienced pain in her left arm. *Id*. Petitioner estimated the medical card book weighed fifteen (15) pounds. (Resp. Ex. 5, p. 18). Approximately one week later, she saw her doctor and reported her forearm was aching. *Id*.

She was referred to Dr. Williams, who she saw in October of 2018. (Resp. Ex. 5, p. 17). Petitioner further provided a history stating Dr. Williams ultimately recommended she undergo bilateral carpal tunnel release surgeries and bilateral wrist bone shortening procedures. (Resp. Ex. 5, p. 18).

Dr. Hoepfner reviewed an MRI which was performed on December 7, 2018. (Resp. Ex. 5, p. 20). The findings revealed a center perforation, likely degenerative, of the triangular fibrocartilage complex with synovitis over the ulnar side of the wrist, some fluid distending the distal radiolunar joint, fenestration and partial thickness tearing of the scaphoid limb of the scapholunate ligament, a ganglion cyst over the volar aspect of the wrist at the level of the capitate, and early erosive arthropathy affecting the triquetrum and the capitate. (Resp. Ex. 5, p. 19-20). Dr. Hoepfner testified the findings regarding the triangular fibrocartilage complex are degenerative and unrelated to Petitioner's work. (Resp. Ex. 5, p. 21). He explained the triangular fibrocartilage complex is on the ulnar side, or pinky side, of the wrist, and overlies the head of the ulna. *Id*. Dr. Hoepfner testified the finding of early erosive arthropathy of the triquetrum is also degenerative and unrelated to Petitioner's employment. (Resp. Ex. 5, p. 21-22). The triquetrum is also on the ulnar side of the wrist. (Resp. Ex. 5, p. 22). Dr. Hoepfner opined these findings could cause Petitioner to have pain or discomfort in the ulnar aspect of her wrist. *Id*. Dr. Hoepfner also testified these degenerative findings might naturally get worse over time. *Id*.

On June 4, 2020, Dr. Hoepfner performed X-rays of Petitioner's right and left wrists. (Resp. Ex. 5, p. 23). The X-rays revealed two (2) millimeters of ulnar positive variance in both wrists. *Id*. Some arthritic changes were seen in the thumb. (Resp. Ex. 5, p. 24). There was no evidence of a lunate cyst forming. (Resp. Ex. 5, p. 23). Dr. Hoepfner explained the absence of a lunate cyst is notable because, in advanced cases of ulnocarpal impaction, large cysts can form in the lunate. (Resp. Ex. 5, p. 24).

Dr. Hoepfner performed a physical examination of Petitioner's bilateral upper extremities, from her neck down to her finger tips. (Resp. Ex. 5, p. 24). In the elbows, Petitioner had a mildly positive elbow flexion test on the right side. (Resp. Ex. 5, p. 25). She had no pain over the medial or lateral epicondyles in either elbow. *Id*. In the forearms, Petitioner had some tenderness over the first dorsal compartment in both the right and left wrist. *Id*. A Finkelstein's test for de Quervain's tendonitis was negative in both wrists. *Id*. There was no carpal instability. *Id*. There was mild tenderness over the TFCC bilaterally. *Id*. The ulnar grind test was negative bilaterally. *Id*. There

was no instability with testing of the ligaments on the ulnar side of the wrist. *Id*. Dr. Hoepfner performed provocative tests for carpal tunnel syndrome, and there was only mild tenderness over the median nerve and Tinel's sign at both wrists. (Resp. Ex. 5, p. 25-26). There was tenderness over the right middle finger A1 pulley and mild tenderness over the left middle finger A1 pulley. (Resp. Ex. 5, p.26).

Petitioner's grip strength was forty-two (42) pounds on the right and forty-seven (47) pounds on the left. (Resp. Ex. 5, p. 25). Her rapid exchange grip strength was sixty-five (65) pounds bilaterally. *Id*. Given the dramatic difference between Petitioner's static grip strength and her rapid exchange grip strength, Dr. Hoepfner identified she provided sub-maximal effort during the static grip strength testing. *Id*.

Dr. Hoepfner testified Petitioner did not put forth a full effort during her physical examination testing, based on the rapid exchange grip strength test. (Resp. Ex. 5, p. 26). He explained Petitioner was first asked to squeeze a grip strength meter once to measure static grip strength. *Id*. Later in the exam, she was then asked to perform grip strength testing again, but alternating quickly from one side to the next, grabbing the meter five times on each side. *Id*. He encouraged her to use her best effort each time. *Id*. Petitioner provided substantially higher grip strength with the rapid exchange testing. (Resp. Ex. 5, p. 26-27). Dr. Hoepfner explained studies show it is more difficult for patients to feign weakness in their hands during rapid exchange grip strength testing. *Id*. Petitioner's results suggested she did not provide maximum effort during the static grip strength testing. (Resp. Ex. 5, p. 27). During a previous Independent Medical Examination Petitioner attended with Dr. Robert Schenck on April 30, 2008, Dr. Schenck also noted Petitioner did not provide a full and valid effort during her physical examination. (Resp. Ex. 5, p. 95).

Dr. Hoepfner testified Petitioner showed signs of symptom magnification during his examination. (Resp. Ex. 5, p. 27). Dr. Hoepfner also felt Petitioner's subjective history was not consistent with the objective findings. *Id*. He opined Petitioner's subjective complaints of severe wrist pain were out of proportion to her objective exam findings, which were relatively minor. *Id*. Petitioner had full range of motion and full strength in her upper extremities. (Resp. Ex. 5, p. 28). Dr. Hoepfner's objective examination did not reveal any functional deficits in Petitioner's upper extremities. *Id*.

Dr. Hoepfner testified, at the time of his examination of Petitioner, she did not have any specific diagnosis affecting her hands, other than being status post multiple prior surgeries. (Resp. Ex. 5, p. 29). There were no specific localized substantial anatomic deficits or findings on her exam other than minor discomfort in multiple locations, which one would expect after having upwards of ten (10) surgeries involving her upper extremities. *Id*. Dr. Hoepfner noted Petitioner had positive ulnar variance and low-grade arthritis. *Id*.

Dr. Hoepfner testified Petitioner's ulnar variance was not caused or aggravated by her employment for the City. (Resp. Ex. 5, p. 29-30). He further testified the symptoms Petitioner reported were not causally related to her employment for the City. (Resp. Ex. 5, p. 30). Dr. Hoepfner testified Petitioner's bilateral ulnocarpal impaction was not aggravated by her work activities as a 911 dispatcher for twenty-two (22) years. *Id*. Dr. Hoepfner opined Petitioner's job duties did not require sufficient forceful use of her hands to aggravate her ulnocarpal impaction. (Resp. Ex. 5, p. 65-66). Based on the mechanism Petitioner described and the amount of force involved, Dr. Hoepfner further testified Petitioner's bilateral ulnocarpal impaction was not aggravated by the twisting injury alleged to have occurred in April of 2018 while retrieving the medical cards. (Resp. Ex. 5, p. 31). Dr. Hoepfner testified the treatment Petitioner has received to this point has not been related to her employment for the City. (Resp. Ex. 5, p.33). He further testified the surgeries proposed by Dr. Williams are not related to Petitioner's employment for the City. (Resp. Ex. 5, p. 33-34). Dr. Hoepfner testified Petitioner's employment for the City did not cause or aggravate her wrist tendonitis, trigger fingers, or arthritis. (Resp. Ex. 5, p. 41-42).

Dr. Hoepfner testified ulnocarpal impaction is the type of condition which could be aggravated by activities of daily life requiring more vigorous use of the hands, such as yard work, mowing, or lifting heavy boxes weighing over forty (40) to fifty (50) pounds. (Resp. Ex. 5, p. 32-33).

Dr. Hoepfner testified the likelihood of success would be very low in regard to Petitioner undergoing any further surgeries on her wrists and hands. (Resp. Ex. 5, p. 34). In his entire career as a treating physician, he has never performed so many surgeries on a single patient as Petitioner has undergone for her upper extremities. *Id*. Dr. Hoepfner said he would be very hesitant in regard to Petitioner undergoing any further surgeries for what he considered to be a relatively mild presentation of ulnocarpal impaction syndrome. *Id*. He testified he most recently

treated a patient with five (5) millimeters of ulnar positive variance with extreme symptoms, and he felt patients for this operation need to be selected very carefully *Id*. Dr. Hoepfner normally reserves the ulnar shortening surgery for patients with a greater degree of ulnar variance than the variance in Petitioner's wrists, as well as more severe symptoms than the symptoms Petitioner reported. (Resp. Ex. 5, p. 62).

Dr. Hoepfner described the ulnar shortening surgery, saying it involves essentially taking a wedge of bone out with a saw, then pulling the bone back together and placing a plate and screws in order to change the shape and length of the ulna to create a more anatomic alignment. (Resp. Ex. 5, p. 34-35). Risks of this surgery include infection, hardware failure, and failure of the bone to heal. (Resp. Ex. 5, p. 35). If the bone fails to heal properly, a fair number of patients experience a "nonunion", which then requires a revision surgery. *Id*. There is also a risk of neuroma as well as a risk of irritation and pain associated with the presence of hardware. (Resp. Ex. 5, p. 34-35).

Dr. Hoepfner testified he does not believe the proposed surgeries would eliminate, or even significantly reduce, Petitioner's symptoms. (Resp. Ex. 5, p. 36). He would not recommend any further surgery. *Id*.

Dr. Hoepfner is certified to provide impairment ratings. (Resp. Ex. 5, p. 36). He provided an impairment rating of zero (0) percent in regard to Petitioner's upper extremities. *Id*. He testified Petitioner has had likely ten (10) different diagnoses which have affected her hands, but the surgeries she has undergone have not resulted in any lack of motion or asymmetry in her strength. (Resp. Ex. 5, p. 36-37). She has no functional impairment, despite the surgeries she has undergone and the subjective complaints she describes. (Resp. Ex. 5, p. 37).

Dr. Hoepfner did not see Petitioner again after his June 4, 2020 Independent Medical Examination. (Resp. Ex. 5, p. 59). He did not have any awareness of what work duties Petitioner may have performed after June 4, 2020. *Id*.

C. Testimony of Dr. Lawrence Li

Dr. Lawrence Li is a board-certified orthopedic surgeon who focuses on shoulders, hands, and knees. (Pet. Ex. 4, p. 6). He saw Petitioner for an Independent Medical Examination on November 9, 2020. (Pet. Ex. 5, p. 7). He said he would be testifying from his IME report in this

matter. (Pet. Ex. 5, p. 8). Dr. Li testified his IME report is a summary of all the important information regarding his November 9, 2020 examination of Petitioner. (Pet. Ex. 5, p. 16). He agreed having a complete and accurate patient history would be important to him in forming his diagnosis, causation opinion, and treatment recommendation. *Id*. Dr. Li did not review the records regarding any of Petitioner's treatment occurring prior to February 1, 2007. (Pet. Ex. 5, p. 19). Dr. Li did not review a written job description. *Id*. He relied on Petitioner's subjective representations as to her job duties. *Id*.

Petitioner provided a history to Dr. Li on November 9, 2020, stating she was fifty-seven (57) years old and had worked as a dispatcher for the City for twenty-four (24) years. (Pet. Ex. 5, p. 10). She was right-handed. *Id*. She had a long history of bilateral upper extremity conditions, including multiple carpal tunnel surgeries bilaterally, bilateral trigger thumb releases, bilateral lateral epicondyle releases, and bilateral cubital tunnel releases. *Id*. She reported in May of 2018, she twisted her left wrist while pulling an end book. *Id*. Dr. Li testified he has no knowledge as to the weight of the end book. (Pet. Ex. 5, p. 24). Petitioner did not provide him with any description of the end book. *Id*. Petitioner further reported Dr. Williams diagnosed her with de Quervain's tendinitis and performed a cortisone injection. (Pet. Ex. 5, p. 10). She got relief from the de Quervain's pain, but has had persistent pain over the ulnar aspect of the wrist. *Id*. Dr. Williams diagnosed her with pre-existing ulnocarpal impaction, aggravated by her work activities, and recommended ulnar shortening surgery. *Id*.

At the time Dr. Li saw Petitioner, her complaints consisted of left wrist pain in distal ulna, radiating into her elbow, as well as first CMC joint pain. (Pet. Ex. 5, p. 11). Dr. Li testified Petitioner had a pre-existing condition of positive ulnar variance. *Id*. As a result of the relatively long ulna, she has ulnocarpal impaction. (Pet. Ex. 5, p. 17). The ulnocarpal impaction is also a pre-existing condition, unrelated to Petitioner's employment. (Pet. Ex. 5, p. 18). Dr. Li testified Petitioner denied a history of smoking tobacco. *Id*. Petitioner was working full duty at the time of the examination. (Pet. Ex. 5, p. 11). Dr. Li testified he did not have any knowledge as to what non-occupational activities Petitioner participates in. (Pet. Ex. 5, p. 33).

Dr. Li noted Petitioner's significant past history included multiple prior upper extremity surgeries, but he opined none of those surgeries relate to the current complaints. (Pet. Ex. 5, p. 12).

He further testified, in spite of all the multiple problems Petitioner has in her upper extremities, this problem is independent of those. *Id*.

Dr. Li performed a physical examination, which revealed tenderness over the right first CMC joint and over the distal ulna. (Pet. Ex. 5, p. 12, 20). She had no significant swelling in the wrist. (Pet. Ex. 5, p. 12). She had decreased two-point discrimination in both the median and ulnar nerve distributions. *Id*. Her range of motion was equal in both wrists. *Id*. She had no tenderness over the left CMC joint, but exquisite tenderness over the TFC and distal ulna. *Id*. She had decreased sensation in the median nerve distribution and intact sensation in the ulnar nerve distribution. *Id*. Dr. Li opined the decreased sensation was due to her previous carpal tunnel and cubital tunnel nerve surgeries and not related to the alleged injuries. (Pet. Ex. 5, p. 13). Dr. Li did not perform any provocative testing other than palpating the CMC joints. (Pet. Ex. 5, p. 20).

Dr. Li reviewed the MRI report corresponding to an MRI performed on December 7, 2018. (Pet. Ex. 5, p. 13). He testified the MRI report showed TFC synovitis, a tear of the TFC, and a partial tear in the scapholunate ligament without instability. *Id*.

Dr. Li testified he believes Petitioner's current problems stem from her ulnar impaction syndrome and also stem from her TFC, which is also connected to the ulna. (Pet. Ex. 5, p. 13). He further testified Petitioner had a pre-existing long ulna, but it was aggravated by the April, 2018 accident. *Id*. He testified treatment Petitioner had received to date was reasonable and necessary. (Pet. Ex. 5, p. 14).

Dr. Li testified smoking negatively affects healing in any surgical condition. (Pet. Ex. 5, p. 22). He further testified Petitioner has undergone multiple surgeries on both of her elbows and both of her wrists, as well as a surgery on each of her thumbs. (Pet. Ex. 5, p. 25). Dr. Li testified her past surgical history may be related to her current complaints, but those complaints would be independent of the ulnocarpal impaction. (Pet. Ex. 5, p. 27).

Dr. Li testified Petitioner's ulnocarpal impaction was aggravated by her specific work injury involving pulling down the end book. (Pet. Ex. 5, p. 23). He further testified Petitioner's ulnocarpal impaction was not aggravated by her other work as a dispatcher. *Id*. He testified her condition was not aggravated by talking on the phone and typing. *Id*. Dr. Li did not believe repetitive trauma was an aggravating factor to Petitioner's wrists. (Pet. Ex. 5, p. 23-24). Dr. Li opined any alleged repetitive trauma unrelated to the end book incident was not an aggravating factor of Petitioner's

ulnocarpal impaction. (Pet. Ex. 5, p. 25). Dr. Li did not provide any opinion relating Petitioner's right wrist injury to her employment. (Pet. Ex. 5, p. 24). Dr. Li agreed ulnocarpal impaction could be aggravated by non-occupational activities. (Pet. Ex. 5, p. 32-33). Nevertheless, Dr. Li testified Petitioner's pre-existing ulnar variance could not have necessitated medical treatment, including potential surgical fixation, unless she aggravated the condition at work. (Pet. Ex. 5, p. 33).

Dr. Li recommended Petitioner undergo a left wrist arthroscopy, ulnar shortening, and post-operative therapy for three to four months. (Pet. Ex. 5, p. 14). He testified possible complications of this surgery include persistent swelling and stiffness, infection, and nerve damage. (Pet. Ex. 5, p. 28). He agreed this operation rarely gives patients total pain relief, and Petitioner would likely still have symptoms even after surgery. (Pet. Ex. 5, p. 29).

Dr. Li testified Petitioner had failed conservative treatment. (Pet. Ex. 5, p.14). He said this opinion was based on Petitioner's subjective pain complaints. (Pet. Ex. 5, p. 33). He further testified Petitioner did not need any work restrictions. *Id*. He said she has not reached maximum medical improvement. (Pet. Ex. 5, p. 14-15). He also opined Petitioner has not suffered any permanent impairment as a result of the injury which is the subject of this case. (Pet. Ex. 5, p. 24). Dr. Li did not recommend Petitioner undergo any surgery for her right wrist. (Pet. Ex. 5, p. 26). Dr. Li has not seen Petitioner or reviewed any additional medical treatment records since November 9, 2020, and does not have any information as to the current status of her symptoms. (Pet. Ex. 5, p. 34).

V. Petitioner's Previous Workers' Compensation Claims

Petitioner has previously filed multiple workers' compensation claims regarding injuries to her hands, wrists, and arms. (Resp. Ex. 13, p. 1-4, Pet. Ex. 14, p. 1-14). Workers' compensation case number 95-WC-003839 was filed on January 24, 1995, alleging injuries to the left and right hands. (Resp. Ex. 13, p. 1). A settlement contract was approved on February 19, 1996, awarding Petitioner fifteen (15) percent loss of use of her left hand and fifteen (15) percent loss of use of her right hand. (Resp. Ex. 13, p. 2). Workers' compensation case number 14-WC-024827 was filed on July 24, 2014, alleging injuries to the right hand and right arm. (Resp. Ex. 13, p. 3). A settlement contract was approved on December 20, 2017, awarding Petitioner four and a half (4.5) percent loss of use of the right hand. (Resp. Ex. 13, p. 4).

Workers' compensation case number 08-WC-017751 was filed April 22, 2008, alleging injury to the right and left arms and hands. (Resp. Ex. 14). The case was arbitrated on September 27, 2011. (Resp. Ex. 14, p. 2). The arbitrator found Petitioner did not sustain an accident that arose out of and in the course of employment, and her condition of ill-being was not causally related to her alleged work accident. (Resp. Ex. 14, p. 2-3). Petitioner's claim for compensation was denied. (Resp. Ex. 14, p. 13). The Arbitrator's Decision was appealed to the Illinois Workers' Compensation Commission. (Resp. Ex. 14, p. 1). The Commission affirmed and adopted the Decision of the Arbitrator. (Resp. Ex. 14, p. 1). The arbitration Decision, affirmed and adopted by the Commission, found Petitioner lacked credibility, stating as follows:

> Petitioner's credibility should be called into question due to her continued and unpervasive [sic] statements at arbitration that her medical providers' records were inaccurate with regard to her statements to them. Simply put, an error by one of the physicians may be explainable, but Petitioner's testimony indicated that her physicians made a continual stream of errors in their records relating to the history which Petitioner provided to them. The idea that her own treating physicians made all of these errors relating to Petitioner's history calls into question the Petitioner's credibility. With her credibility in doubt, the Petitioner's statements regarding her level of function, her symptoms, her pain and her recitation of her medical history must be disregarded. Petitioner's lack of credibility is supported by her failure to disclose to Dr. Garst an accurate history with regard to her upper extremity problems. Also, Dr. Garst specifically testified that the Petitioner's credibility is shaky given her failure to disclose to him Dr. Stedwill's EMG/NCV test results, her recitation to Dr. Below of a prior elbow trauma, and her consistent violation of her work restrictions. (Resp. Ex. 14, p. 13. *Lane v. City of Peoria*, 08 IL.W.C. 17751 (Ill.Indus.Com'n), 12 I.W.C.C. 1073, 2012 WL 5878713).

CONCLUSIONS OF LAW

In support of the Arbitrator's Decision relating to (C). Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? and (F). Is Petitioner's current condition of ill-being causally related to the injury?, the Arbitrator finds the following:

Under the Illinois Workers' Compensation Act, Petitioner has the burden of establishing she suffered an accident arising out of and in the course of employment by a preponderance of the evidence. *Great American Indemnity Co. v. Industrial Com'n.*, 367 Ill. 241 (1937). The words "arising out of" refer to the origin or cause of the accident and are descriptive of its character,

while the words "in the course of" refer to the time, place and circumstances under which the accident occurs. *Vincennes Bridge Co. v. Industrial Com'n.*, 351 Ill. 444 (1933). Both elements must be present at the time of the injury in order to justify compensation. *Borgeson v. Industrial Com'n.*, 368 Ill. 188 (1938).

The causal relationship between Petitioner's current condition of ill-being and the alleged April 12, 2018, and April 22, 2019, accidents was also placed at issue by the parties. Petitioner bears the burden to prove, by a preponderance of evidence, her conditions are causally related to the alleged work accidents. *Hansel & Gretel Day Care Center v. Industrial Com'n*, 215 Ill. App. 3d 284 (1991). A complete review of the evidence establishes Petitioner failed to meet his burden.

With regard to the alleged April 22, 2019, accident, the Arbitrator finds Petitioner failed to meet her burden of establishing an accident occurred, by a preponderance of the evidence. This conclusion is supported by the medical records in evidence and the testimony of Dr. Hoepfner and Dr. Li.

Petitioner has failed to meet her burden in regard to proving her alleged work injuries of April 12, 2018, and April 22, 2019, were causally related to her employment for the City.

It is undisputed Petitioner has pre-existing, degenerative conditions of ulnar variance and ulnocarpal impaction in her bilateral wrists. It is also undisputed these conditions are not caused by Petitioner's employment for the City. Petitioner's treating medical records show a long and substantial history of injuries, conditions, surgeries, and other treatment to her bilateral wrists, dating back as far as 1987. Over the years, Petitioner has undergone three surgeries on the right wrist, two surgeries on the left wrist, two surgeries on the right elbow, two surgeries on the left elbow, one surgery on the right thumb, one surgery on the left thumb, and at least one surgery on the right shoulder. Petitioner complained to her treating physicians regarding symptoms in her wrists and/or hands in 1987, 1988, 1995, 2004, 2008, 2009, 2010, 2011, 2012, 2014, 2015, 2016, 2017, and in 2018 prior to her first alleged accident date. This pattern of symptoms and treatment is indicative of a degenerative condition progressing naturally over time more so than an acute aggravation in April of 2018 or twenty-two (22) years of employment aggravating a pre-existing condition.

Petitioner's treating doctor, Dr. Williams, testified symptoms resulting from ulnar variance will naturally get worse over time for some people. Dr. Hoepfner, who performed an Independent

Medical Examination, also testified the conditions seen in Petitioner's wrist are of the type which might get naturally worse over time. Dr. Hoepfner testified, at the time of his examination of Petitioner, she did not have any specific diagnosis affecting her hands, other than being status post multiple prior surgeries. He found Petitioner had no specific localized substantial anatomic deficits or findings on her exam other than minor discomfort in multiple locations, which would be expected after undergoing more than ten (10) surgeries involving her upper extremities. Dr. Williams and Dr. Li both testified it is possible a person with Petitioner's surgical history might have some residual symptoms as a result of those prior surgeries.

The Arbitrator finds significant the MRI of December 7, 2018, which, among other findings, showed a central perforation, likely degenerative, of the triangle fibrocartilage complex, fenestration versus partial-thickness tearing of the scaphoid limb of the scapholunate ligament, small triquetrum and capitate erosions, and early erosive arthropathy. Dr. Hoepfner and Dr. Williams both testified these findings were degenerative and not related to Petitioner's employment for the City. Dr. Williams testified ulnocarpal impaction is a degenerative condition which usually involves eventual tearing of the TFCC, which was shown on Petitioner's MRI. Dr. Hoepfner testified the triangular fibrocartilage complex is on the ulnar side of the wrist and overlies the head of the ulna, and the triquetrum is also on the ulnar side of the wrist. Dr. Hoepfner opined the findings regarding the TFCC and the triquetrum were the type of findings which could cause pain or discomfort in the ulnar aspect of the wrist, and he further testified these degenerative findings might naturally get worse over time. Dr. Li opined some of Petitioner's symptoms are related to her previous surgeries. Dr. Li testified Petitioner's symptoms stemmed from her ulnocarpal impaction and also from the findings seen in the triangular fibrocartilage complex. The Arbitrator finds it significant that Petitioner's right wrist MRI, performed on December 19, 2014, prior to either of her alleged work injuries, showed fraying of the body and ulnar-sided attachments of the triangular fibrocartilage with synovitis along the ulnar capsule. The evidence regarding these MRI findings further suggests Petitioner's symptoms are caused by the natural progression of her pre-existing degenerative condition.

The Arbitrator finds Petitioner is not credible regarding these claims. First, Petitioner's subjective reports of symptoms were inconsistent. After her first alleged injury, when Petitioner sought treatment with Dr. San German on April 27, 2018, she reported left arm pain and was found to be tender over her left elbow and forearm. Dr. San German provided a diagnosis of tendonitis

of the elbow or forearm. On July 11, 2018, she told Dr. San German her left forearm pain radiated into her thumb as well as up to the biceps. When she then sought treatment with Dr. Williams on October 3, 2018, she complained of pain over the lateral aspect of the left wrist. Dr. Williams testified, during his treatment of Petitioner, she never complained of numbness or tingling. When she saw Dr. Hoepfner, Petitioner complained of bilateral hand numbness and tingling. When she saw Dr. Li, Petitioner complained of left wrist pain in distal ulna, radiating into her elbow. Dr. Li and Dr. Hoepfner both testified Petitioner denied a history of tobacco use, even though her medical records show she smoked a pack and a half of cigarettes per day for thirty-eight (38) years, before quitting in 2017.

Petitioner's credibility is further called into question by the objective examination performed by Dr. Hoepfner. During this examination, Petitioner provided substantially higher grip strength with the rapid exchange grip strength testing, compared to static grip strength testing. Dr. Hoepfner testified this is an indication Petitioner was feigning weakness during the static grip strength test. He felt she did not put forth a full effort, and there was an element of symptom magnification. Dr. Hoepfner's IME Report stated Petitioner was also found to have not provided a full and valid effort during a physical examination she underwent during a previous Independent Medical Examination with Dr. Robert Schenck on April 30, 2008.

Additionally, at arbitration Petitioner testified the 911 tablet which she claims caused her left wrist injury of April 12, 2018 weighed fifteen (15) to twenty (20) pounds. Her supervisor, Mr. Blayney, testified he weighed the 911 tablet with a postage scale, and the true weight is five (5) pounds and three (3) ounces. Petitioner testified she told Dr. Williams the 911 tablet weighed fifteen (15) to twenty (20) pounds, but Dr. Williams testified Petitioner did not tell him how much the 911 tablet weighed. He further testified he could only speculate as to what a 911 tablet actually is. Petitioner also testified she described her job duties to Dr. Williams, but Dr. Williams testified none of his treating records indicate he had any discussion with Petitioner about her specific job duties.

Petitioner testified she had never been disciplined for use of her personal laptop prior to the time she filed her workers' compensation claim for her alleged April, 2018 work accident. However, her testimony shows the described discipline was issued to Petitioner on June 8, 2018. Petitioner's first Application for Adjustment of Claim in regard to the alleged April, 2018 work

accident was not filed until May 7, 2019. Petitioner was not forthcoming about the reason she was disciplined on June 8, 2018. She initially testified she was disciplined for having her personal laptop out on her desk. She then admitted this was not the reason for the discipline, as she was allowed to have her laptop on her desk. Still, Petitioner did not agree she was disciplined because her attentiveness to her laptop causing her to be less attentive to her work duties. She then reviewed the letter of suspension she received on June 8, 2018, and admitted the subject line of the letter said "Inattentiveness to duties, delays in dispatch of emergency calls", the first two paragraphs described issues she was having regarding delays in handling incoming calls, and the fourth paragraph stated, "I believe you were distracted with your electronic devices and did not notice the calls for service holding in each case."

Finally, as to Petitioner's credibility, the Arbitrator finds it significant that Petitioner was found to be non-credible by the Arbitrator and the Commission in regard to her previous workers' compensation claim, due to her testimony claiming her medical providers made a continual stream of errors in their records relating to the history she provided them, her failure to disclose an accurate history to her treating doctor, and her consistent violation of her work restrictions. Her own treating physician in that case testified her credibility was shaky. With Petitioner's credibility in doubt, the Arbitrator and the Commission found her statements regarding her level of function, her symptoms, her pain, and her recitation of her medical history had to be disregarded. In regard to the immediate claims, Petitioner's credibility remains questionable.

The Arbitrator finds the opinions of Dr. Hoepfner should be given greater weight than the opinions of Dr. Williams or Dr. Li. In forming his opinions, Dr. Hoepfner reviewed a written job description, a work hours history report, a keystroke report and related computer aided dispatch reports, photographs of Petitioner's workstation, and medical records regarding Petitioner's medical treatment dating back to 1995, including surgical reports and imaging films. Dr. Williams testified he never reviewed Petitioner's treating medical records or surgical reports from other providers she treated with prior to treating with him. Dr. Williams also did not review a written job description, work hours history report, photographs of Petitioner's workstation, or any information regarding the number of reports she generated or the amount of typing she performed at work. Dr. Williams agreed none of his treating records indicate he had any discussion with Petitioner about her specific job duties. Dr. Li reviewed medical records dating back only as far as February 1, 2007. He did not review a written job description.

Dr. Williams testified activities which involved gripping, pinching, or lifting would be the type of activities which could aggravate Petitioner's pre-existing condition. However, Dr. Williams testified he did not have any information regarding how much, if any, gripping, pinching, or lifting Petitioner performed during her work for the City. Mr. Blayney, who supervised Petitioner and also used to be an emergency communications telecommunicator himself, testified the job duties did not involve any forcible gripping, any pinching, or any forceful use of the hands at all. Mr. Blayney testified Petitioner's job never required her to lift anything heavy. The heaviest thing she would have ever been required to lift would be the EMD medical cards, which weighed five (5) pounds and three (3) ounces, and she did not have to lift these cards for every call she answered. Dr. Hoepfner testified, based on both a written job description and Petitioner's own subjective description of her job duties, her duties did not involve a significant amount of gripping, pinching, lifting, squeezing, or sustained forceful wrist flexion or extension.

Further, the opinions of Dr. Williams and Dr. Li conflict with one another. Dr. Williams testified Petitioner's left wrist injury and her pre-existing ulnocarpal impaction could have been aggravated by her work activities as a 911 dispatcher for twenty-two (22) years. However, Dr. Li testified Petitioner's ulnocarpal impaction was not aggravated by her work duties as a dispatcher. Dr. Li did not believe repetitive trauma was an aggravating factor to Petitioner's wrists. While Dr. Williams recommended bilateral ulnar shortening surgeries, Dr. Li only recommended surgery for the left wrist. Dr. Li also did not provide any opinion relating Petitioner's alleged right wrist injury to her employment.

In regard to Petitioner's alleged left wrist injury of April 12, 2018, the Arbitrator finds the alleged mechanism of injury did not involve sufficient force to aggravate Petitioner's pre-existing ulnocarpal impaction. Petitioner had a long, substantial history of complaints in her left wrist prior to this alleged work accident. While Petitioner testified the EMD book weighed fifteen (15) to twenty (20) pounds, Mr. Blayney weighed the book and found it only weighed five (5) pounds and three (3) ounces. Petitioner testified she told Dr. Williams the EMD book weighed fifteen (15) to twenty (20) pounds, but Dr. Williams denied being told the weight of the EMD book. Therefore, Dr. Williams' opinion that grabbing the EMD book aggravated Petitioner's condition is either based on false information or lacking foundational knowledge. Dr. Hoepfner testified even if the EMD book weighed fifteen (15) pounds, the mechanism of injury described by Petitioner was insufficient to aggravate her condition.

The Arbitrator also finds significant the fact Petitioner did not seek treatment until more than two (2) weeks after the alleged accident. When she did seek treatment on April 27, 2018, Dr. San German found no significant swelling. When Petitioner followed up on July 11, 2018, she complained of forearm tenderness with radiation into the thumb. This history is inconsistent with an acute injury or aggravation to the ulnar/pinky side of the wrist.

In regard to Petitioner's alleged bilateral repetitive trauma injuries of April 22, 2019, Petitioner has the burden of proving her injury was work related and not the result of a normal degenerative aging process or the result of some other non-work-related condition. *Peoria County Belwood Nursing Home v. Industrial Com'n*, 115 Ill.2d 524, 530. The Arbitrator finds Petitioner has not met this burden.

Petitioner's job duties did not require sufficient forceful use of her hands to aggravate her ulnocarpal impaction or any of the other pre-existing degenerative conditions present in her wrists. Based on Petitioner's own subjective description of her job duties reported to Dr. Hoepfner, Petitioner's job duties were sedentary office-type duties, involving typing, stapling, filing, data entry, and answering phone calls.

Dr. Williams testified the pre-existing conditions in Petitioner's wrist could be aggravated by gripping, pinching or lifting. However, he admitted he had no information as to how much, if any, gripping, pinching, or lifting Petitioner performed at work. Mr. Blayney testified her job duties did not require any forcible gripping, any pinching, or any forceful use of the hands at all, and she was never required to lift anything heavier than the EMD book which weighed approximately five pounds. Dr. Hoepfner also testified, based on both a written job description and Petitioner's subjective description of her job duties, her work did not involve a significant amount of gripping, pinching, lifting, squeezing, or sustained forceful wrist flexion or extension.

Further, Petitioner testified she spent ten (10) to fifteen (15) percent of her workday using her personal laptop for non-work-related activities. Mr. Blayney estimated, based on his own experience performing Petitioner's job as well as his observations of Petitioner as her supervisor, she spent about twenty (20) percent of her workday actually typing on her work computer. Petitioner had a gel wrist rest on her work computer, which she testified helped in reducing her wrist issues. She did not have a wrist rest on her personal laptop. Petitioner's use of her personal laptop during work hours was so pervasive, she was disciplined in June of 2018 for inattentiveness

to her duties and delays in dispatch of emergency calls due to being distracted by her personal electronic devices. None of the three doctors who testified in this case provided an opinion that typing aggravated Petitioner's ulnar variance or ulnocarpal impaction syndrome.

Finally, after retiring from her employment with the City, Petitioner worked as a delivery driver for UPS, carrying many packages, weighing up to thirty (30) pounds, without the use of any moving equipment. Petitioner testified she never felt better physically in her entire life than while working for UPS in this capacity. As of the time of arbitration, Petitioner worked for Sam's Club, where she performs cashier duties, including lifting items weighing up to twenty (20) pounds, operating a cash register with her hands, and operating a scanning gun which requires her to pinch a trigger. Throughout her employment for UPS and Sam's Club, Petitioner has not required any work restrictions and has not missed any time from work due to wrist pain.

Based on the facts in evidence, the Arbitrator finds Petitioner's current conditions of ill-being are neither causally related to her alleged April 12, 2018, work accident involving grabbing the EMD book nor the alleged repetitive trauma with a manifestation date of April 22, 2019.

In support of the Arbitrator's Decision relating to (J). Where the services provided to Petitioner Reasonable and Necessary, has Respondent paid all appropriate charges for said services, and is the Petitioner entitled to any prospective medical care?, the Arbitrator finds the following:

Petitioner has not met her burden of proving her alleged injuries are related to her employment for Respondent. As such, the Arbitrator finds the medical expenses Petitioner has incurred relating to treatment she has undergone for her alleged upper extremity injuries are not work related and are not the responsibility of the Respondent.

On April 22, 2019, Dr. Williams recommended Petitioner undergo bilateral wrist surgeries. Dr. Williams testified he recommended bilateral ulnar shortening osteotomy surgeries. Dr. Williams testified his surgical recommendation was based on the subjective history provided and objective examination performed on April 22, 2019. The Arbitrator finds it significant that Dr. Williams recommended surgery for Petitioner's right wrist, despite the fact Petitioner did not report right wrist symptoms on April 22, 2019, nor did Dr. Williams perform an objective examination of her right wrist at that appointment. Interestingly, Dr. Williams testified, and the medical records in evidence confirm, leading up to the April 22, 2019, surgical recommendation,

Petitioner had not complained to Dr. Williams of pain in her right wrist since March 19, 2015. Petitioner also provided testimony confirming she did not complain to Dr. Williams of symptoms in her right wrist during the time leading up to April 22, 2019. Dr. Williams never provided Petitioner with any work restrictions for her right upper extremity. On April 22, 2019, Petitioner rated the severity of her left wrist pain as two out of ten (2/10).

Dr. Williams testified the recommended surgery involves taking out a certain number of millimeters of the ulna bone, then using plates and screws to put the bone back together. He testified the risks involved with this surgery include persistent swelling and infection. There is also a chance of non-union of the bone, which would require revision surgery. Dr. Williams testified this operation rarely gives patients total pain relief, and Petitioner would likely still have symptoms after undergoing the operation.

Dr. Li recommended Petitioner undergo the ulnar shortening procedure for her left wrist. He did not provide a surgical recommendation in regard to her right wrist. He testified possible complications of this surgery include persistent swelling and stiffness, infection, and nerve damage. He agreed this operation rarely gives patients total pain relief, and Petitioner would likely still have symptoms even after surgery. Dr. Li testified Petitioner did not need any work restrictions. He also opined Petitioner has not suffered any permanent impairment as a result of her alleged injuries.

Dr. Hoepfner testified the surgeries proposed by Dr. Williams would not be related to Petitioner's employment for the Respondent. Dr. Hoepfner testified he would not recommend any further surgery for Petitioner. He said he would be very hesitant in regard to Petitioner undergoing any further surgeries for what he considered to be a relatively mild presentation of ulnocarpal impaction syndrome. He testified he would reserve ulnar shortening surgery for patients with a greater degree of ulnar variance and more severe symptoms than seen in Petitioner. Dr. Hoepfner further testified the likelihood of success would be very low in regard to Petitioner undergoing any further surgeries on her wrists and hands, and he did not believe the proposed surgery would eliminate, or even significantly reduce, Petitioner's symptoms.

At least two of Petitioner's previous treating physicians have expressed similar concerns in regard to Petitioner undergoing any further upper extremity surgeries. On November 24, 2009, Dr. Garst recommended Petitioner treat conservatively and avoid further surgery because she had

already "had quite a bit done." On January 15, 2010, Dr. Moody noted, "Given the extensive surgery she has had of her upper extremities, I would recommend caution regarding proceeding with additional surgical interventions."

After retiring from her employment with the City, Petitioner worked as a delivery driver for UPS, carrying many packages, weighing up to thirty (30) pounds, without the use of any moving equipment. Petitioner testified she never felt better physically in her entire life than while working for UPS in this capacity. As of the time of arbitration, Petitioner works for Sam's Club, where she performs cashier duties, including lifting packages weighing up to twenty (20) pounds, operating a cash register with her hands, and operating a scanning gun which requires her to pinch a trigger. Throughout her employment for UPS and Sam's Club, Petitioner has not required any work restrictions and has not missed any work time due to wrist pain.

The Arbitrator finds the proposed bilateral ulnar shortening osteotomies are not reasonable nor necessary, and are not related to Petitioner's employment. All three doctors providing testimony in this case agreed surgery was unlikely to provide total relief of Petitioner's symptoms. Without surgery, Petitioner has been able to perform employment tasks for UPS and Sam's Club which require more lifting, pinching, and gripping, and more forceful use of her hands and wrists, than her employment with the Respondent required. Yet, her symptoms have not become severe enough to require work restrictions, or time off work. In fact, Petitioner testified she never felt better, physically, than while delivering packages for UPS. Multiple doctors have recommended Petitioner avoid any further surgeries. The Arbitrator gives greater weight to the opinion provided by Dr. Hoepfner that the recommended ulnar shortening surgeries seem to present an unreasonable level of risk in regard to potential complications or failure to provide significant relief, given Petitioner's relatively minor presentation of symptoms. Dr. Williams surgical recommendation in regard to the right wrist seems especially unreasonable and unnecessary, given Petitioner's lack of right wrist symptoms for over four years leading up to the date the recommendation was made.

Finally, as the Arbitrator finds Petitioner's current condition of ill-being is not causally related to her employment for the Respondent, the Arbitrator similarly finds any need for the proposed surgeries, or any other prospective treatment in regard to Petitioner's alleged wrist injuries, is not causally related to her employment for the Respondent.

In support of the Arbitrator's Decision relating to (E). Was timely notice of the accident given to Respondent? the Arbitrator finds the following:

A supervisor's accident investigation report was submitted into evidence which shows Petitioner reported her alleged April 12, 2018, work accident to one of her supervisors, Jeanette Morse, on April 26, 2018. (Resp. Ex. 15). Notwithstanding the Arbitrator's finding that Petitioner did not suffer a work related injury on April 12, 2018, this supervisor's accident investigation report shows she provided timely notice of the accident alleged to have occurred on April 12, 2018.

There is no evidence in the record showing Petitioner provided timely notice to her employer in regard to the alleged repetitive trauma claim. As such, her claim for compensation is jurisdictionally barred. Her failure to provide timely notice is an absolute bar to her claim, with no discretion for the Arbitrator or the Commission to excuse her failure to provide notice. 820 ILCS 305/6(c); *Ristow v. Industrial Com'n*, 39 Ill. 2d 410, 413; *White v. Workers' Compensation Com'n*, 374 Ill. App. 3d 907, 910. As the appellate court stated in *White:*

> Regarding notice, the statutory element of undue prejudice to the employer is pertinent only where some notice is given in the first place. We need not address whether [the employer] suffered undue prejudice because, as noted above, the prejudice inquiry does not pertain unless some notice was given in the first place. The instant case does not involve timely but defective notice, it involves lack of timely notice altogether. *White*, 374 Ill. App. 3d, at 910- 911 (internal citations omitted).

The original Application for Adjustment of Claim, showing an accident date of April 11, 2018, was filed on October 24, 2019. (Resp. Ex. #3) Her amended Application for Adjustment of Claim was filed on December 9, 2019, alleging an accident date of April 22, 2019. *Id.* No testimony was adduced at arbitration indicating that Petitioner notified Respondent that she was alleging injuries to her bilateral wrist as a result of repetitive trauma in a timely manner. Accordingly, as Petitioner failed entirely to provide timely notice, this is an absolute bar to case number 19WC031054.

In support of the Arbitrator's Decision relating to (G). What were Petitioner's earnings? the Arbitrator finds the following:

Petitioner submitted a collection of paystubs, dating from December 30, 2017, to November 30, 2019, into evidence as Petitioner's Exhibit six (6). All of these paystubs show Petitioner's hourly rate of pay as thirty dollars and forty cents ($30.40). Petitioner's former supervisor, Mr. Blayney, testified emergency communication telecommunicators work a regular shift of forty (40)

hours per week, and an additional eight (8) hours of mandatory overtime each week. (Arb. Tr. p. 116).

Section 10 of the Illinois Workers' Compensation Act states overtime is excluded in calculating a Petitioner's average weekly wage. In regard to this exclusion of overtime, the courts have held overtime includes those hours in excess of an employee's regular weekly hours of employment 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 Exp., Inc. v. Ill. Workers' Compensation Com'n*, 372 Ill.App.3d 549, 554. While the evidence shows Petitioner worked substantial overtime, there is no evidence showing Petitioner consistently worked a set number of overtime hours each week, or that her overtime hours were part of her regular hours of employment. The evidence does show eight (8) hours of Petitioner's overtime each week were mandatory as a condition of her employment. (Arb. Tr. p. 116). She worked these eight (8) hours of mandatory overtime in addition to a standard forty (40) hour week. As such, Petitioner's average weekly wage should be calculated on the basis of forty-eight (48) hours per week, paid at a wage rate of $30.40 per hour. This equates to an average weekly wage of $1,459.20.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC005292
Case Name	Jose Gabriel Espinoza v. American Stone Works
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0280
Number of Pages of Decision	17
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Jack R Epstein
Respondent Attorney	W. Britt Isaly

DATE FILED: 6/26/2023

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jose Gabriel Espinoza,

Petitioner,

vs. NO: 22 WC 5292

American Stone Works,

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 employer-employee relationship, accident, notice, causal connection, temporary total disability, medical expenses, and prospective medical care, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

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

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $31,200.00. 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.

June 26, 2023

MP:yl
o 6/15/23
68

/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC005292
Case Name	Jose Gabriel Espinoza v. American Stone Works
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Gerald Napleton, Arbitrator

Petitioner Attorney	Jack Epstein
Respondent Attorney	W. Britt Isaly

DATE FILED: 12/6/2022

THE INTEREST RATE FOR THE WEEK OF DECEMBER 6, 2022 4.57%

/s/Gerald Napleton, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JOSE GABRIEL ESPINOZA
Employee/Petitioner

v.

AMERICAN STONE WORKS
Employer/Respondent

Case # **22** WC **005292**

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 W. Napleton**, Arbitrator of the Commission, in the city of **Waukegan**, on **July 26, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **February 9, 2022**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**45,760.00**; the average weekly wage was $**880.00**.

On the date of accident, Petitioner was **49** years of age, ***single*** with **0** dependent children.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule to Illinois Orthopedic Network, Preferred Open MRI, University of Illinois Hospital Physicians, University of Illinois Hospital, MidCity Rehabilitation, and Midwest Specialty Pharmacy, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay and is ordered to approve the medical treatment prescribed by Dr. Lipov and Dr. Giannoulias.

Respondent shall pay Petitioner temporary total disability benefits of $586.67/week for 22 and 5/7ths weeks, commencing February 18, 2022, through July 26, 2022, as provided in Section 8(b) of the Act.

Petition for Penalties 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.

/s/ Gerald W. Napleton — **DECEMBER 6, 2022**

Signature of Arbitrator

JOSE GABRIEL ESPINOZA v. AMERICAN STONE WORKS, INC.
22WC005292

FINDINGS OF FACT

Petitioner's Testimony

Petitioner, Jose Gabriel Espinoza, testified at hearing through a Spanish interpreter that he was employed by Respondent, American Stone Works. He applied for work in person at Respondent's location in Bridgeview as a countertop installer and spoke with Robert Teodorczak a.k.a. "Robert Theodore" (hereinafter "Mr. Teodorczak") who was an owner of Respondent. He was offered a job the following day where his job duties included installing stone, marble, or quartz countertops in kitchens along with some stone fabrication at the Bridgeview location.

The Petitioner would receive text messages of locations where he is to report for work. He would use a company pickup truck (PX10) to drive to the job sites and would wear a company shirt or sweatshirt (PX9) while working. Petitioner did not have any written contract with Respondent. Respondent provided Petitioner the tools and materials to install and fabricate the countertops. Respondent was owned by Mr. Teodorczak and another man named Robert. Petitioner was instructed how to perform his job by both Roberts. Petitioner did not decide how he was to install the countertops.

Petitioner was paid by the hour. He did not invoice his time to Respondent or either Robert. Petitioner was given a debit card to pay for gas for the company truck. The Petitioner worked only for Respondent and did not perform any side work.

On February 9, 2022, Petitioner received a text to report to 643 St. Mary's Parkway in Buffalo Grove, Illinois. He met Mr. Teodorczak there and his job was to bring the stone slab inside the house and install them. Petitioner testified that there was snow on the floor and that while he was carrying a stone slab with Mr. Teodorczak, he felt his knees "crack." (T.22). He felt pain in his knees and left heel.

Petitioner testified that he advised Mr. Teodorczak of his injury, but that Mr. Teodorczak did not respond. Petitioner experienced pain but continued to work and was sent to another jobsite in Glenview with his co-worker, Gabriel.

Petitioner continued to work for another week with Respondent and testified that he advised the owners of his pain. He was advised that if he missed work, he would not get paid. He believes he told his employers of his accident four times.

On February 17, 2022, Petitioner was at a jobsite in Glendale Heights to install a kitchen. He testified that he injured his back and shoulder while pulling a stone slab from the truck. Petitioner said the slab measured approximately 80 inches by 50 inches and Petitioner believed weighed 1,000 pounds. His knees were still hurting from his previous, February 9, 2022, accident. Petitioner testified that he was with Mr. Teodorczak that day and had told both Roberts of his second

accident. Petitioner testified that the Roberts did not respond and that the next day when he advised Mr. Teodorczak of his accident his only response was a shrug of his shoulders (TX34).

The Petitioner testified that before February 9, 2022, he had never had any problems with his legs, knees, left foot, back, shoulders, or any other body part. Before February 9, 2022, the Petitioner never had any problems doing his job and never missed a single day. (Tx. 34).

Petitioner testified that he could not handle the pain and went to the emergency room at the University of Illinois Hospital on Saturday, February 19, 2022. The Petitioner told the nurses and medical personnel how his accident occurred. Petitioner clarified on the record that the hospital records note an accident day of February 16, 2022 but that he told them it was February 17, 2022. (TX36).

The Petitioner testified that on February 17, 2022, he was only at the Arlington Heights home for around an hour. The Petitioner testified that they unloaded the slab, then the Petitioner told the Respondent he was in pain and left. (Tx. 57). The Petitioner testified that he returned the company truck to the shop and returned home in his vehicle. TX58. During cross-examination, he was less clear about the time he spent at the various locations and when he left. TX55.

Petitioner was taken off work by the doctor at University of Illinois and provided Petitioner with an off work note. Petitioner testified that he sent the letter to Respondent by mail. TX37. He was advised by Respondent that he was no longer needed at Respondent. The Petitioner testified that when he told the Respondent that he could not take the pain anymore and needed to go to the clinic, the Petitioner sent him a message saying that there was no work for him anymore and his employment was terminated. TX61.

Further treatment was sought at Illinois Orthopedic network on February 25, 2022 where he underwent an injection and sought ongoing treatment through April 4, 2022. TX38. Additional injections have been advised along with MRIs of both knees. Petitioner wishes to undergo this treatment.

Before his February 25, 2022 visit with ION, Respondent's Mr. Teodorczak was waiting for him at the medical facility. Respondent asked Petitioner to sit down and talk. Petitioner was there with his daughter. Petitioner testified that Respondent was trying to record him on his phone and asked, "why didn't you tell me you were injured?" The Petitioner responded that he did tell him. The Respondent then asked Petitioner how much he wanted, and Petitioner said he didn't want anything, and that Petitioner's attorney will contact Respondent. Mr. Teodorczak left immediately after that. TX39-42.

Petitioner has not received any disability payments from Respondent to date since he was terminated in February of 2022. He is unable to work and wishes to undergo the treatment recommended by his doctors.

Petitioner's Medical Treatment

The records at University of Illinois Hospital demonstrate that Petitioner was seen on February 19, 2022 complaining of bilateral knee, right shoulder, left

heel, and chest pain. PX1. He was provided a history of his accident, was examined, given an X-ray, and prescribed muscle relaxers. He was diagnosed with a right knee sprain, left knee sprain, Achilles' tendon sprain, right shoulder injury, and contusion of the left chest wall. PX1p12. The records show he was restricted from work until March 19, 2022 or until he is released to work by a primary care physician. He was advised to follow up with a primary care physician and orthopedist. PX1,p.31,42.

Petitioner next sought treatment at Illinois Orthopedic Network on February 25, 2022. He complained to Dr. Lipov of bilateral shoulder pain, bilateral elbow pain, bilateral knee pain, bilateral foot pain, and low back pain that radiates to his legs with numbness and tingling. Petitioner was prescribed physical therapy, a Medrol dosepak, muscle relaxer, diclofenac, lidothol patches, and an oral NSAID. Petitioner was to remain off work.

On March 11, 2022, Petitioner followed up with ION and Dr. Lipov. Petitioner reported that his pain persisted at a 10/10 level. He also complained of bilateral elbow pain. He testified that his back pain starts in his ankles and radiates into his low back and hip. Physical therapy was reduced to twice per week, an MRI of the right shoulder, right arm, and lumber spine was ordered, and Petitioner was referred to an orthopedist. He was to remain off work.

On March 21, Petitioner followed up with Dr. Lipov at ION. He continued to complain of pain at a 10/10 level. Petitioner desired to have MRIs performed and was restricted from work again.

On March 28 through 31, 2022 the Petitioner underwent several MRIs at Preferred Open MRI of the right shoulder and lumbar spine. The shoulder MRI revealed mild supraspinatus tendinosis/tendinopathy, mild AC joint arthrosis with mild osteophytes, and minimal fluid within the subcoracoid/subscapularis recess. The low back MRI revealed a diffuse annular posterior disc bulge of 3mm with facet arthropathy at L3-L4; a diffuse annular posterior disc bulge of 2.5mm with facet arthropathy, mild stenosis of the lateral recesses, moderate bilateral neural foraminal stenosis at L4-L5; a diffuse underlying annular posterior disc bulge, suspected superimposed broad-based central posterior disc protrusion of 3mm, facet arthropathy, and mild bilateral neural foraminal stenosis. PX2, 26-29. His left and right elbow X-rays were normal. PX2p31. His left heel X-ray revealed a tiny calcaneal spur. PX3p32. The upper arm/humerus MRI was unremarkable. The left knee X-ray revealed minimal arthritis. The right knee X-ray revealed degenerative tricompartmental arthritis. PX3,p36. The MRI of the right forearm was unremarkable.

Petitioner's April 13 PT note from Midcity Rehabilitation (PX2,p38) stated that Petitioner reported 0% improvement and reported pain levels in all treating body parts as an 8/10. An increase in range of motion was noted in all affected body parts.

On April 14, 2022, Petitioner saw Dr. Christos Giannoulias, gave a history of his accident, and complained of 10/10 pain in the knees and 8/10 pain in his shoulders and arms. The examination findings revealed significant stiffness and pain with any type of palpation of the shoulders and elbows, difficulty with

extension and flexion of the elbows, difficulty raising his arms, significant knee tenderness over the anterior and medial joint lines, and a left swollen ankle. The doctor noted the negative MRIs but noted mild arthritic changes in his knees. The assessment was bilateral shoulder, bilateral elbow, bilateral knee, and left ankle pain. The doctor ordered additional imaging, but the record is unclear as to what imaging is specifically desired.

Petitioner also saw Dr. Krishna Chunduri on April 14, 2022. He reported pain of 8/10 in his low back and his leg symptoms were constant and worse with activity. Dr. Chunduri assessed Petitioner with lumbar spondylosis with left radiculitis and recommended an L4-L5 epidural steroid injection and more physical therapy.

On May 5, 2022, Dr. Giannoulias spoke with Petitioner who noted Petitioner complained of persistent daily and debilitating pain at a 10/10 rating. He stated Petitioner had been prescribed diagnostic imaging and that they should be reviewed at the next visit. Dr. Giannoulias also prescribed meloxicam, but Petitioner declined the medication due to cost and inability to pay. PX2p46.

Petitioner also spoke with Dr. Chunduri on May 5, 2022 who noted Petitioner's back pain has not changed and remains a 9/10. He noted Petitioner was pending a left-sided epidural steroid injection (ESI) at L4-L5. Petitioner was to remain off work and follow up post-ESI. He underwent the ESI on May 12, 2022 and followed up with Dr. Chunduri on May 26, 2022. Petitioner reported that 70% of his pain resolved for two weeks but then returned and is radiating down his left thigh and his pain is at 8/10. An ESI at L5-S1 was recommended. PX2,p58.

Dr. Giannoulias examined Petitioner on June 24, 2022 and continued to recommend MRIs of both knees, elbows, and left ankle. Petitioner reported pain in these areas. Dr. Giannoulias notes Petitioner is unable to return to work at this time. A right knee injection was performed. Petitioner also saw Dr. Chunduri on that day who noted Petitioner's left L5-S1 injection was pending approval and that Petitioner still experienced 9/10 pain that radiates into his left leg. Dr. Chunduri recommended proceeding with the ESI.

Petitioner followed up with Dr. Giannoulias on July 8, 2022 and stated he experienced no improvement in his knee after the injection. His shoulder and left ankle complaints continued. MRIs of both knees, elbows, and left ankle remain pending. Petitioner remained unable to work. TX2,p68.

Robert Teodorczak Testimony

Robert Teodorczak (hereinafter "Mr. Teodorczak") testified that he is the owner of Respondent and has been in that business since 2016 which installs kitchen countertops, vanities, and fireplace stone. He had two workers consisting of Gabriel Campos and Petitioner, Gabriel Espinoza. He has a partner named Robert Chrzanowski who runs the office. He testified that his workers are contractors, not employees.

Mr. Teodorczak said Petitioner was hired in 2020. No taxes or deductions were taken from Petitioner's pay. No employment contract existed. He gave

Petitioner two t-shirts and a sweatshirt but testified that he did not order Petitioner to wear them.

Mr. Teodorczak testified that he was working with Petitioner in Buffalo Grove on February 9, 2022. He denied Petitioner telling him about any pain or injury. He denied that Petitioner ever informed him of any injury while working for Respondent and denied ever being told that Petitioner was unable to return to work. He further testified that a countertop could not weigh 1,000 pounds as alleged by Petitioner and that they weigh a few hundred pounds at best – 300 at most. He confirmed that PX12B appears to be the countertop that was lifted on February 17, 2022 and that Petitioner helped him lift it. TX80. He stated that Petitioner worked for Respondent after February 9, 2022 for nine more days.

Mr. Teodorczak testified that he met the Petitioner at ION. He testified that he received a telephone call from the ION office telling him to appear at their offices but did not elaborate on who contact him or why he was to be there.(Tx. 83-84). He denied asking Petitioner to sit down and talk but testified that he asked Petitioner why Mr. Teodorczak had to be there, and that Petitioner refused to talk to him and advised contact with Petitioner's attorney. Mr. Teodorczak further testified that he left after that conversation and hasn't seen Petitioner since. (Tx. 84-85, 103-104). He acknowledged that Petitioner's daughter was with him but was not next to them during their conversation.

Mr. Teodorczak testified that Petitioner told him that he was working for Uber and Lyft while he worked for Respondent and that Petitioner had the stickers on his car indicating his work for Uber and Lyft. He testified that he saw Petitioner driving away with the Lyft light illuminated and that Petitioner would tell him at work about the customers he drove the day before.

He further testified that he was never aware that the Petitioner was getting medical care from injuries at his company. The Petitioner never told him that he was hurt while working for Respondent. (Tx. 86).

Further, Mr. Teodorczak testified that when he hired the Petitioner, they agreed that the Petitioner would pay for his taxes. Petitioner was offered a certain amount of money, and the Petitioner was responsible for everything else. Respondent did not take any income tax withholdings from the Petitioner's paychecks. (Tx. 89). He continued to testify that hat he does not know whose decision it was to not pay income taxes, unemployment taxes, workers' compensation premiums, or Social Security taxes for the Petitioner's earnings. (Tx. 91). He denied knowing who issues a 1099 to Petitioner.

Mr. Teodorczak testified that he would pay for gas for the company car and supply all the materials needed for jobs. Further, he testified that when the Petitioner would go to a job site, he represented the Respondent, and the Petitioner would introduce himself as someone working for American Stone Works. (Tx. 94).

Gabriel Campos Testimony

Gabriel Campos ("Campos") testified that on February 9, 2022, he worked for the Respondent as a Fabricator. Campos' job as a fabricator was to polish the

kitchen countertops and cut the sinks. (Tx. 109). Campos testified that he has worked for the Respondent since June 2021. (Tx. 110).

Campos testified that he knows the Petitioner from work and has worked with the Petitioner since Campos began in June 2021. Campos testified that he rarely went with the Respondent to help install the countertops, as he primarily worked in the office fabricating. (Tx. 110). He testified that he performed less than 10 installations.

Campos testified that on February 9, 2022, he does not remember anything that happened to the Petitioner while working in Buffalo Grove, nor does he Remember working in Buffalo Grove on February 9, 2022. (Tx. 113). Campos testified that all he remembers is that the last time he worked with the Petitioner, they installed some small pieces and a vanity of a bathroom, but he does not remember the date, only that it was just the two of them. (Tx. 114).

Campos testified that the Petitioner never told him he got hurt or had an accident while working for the Respondent. Campos testified that he had not seen the Petitioner since February 2022. (Tx. 115-116).

Robert Chrzanowski Testimony

Chrzanowski testified that he was the Partner with Respondent until 2019. Chrzanowski testified that since then, he has been self-employed and works as a contractor. Chrzanowski testified that he still works with Mr. Teodorczak. (Tx. 119-120).

Chrzanowski testified that on February 9, 2022, his job was to show up to the office, open the office, and send employees to work sites. (Tx. 121). Chrzanowski testified that the Petitioner's job was to assist with the installation of granite slabs and that he did work alongside the Petitioner. (Tx. 122).

Chrzanowski testified that he did work at the Arlington Heights job site with the Petitioner on February 17, 2022, and that the Petitioner's job was to assist with carrying the stone into the house. (Tx. 123). Chrzanowski testified that the countertop could not have been 1,000 pounds and that an entire slab does not weigh 1,000 pounds. Chrzanowski testified that the countertop would have weighed 200 or 300 pounds. (Tx. 124). Chrzanowski testified that the Petitioner never told him he had injured himself in Arlington Heights. (Tx. 124). Chrzanowski testified that the Petitioner did not appear to be in pain, was not bent over, and not using a cane. (Tx. 125). Chrzanowski testified that between February 9 and February 19, 2022, the Petitioner never told him that he was hurt while working at American Stone Works. (Tx. 127-128).

Chrzanowski testified that Robert Teodorczak instructed him to send the text to the Petitioner terminating the Petitioner's employment with the Respondent. The text read as follows:

> "Hi, Gabriel, You probably noticed we are really slow with jobs. There is nothing to install on Monday and Tuesday and probably Wednesday too. You

good employee but we can't keep you no longer. I hope you understand it. Thank you for your hard work for us. We appreciate it. "

Chrzanowski testified the Petitioner's employment was terminated because work was slowing down due to COVID. (Tx. 130). In the 10 days between February 9 through 19, 2022 the Petitioner did not mention an injury to Mr. Chrzanowski. (T. 127).

Stephanie Cabrera Testimony

Cabrera testified in rebuttal that the Petitioner is her father and accompanied him when he went to ION on February 25, 2022, as the Petitioner needed help walking to the appointment. Cabrera testified she was with the Petitioner when he entered the ION waiting room. (Tx. 139-140). Cabrera testified that the Petitioner told her that the Respondent was sitting down in the waiting room and that the Respondent called over the Petitioner to speak to him. (Tx. 141).

Cabrera testified that she could hear everything said between the Petitioner and the Respondent. Cabrera testified that the Mr. Teodorczak stated that he wanted to fix things with the Petitioner. (Tx. 142).

Cabrera testified that when the Petitioner told Mr. Teodorczak that he did not want to talk to him and that his attorney would call him, Mr. Teodorczak got up and spoke on the phone loud enough that the whole waiting room could hear and that when the Respondent left, he appeared angry. (Tx. 144-145).

CONCLUSIONS OF LAW

Regarding Issue (A) whether Respondent was operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act and Issue (B) whether there an employee-employer relationship? The Arbitrator finds as follows:

The Arbitrator finds that Respondent was operating and subject to the Act as Respondent's work and the work performed by Petitioner for Respondent meets several criteria under Section 8 of the Act. Further, the Arbitrator finds that an employee-employer relationship existed between Petitioner and Respondent.

The law in Illinois provides no specific litmus test for determining whether an employer-employee relationship exists. Rather, such a relationship, if one exists, must be inferred from the conduct of the parties, the right to control work being the primary factor in determining an employment relationship. The factors that the Arbitrator must weight are as follows: (1) whether the employer may control the manner in which the person performs the work; (2) whether the employer dictates the person's schedule; (3) whether the employer pays the person hourly; (4) whether the employer withholds income and social security taxes from the person's compensation; (5) whether the employer may discharge the person at will; (6) whether the employer supplies the person with the needed instrumentalities; and

(7) whether the employer's general business encompasses the person's work. *Roberson v. Industrial Commission*, 225 111. 2d 159, 175 (2000). Other relevant factors include the label the parties place on their relationship and whether the parties' relationship was "long, continuous, and exclusive." The single most important factor determining whether a party is an employee or an independent contractor is the right to control the manner in which one's work is done and that an independent contractor is one who undertakes to produce a given result, without being controlled as to the method by which he attains the result." *Bryant v. Fox*, 162 Ill. App. 3d 46,113 Ill Dec. 215,498 N.E.2d 775 (1 Dist. 1987). "No single factor is determinative, and the significance of these factors will change depending on the work involved." *Roberson*, 225111.2d at 175.

In the instant case, it is clear to the Arbitrator that the Respondent controlled the manner in which the work was to be performed. The Respondent did not seriously dispute that the Respondent directed the Petitioner and did not cite one example of how the Petitioner directed his own work. The Respondent dictated the Petitioner's work schedule. The Respondent sent texts and indicted when and where the Petitioner was to work. The Respondent paid the Petitioner hourly, not by the job or task upon completion. The Respondent also had the power to discharge the person at will, which the Respondent did shortly after the Petitioner claimed a work-related injury. The Respondent also supplied the Petitioner with all the tools and implements necessary for the job and provided the Petitioner with a work vehicle and work shirts emblazoned with Respondent's business name. While the Respondent did not withhold taxes and supplied the Petitioner with a 1099, the overwhelming evidence in the record supports a finding that that an employer-employee relationship existed. Further, it is not clear to the Arbitrator that the Petitioner understood this 1099 versus w2-related financial relationship. Respondent's attempt to place responsibility on Petitioner's 1099 status on the accountant without guidance from Mr. Teodorczak further discounts the impact Petitioner receiving a 1099 has on the thinly supported suggestion that Petitioner was a contractor and not an employee.

Accordingly, the Arbitrator finds that an employer-employee relationship existed between Petitioner and Respondent.

Regarding Issue (C), whether Petitioner sustained an accidental injury which arose out of and in the course of his employment, the Arbitrator finds as follows:

To obtain benefits under the Act, a claimant must establish by a preponderance of the evidence that he sustained an accidental injury "arising out of" and "in the course of" his employment. 820 ILCS 305/1(d) (West 2014); *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124848, Par. 32; *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d. 193, 203 (2003); The "arising out of" component is primarily connected with causal connection. *McAllister*, 2020 IL 124848, Par. 36. An injury is said to "arise out of" one's employment if its origin is in some risk connected with or incidental to the employment so that there is a causal connection between the employment and the accidental injury. Id. Par. 36;

Caterpillar Tractor Co. v. Industrial Comm'n, 129 Ill. 2d 52, 58 (1989). A risk is "incidental to the employment" when it belongs to or is connected with what the employee has to do in fulfilling his or her job duties. *McAllister*, 2020 IL 124848, Par. 36; *Purcell v. Illinois Workers' Compensation Comm'n*, 2021 IL App. (4th) 200359WC, Par. 18.

The Petitioner in the instant case claims he was injured while lifting a stone countertop on February 9, 2022 and again on February 17, 2022. Experiencing an injury while lifting a heavy stone countertop is an imminently sensible mechanism of injury in which its causal relationship to Petitioner's work for Respondent would be difficult to dispute. Respondent, however, calls Petitioner's credibility in to play. It is a function of the Arbitrator and Commission, if reviewed, to determine credibility.

Respondent's arguments that Petitioner's testimony lack credibility are based on Petitioner's failure to appear injured nine days after his initial injury, that Petitioner overestimated the weight of the stone countertop he was lifting, and that he continued to work for a week after his injury until he reported to the emergency room. None of the arguments sufficiently attack the credibility of Petitioner.

Respondent did not submit any medical testimony that suggests that a person suffering from the injuries sustained by Petitioner would appear obvious to any lay witnesses or that the type of injury received would require immediate medical care or prevent Petitioner from working. The Arbitrator does not view Petitioner not mentioning an accident to Gabriel Campos to be persuasive as Mr. Campos was not Petitioner's supervisor and its reasonable to infer that Petitioner and Mr. Campos, who only worked together 10 times, were of a relationship that Petitioner would confide in or complaint to Mr. Campos about his injury.

Petitioner testified that he advised Mr. Teodorczak of his injuries which Mr. Teodorczak denied. The Arbitrator does not find the testimony of Mr. Teodorczak to be credible. Mr. Teodorczak's answers were evasive and self-serving. The Arbitrator does not find Mr. Teodorczak's testimony convincing at all.

The Arbitrator does not find Petitioner's overestimation of the weight of the stone countertop to be an exaggeration that rises to the level of deeming it completely unbelievable.

The Arbitrator finds that Petitioner has met his burden by a preponderance of the evidence that he sustained an accident that arose out of and in the course of his employment with Respondent. He sought medical treatment soon thereafter. The histories provided to his medical providers were consistent and credible.

Regarding Issue (E) whether Respondent was given notice of the accident within the time limits stated in the Act, the Arbitrator finds as follows:

Petitioner testified credibly that he notified his employer, through Robert Teodorczak, of his work-related accident and condition on February 10, 2022. The Petitioner also testified that when he further aggravated his condition on February 17, 2022, he advised Mr. Teodorczak again. The Arbitrator again notes that the testimony of Robert Theodore which disputes that Petitioner advised Respondent of

his accidents is not credible. Accordingly, the Arbitrator finds Petitioner provided timely notice of his work accident.

Regarding issue Issue (F), whether Petitioner's current condition of ill-being is causally related to her employment injury, the Arbitrator finds as follows:

The Arbitrator has found that the Petitioner sustained an accidental injury that arose out of and in the course of his employment. The Petitioner submitted medical records noting a history of his accident, a recommended course of medical treatment, and contain statements from his treating doctors that his injury is related to his accident. Respondent did not submit a Section 12 examination report to refute the causal relationship between Petitioner's injury and his current condition or to impeach the statements of his treating doctors. As such, the Arbitrator finds that the Petitioner's current condition of ill-being is causally connected to his injury.

Regarding Issue (J) whether the medical services that were provided to Petitioner were reasonable and necessary, and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

Section 8(a) of the Act states a Respondent is responsible "…for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury…" A claimant has the burden of proving that the medical services were necessary and the expenses were reasonable. See *Gallentine v. Industrial Comm'n*, 201 Ill.App.3d 880, 888 (2nd Dist. 1990).

Respondent disputed liability for the medical bills based upon accident and causation. Having found in favor of the Petitioner on those issues, and there being no Section 12 report or medical evidence to suggest otherwise, the Arbitrator finds the medical treatment he received was reasonable and necessary. Respondent shall pay the following medical bills, pursuant to Sections 8(a) and 8.2 and the Medical Fee Schedule:

Illinois Orthopedic Network $7,753.38
Midwest Specialty Pharmacy $9,930.39
Preferred Open MRI $6,662.40
University of Illinois Health Physicians $670.00
University of Illinois Hospital $1,945.45
Mid-City Rehabilitation $12,019.99

Respondent shall be given credit for all medical bills that have been paid, and Respondent shall hold Petitioner harmless from any claims by group medical providers or carriers pursuant to Section 8(j) of the Act.

Regarding Issue (K) whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows:

Having found in favor of the Petitioner on the issues of accident, causation, and medical necessity, the Arbitrator that Petitioner is entitled to the medical treatment recommended by his treating doctors.

Regarding Issue (L) whether Petitioner is entitled to Temporary Total Disability benefits, 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 MMI. *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 that he did not work and 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 the Petitioner is entitled to TTD benefits from February 18, 2022, through July 26, 2022 or 22 and 5/7ths weeks. The Petitioner's injuries prevented him from returning to work after February 18, 2022, he restricted from work by his treating physicians, and he continues to be off work. The Arbitrator finds the Petitioner's condition has not stabilized given that he is still off work and treatment has been recommended. As such, the Respondent shall pay Petitioner TTD benefits from February 18, 2022, through July 26, 2022 or 22 and 5/7ths weeks.

Regarding Issue (M) whether Penalties should be imposed, the Arbitrator finds as follows:

The Arbitrator finds that a legitimate controversy existed based on differing perspectives and credibility of the witnesses. While the Arbitrator finds that Petitioner was more credible than the witnesses for Respondent, there is not enough evidence to find that Respondent acted in bad faith in their disputes in this matter. Accordingly, no penalties are imposed.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC002005
Case Name	William Kargel v. Turner Industries Group
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0281
Number of Pages of Decision	20
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Tyler Berberich
Respondent Attorney	Miles Cahill

DATE FILED: 6/26/2023

/s/ Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM KARGLE,

Petitioner,

vs. NO: 14 WC 2005

TURNER INDUSTRIES GROUP,

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 causal connection, benefit rates, medical expenses, temporary benefits and the nature and extent of Petitioner's disability, and being advised of the facts and law, writes to correct a calculation error but otherwise affirms and adopts the Decision of the Arbitrator which is attached hereto and made a part hereof.

The Commission corrects Petitioner's average weekly wage (AWW) to $1,700.80 based on the Arbitrator's finding that Petitioner earned his regular hourly rate of $42.52 working 40 hours per week. Based upon the corrected AWW, the temporary total disability (TTD) benefit rate is $1,133.87 and the permanent partial disability (PPD) benefit rate is the maximum rate of $721.66.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed May 9, 2022, is hereby corrected as stated and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the reasonable, necessary, and related medical bills through March 26, 2014, as evidenced in Petitioner's Exhibit 29, pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary total disability benefits of $1,133.87 per week for 15 1/7 weeks, from December 11, 2013 through March 26, 2014, 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 shall pay to Petitioner permanent partial disability benefits of $721.66 per week for 50 weeks because the injuries sustained caused ten-percent (10%) loss of use of the person as a whole pursuant to Section 8(d)2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent 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 $32,200.00. 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 the Circuit Court.

June 26, 2023

CAH/pm
O: 6/15/23
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	14WC002005
Case Name	KARGEL, WILLIAM v. TURNER INDUSTRIES GROUP
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	17
Decision Issued By	Frank Soto, Arbitrator

Petitioner Attorney	Tyler Berberich
Respondent Attorney	Miles Cahill

DATE FILED: 5/9/2022

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

/s/Frank Soto, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

William Kargle
Employee/Petitioner

v.

Turner Industries Group
Employer/Respondent

Case # **14** WC **2005**

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 **February 22, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **December 3, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**89,065.60**; the average weekly wage was $**1,712.80**.

On the date of accident, Petitioner was **30** 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 $**21,121.88** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**21,121.88**.

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

ORDER

The Arbitrator finds Petitioner proved he worked 40 hours a week earing $42.52 per hour and, as such, his average weekly wage was $1,712.80,

Respondent shall pay Petitioner temporary total disability benefits of $1,141.87/week for 15 1/7 3 weeks, commencing December 11, 2013 through March 26, 2014, as provided in Section 8(b) of the Act,

Respondent shall pay reasonable and necessary medical services provided prior to March 26, 2014, as identified in Petitioner's Exhibit 29, as provided in Sections 8(a) and 8.2 of the Act,

Respondent shall pay Petitioner permanent partial disability benefits of 50 weeks because Petitioner sustained 10% loss of use of the person, pursuant to §8(d)(2) of the Act

Respondent shall pay Petitioner compensation that has accrued from December 3, 2013 through February 22, 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

MAY 9, 2022

DISPUTED ISSUES:

This case was tried on February 22, 2022. The disputed issues are whether Petitioner' current condition of ill-being is causally related to his injury, Petitioner's average weekly wage, whether the medical services provided were reasonable and necessary, whether Petitioner is entitled to TTD and/or maintenance benefits and the nature and extent of the injury.[1]

FINDINGS OF FACT

On December 3, 2013, William Kargle (hereinafter referred to as "Petitioner") was employed by Turner Industries Group (hereinafter referred to as "Respondent") as a carpenter. (T, pg. 11). At the time of the injury, Petitioner had been working for Respondent for two or three months. (T. pg. 11).

Petitioner testified he earned $42.52 per hour as a union member. Petitioner testified he was paid his regularly hourly rate of pay for working 40 hours a week but he could also earn overtime consisting of time and a half for working more than eight hours a day and double time for working weekends. (T. pg. 16). Petitioner testified only some overtime was mandatory. Petitioner also testified he had the choice to work overtime or not. (T. pg. 16). Petitioner did not testify as to the number of mandatory overtime hours worked per week nor what constituted mandatory work.

Petitioner testified, on December 3, 2013, he was "pushing" up on a bar when he felt a pop in his back and, about 10 minutes later, he started to feel a bad pain in the middle of his back. (T. pg. 17). Petitioner reported the accident to Respondent and was sent to Physician's Immediate Care. (T. pg. 18).

The Physician's Immediate Care records dated December 3, 2013 state Petitioner reported mid-back pain after "pulling" on a bar and feeling a pop in his back. The examination noted spasms and tenderness of the paraspinal muscles and tenderness of the thoracic spine at T5. Petitioner was diagnosed with a thoracic sprain, prescribed Naproxen and Tylenol and found fit to return to work full duty. (Px. 1, Rx. 7). The following day, Petitioner returned to Physician's Immediate Care reporting his pain was worse on the left side and center. The exam noted no radiation of pain or weakness. Petitioner was issued a lumbar orthosis and found fit to return to work full duty. (Px. 1, Rx. 7). On December 10, 2013, Petitioner returned to Physician's Immediate Care reporting his symptoms improved. Petitioner identified the location of his pain on the left mid back area. The exam noted normal range of motion, normal strength, negative Patrick-Faber test, and negative Waddell's signs. Petitioner was diagnosed with a sprain of the thoracic region, proscribed Naproxen and Tylenol and found fit to return to work full duty. (Px. 1, Rx. 7).

On December 11, 2013, Petitioner was treated at the emergency room of Presence St. Joseph Hospital reporting cervical pain after a doctor performed axial loading during treatment. The exam noted Petitioner was

[1] The parties did not comply with Supreme Court Rule 138 so the Arbitrator redacted personal information so the record complies with Supreme Court Rule 138.

not in an apparent distress nor displayed any new or worsening symptoms. X-rays of the cervical spine were unremarkable. Petitioner was diagnosed with a cervical sprain, radiculopathy and lumbago, taken off work, and prescribed Norco and Flexeril. (Px. 3).

On December 18, 2013, Petitioner followed up with Dr. Ziad AL Aani, a neurologist with the Neuroscience Institute at Presence, reporting pain in his mid-back spreading up to his upper back after "lifting" something heavy and "pushing" on a bar at work. The exam was found to be normal. X-rays taken of the thoracic spine were also found to be normal. Dr. Aani's records state unable to find any specific trigger points and, from a neuro standpoint, Petitioner is normal and no further neurological workup is needed. Dr. Aani recommended physical therapy followed by an FCE. Dr. Aani continued to keep Petitioner off work. (Px. 2). Petitioner started physical therapy with ATI on December 23, 2013. (PX 4). Upon completion of the physical therapy Petitioner underwent an FCE on January 30, 2014, at ATI, which found Petitioner capable of work at a light physical demand level. (Px. 10).

On February 11, 2014, Petitioner returned to Dr. Aani reporting back pain. Dr. Aani noted physical therapy had not helped. Dr. Aani's records state Petitioner was normal from a neurological standpoint and that Petitioner's pain could be musculoskeletal or a muscle tear and he referred Petitioner to pain management. (Px 2).

On February 25, 2014 Petitioner presented to Dr. Anas Alzoobi, of Health Benefits Pain Management, reporting pain in the mid upper back after "pushing" on scaffolding and feeling a pop. The exam noted full range of motion, no motor or sensory deficits, negative axial pressure, negative Spurling's test, and no radicular pain. Dr. Alzoobi noted that Petitioner was not in any distress. Dr. Alzoobi's exam was negative for any signs or symptoms of dermatomal involvement or discogenic involvement. Dr. Alzoobi ordered an MRI and assessed mid thoracic pain below the T 8 level. (Px 5).

Petitioner underwent the MRI on March 6, 2014 which identified a mild central generalized disk bulge at T6-7 which sightly effaced the ventral aspect of the thecal sac but did not cause significant central canal or foraminal stenosis. (Px 5). On March 11, 2014, Petitioner followed up with Dr. Alzoobi who found Petitioner's examination to be within normal limits other than pain around the T8 level. Dr. Alzoobi indicated the MRI was positive for a mild degenerative disc bulge at T6-7. Dr. Alzoobi prescribed Naprosyn and Norco and referred Petitioner to work hardening. (Px. 5). Petitioner started work hardening at ATI on March 17, 2014. (PX 4).

On March 26, 2014, Petitioner underwent a Section 12 examination with Dr. Kern Singh. At that time, Petitioner reported pain in the mid to lower back after "pushing" up on a scaffold bar at work. Petitioner rated his pain level as 4 out of 10 but that his pain was worse with sitting and he could only stand, sit, or walk for 5 minutes at a time. Dr. Singh reviewed the MRI which, he said, showed normal thoracic kyphosis and no

evidence of central foraminal stenosis. Dr. Singh opined the MRI was normal with no preexisting conditions and that Petitioner's pain complaints were unsupported by any objectifiable findings. Dr. Singh diagnosed a resolved thoracic muscle strain and opined Petitioner could return to work full duty. Dr. Singh further opined Petitioner reached maximum medical improvement approximately 4 four weeks after the date of injury and treatment beyond 4 weeks of physical therapy was excessive. (Rx. 1).

On April 22, 2014, Petitioner returned to Dr. Alzoobi who noted Petitioner reached a plateau in work conditioning. Dr. Alzoobi's examination noted good range of motion, no radicular symptoms and that Petitioner could ambulate without any assistance. Dr. Alzoobi opined Petitioner suffered a work-related disc bulge at T6-7 which is the source of Petitioner's pain. Dr. Alzoobi found Petitioner not to be at maximum medical improvement and prescribed epidural steroid injections, additional work conditioning and a second FCE, which again placed Petitioner at a light to medium work level. (Px. 5, Px. 11).

On June 10, 2014, Petitioner followed up with Dr. Alzoobi who noted Petitioner's pain returned. Dr. Alzoobi opined no further treatment would bring Petitioner closer to his pre-injury capacity and he discharged Petitioner from care and found Petitioner to be at maximum medical improvement. (Px. 5).

Petitioner returned to Dr. Alzoobi on July 15, 2014. Dr. Alzoobi's exam was limited due to Petitioner's complaints of pain at the vicinity of T6-7. The exam showed no weakness or radicular symptoms. Dr. Alzoobi opined Petitioner's condition was stable and no further treatment was recommended. Dr. Alzoobi's records indicate he was referring Petitioner for a surgical evaluation to determine whether surgical intervention was warranted. (Px. 5).

Petitioner testified Respondent did not offer work within his work restrictions. (T. pg. 24). Petitioner did not testify that he provided Respondent a copy of his work restrictions or requested to return to work for Respondent. Petitioner submitted into evidence a self-directed job search from September 3, 2014 through August 9, 2016. (Px. 24). The job search shows Petitioner applied to 10 jobs during the last four months of 2014, 41 jobs in 2015 and 26 jobs during the first eight months of 2016. (Px. 24).[2] Most of Petitioner's job search efforts consisted of emailing applications. (Px. 23). On August 11, 2014, Petitioner met with vocational counselor Susan Entenberg.

Petitioner was hired to operate a forklift for a staffing agency but quit after working 6 hours due to the physical demands of the job. (Px. 23). On July 26, 2016, Petitioner worked one day at Dolphin Car Wash but quit because his pay was based on tips. (T. pg. 36). On August 17, 2016, Petitioner started working for Geo's

[2] A review of the self-directed job search shows Petitioner applied for 3 jobs in September of 2014, 6 jobs in both October and November of 2014, 1 job in December of 2014, 3 jobs in January of 2015, 3 jobs in February of 2015, 2 jobs in March of 2015, 1 job in April of 2015, 6 jobs in May of 2015, 6 jobs in June of 2015, 4 jobs in July of 2015, 2 jobs in August of 2015 (both on the 25th), 1 job in September of 2015, 2 jobs in October of 2015 (both on the 30th), 5 jobs in November of 2015, and 3 jobs in December of 2015,

Pizza as a delivery driver but quit in June 2020 due to physical issues caused by driving. Petitioner testified at Geo's Pizza he was paid $5.00 per hour plus $2.00 for each delivery and tips. (T. pg. 46). Petitioner testified the last job he applied for was for Geo's Pizza and he had not applied for any jobs in 2018, 2019, 2020, 2021 or in 2022. (T. pgs. 93-97).

From October 2014 through August 2015, Petitioner continued to follow up with Dr. Alzoobi who prescribed various medications. On January 6, 2015, Dr. Alzoobi's examination noted good range of motion, normal flexion and extension and that Petitioner could ambulate freely without assistance. Dr. Alzoobi continue to diagnose discogenic disease and a disk protrusion at T6-7. Dr. Alzoobi indicated Petitioner reached maximum medical improvement as of March 31, 2015 and no further treatment was warranted. At that time, Dr. Alzoobi discussed tapering Petitioner off Norco over the next 2-4 weeks. (PX 5).

Dr. Alzoobi left the Health Benefits practice so Petitioner started treating with Dr. Zaki Anwar. On September 1, 2015, Dr. Anwar recommended repeating epidural steroid injection, as had previously performed by Dr. Alzoobi. (Px 15).

On October 29, 2015 Petitioner underwent a second Section 12 examined with Dr. Singh who opined epidural injections were not indicated for discogenic pain because the epidural space has no role in discogenic pain. Dr. Singh indicated discogenic pain is related to motion of the disk space segments and the thoracic spine is immobile because it is surrounded by the rib cage and sternum. Dr. Singh said Petitioner could not have discogenic pain at T6-7 because the spine that segment is immobile. In his report, Dr. Singh said he disagrees with Dr. Alzoobi's opinions because if the T6-7 disk protrusion caused spinal cord effacement, it would have resulted in objective findings of spasticity and hyperreflexia, which was not present. Dr. Singh said if Petitioner had spinal cord effacement, the epidural injection would still be medically contraindicated. (Rx 2).

Petitioner underwent a thoracic MRI on December 21, 2015 which identified multilevel spondylosis from T-2 through T12. The disc bulge at T6-7 present on the March 6, 2014 MRI was no longer present on the December 21, 2015 MRI. The multilevel spondylosis present on the December 21, 2015 MRI was not present on the March 6, 2014 MRI. Although the T6-7-disc bulge resolved Petitioner continued to report the same or similar symptoms.

Dr. Anwar proffered a new diagnosis after reviewing the December 21, 2015 MRI or reviewing Dr. Singh's report. Dr. Anwar opined the source of Petitioner's pain has always been the facet joints caused by spondylosis related to Petitioner's work accident. (PX 7, Px. 15). Dr. Anwar recommended a different course of treatment consisting of diagnostic medial branch blocks and radio frequency ablations. Petitioner underwent the diagnostic medial branch blocks in September and October of 2016 and the radiofrequency ablations in

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4 jobs in January of 2016, 5 jobs in February of 2016, 3 job in March of 2016, 2 jobs in April of 2016, 3 jobs in May of 2016, 3 jobs in June of 2016, 4 jobs in July of 2016 and 2 jobs in August of 2016. (Px. 23).

September of 2017 and April of 2018. (PX 7). Dr. Anwar testified Petitioner received some initial relief from the injections but his pain gradually worsened. (Px 15, pg. 25).

On December 21, 2016, Petitioner underwent a third FCE which found Petitioner capable of working at a medium demand level still below the physical requirements of Petitioner's previous profession as a carpenter. [3] (PX 12). Petitioner continued following up with Dr. Anwar and in 2017 Dr. Anwar discussed the use of medical marijuana which Petitioner currently takes. (PX 7, T. pg. 39).

Petitioner testified he is not currently employed and has not worked since June of 2020 (T. pg. 45). Petitioner testified he also underwent physical therapy for right shoulder and hip pain. Petitioner did not submit into evidence that his hip or shoulder conditions are related to his December 3, 2013 work injury. Petitioner testified he wakes up in pain and he is unable to stand without taking a hot shower and using heating pads. Petitioner testified he continues take Norco, anti-inflammatories, and medical marijuana. (T. pg. 48).

Testimony of Dr. Singh, Section 12 Examiner

Dr. Singh testified he examined Petitioner on March 26, 2014 and October 29, 2014. Petitioner reported "pushing" on an overhead scaffold bar when he felt a pop in his mid-lower back. Dr. Singh testified Petitioner's exam showed normal reflexes, normal strength, no signs of spinal cord compression, negative Hoffman's Inverted Brachioralis Test, and negative Spurling's Signs. Dr. Singh indicated Petitioner self limited while performing range of motion testing for both the thoracic and lumbar spine. Dr. Singh also indicated his exam showed positive Waddell signs. (Rx. 3, pgs. 9-14). Dr. Singh reviewed the MRI which, he said, was normal and showed no central or foraminal stenosis, no spinal cord or nerve root compression and normal thoracic kyphosis. Dr. Singh diagnosed a resolved thoracic muscular strain. (Rx. 3, pgs. 12-13). Dr. Singh opined Petitioner could return to work without restrictions and no further treatment was warranted. (Rx. 3, pg. 16).

Dr. Singh testified Petitioner did not have preexisting spinal condition at the time of his work incident based upon the normal MRI. Dr. Singh opined Dr. Alzoobi's diagnosis of discogenic pain at T6-7 with axial and mechanical pain is scientifically and medical impossible. Dr. Singh testified the thoracic spine can't have discogenic pain because discogenic pain is caused by a moving disc and the thoracic spine, by definition, can't move because it's surrounded by a rib cage and sternum. (Rx. 3, pg. 54). Dr. Singh further testified Petitioner could not have discogenic pain at T6-7 because it is a non-moving segment and that diagnosis is medically and scientifically impossible. (Rx. 3, pg. 35).

[3] The Arbitrator does not place significant weight on the FCE reports because Petitioner's physical condition prior to his work accident is unknown. Petitioner was able to perform his job duties for 3 months prior to his work accident but he received medical treatment for his back just a month prior to starting work for Respondent. The Arbitrator also notes Dr. Alzoobi testified Petitioner was capable of returning to his prior occupation but risked reinjury if he did. (Rx. 8, Px 15, Px. 15, pg. 55).

Dr. Singh opined the FCE, pain management treatment and epidural injections were not warranted based upon Petitioner's normal neurological examination, normal MRI, normal appearing thoracic spine and lack of any functional limitations. (Rx. 3, pgs. 47-49). Dr. Singh testified injections into the thoracic spine are rarely ever done. Dr. Singh testified the only time thoracic epidural injections are used involves thoracic radiculopathy with a particular distribution into the rib cage and thoracic wall. Dr. Singh testified thoracic epidural injections aren't recommended, in this case, due to the high rate of neurological injury and lack of any neurological deficit. (Rx. 3, pg. 17). Dr. Singh testified an epidural injection into a non-compressed disc protrusion would have no effect. Dr. Singh testified Petitioner's central disc protrusion could not have cause nerve compression because there is no nerve at that location. Dr. Singh further testified if spinal compression existed Petitioner would have weakness in his legs and profound deficit changes, which he did not. (Rx. 3, pg. 49).

Testimony of Dr. Alzoobi (pain management)

Dr. Alzoobi testified he first examined Petitioner on February 25, 2014 and, at that time, Petitioner reported "pushing" against a scaffold and, as he "lifted up", Petitioner felt a pop in is back. Dr. Alzoobi testified his examination showed no neurological injury or nerve damage. (Px. 14, pg. 34). Dr. Alzoobi testified the MRI, dated March 6, 2014, showed a generalized disc bulge at T6 level effacing the ventral thecal sack, which was the source of Petitioner's pain. (Px. 14, pgs. 13-14). Dr. Alzoobi testified Petitioner's T6-7-disc pathology was the cause of his pain. (Px. 14, pg. 42).

Dr. Alzoobi opined Petitioner had discogenic pain at T6-7 and the use of epidural steroid injections was reasonable treatment for discogenic pain at T6-7. (Px 14, pg. 18). Dr. Alzoobi disagreed thoracic epidural steroid injections aren't indicated and that a T6-7-disc bulge could not cause discogenic pain. (Px 14, pgs. 37-38). Dr. Alzoobi testified he based his conclusions upon Petitioner's age, lack of other problems, and an MRI showing some pathology. (Px. 14, pg. 43).

On cross examination, Dr. Alzoobi admitted his examination showed no evidence of nerve root or spinal canal involvement and that Petitioner's reflexes, sensory and motor functions were all normal. Dr. Alzoobi also admitted his examinations did not find any muscle spasms. (Px. 14, pgs. 55-64). Dr. Alzoobi testified his conclusions regarding the legitimacy of Petitioner's pain complaints were predominantly based upon Petitioner's responses to questions. (Px. 14, pg. 68).

Testimony of Dr. Anwar (pain management)

Dr. Anwar testified he first examined Petitioner in September of 2015 after Dr. Alzoobi left the practice. Dr. Anwar testified Petitioner was originally assessed discogenic pain at T7-8. (Px. 15, pg. 10). Dr. Anwar testified he ordered an MRI, which was performed on December 21, 2015, that showed multi-level spondylosis. (Px. 15, pg. 13). Dr. Anwar testified he compared the original MRI to the new MRI and noted the new MRI

showed a spondylosis condition not identified in original MRI. Dr. Anwar testified the spondylosis was the reason to proceed further. (Px. 15, pg. 13).

Dr. Anwar opined repetitive axial loading in people who do heavy lifting work over years can cause the lordotic curve to change. (Px. 15, pg. 15). Dr. Anwar testified after the second MRI he opined the source of Petitioner's pain was emanating from a different source. Dr. Anwar opined Petitioner was suffering from symptomatic thoracic facet joints at T6-7 and T7-8. (Px. 15, pg. 27). Dr. Anwar testified Petitioner had always been suffering from a symptomatic thoracic facet joint pain due to multi-level spondylosis. (Px. 15, pgs. 28-29). Dr. Anwar testified Petitioner had a pre-existing medical condition of spondylosis which made him prone to injury. (Px. 15, pg. 32). Dr. Anwar opined Petitioner's condition was causally related to his work injury of December 3, 2013 because Petitioner sustained an axial loading injury to the spine after "lifting" a heavy bar causing trauma to the middle of Petitioner's back. (Px. 15, pg. 28).

On cross examination Dr. Anwar admitted stating in prior reports Petitioner was suffering from discogenic pain caused by a disc protrusion at C7-8. (Px. 15, pg. 53). Dr. Anwar also admitted the March 2014 MRI never identified the existence of spondylosis or hypertrophic changes in the thoracic spine. (Px. 15, pg. 65).

Testimony of Dr. Dinora Ingberman

Dr. Ingberman is a physical medicine rehabilitation and pain specialist who performed a records review for Respondent. (RX 5, pgs. 7-8). Dr. Ingberman testified the radiologist who interpreted the March 6, 2014 MRI identified a mild central disc bulge at T6 between T6-7 slightly effacing the ventral aspect of the thecal sac. (Rx. 5, pgs. 25-26). Dr. Ingberman testified the MRI showed no significant stenosis, no neural structure compromised, no impact on any neutral structures from the slightly bulging central disc. (Rx. 5, pgs. 26). Dr. Ingberman testified the MRI was found to be normal other than the mild disc bulge. Dr. Ingberman also reviewed the subsequent MRI. Dr. Ingberman testified the subsequent MRI showed some hypertrophy of the posterior element, not present in the March 6, 2014 MRI. (Rx. 5, pg. 15).

Dr. Ingberman testified Petitioner underwent a compression test which showed no indication of nerve impingement and Petitioner only had scapular pain indicating his condition was more muscular. (Rx. 5, pg. 19). Dr. Ingberman testified Dr. Alzoobi's exams showed no signs of nerve impingement or dermatomal involvement or discogenic involvement. (Rx. 5, pg. 25).

Dr. Ingberman opined Petitioner was not a candidate for epidural steroid injections. (Rx 5. Pg. 30). Dr. Ingberman testified no additional treatment was warranted after Dr. Alzoobi found Petitioner to be at maximum medical improvement on June 10, 2014. (Rx. 5, pg. 32). Dr. Ingberman testified after reviewing the December 21, 2015 MRI there was no justification to continue treatment or administer epidural injections. (Rx. 5, pg. 41. Dr. Ingberman testified no objective signs existed to justify medical branch block injections or prescribe Norco. (Rx. 5, pg. 45-49).

Dr. Ingberman diagnosed a resolved thoracic muscle strain with chronic left parathoracic pain without objective evidence of correlating pathology. (Rx. 5, pgs. 54-55). Dr. Ingberman opined Petitioner's current condition is not related to his December 3, 2013 incident because no pathology exists which explains Petitioner's complaints. (Rx. 5, pg. 55). Dr. Ingberman opined the first few weeks of medical treatment was reasonable for Petitioner's muscle strain and he could return to work full duty. (Rx. 5, pgs. 56-58).

Testimony of Susan Entenberg-Vocational Specialist

Ms. Entenberg testified on December 12, 2014 (Rx 17) and December 1, 2017 (Rx 18). Ms. Entenbert testified Petitioner worked as a construction carpenter which is deemed heavy in exertional level by the Dictionary of Occupational Titles. (Px 17, pg. 20). Ms. Entenberg opined based upon the FCE and Dr. Alzoobi's restrictions Petitioner could not return to his previous line of employment as a union construction carpenter. (Px 17, pgs. 21, 23-24).

Ms. Entenberg opined Petitioner had sustained a loss of earning power as a result of his injuries and inability to return to his previous line of work. (Px 17, pg. 28). Ms. Entenbert opined without training Petitioner would be able to earn between $11 to $16 per hour in an entry level position such as a light delivery driver, building maintenance worker, forklift driver or sales representative. (Px 17, pg. 31).

Ms. Entenberg interviewed Petitioner a second time on October 13, 2017. Ms. Entenberg reviewed Petitioner's 2016 FCE and updated records from Dr. Anwar. (Px 18). Ms. Entenberg also reviewed information from Petitioner regarding his employment with Geo's Pizza and his job logs. Ms. Entenbert testified Petitioner worked about 30 hours per week at Geo's Pizza earing approximately $450.00 per week or $15.00 per hours. (Px. 18, pg. 59). Upon reviewing Petitioner's job logs, Ms. Entenberg testified Petitioner told everyone about his work restrictions, (Px. 18, pg. 71).

Ms. Entenbert testified, based upon Dr. Anwar's work restrictions, Petitioner was still not able to return to his work as a construction worker. (Px. 18, pg. 61). Ms. Entenberg opined that Petitioner's earning ability was in the range of $11 to $16 per hour and his earnings with Geo's Pizza was within that range. (Px 18, pg. 62).

Testimony of Julie Bose-Vocational Specialist

Julie Bose performed a vocational rehabilitation evaluation of Petitioner at the request of Respondent and testified on February 6, 2019. (Rx 6). Ms. Bose did not meet with Petitioner. (Rx 6, pg. 9). After reviewing Petitioner's FCE, Ms. Bose testified Petitioner was in the limited range of medium work activity, which means there are some jobs in the medium range of activity he would be unable to perform. (Rx 6, pg. 13). Ms. Bose testified, assuming the FCE restrictions were valid, Petitioner could not return to the work of a journeyman carpenter. (Rx 6, pg. 15).

Without retraining, Ms. Bose felt Petitioner could work in positions such as tool counterman, subcontracting clerk in a home improvement store, or building supply sales. (Rx 6, pg. 22). Ms. Bose contacted

employers and found the entry level wage range was $10 to $18 per hour with an overall mean of $13.13 per hour. (Rx 6, pg. 23).

After contacting various potential employers, Ms. Bose concluded Petitioner's earning ability in these positions was similar to his job at Geo's Pizza but those positions were full time and had advancement opportunities. (Rx 6, pgs. 28-29). Ms. Bose did not agree Petitioner was at his maximum hourly earning ability because she felt that jobs, she suggested, had more growth potential. (Rx 6, pg. 56).

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), Whether the Petitioner's Current Condition of Ill-being is Causally Related to the 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). When an employee with a preexisting condition is injured in the course and of his employment the Commission must decide whether there was an accidental injury which arose out of the employment, whether the accidental injury aggravated or accelerated the preexisting condition or whether the preexisting condition alone was the cause of the injury. *Sisbro, Inc. Industrial Comm'n*, 207 Ill.2d 193, 278 Ill.Dec. 70,797 N.E.2d 665, (2003). 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).

The Arbitrator has carefully reviewed and considered all medical evidence along with all testimony. The Arbitrator concludes Petitioner has not proven by the preponderance of the credible evidence that his current back condition is causally related to his work accident of December 3, 2013, as set forth more fully below.

Petitioner's original pain management physician, Dr. Alzoobi, diagnosed discogenic pain at the T6-7 level based upon a March 6, 2014 MRI. [4] (Px 14). The Arbitrator notes the March 6, 2014 MRI did not show the existence of hypertrophy or spondylosis at that time. Dr. Alzoobi's examinations identified no loss of strength, no nerve damage or neurologic injury and that Petitioner had normal sensory and motor functions as well as normal reflexes. (Px 14).

Petitioner's second pain management physician, Dr. Anwar, opined Petitioner's pain was due to symptomatic thoracic facets joints at T6-7 and T7-8 caused by hypertrophy or spondylosis, not by discogenic pain at T6-7. (Px15). Dr. Anwar testified Petitioner had always been suffering from symptomatic thoracic joint pain due the axial loading of the multi-level spondylosis. (Px 15, pgs. 28-29). Dr. Anwar recommended a different course of treatment consisting of diagnostic facet branch blocks, radio frequency ablations and various pain medications. (Px 15).

Dr. Anwar based his diagnosis upon a December 21, 2015 MRI showing hypertrophy. Arbitrator notes the T6-7-disc bulge effacing the thecal sac, as noted in the March 6, 2014 MRI, resolved prior to the second MRI. The radiologist who interpreted the December 21, 2015 MRI stated no disc bulge exists at T6-7. (Px 9).

The Arbitrator does not find the opinions of Drs. Anwar and Alzoobi persuasive. Dr. Anwar testified the source of Petitioner's pain emanated from a different condition than Dr. Alzoobi. Dr. Anwar believed the source of Petitioner's pain was from symptomatic thoracic facets joints caused by spondylosis while Dr. Alzoobi believed Petitioner was suffering from discogenic pain caused by a disc bulge at T6. The Arbitrator notes the spondylosis condition, identified on the December 21, 2015 MRI, did not exist at the time Petitioner underwent the March 6, 2014 MRI, four months after his work incident.

Dr. Anwar testified Petitioner had spondylosis causing his facet joints to become symptomatic from an axial loading injury when Petitioner lifted a heavy bar at work. (Px 15, pgs. 28, 29). The Arbitrator does not find Dr. Anwar's opinions persuasive. The March 6, 2014 MRI, taken 3 months after the accident, did not show the existence of a preexisting of hypertrophy or spondylosis condition. The Arbitrator notes Dr. Anwar testified it takes years of repetitive axial loading and heavy lifting at work to cause hypertrophy. (Px.15, pg. 14). If the preexisting condition existed, it should have been identified on the March 6, 2014 MRI. As such, the Arbitrator finds the hypertrophy or spondylosis condition did not exist at the time of Petitioner's work incident so it could not have been a preexisting condition which caused Petitioner's thoracic facet joints to become symptomatic. The Arbitrator notes Dr. Anwar failed to provide an explanation how the spondylosis or hypertrophy condition existed, if it did, and would not been identified on the March 6, 2014 MRI. The Arbitrator finds it reasonable to

[4] The MRI identified a mild central generalized disc bulge at T6-7 which slightly effaces the ventral aspect of the thecal sac but does not cause significant central canal or foraminal stenosis. The MRI of the thoracic spine was found to be otherwise normal in appearance by the radiologist. (Px. 5). The Arbitrator notes that no hypertrophy or spondylosis was identified on the MRI.

assume Dr. Anwar's diagnosis changed after realizing the T6-7-disc bulge, identified on the March 6, 2014 MRI, resolved and was not be effacing the ventral aspect of the thecal sac or after reviewing Dr. Singh's report which stated discogenic pain at T6-7 was scientifically and medically impossible. This is not a situation when the nature of Petitioner's pain complaints changed and, therefore, could be emanating from a new or different source.

The Arbitrator finds the opinions of Drs. Sing and Ingberman persuasive. Dr. Singh diagnosed a thoracic muscular strain resolved by the time of his March 36, 2014 examination. Dr. Ingberman also diagnosed a resolved thoracic muscle strain. (Rx 5, pg. 54). Dr. Singh reviewed the March 6, 2014 MRI which, he said, was normal and showed no spinal cord or nerve root compression, no central or foraminal stenosis and showed normal thoracic kyphosis. (Rx. 3, pg. 11). Dr. Singh testified Petitioner sustained a non-structural strain which was an intra-muscular injury. (Rx. 3. Pg. 23). Dr. Singh testified his examination showed normal reflexes, no signs of spinal cord compression, 5/5 strength, negative Spuling's sign and negative Hoffman's Inverted Brachioralis reflex. Dr. Singh testified Petitioner had positive Waddell Signs and that he was also self-limiting his lumbar and thoracic range of motions. (Rx. 3, pgs. 9-15).

Dr. Singh opined a disc bulge at T6-7 effacing the thecal sac cannot cause discogenic pain, as diagnosed by Dr. Alzoobi. Dr. Singh testified Dr. Alzoobi's diagnosis of T6-7 discogenic pain was scientifically or medically impossible. (Rx 3, pg. 34). Dr. Singh testified discogenic pain requires movement and the thoracic spine at T6-7 is a nonmoving segment because it is bound by the rib cage which connects to the sternum. (Rx 3, pgs. 34-35). Dr. Singh further testified thoracic discogenic pain is scientifically impossible. (Rx 3, pg. 35). Dr. Ingberman opined Petitioner's current condition is not related to his December 3, 2013 work incident because there is no pathology that occurred which explains Petitioner's complaints. (Rx. 5, pg. 55).

With Respect to Issue (G), What were Petitioner's earnings, the Arbitrator Finds as follows:

Petitioner testified he earned $42.52 per hour as a union member. Petitioner testified he was paid his regularly hourly rate of pay for working 40 hours a week but he could also earn time and a half for working more than eight hours a day or double time for working weekends. (T. pg. 16). Petitioner testified at the particular job he was working when injured, he was working 12 hours 7 days a week. (T. pg. 15). Petitioner did not testify whether he worked the same number of hours a week while working for Respondent on all jobs or just this particular job. Petitioner testified only some overtime was mandatory but he did not testify as to the number of mandatory overtime hours worked per week nor the circumstances involving the nature of overtime work Petitioner believed was mandatory. (T. pg. 16). Petitioner also testified he had the choice to work overtime or not. (T. pg. 16). The Arbitrator finds Petitioner failed to prove the number of hours a week he

regularly worked mandatory overtime. The Arbitrator further finds Petitioner proved he worked 40 hours a week earing $42.52 per hour and, as such, his average weekly wage was $1,712.80.

With Respect to Issue (J), Whether Respondent is liable for Medical Expenses, the Arbitrator Finds as Follows:

Section 8(a) of the Act states a Respondent is responsible "*…for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury…*" A claimant has the burden of proving that the medical services were necessary, and the expenses were reasonable. See *Gallentine v. Industrial Comm'n*, 201 Ill.App.3d 880, 888 (2nd Dist. 1990).

The Arbitrator has carefully reviewed and considered all medical evidence along with all testimony. The Arbitrator concludes Petitioner has not proven by the preponderance of the credible evidence the medical expenses after Dr. Singh's exam of March 26, 2014 was necessary medical treatment reasonable required to cure or relieve Petitioner from the effects of his injury.

As stated above, the Arbitrator find the opinions of Drs. Singh and Ingberman to be more persuasive than those of Drs. Alzoobi and Anwar. Drs. Singh and Ingberman opined Petitioner's condition resolved by March 26, 2014, the date of Dr. Singh's original examination, and treatment, after that date, was neither necessary nor reasonable. The Arbitrator specifically relies on the findings of Dr. Singh regarding the lack of any movement of the vertebrae in Petitioner's thoracic spine as well as the lack of any objective pathology as the source of Petitioner's pain. The Arbitrator also notes the condition Dr. Anwar diagnosed as the source of Petitioner's pain did not exist at the time of his work incident. As such, Respondent is liable to pay for reasonable and necessary medical services provided prior to March 26, 2014, as identified in Petitioner's Exhibit 29, as provided in Sections 8(a) and 8.2 of the Act.

With respect to issue (K) whether Petitioner is entitled to TTD benefits, 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 that he is entitled to receive temporary total disability benefits for 15 1/7 weeks, commencing December 11, 2013 through March 26, 2014, as provided in Section 8(b) of the Act. Petitioner was placed on an off-work status on December 11, 2013 at Provena St. Joseph Medical Center. (PX 1). Petitioner remained off work or on restrictions until Dr. Singh determined he reached maximum medical improvement and could return to work full duty on March 26, 2014. Based upon the Arbitrator's findings that Petitioner's current condition of ill-being not being causally related to his work accident, as detailed above in Section (f) and incorporated herein, the Arbitrator finds Petitioner failed to prove by the preponderance of the evidence he is entitled to receive benefits after March 26, 2014.

Based upon the various findings above, the Arbitrator makes no additional findings regarding the validity of Petitioner's self-directed job search nor entitlement to maintenance.

With respect to issue "L," the nature and extent of Petitioner's injuries, the Arbitrator makes the following conclusions:

Section 8.lb of the Illinois Workers' Compensation Act ("Act") addresses the factors that must be considered in determining the extent of permanent partial disability for accidents occurring on or after September 1, 2011. 820 ILCS 305/8.1b (LEXIS 2011). Specifically, Section 8.1b states:

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:
>
> (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.
>
> (b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:
>
> (i) the reported level of impairment pursuant to subsection (a);
> (ii) the occupation of the injured employee;
> (iii) the age of the employee at the time of the injury;
> (iv) the employee's future earning capacity; and
> (v) evidence of disability corroborated by the treating medical records.

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. *Id.*

Considering these factors in light of the evidence submitted at trial, the Arbitrator addresses the factors delineated in the Act for determining permanent partial disability.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report was submitted into evidence and, therefore, the Arbitrator gives no weight to this factor in determining permanent partial disability.

With regard to subsection (ii) of §8.lb(b), the occupation of the employee. Petitioner was employed as a carpenter which is a physically demanding occupation. Drs. Singh and Ingherman opined Petitioner could return to work without restrictions. Petitioner did not return to work as a carpenter for reasons found not to be caused by his work accident. As such, the Arbitrator gives some weight to this factor in determining permanent partial disability.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 30 years old at the time of the accident. The Arbitrator views Petitioner as a younger individual with a significant amount of his work life remaining and the Petitioner would be required to continue working with the effects of his thoracic muscle strain for the balance of his work life, assuming he returned to his occupation. As such, the Arbitrator gives some weight to this factor in determining permanent partial disability.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity. Petitioner did not return to work as a carpenter. Petitioner failed to prove he was unable to return to work as a carpenter due to a work-related condition and, therefore, Petitioner did not prove his future earnings capacity were adversely impacted as a result of a work-related accident. As such, the Arbitrator gives little weight to this factor in determining permanent partial disability.

With regard to subsection (v) of §8.lb(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner's pain complaints were not corroborated by the medical records. The Arbitrator did not find the opinions of Drs. Alzoobi and Anwar persuasive. The Arbitrator notes Dr. Anwar believed Petitioner's symptoms were caused by a condition which did not exist at the time of Petitioner's work accident while Dr. Alzoobi believed Petitioner's symptoms were caused by a condition Dr. Singh believed was scientifically and medically impossible. The Arbitrator also notes all of Petitioner's examinations failed to any identify a single objective positive neurologic finding. As such, the Arbitrator gives some weight to this factor in determining permanent partial disability.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 10% loss of use of the person, pursuant to §8(d)(2) of the Act.

By: /o/ *Frank J. Soto* May 6, 2022
Arbitrator Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC018891
Case Name	Vern Brotherton v. Coalfield Construction
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0282
Number of Pages of Decision	18
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Roman Kuppart
Respondent Attorney	Julie Webb, Kenneth Werts

DATE FILED: 6/27/2023

/s/Maria Portela, Commissioner

Signature

23IWCC0282

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

VERN BROTHERTON,

Petitioner,

vs. NO: 18 WC 18891

COALFIELD CONSTRUCTION,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, and permanent partial disability and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Statement of Facts of the Arbitrator, which is attached hereto and made a part hereof.

The Commission finds that the Petitioner failed to prove he sustained a compensable accident and reverses the Decision of the Arbitrator as to accident.

The burden is on Petitioner to prove by a preponderance of the evidence that coal workers' pneumoconiosis exists in him. *Smith v. Industrial Comm'n*, 98 Ill.2d 201 (1983). To prove his claim by a preponderance of the evidence, Petitioner must show that it is more probably true than not that he has coal workers' pneumoconiosis. *Dubey v. Public Storage*, 395 Ill.3d 342, 353 (1st Dist. 2009).

Petitioner spent approximately 42 years under ground working in the coal mines and was regularly exposed to coal and rock dust. (T. 10) His last day worked was April 6, 2018. He testified that one of the reasons he decided to retire was because he was worn out from that work and that the effects of breathing in coal dust was part of that. (T. 13)

On November 12, 2018, eight months after Petitioner last worked for Respondent, he first sought medical treatment with Dr. Istanbouly at his attorney's request for his alleged respiratory condition. Petitioner told Dr. Istanbouly he left the mine when it closed and did not quit mining due to any respiratory problem. (Px1, p. 20) At the time of this initial visit Petitioner told Dr. Istanbouly he had no significant exertional dyspnea and was able to walk a mile without any breathing

problems. Petitioner's history to Dr. Istanbouly is inconsistent with his trial testimony that he had experienced breathing problems years before he retired.

Petitioner's treating records were in evidence and did not contain notations of respiratory problems or complaints in relation to same. In addition, the three spirometry studies in evidence were normal. (Rx6 9/18/17 exam, Px1 11/12/18 exam and Rx3 3/11/19 exam) The medical experts also reviewed chest x-rays Petitioner underwent on September 8, 2017 and May 18, 2018, in order to determine if Petitioner suffers from coal workers' pneumoconiosis. Petitioner introduced into evidence the B-readings of Drs. Crum, Cohen and Smith, as well as the report of Dr. Istanbouly, all of which found evidence of coal workers' pneumoconiosis. Respondent introduced into evidence the B-readings of Drs. Meyer, Seaman and Lockey, all of which found no evidence of coal workers' pneumoconiosis.

Petitioner introduced the testimony of Dr. Istanbouly who testified that he characterized what he saw on Petitioner's chest x-ray as mild pneumoconiosis. Dr. Istanbouly also stated that he could not say what the distinction is between a profusion of 1/0 or 0/1. Dr. Istanbouly further testified that he knows that one is positive and one is negative, but the finer distinction between the two he could not say. One of Respondent's Section 12 examiners, Dr. Meyer testified to the training and examination required to become a B-reader. Dr. Istanbouly does not have such training. He is not an A-reader or B-reader of films. While one is not required to be an A-reader or B-reader to interpret films for the presence of pneumoconiosis, having such training and certification certainly lends credibility to a physician's interpretation. The Arbitrator noted that Dr. Istanbouly's testimony revealed his significant experience and credentials in the field of pulmonary studies and that he was board certified in critical care medicine and pulmonary medicine. However, these credentials do not provide any evidence of expertise in interpreting chest x-rays for the presence of pneumoconiosis. In fact, his testimony reveals that he is the least qualified expert in this case to provide interpretations of chest x-rays for pneumoconiosis.

Respondent's Section 12 examiner, Dr. Lockey, testified as to what is required for a proper reading of a chest x-ray for pneumoconiosis. Dr. Lockey testified that to have a positive interpretation of a film for pneumoconiosis, one needs to have a minimum profusion of 1/0. He testified that a profusion of 0/1 is technically negative for pneumoconiosis. Dr. Lockey testified that the distinction between a profusion of 1/0 and 0/1 is a fine one and is a point of emphasis in the B-reading course and syllabus.

Coal workers' pneumoconiosis typically manifests in the upper zones of the lungs, Experts for both Petitioner and Respondent agreed that upper zone manifestation is more typical. Dr. Meyer testified that coal workers' pneumoconiosis is typically an upper zone predominant process. Dr. Smith agreed that the small opacities of coal workers' pneumoconiosis are usually rounded and involve the upper lung zones first and as the dust exposure continues all the lung zones may become involved. Dr. Lockey also testified that coal workers' pneumoconiosis usually causes a round opacity initially located in the upper lung fields.

In the instant case, the alleged process was not present in the upper lung zones. Dr. Meyer testified that the P, Q and R are nodular opacities while S, T and U are linear opacities. Dr. Cohen interpreted the chest x-ray of May 18, 2018, as profusion 1/0 with S/T opacities in the mid and lower lung zones. Dr. Smith interpreted the chest x-rays of May 2018 and September 2017 as having profusion 1/1 with P/P opacities in all lung zones. Dr. Crum interpreted the September 2017 and May 2018 chest x-rays as revealing P/Q opacities in all lung zones of profusion 1/0. Dr. Cohen's

interpretation is an outlier even when compared to the other positive B-readings and is not consistent with the general presentation and progression of coal workers' pneumoconiosis.

All three of Respondent's Section 12 examiners found the September 2017 and May 2018 films to be of questionable quality. Drs. Meyer and Lockey interpreted the two chest x-rays as negative for pneumoconiosis. Dr. Seaman interpreted the September 2017 chest x-ray as negative for pneumoconiosis. Dr. Meyer testified that the chest x-rays of 2017 and May 2018 were both quality 2 films. He testified that 2017 examination was slightly underexposed and had some quantum mottle. The 2018 examination was underinflated and had mottle. Dr. Meyer testified that mottle can make a film look grainy and can simulate small opacities. He testified that an underexposed film tends to accentuate the pulmonary vasculature and the reader has to be careful not to mistake that for a nodule or opacity. He testified that a patient's failure to take a deep breath can also accentuate the pulmonary vasculature. Dr. Lockey also found these two films to be quality 2. The 2017 film was underexposed. Dr. Lockey testified that the May 2018 film was underexposed and underinflated. Dr. Seaman found the September 2017 chest x-ray to be quality 2 due to mottle.

Alternatively, Petitioner's Section 12 examiners found the films to be of diagnostic quality. Drs. Crum and Smith found the chest x-rays of 2017 and 2018 to be quality 1. They did not note the presence of mottle on the films or that they were underexposed or underinflated. Dr. Lockey testified that it is important to note the quality of the film to see whether the interpreter noted the deficiencies in the film with the presumption that the reader took same into consideration when he interpreted the film. Drs. Crum and Smith apparently did not take any deficiencies in the chest x-rays into account when interpreting Petitioner's chest x-rays.

Additionally, the Commission takes the qualifications of each of the Section 12 examiners into account. Dr. Meyer has been certified as a B-reader since 1999 and has passed every subsequent recertification exam. While Dr. Smith has been continuously certified as a B-reader since 1987, he testified that he failed the B-reading recertification examination twice around 1999. He testified that he failed because he was overreading the films. He was finding more disease than was present on the standard film. Dr. Smith testified that the syllabus that he uses to study for the B-reading exam he pretty much takes as gospel and that the panel that puts that together are the peers that he aspires to be. Dr. Smith testified that the leaders in the field have been chosen to put that syllabus together. Dr. Smith testified that Dr. Cris Meyer was one of the authors of the new syllabus that has been authored for NIOSH. Dr. Lockey testified that he was also part of the ACR Pneumoconiosis Task Force with regard to redoing the training manual/syllabus for physicians taking the B-reading course. Dr. Seaman is board certified in radiology and is a NIOSH B-reader. Dr. Seaman also served on the ACR Pneumoconiosis Certification Program Task Force which delivered the new B-reading syllabus to NIOSH in March 2017. According to Dr. Smith, Respondent's experts are the leaders in the field of B-reading.

Based on the totality of the evidence, the Commission finds the opinions of Drs. Meyer, Seaman and Lockey to be more persuasive than those of Drs. Smith, Crum or Cohen. As such, the Commission finds that Petitioner failed to prove by a preponderance of the evidence that he suffered from coal workers' pneumoconiosis or any other occupational disease and reverses the Arbitrator's Decision as to accident.

Based on these findings, all other issues are moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitration Decision, filed June 16, 2022 is hereby reversed and all awards vacated.

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

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

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

June 27, 2023

/s/ *Maria E. Portela*

MEP/dmm
O: 050923
49

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC018891
Case Name	BROTHERTON, VERN v. COALFIELD CONSTRUCTION
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Roman Kuppart
Respondent Attorney	Kenneth Werts

DATE FILED: 6/16/2022

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

/s/Linda Cantrell, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

VERN BROTHERTON
Employee/Petitioner

v.

COALFIELD CONSTRUCTION
Employer/Respondent

Case # **18** WC **018891**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Herrin**, **Illinois** on **March 25, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ 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 **April 6, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**78,000.00**; the average weekly wage was $**1,500.00**.

On the date of accident, Petitioner was **62** years of age, ***married*** with **0** dependent children.

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

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

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

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

ORDER

Respondent shall pay Petitioner the sum of $**790.64 (Max. rate)**/week for a period of **25** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused permanent partial disability to the extent of **5% loss of Petitioner's body as a whole.**

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

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

Linda J. Cantrell

_____ **JUNE 16, 2022**

Arbitrator Linda J. Cantrell

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

VERN BROTHERTON,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 18-WC-018891
	)	
COALFIELD CONSTRUCTION,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on March 25, 2022 on all issues. An Application for Adjustment of Claim was filed in June 2018, wherein Petitioner alleges he sustained an occupational disease of his lungs and/or heart as the result of inhaling coal mine dust, including, but not limited to, coal dust, rock dust, fumes, and vapors for a period in excess of 41 years. The issues in dispute are disease, causal connection, the nature and extent of Petitioner's injuries, and Sections 1(d)-(f) of the Occupational Diseases Act. All other issues have been stipulated.

TESTIMONY

Petitioner is 65 years old, married, with no dependent children. He testified he worked in the coal mines for approximately 42 years and was regularly exposed to coal and rock dust, diesel fumes, and smoke from coal fires. Petitioner testified he last worked in the mines on 4/6/18, at which time he worked for Respondent at M-Class Mine in Akin, Illinois as a supervisor. He testified he was exposed to coal dust on his last day of employment as he was working underground at the tailgate on the long wall. Petitioner testified he was ready to retire because his body was worn out and feeling the effects of 42 years in the coal mine.

Petitioner obtained his high school diploma in 1974. He took a few courses in coal mining technology at Rend Lake College but did not finish. From 1974 to July 1976, Petitioner worked for a grocery store. From July 1976 to December 1978, Petitioner worked for Freeman No. 6 at the Waltonville coal mine. From December 1978 to 1982, Petitioner worked for Old Ben #27. From 1984 through September 2017, he worked for Kerr-McGee/American Coal. In September 2017, Petitioner became employed by Respondent and worked there until he retired. He has not worked anywhere else since.

Petitioner testified that while working at Freeman he operated a shuttle car that carried coal from the miner to the belt tail where it was deployed out of the mines. Petitioner was also a continuous miner operator. Petitioner testified the dust conditions were bad as a shuttle car and continuous miner operator in the 1970's as they did not have scrubbers or water sprayers for the

machinery. Petitioner testified now they have a certain amount of limited water sprays that must run on a miner. Petitioner testified that he also loaded roof bolters, scooped, hung curtains, and shoveled belt tails. Petitioner testified he would load a bundle of 250 bolts a day. Petitioner testified that as a supply man he ran supplies into the mine. He loaded supplies by machine and hand. Petitioner testified as a belt man he extended the belt lines as the miner mined. He installed and moved the rollers which required two people to move.

Petitioner testified that at Kerr-McGee/American Coal he was a roof bolter, a miner operator, and a face boss in both the miner units and long wall unit. He was a general mine foreman and his job as face boss was to make sure the mine and work activity were safe. Petitioner operated machinery when his crew was on break. He checked for gas at each face every 20 minutes. He would ride to a certain point and walk the rest of the way to perform safety checks. He stated the walking distance varied from long to short. He testified the terrain varied from gravel to very muddy, with ruts and water sometimes up to his chin.

Petitioner testified that as general foreman he did the planning for the entire mine which required a lot of walking underground. Petitioner testified that one of the long walls was 21,000 feet long which he walked every day. It was his job to make sure certain areas were walkable all the way back behind the long wall, gob line, and to a return fan. Petitioner testified the mine was inspected by MSHA every quarter which he prepared for. Petitioner testified he has had to walk ten miles per day underground. His exertional requirements as a coal miner were mostly heavy labor.

Petitioner testified that he currently has breathing problems when he exerts himself. He was examined by Dr. Istanbouly at his attorney's request in November 2018. He told Dr. Istanbouly that he had no significant exertional dyspnea and was able to walk at least a mile without any breathing problems, but he testified that statement is not true today. Petitioner testified he can currently walk about 100 yards before having breathing difficulties. Petitioner testified that his physical capacity has declined since leaving the mine. He first started noticing breathing problems before he retired. He stated it became more difficult to walk the required distances toward the end of his employment and he had to take breaks.

Petitioner testified he cannot climb more than eight to ten stairs. He stated his breathing difficulty has worsened. He has never taken breathing medication. He had both of his knees replaced at the age of 49. Petitioner testified his breathing problems affect his daily life. He cannot exert himself with his sixteen grandchildren but is able to attend their sporting events. He performs tasks at a slower pace. His hobby of hunting has been adversely affected but he is able to walk 40 to 50 yards to a deer stand. He parks his car as close as possible to minimize walking. His son helps him to drag deer.

Petitioner testified he takes care of his disabled brother-in-law who is 50 years old and on dialysis at their house. He takes his brother-in-law with him to Florida and they occasionally vacation in Branson on weekends.

Petitioner testified he mows 6 out of 8 acres of his property with a riding mower, and he weed eats some. Petitioner still fishes and his friends help him launch his boat at the lakes. Petitioner testified he did not want to retire when he did and wanted to work until age 65. He stated he could not currently perform his job duties in a satisfactory manner, and he could not get around underground. He stated he could not always complete his job duties at the end of his career.

Petitioner testified he has never seen a doctor for breathing problems because he "is not a doctor kind of guy and it takes a lot for him to go to the doctor". Petitioner testified he smokes less than a half a pack a day. Petitioner told Dr. Istanbouly he smoked a half a pack a day, but he thought about it and stated he smoked less because he worked underground 8 to 10 hours per day. Petitioner testified he has high blood pressure and takes thyroid medication. Petitioner testified he took x-rays for NIOSH, but he had never been examined for black lung other than by Dr. Istanbouly.

Petitioner testified that after he retired he applied for social security and received a 401K from Kerr-McGee/American Coal. He did not get a pension from UMWA.

MEDICAL HISTORY

Dr. James Brandon Crum is board-certified in radiology and is a NIOSH certified B-Reader. Dr. Crum passed his initial B-Reader examination in 2014 and maintained his certification status continuously since that time. (PX7) On June 5, 2018, Dr. Crum reviewed a chest x-ray dated 5/18/18 and found it to be a quality 1 film. Dr. Crum's impression was simple CWP with small opacities, primary p, secondary q, all zones involved bilaterally, of a profusion 1/0. (PX5). On 3/7/21, Dr. Crum reviewed a chest film dated 9/8/17 that he found to be a quality 1. He found simple CWP with small opacities, primary p, secondary q, in all lung zones bilaterally with a profusion of 1/0. (PX6).

On April 6, 2021, Dr. Christopher A. Meyer testified via evidence deposition at Respondent's request. (RX1) Dr. Meyer testified that he is a board-certified radiologist who has a B-Reading certificate. Dr. Meyer testified that he currently works as the Vice Chair of Finance and Business Development and professor of diagnostic radiology at the University of Wisconsin Hospital and Clinics in Madison, Wisconsin.

Dr. Meyer testified that he reviewed a chest film dated September 8, 2017, and another chest film dated May 18, 2018. Dr. Meyer testified that the 2017 chest film was a quality 2 because it was underexposed and that the 2018 chest film was a quality 2 because it was underinflated and because of mottle. Dr. Meyer found both chest films to be negative for CWP.

On cross examination, Dr. Meyer agreed that it was fair to say that experts with similar credentials may disagree on the reading of chest films, especially those in Category 1 of pneumoconiosis. He agreed that a negative chest x-ray for CWP does not necessarily rule out the disease. Dr. Meyers agreed with the Laney and Petsonk study which stated, "[i]ndividual coal macules are generally too small to be appreciated on chest x-rays". Dr. Meyers explained that "[m]ost of the nodules that we see on chest x-rays are actually what are known as summation

shadows, which means that multiple coal macules superimposed on one another form a shadow that's big enough for us to see."

Dr. James Lockey reviewed medical records and chest x-ray films regarding Petitioner at Respondent's request and testified on June 11, 2021. (RX4) Dr. Lockey reviewed a chest x-ray of Petitioner dated 9/8/2017, which he found to be quality 2 due to underexposure, and a chest film dated s5/18/18, which he found to be quality 2 due to underexposure. He testified that neither of the radiographic studies demonstrated changes consistent with pneumoconiosis.

Dr. Lockey agreed with Dr. Istanbouly that a miner could have CWP and not know they have it, have normal spirometry and have simple CWP, and having pulmonary function within the range of normal does not mean that the lungs have not been damaged. Dr. Lockey did not take a history from, examine, speak to Petitioner, nor speak to any of Petitioner's treating doctors.

Dr. Lockey agreed that it is not unusual for a miner with simple CWP to have a normal physical examination of the chest. He went on to testify that there is inter and intrareader variability and similarly qualified physicians can, and do, disagree on the findings of CWP in the early stages. Dr. Lockey agreed that the ILO system was not intended to be used in a legal setting but was to be used as an epidemiology study of coal miners He agreed that a doctor does not have to be a B-reader to diagnose CWP.

On August 24, Dr. Suhail Istanbouly testified via evidence deposition at Petitioner's request. (PX1). Dr. Istanbouly is board certified in critical care medicine and pulmonary medicine. Dr. Istanbouly did black lung examinations for the U.S. Department of Labor. He has been the medical director of the pulmonary department at Herrin Hospital since 2005. He is also the director of the Intensive Care Unit at Carbondale Memorial Hospital and that he has been the director of the Intensive Care Unit at Herrin Hospital.

Dr. Istanbouly evaluated Petitioner on November 12, 2018. He took a detailed history from Petitioner, performed a physical examination, and reviewed the pulmonary function testing and chest x-ray. Dr. Istanbouly testified that the pertinent aspects of Petitioner's history were that he worked as a coal miner for 41 years, with his last month of employment in coal mining in April 2018. Petitioner began smoking 1 ½ pack per day at the age of 20. Petitioner denied daily chronic cough or exertional dyspnea.

Dr. Istanbouly testified that it is not unusual for miners with simple CWP to be asymptomatic. He testified that a coal miner can have CWP and not know they have it. He testified that a person does not have to have abnormalities on physical examination of the chest and that it is not unusual for someone with early stages of CWP to have a normal physical examination of the chest.

Dr. Istanbouly testified that Petitioner's pulmonary function studies were within normal limits. He testified that a person with CWP could have pulmonary function testing that is completely normal, which is not unusual in the early stages of the disease. Dr. Istanbouly testified that spirometry is a measure of the global impairment of both lungs rather than a focal impairment of a portion of the lungs. He testified that a person could have a certain amount of

their lung with focal impairment, yet the global overall function be normal. Dr. Istanbouly testified that a person could even have shortness of breath and daily cough but have a normal pulmonary function test. He testified that a person could have a normal diffusing capacity and have mild CWP.

Dr. Istanbouly testified that he personally reviewed Petitioner's chest x-ray which was taken on May 18, 2018. He testified that he customarily reviews and interprets chest x-rays in providing care and treatment to his patients. Dr. Istanbouly testified that the chest x-ray was of diagnostic quality, and that it revealed mild bilateral interstitial changes consistent with CWP. Dr. Istanbouly testified that he also reviewed a B-reading report.

Dr. Istanbouly testified that you do not have to be a B-reader in order to diagnose someone with CWP. He testified that there are not any B-readers in any of the hospitals that he is affiliated with. The closest B-reader being approximately 100 miles away. Dr. Istanbouly testified that he does not rely on a B-reader's interpretation of chest films in diagnosing his patients with CWP but relies on his own training and experience.

Dr. Istanbouly testified that CWP is caused by the inhalation of coal dust that causes irritation and inflammation that will ultimately end up forming tiny scars. He testified that CWP causes scarring to occur, which is sometimes referred to as fibrosis, and that the scarring and fibrosis are permanent. Dr. Istanbouly further testified that the scarring and fibrosis cannot carry on the function of normal healthy lung tissue. He testified that, by definition, if you have CWP then you have an impairment of the function of the lungs, at least at the site of the scar or fibrosis. Dr. Istanbouly testified that only exposure to coal dust can cause CWP. Dr. Istanbouly testified that there is no cure for CWP.

Dr. Istanbouly testified that, based upon on a reasonable degree of medical certainty, Petitioner's CWP was caused by his long-term coal dust inhalation. Dr. Istanbouly testified that Petitioner also has an environmental impairment in terms of being precluded from safely returning to the environment of the coal mine due to his CWP. Dr. Istanbouly testified that based on Petitioner's x-ray it is not advisable for Petitioner to ever return to work in the coal mines. Dr. Istanbouly testified that any additional exposure to coal dust would cause the damage to his lungs to worsen. He testified that according to the American Thoracic Society, there is no safe level of dust exposure for someone who has CWP. Dr. Istanbouly testified that Petitioner has damage to his lungs as a result of his occupational exposure to coal dust.

On October 14, 2021, Dr. Henry K. Smith testified on behalf of Petitioner. (PX2). Dr. Smith has been board-certified in Radiology since 1973 and has been a Certified NIOSH B-reader continuously since 1987. Dr. Smith holds medical licensure in five states. Dr. Smith is affiliated with or has privileges at numerous hospitals and clinics. Dr. Smith discontinued seeing walk in patients in 2016 but continues to do consulting work to the present.

On June 10, 2020, Dr. Smith reviewed a chest x-ray taken on September 8, 2017 and found it to be a quality 1 film. Dr. Smith's impression was of interstitial fibrosis. He did not find the film to be underexposed, nor did he see any mottle on the film.

On September 2, 2021, Dr. Smith read a chest film taken May 18, 2018 and found it to be a quality 1 film. Dr. Smith's impression was of interstitial fibrosis with small opacities, primary p, secondary p, all zones involved bilaterally, of a profusion 1/1. He did not find the film to be overexposed nor did he see any mottle on the film.

On June 18, 2020, Dr. Robert A. Cohen reviewed a chest film dated May 18, 2018, at Petitioner's request. (PX3) Dr. Cohen is board-certified in internal medicine, pulmonary diseases and is a NIOSH Certified B-reader. Dr. Cohen has done extensive research on CWP. He holds many consulting positions regarding occupational lung diseases. Dr. Cohen is a reviewer for multiple professional journals including the *American Journal of Respiratory and Critical Care Medicine, American Journal of Industrial Medicine, Archives of Environmental and Occupational Health, American Medical Association, and Chest.* He has also made numerous presentation regarding occupational lung diseases. Dr. Cohen has also published many manuscripts, reports, book chapters and manuscripts. Dr. Cohen's review of Petitioner's 5/18/18 chest film revealed showed CWP category 1/0, primary s, secondary t, opacities in the mid and lower zones bilaterally. Dr. Cohen categorized the film as quality 2 due to mottle.

On September 7, 2021, Dr. Danielle M. Seaman, reviewed a chest film dated September 8, 2017, at Respondent's request. (RX2) Dr. Seaman is a board-certified radiologist and B-reader. Dr. Seaman read the film as a quality 2 because of mottle. He did not find any CWP on the film.

Respondent entered records from Stat-Care. These records consisted of a pulmonary function study and diffusion capacity ordered by Dr. Jeff Selby. Dr. Selby read the examination as being within normal limits. (RX3, p. 2-4). Petitioner's FEV1/FVC ratio was 73 and his DLCO was 92%.

Respondent entered records from Adkins Family Practice. (RX5) These records do not contain any pulmonary testing or chest film imagining.

Respondent entered records from HMC Clinic. (RX6) These records were Petitioner's pre-employment physical for Respondent that contain a chest x-ray dated 9/8/17. (RX6)

Respondent entered records from Dr. Harrion at Primary Care Group. (RX7) The records mostly contain follow up visits for hypertension and medication refills. There are multiple entries relative to lack of cough or dyspnea. On 6/8/21, Petitioner was positive for cough. (RX7, p. 40). The records contain no pulmonary examinations, pulmonary function studies, or chest imaging.

CONCLUSIONS OF LAW

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

Issue (F): Is Petitioner's current condition of ill-being casually related to his occupational exposure?

The Arbitrator finds that Petitioner was last exposed to an occupational disease that arose out of and in the course of his employment with Respondent. Section 1(d) of the Illinois Workers' Compensation Diseases Act states, in pertinent part:

> "A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease needs not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when, for any length of time however short, he or she is employed in an occupation or process in which the hazard of the disease exists...If a miner who is suffering or suffered from pneumoconiosis was employed for 10 years or more in one or more coal mines there shall, effective July 1, 1973 be a rebuttable presumption that his or her pneumoconiosis arose out of such employment." 820 ILCS 310/1(d)

On May 18, 2018, Petitioner underwent a chest x-ray for pneumoconiosis at Ferrell Hospital. On June 5, 2018, Dr. James B. Crum, a board-certified radiologist and B-Reader, performed a chest film interpretation and B-Reading. Dr. Crum's impression was of simple CWP with small opacities, primary p, secondary q, all zones involved bilaterally, of a profusion 1/0. Dr. Istanbouly testified that he physically examined Petitioner and took a detailed medical and occupational history. Dr. Istanbouly testified that Petitioner had CWP and that the cause of Petitioner's condition was long-term exposure to coal mine dust.

Dr. Istanbouly's has significant experience and credentials in the field of pulmonary studies. He is board-certified in critical care medicine and pulmonary medicine. He performs black lung examinations for the U.S. Department of Labor. He has been the medical director of the pulmonary department at Herrin Hospital since 2005. He is also the director of the Intensive Care Unit at Carbondale Memorial Hospital and has been the director of the Intensive Care Unit at Herrin Hospital.

Although Respondent's experts, Drs. Meyer, Lockey, and Seaman, disagree with the findings and diagnosis of Drs. Crum, Smith, Cohen, and Istanbouly, their opinions are found to be less credible by way of their own testimony. On cross-examination, Dr. Meyer agreed that a negative chest x-ray for CWP does not necessarily rule out the disease. Dr. Meyer further agreed that many coal miners have had negative chest x-rays for CWP, but on biopsy or autopsy it is shown that they actually had the condition pathologically. Dr. Meyers agreed with the Laney and Petsonk study which stated, "[i]ndividual coal macules are generally too small to be appreciated on chest x-rays".

Dr. Lockey conceded he had never met, spoken to, or physically examined Petitioner. Dr. Lockey agreed that a person could have CWP without having chest x-ray evidence of the disease. He also agreed that a person can have CWP and not know that they have the disease. Dr. Lockey agreed that a person could have shortness of breath despite normal pulmonary

function. He also agreed that a person could have normal pulmonary function and have CWP, stating that it would not be unusual and most would have normal pulmonary function. He agreed that a person could have a certain amount of their lungs with focal areas of impairment, yet their global function be normal. He testified that a person could have a normal diffusing capacity and have simple CWP. Dr. Lockey admitted that he was using his own interpretation of some PFT's, not the word of the providers and agreed that most of Petitioner's PFT's were abnormal in some way.

Given the totality of the evidence, the Arbitrator finds the opinions of Drs. Crum, Smith, Cohen, and Istanbouly to be more credible than Drs. Meyer and Lockey. Petitioner worked as a coal miner for 41 years, which is well over the statutorily required 10 years, and he was diagnosed with CWP. According to Section (d), there is a rebuttable presumption that his condition arose out of his employment in the coal mines. Respondent has not credibly rebutted that presumption.

Therefore, the Arbitrator finds that Petitioner's occupational disease arouse out of and in the course of his employment with Respondent and that Petitioner's current condition of ill-being is causally connected to his work exposure.

Issue (L): What is the nature and extent of the injury?

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 are to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

(i) **Level of Impairment**: Petitioner's pulmonary function testing was within the range of normal. Pursuant to the medical evidence and testimony, such results do not rule out the diagnoses of CWP or its related symptoms. The Arbitrator gives some weight to this factor.

(ii) **Occupation**: Petitioner testified he voluntarily retired on 4/6/18 because his body was worn out and he was feeling the effects of 42 years in the coal mine. He testified he intended to work until he was 65 years old. The Arbitrator places some weight on this factor.

(iii) **Age**: Petitioner was 62 years old at the time of his last exposure. He is currently retired. The Arbitrator gives some weight to this factor.

(iv) **Earning Capacity**: There is no evidence of reduced earning capacity in the record. The Arbitrator places some weight on this factor.

(v) **Disability**: The medical testimony supports there is no cure for coal workers' pneumoconiosis and the condition is chronic. Petitioner worked as a coal miner for 42 years, all of which appeared to be underground. Petitioner last worked in the coal mines in April 2018 where he was a mine foreman and walked up to 10 miles per day underground and was regularly exposed to coal dust.

Petitioner testified he currently has breathing problems when he exerts himself. He testified his symptoms have worsened since he was examined by Dr. Istanbouly in November 2018. He testified he cannot walk more than 100 yards before having breathing difficulties. He first started noticing breathing problems before he retired that caused him to take breaks while walking through the mine. Petitioner's symptoms increase with climbing stairs and walking long distances. He is able to engage in his hobbies and yard work, but he performs tasks at a slower pace and requires some assistance with certain activities. The Arbitrator places greater weight on this factor.

Based upon the foregoing evidence and factors, the Arbitrator orders Respondent to pay Petitioner the sum of $**790.64 (Max. rate)**/week for a period of **25 weeks**, as provided in Section 8(d)2 of the Act, because the injuries sustained caused **5% loss of the body as a whole.**

Issue (O): **Sections 1(d)-(f) of the Occupational Diseases Act.**

Section 1(e) of the Occupational Diseases Act states, in pertinent part, "{d}isablement" means an impairment or partial impairment, temporary or permanent, in the function of the body or any of the members of the body." 820 ILCS 310/1(e). The Arbitrator finds Petitioner has satisfied the requirements of Section (e) of the Act. Petitioner testified to increased respiratory difficulty with his activities of daily living, like walking and climbing stairs. Dr. Istanbouly testified that the inhalation of coal dust that causes irritation and inflammation will ultimately end up forming tiny scars. Dr. Istanbouly testified that there is no cure for CWP, and it is a chronic condition. Dr. Lockey agreed that the scarring and fibrosis that occurs in the lungs from pneumoconiosis is irreversible and permanent. Dr. Lockey testified that the scarring and fibrosis is an alteration of the lung tissue and is also an alteration of the function of the involved lung tissue.

Section 1(f) of the Occupational Diseases Act states, in pertinent part, "[n]o compensation shall be payable for or on account of any occupational disease unless disablement, as herein defined, occurs within two years after the last day of the last exposure to the hazards of the disease." 820 ILCS 310/1(f). Petitioner last worked in the coal mine on 4/6/18 and has not had any other exposure to coal mine dust since that date. On 5/18/18, Petitioner underwent an x-ray for pneumoconiosis at Ferrell Hospital. Drs. Smith, Crum, Cohen, and Istanbouly's impression of the x-ray was simple CWP. Petitioner was diagnosed with CWP within two years of leaving employment with Respondent and meets the requirement under Section 1(f) of the Act.

Based on the totality of the evidence, and the factual findings above, the Arbitrator finds that Petitioner met the requirements of Sections 1(d)-(f) of the Occupational Diseases Act.

Arbitrator Linda J. Cantrell

DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC003280
Case Name	Jack Melton v. Ottertail Corp/BTD Manufacturing
Consolidated Cases	19WC009956;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0283
Number of Pages of Decision	19
Decision Issued By	Maria Portela, Commissioner, Kathryn Doerries, Commissioner

Petitioner Attorney	Hania Sohail
Respondent Attorney	Randall Stark

DATE FILED: 6/27/2023

/s/Maria Portela, Commissioner

Signature

DISSENT: /s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JACK MELTON,

Petitioner,

vs. NO: 19 WC 3280

OTTER TAIL CORPORATION
D/B/A BTD MANUFACTURING,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical expenses and nature and extent, and being advised of the facts and law, affirms and adopts, with the following change, the Decision of the Arbitrator, which is attached hereto and made a part hereof.

We acknowledge that Petitioner's testimony regarding exactly when his left knee popped became less clear during the course of the hearing. *T.43-46, 67-71, 88-89, 92-94*. Ultimately, Petitioner testified, ""I mean, for me to try to sit here and remember where my feet [were] is hard. I'm trying to remember but, yes, I was in the process of trying to get onto my truck when my knee popped. I was in the process of getting to that step. I don't remember whether my foot was up in the air or on the floor. I'm sorry." *T.95.* Therefore, it is unclear whether Petitioner was walking to the truck or in the process of getting into the truck when his knee popped.

If Petitioner's knee popped while he was getting into the truck then that would be a risk distinctly associated with his employment. However, since Petitioner may have still been in the process of walking, Respondent asks us to consider that to be a common bodily movement and argues that it is not an employment risk. In support of its position, Respondent argues:

> He was instructed to raise the forks on the fork truck so other individuals could have a better look at the parts on a pallet. Petitioner started to walk the two steps toward the fork truck when he twisted his knee. During his testimony, **Petitioner indicated it was his first step when he twisted his knee and sustained an injury. Consequently, Petitioner's injury occurred when he was merely walking**.
>
> **Petitioner was instructed to raise the forks on the fork truck. He had not yet started to perform that duty when the injury occurred**. Consequently, the first listed prong of the employment related risks set forth in Caterpillar was not established.

R-brief-3280 at 8 (emphasis added).

Respondent requests, "[t]he Commission should expressly find *the mere act of walking in the workplace does not constitute an activity incidental to the employment"* because, otherwise, "the Commission will be adopting the positional risk doctrine." *Id. at 9 (emphasis in original).*

Initially, we find Respondent's argument that Petitioner was "merely walking" to be inconsistent with its admission (and the evidence) that Petitioner was "instructed to raise the forks on the fork truck." We agree with the Arbitrator that, in order to accomplish his assigned task, Petitioner was required to turn and walk those couple of steps to the fork truck.

As the Arbitrator noted, in *Caterpillar Tractor Co. v. IC*, 129 Ill.2d 52 (1989), the Illinois Supreme Court held that 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.

Even if one were to accept Respondent's argument that Petitioner had not yet begun the specific task which he was assigned (i.e., raising the forks on the truck), Petitioner's actions would still constitute a risk distinctly associated with his employment under the third prong of *Caterpillar* because, at the time his knee popped, Petitioner was performing "acts that the employee might reasonably be expected to perform incident to his or her assigned duties." *McAllister v. IWCC, 2020 IL 124848,* ¶46, 181 N.E.3d 656. In other words, Petitioner would reasonably be expected to turn and walk to the fork truck in order to accomplish his assigned task of raising the forks.

In an attempt to counter the third *Caterpillar* prong, Respondent argues:

> **The mere act of walking from one location to another is a benign activity which cannot be classified an employment related "act."** If the mere act of walking from one location to another in order to perform a job duty is classified as being incidental to the employment duties, then a determination would be made **essentially imposing strict liability** on an employer for any injuries sustained in the workplace. Such a determination would violate the Illinois Supreme Court edict set forth in *Greater Peoria Mass Transit District v. Industrial Commission,* 81 Ill.2d 38 (1980). In *Greater Peoria Mass Transit*

> *District,* the Illinois Supreme Court held that to be entitled to benefits under the Workers' Compensation Act, more is required than the fact of an occurrence at the employee's place of work.

R-brief-3280 at 8-9 (emphases added). Respondent also claims, "If the Commission finds the act of walking in order to perform a job duty is incidental to the employment or part of the instructions from a supervisor, then the Commission will be adopting the positional risk doctrine. See *Brady v. Louis Ruffolo & Sons Construction Company,* 143 Ill.2d 542 (1991)." *R-brief-3280 at 9 (emphases added).*

However, Respondent's argument regarding positional risk was addressed in *McAllister* which stated, "**we need not address the employer's argument relating to the positional risk doctrine**, which this court has declined to adopt (*Brady*, 143 Ill. 2d at 552-53) and **which only applies to neutral risks**. See *USF Holland, Inc. v. Industrial Comm'n*, 357 Ill. App. 3d 798, 803, 829 N.E.2d 810, 293 Ill. Dec. 885 (2005)." *McAllister at* ¶ 66, 656.

Respondent attempts to transform a distinctly employment-related risk (acts that Petitioner was specifically directed to perform and those he might reasonably be expected to perform in the performance of his assigned duties) into a neutral risk by "merely" using the word "merely" when referring to "walking" as though an injury while walking cannot possibly be work-related. However, as *McAllister* held:

> Once it is established that the injury is work related, *Caterpillar Tractor* does not require claimants to present additional evidence for work-related injuries that are caused by common bodily movements or everyday activities. Therefore, we hold that *Adcock* and its progeny are overruled to the extent that they find that injuries attributable to common bodily movements or routine everyday activities, such as bending, twisting, reaching, or standing up from a kneeling position, are not compensable unless a claimant can prove that he or she was exposed to a risk of injury from these common bodily movements or routine everyday activities to a greater extent than the general public.

McAllister v. Illinois Workers' Compensation Comm'n, 2020 IL 124848, ¶ 64, 181 N.E.3d 656

We find that *McAllister* is very clear. Petitioner's walking and turning to accomplish his assigned task should be compensable under both the first and third prongs of *Caterpillar*. However, Respondent also cites two appellate court cases to support its argument that walking at work is a neutral risk:

> Based upon the facts of this case, a neutral risk analysis is appropriate. The mere act of walking at work is subject to a neutral risk analysis. *First Cash Financial Services,* 367 Ill.App.3d 102 (2006). See also, *Buckley v. Illinois Workers' Compensation Commission,* 2022 IL App (2d) 210055WC-U. (Appellate Court held the act of walking was appropriately analyzed under a neutral risk analysis and did not arise out of the claimant's employment).

R-brief-3280 at 10.

First Cash stated, "**By itself**, the act of walking across a floor at the employer's place of business does not establish a risk greater than that faced by the general public." *First Cash Financial Services v. IC (Rios)*, 367 Ill. App. 3d 102, 105, 853 N.E.2d 799, 804 (1st Dist. 2006) (Emphasis added). We point out that *First Cash* was decided long before *McAllister* and involved an idiopathic fall in an employee bathroom. Significantly, the claimant in that case was not instructed to go to the bathroom at the time of her fall and the court considered this a purely neutral-risk case. In light of *McAllister*, it is possible that the outcome may have been different if the claimant had been instructed by her employer to go to that bathroom to bring something back for her supervisor, for example. Nevertheless, the *First Cash* court stated, "by itself, the act of walking…does not establish a risk greater than that faced by the general public." We believe the "by itself" language is important and, as supported by the holding in *McAllister*, once an employee proves that the activity was distinctly associated with or incidental to his employment under *Caterpillar*, no further analysis is required.

Addressing the *Buckley* case, we note that it was issued on June 16, 2022, which was three days after the Arbitrator filed his decision on June 13, 2022. This explains why the Arbitrator did not mention or distinguish this case. *Buckley* involved a firefighter who alleged "the buckling of his knee while he was walking at work was the end result of accidental injuries he sustained when he ran around and jumped in the fire engine at the scene of the vehicle accident." *Buckley v. IWCC*, 2022 IL App (2d) 210055WC-U, ¶ 70. The *Buckley* decision explained that the claimant had responded to a vehicle accident and:

> Upon arriving back at the fire station, the claimant got out of the engine by putting one foot on the step and the other foot on the ground. He testified that his knee felt uncomfortable at that time and he was unable to straighten his right leg. The claimant stated that he had had no difficulty straightening his right leg before he responded to the motor vehicle accident. The claimant then went into a meeting. **After the meeting, he noticed he was still unable to straighten his right knee** all the way, and he walked with a limp. He testified that his discomfort was getting worse at that time. The claimant then went to another area of the station where he conducted a verbal training session while sitting down.
>
> After leaving the training session, **the claimant walked down a hallway to speak to the Deputy Chief**. Although his right knee was still uncomfortable and he was unable to fully extend his right leg, he was able to walk. He was walking at a normal pace. The floor was carpeted and there was no issue with the carpeting. **As he walked, he tried to extend his knee. He then heard a popping sound, his knee gave way**, and he fell to the ground. He got up and hobbled to his office. He had to hobble because he was unable to put weight on his leg.

Buckley at ¶¶ 11-12 (Emphases added).

The court affirmed the Commission's neutral-risk analysis and stated:

> The claimant argues that the Commission erred by applying a neutral risk analysis to his claim. We disagree. **The Commission employed a neutral risk analysis only after determining that the claimant's injury had no particular employment characteristics**. Specifically, the Commission found that the evidence failed to show that the claimant sustained any kind of specific accident or injury while responding to the vehicle accident or while returning to the firehouse while seated in the cramped quarters of the fire engine. **That left only the claim that the claimant had injured his knee while walking at work. Such claims are subject to a neutral risk analysis.** *First Cash Financial* Services, 367 Ill. App. 3d at 105 ("By itself, the act of walking across a floor at the employer's place of business does not establish a risk greater than that faced by the general public," and is therefore a neutral risk); *Illinois Consolidated Telephone Co. v. Industrial Comm'n.*, 314 Ill. App. 3d 347, 353, 732 N.E.2d 49, 247 Ill. Dec. 333 (2000) (Rakowski, J., specially concurring) (walking on level ground at work is a neutral risk because it is not a risk that is distinctly associated with most workers' employment, and workers are generally not specifically paid to simply walk on level ground). Accordingly, the Commission did not err in analyzing the claimant's claim under neutral risk principles.

Buckley at ¶ 62 (Emphases added).

Although the *Buckley* analysis referenced *McAllister*, it did not specifically address the three *Caterpillar* prongs to determine if the claimant's risk of walking down the hallway to speak with his Deputy Chief was a risk distinctly associated with his employment. If the *Caterpillar* prongs had been analyzed, perhaps the claimant's "walking" would have been something he could "reasonably be expected to perform incident to [his] assigned duties" under the third prong. Interestingly, the *Buckley* decision does not indicate *why* the claimant was walking down the hallway to speak with the Deputy Chief. But what if the claimant had testified that he was walking so he could inform the Deputy Chief about something work-related? Would that have made "walking" an employment risk under the third prong? What if his Deputy Chief had ordered the claimant to come see him at that particular time? Would that have made "walking" an employment related risk under the first *Caterpillar* prong? In any event, without additional evidence surrounding the circumstances that led to the "walking" that was involved in *Buckley*, we do not believe an adequate comparison can be made to the case at bar, in which Petitioner was specifically instructed to raise the forks and which then required him to turn and walk a couple of steps.

We affirm the Arbitrator's finding that Petitioner's injury arose out of his employment under the first prong in *Caterpillar*. However, we expand on the rationale and find that, even if Petitioner was not actually performing the specific act that he was instructed to do (i.e., raising the forks), he was nevertheless engaged in an activity that he was reasonable expected to perform in the performance of his duties (i.e., turning and walking). Therefore, even if the first *Caterpillar* prong does not apply, Petitioner's action was still a distinctly employment-related risk under the third prong in *Caterpillar*.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 13, 2022 is hereby affirmed and adopted with the changes noted above.

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 $25,200.00. 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.

June 27, 2023

/s/ *Maria E. Portela*

/s/ *Amylee H. Simonovich*

SE/
O: 5/9/23
49

Dissent

I dissent from the majority opinion and would reverse the Decision of the Arbitrator and find that Petitioner failed to satisfy his burden of proving he sustained an accident arising out of and in the course and scope of his employment. The Petitioner bears the burden of proving every aspect of her (his) claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill App. 3d 706 (1992).

> Preponderance of the evidence, as defined in *Moss-American, Inc. v. Fair Employment Practices Com*. (5th Dist. 1974), 22 Ill. App. 3d 248, 259, 317 N.E.2d 343, means:
>
> "[T]he greater weight of the evidence, not necessarily in numbers of witnesses, but in merit and worth that which has more evidence for it than against it is said to be proven by a preponderance. Preponderance of the evidence is sufficient if it inclines an impartial and reasonable mind to one side rather than the other." *Spankroy v. Alesky*, 45 Ill. App. 3d 432, 436, 359 N.E.2d 1078, 1080, 1977 Ill. App. LEXIS 2157, *7, 4 Ill. Dec. 126, 128.

The burden of proof is on a claimant to establish the elements of her (his) right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment there is no right to recover. *Revere Paint & Varnish Corp. v. Industrial Commission, 41* Ill.2d. 59 (1968).

The evidence in this case does not have a greater weight "in merit and worth that which has more evidence for it than against it." *Spankroy v. Alesky*, 45 Ill. App. 3d 432, 436, 359 N.E.2d 1078, 1080. In fact, the majority conceded that, "it is unclear whether Petitioner was walking to the truck or in the process of getting into the truck when his knee popped." I take issue with the majority's conclusions based upon that statement for two reasons. First, given that the Illinois courts have consistently held it is Petitioner's burden to prove he sustained an accident in the course and scope of his employment, by the plain language of that sentence, Petitioner has failed to sustain his burden of proving accident. However, the majority would also have us believe the case is compensable under either of those scenarios. I disagree and would find that "walking" to get somewhere at work is not a compensable accident.

Further, I agree with the Arbitrator, Petitioner's injury occurred when he was "merely walking" and he was very clear that he was walking when his knee popped. (Arb.Dec. Conclusions of Law, Accident ¶4) He was not in the "process of getting into the truck." In fact, he testified very specifically that he was a couple of feet from the forklift when his knee popped and it was upon his first step he felt the initial pop. (T. 67, 70, 72, 93-94)

Ultimately, the Arbitrator and my colleagues have found this case compensable because the Petitioner was on his way to do something he was instructed to do, and they reason, therefore, walking to do this task was incidental to his employment. However, walking is something everyone who is not incapacitated must do at work and thus walking to where you are instructed to go, or walking back from the work task, is not the type of everyday or common bodily activity contemplated by the *McAllister* court.

In *McAllister* the court found the case was compensable based on the following:

> "the evidence establishes that claimant's knee injury was caused by an employment-related risk because claimant testified that one of his duties as a sous-chef was to arrange food in the walk-in cooler. At the time claimant injured his knee, the evidence established that he was at work kneeling and standing while searching for a coworker's misplaced pan of carrots in the walk-in cooler. Because claimant was assisting another chef with his work in the walk-in cooler, he was fulfilling his duties of arranging food in the walk-in cooler and was engaged in work that his employer would have reasonably expected him to perform. Therefore, because claimant injured his knee while assisting a coworker searching for a misplaced pan of carrots and because he was kneeling and standing on the floor of the walk-in cooler he had a duty to arrange, claimant was performing a job-related task that was causally connected and incident to his assigned duties as a sous-chef. *McAllister v. Ill. Workers' Comp. Comm'n,* 2020 IL 124848, P56, 181 N.E.3d 656, 669, 2020 Ill. LEXIS 561, *21, 450 Ill. Dec. 309, 317.

Here, the Petitioner was walking to get on the forklift but he was not in the process of getting onto it, he merely stepped. When the Petitioner first sought medical treatment at IWIRC on January 4, 2019, it is noted that he was 64 years old presenting for left knee pain. The rest of the history was not consistent with Petitioner's testimony that he was actually walking, taking a

step when he heard his knee pop and he was very clear about that. Petitioner's testimony placed no emphasis upon turning or twisting. It was only upon prompting by his attorney did the Petitioner admit, "Yeah, it was twisted, but I heard the pop. **I wasn't realizing the twist**. (emphasis added) I just heard the pop and felt the pop, so to speak." (T. 46)

Since the Petitioner was walking, taking a step and his knee popped, the injury is not compensable. To hold otherwise, obliterates the neutral risk analysis—every single activity that occurs at work no matter how remote from the work description can be defined as incidental to employment thus an employment risk. As the majority notes, the *McAllister* court prescribes that the positional risk doctrine applies solely to neutral risks. To hold that walking is "incidental to employment" once there is an instruction to do something or go somewhere at work, results in the same outcome as adoption of the positional risk doctrine. If the Court in *Buckley* held that it was proper to apply a neutral risk analysis to the injury that claimant sustained walking away from the task he just completed, it would follow that a neutral risk analysis should also be applied to the subject facts. By finding walking to or away from an employee's actual task "incidental to employment" it would be virtually impossible to get to a neutral risk analysis and thus the outcome is the positional risk equivalent. It is unlikely that the *McAllister* Supreme Court intended such a dire outcome.

The *Buckley* case was rightfully reviewed by the majority for guidance because in that case the court held the Commission correctly applied a neutral risk analysis. The *Buckley* Court held:

> The Commission employed a neutral risk analysis only after determining that the claimant's injury had no particular employment characteristics. Specifically, the Commission found that the evidence failed to show that the claimant sustained any kind of specific accident or injury while responding to the vehicle accident or while returning to the firehouse while seated in the cramped quarters of the fire engine. That left only the claim that the claimant had injured his knee while walking at work. Such claims are subject to a neutral risk analysis. *First Cash Financial* Services, 367 Ill. App. 3d at 105 ("By itself, the act of walking across a floor at the employer's place of business does not establish a risk greater than that faced by the general public," and is therefore a neutral risk); *Illinois Consolidated Telephone Co. v. Industrial Comm'n.*, 314 Ill. App. 3d 347, 353, 732 N.E.2d 49, 247 Ill. Dec. 333 (2000) (Rakowski, J., specially concurring) (walking on level ground at work is a neutral risk because it is not a risk that is distinctly associated with most workers' employment, and workers are generally not specifically paid to simply walk on level ground). Accordingly, the Commission did not err in analyzing the claimant's claim under neutral risk principles. *Buckley v. Ill. Workers' Comp. Comm'n*, 2022 IL App (2d) 210055WC-U, P62, (Ill. App. Ct. 2d Dist. June 16, 2022).

The majority in this case, however, speculates about "possible" different outcomes of *First Cash* based on different facts and further speculates about possible different outcomes of *Buckley*, which are simply not relevant. "Liability under the Workmen's Compensation Act may

not be based on imagination, speculation, or conjecture, but must have a foundation of facts established by a preponderance of the evidence…" *Shell Petroleum Corp. v. Industrial Commission*, 10 N.E.2d 352 (1937).

The fact is the Petitioner in *Buckley* had been performing vigorous job activities earlier in the day, however, his knee popped while he was walking. Those activities were described as follows:

> The claimant was responsible for managing the scene, keeping the scene safe, and controlling the location of the fire engine, among other things. After he finished assisting medical personnel at the scene, the claimant guided the engine driver to back up the firetruck so it no longer blocked traffic. He then ran around the front of the engine and jumped into the engine to hurry up and get out of the way of traffic. This required him to perform a right-hand pivot on the driver's side corner and then another right-hand pivot on officer side of the engine. He then grabbed the door latch and jumped up onto the step for the seat and got into the vehicle in a fluid motion.
>
> The front seat where the claimant was required to sit had little space and was barely larger than the claimant. (The claimant was 6 feet 5 inches tall and he weighed 350 pounds at the time.) While sitting in that cramped space, the claimant's knees were bent at a 90-degree angle and he was unable to extend his legs or move his legs and feet. *Buckley v. Ill. Workers' Comp. Comm'n*, 2022 IL App (2d) 210055WC-U, P9-P10, 2022 Ill. App. Unpub. LEXIS 1000, *3-4 (Ill. App. Ct. 2d Dist. June 16, 2022).

This case is similar except the Petitioner did not yet get to the job task he was instructed to do when he was injured walking to the forklift. The *Buckley* Court held that "the claimant stated that he did not feel he had suffered any specific injury until he was walking down the hallway and his knee snapped. Given this evidence, the Commission reasonably found that the claimant had not proven a work-related injury, and the same finding would have been justified under a personal risk analysis." *Buckley v. Ill. Workers' Comp. Comm'n*, 2022 IL App (2d) 210055WC-U, P68.

In this case, the Petitioner was walking to do something he was instructed to do, but he did not suffer any specific injury except when walking to get to the forklift, and prior to getting on the forklift, while taking a step, his knee popped. The circumstances described would also justify a denial under a personal risk analysis or a neutral risk analysis. Therefore, I dissent from the Arbitrator's and my colleagues' decisions and I would reverse the finding of accident and find this case is not compensable.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC003280
Case Name	MELTON, JACK v. OTTER TAIL CORPORATION D/B/A BTD MANUFACTURING
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Bradley Gillespie, Arbitrator

Petitioner Attorney	Hania Sohail
Respondent Attorney	Randall Stark

DATE FILED: 6/13/2022

THE INTEREST RATE FOR THE WEEK OF JUNE 7, 2022 1.71%

/s/Bradley Gillespie, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Jack Melton
Employee/Petitioner

v.

Otter Tail Corporation d/b/a BTD Manufacturing
Employer/Respondent

Case # **19** WC **003280**

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 **Bradley Gillespie**, Arbitrator of the Commission, in the city of **Bloomington**, on **March 31, 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 **January 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 the accident.

In the year preceding the injury, Petitioner earned $**46,544.58**; the average weekly wage was $**895.09**.

On the date of accident, Petitioner was **64** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**2436.22** for other benefits, for a total credit of $**2436.22**.

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 $$14,787.51, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $**596.72**/week for **6 5/7** weeks, commencing **January 9, 2019** through **February 5, 2019**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**537.05**/week for **16.125** weeks, because the injuries sustained caused the **7.5**% loss 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.

Bradley D. Gillespie **JUNE 13, 2022**

Signature of Arbitrator

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JACK MELTON,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	**No: 19 WC 003280**
OTTER TAIL CORPORATION, d/b/a,	)	
BTD MANUFACTURING,	)	
Respondent,	)	
	)	

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Jack Melton [hereinafter, "Petitioner"] filed two Applications for Adjustment of Claim alleging accidental injuries occurring while working for Otter Tail Corporation d/b/a BTD Manufacturing [hereinafter, "Respondent"]. Petitioner filed two cases against Respondent. Case number 19WC003280 involves an alleged accident date of January 4, 2019, with claimed injuries to Petitioner's left knee. (PX #2) Case number 19WC009956 involves a repetitive trauma injury with an alleged manifestation date of October 31, 2018. (PX #1) Petitioner claimed bilateral carpal tunnel syndrome. The cases were consolidated for trial. The instant case involves the left knee injury.

Petitioner testified that Respondent hired him as a welder September 7, 2010. Respondent laid off Petitioner near the end of September 2019. (T 15)

Petitioner testified he eventually changed positions to a material handler position. He primarily operated a fork truck, but he also had to move parts by hand. He performed those job duties for a couple of years. (T 24)

In August 2018, Petitioner changed to production support position. He still operated a fork truck, but he also made sure products were built correctly and he inspected welds to make sure they were right. (T 26-27)

After Petitioner suffered his knee injury, Respondent eliminated the product support position and Petitioner returned to a welding position. (T 28)

Petitioner testified that on January 4, 2019, he was doing the production support job. He noticed some discrepancies with some parts, and he asked his lead man, Shawn McMullen, and the quality control person to look at the parts. The parts were on a fork truck. The two individuals inspecting the parts asked Petitioner to lift the parts up higher so they could have a better look. (T 42-43)

Petitioner testified that when he was getting ready to get into the fork truck, he felt a popping in his knee. He entered the fork truck and lifted the parts up. The two individuals examined the parts, and they advised Petitioner where to deliver the parts. (T 43)

Petitioner further testified that no more than 15 minutes later, he reported having a problem with his knee. (T 43)

Petitioner testified that when he turned, his knee popped real loud, and he was in a lot of pain. (T 44) When asked to further explain the mechanism of injury, Petitioner testified he was getting ready to take his first step to get into the fork truck. (T 44)

On cross-exam, Petitioner explained the parts were on a pallet on the forks of the fork truck. The pallet exceeded the width of the fork truck. Petitioner was standing closest to the fork truck while the other individuals inspected the defective parts. Petitioner explained that he was two steps away from getting into the fork truck. His knee popped during those two steps. (T 68-69)

After a series of questions by counsel for each party about the positioning of Petitioner's feet when his left knee popped, Petitioner testified his knee popped when he took the first initial step heading toward the fork truck. He was within a couple of feet of the fork truck when his knee popped. (T 93-94)

Petitioner's medical treatment for his left knee began at IWIRC January 4, 2019. Petitioner provided a history of turning to get into his fork truck when he twisted his left knee. He reported feeling a pop and having instant pain. The pain was in the posterior and lateral part of the knee. Petitioner also explained he felt like his knee was giving out when walking. The clinical exam revealed swelling in the posterior aspect of his left knee. The range of motion of the knee was normal, and there was no instability noted. A McMurray's test was negative, and Petitioner had good strength. The diagnosis was a knee sprain. The doctor at IWIRC advised Petitioner to return to work in a light-duty capacity. (Px 4)

Petitioner testified he was sent back to work by IWIRC with no restrictions.

Petitioner saw his primary care physician, Dr. Brad Stoecker January 11, 2019. Petitioner complained of pain in the back of his knee. Petitioner indicated he returned to work in a light-duty capacity, but his knee seemed to be getting worse. On exam, Dr. Stoecker noted a negative McMurray's test. Petitioner had a decreased range of motion secondary to pain. Dr. Stoecker took Petitioner off work.

Petitioner went to see a lawyer, and the attorney's office helped Petitioner to see Dr. Rhode. (T 52) On January 31, 2019, Petitioner advised Dr. Rhode he was off the truck checking a part. He went to get back into the truck and when he turned to walk, he felt immediate pain and a pop in his left knee. (Px 8)

An MRI of the left knee was performed January 31, 2019. The report indicates Petitioner had a small non-displaced subchondral medial tibial plateau fracture with marked surrounding

marrow edema. Additionally, Petitioner had a complex tear of the medial meniscus and a horizontal tear of the lateral meniscus with an anterior parameniscal cyst. Additionally, the MRI report identified degenerative changes in all three compartments of the knee with the medial compartment being the most severe. (Px 6)

Petitioner returned to see Dr. Rhode February 6, 2019. Petitioner complained of ongoing medial sided knee pain with mechanical complaints of locking and catching. Dr. Rhode administered a steroid injection into the left knee. (Px 8)

On February 20, 2019, Dr. Rhode allowed Petitioner to return to work in a full-duty capacity on a trial basis. On March 20, 2019, Dr. Rhode discharged Petitioner from care noting he was at maximum medical improvement and capable of working in a full-duty capacity. (Px 8)

Petitioner testified he has not received any treatment for his left knee and has not taken any prescription medications for his left knee since March 20, 2019, when Dr. Rhode discharged him from care. (T 73) Petitioner also acknowledged he has not missed any time from work because of his knee after March 20, 2019. (T 74)

With respect to his current condition, Petitioner testified his left knee is still tender and he sometimes experiences weakness. His symptoms are not consistent or debilitating, but he still experiences some pain and stiffness. (T 55-56)

Petitioner acknowledged there are no activities he could do before the January 4, 2019, incident that he cannot do now. (T 58) Petitioner also stated the condition of his left knee does not affect the ability to perform his two current jobs. (T 58)

At the time of trial, Petitioner was working two separate jobs. He works as a cleaner for Service Master and works in the breakage department at RJ Distributing. (T 13-14)

Petitioner explained he cleans a FedEx Express facility in Peoria as well as Pracht's Air in Pekin, Illinois. He works 25 hours per week at the FedEx facility and 5 hours per week at the Pracht's Air location. (T 13-14)

Petitioner further described his current job duties as a cleaner. He explained he uses a scrubber, which is self-propelled. The FedEx facility is about the length of a football field and at least 150 feet wide. Petitioner testified he has to walk between 1.25 and 2 miles per day for that job. (T 74-75)

For RJ Distributing, Petitioner works in the breakage department. When products are damaged, he sorts them out and repackages the items so they can be returned to a delivery truck. Petitioner testified he works 3-4 hours per day and three or four days per week at RJ Distributing. (T 14)

At the conclusion of Petitioner's testimony and the admission of each party's exhibits, the Arbitrator took the matter under advisement.

CONCLUSIONS OF LAW

In support of the Arbitrator's Decision relating to whether an accident occurred that arose out of an in the course of Petitioner's employment by Respondent, the Arbitrator states as follows:

There is no dispute that Petitioner twisted his left knee and sustained injuries. There is also no dispute that Petitioner was in the course of his employment when the injury occurred. The issue in dispute is whether Petitioner's injuries arose out of his employment.

The law is well-established in Illinois that for an accidental injury to be compensable it must not only be sustained in the course of the employment but it must also arise out of it. It must be of such character that it may be seen to have had its origin in the nature of, or have been incidental to, the employment, or must have been the result of a risk to which, by reason of the employment, the injured employee was exposed to a greater degree than if he had not been so employed. *Board of Trustees of the University of Illinois v. Industrial Commission*, 44 Ill.2d 207 (1969). Additionally, it is not sufficient that an employee be at his place of work when the accidental injury is sustained to permit a recovery. *Id.*

When analyzing whether an injury arose out of the employment, it is necessary to first determine the nature of the risk to which the employee was exposed. The risks include 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. *McAllister v. IWCC*, 2020 IL 124848. In *McAllister*, the Illinois Supreme Court determined the appropriate analysis in determining whether injuries sustained as a result of a common bodily movement constitute an employment related injury was set forth in the case of *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill.2d 52 (1989). In *Caterpillar*, the Illinois Supreme Court held 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.

Here, Petitioner responded to numerous questions about the mechanism of injury. Taking Petitioner's testimony in its entirety, Petitioner was standing just two steps away from the "driver's door" of the fork truck. He was instructed to raise the forks on the fork truck so other individuals could have a better look at the parts on a pallet. Petitioner started to walk the two steps toward the fork truck when he twisted his knee. During his testimony, Petitioner indicated it was his first step when he twisted his knee and sustained an injury. Consequently, Petitioner's injury occurred when he was merely walking.

Petitioner was instructed to raise the forks on the fork truck. He had not yet mounted the fork truck when the injury occurred. However, it is clear from Petitioner's testimony that he was not in a position to accomplish his assigned task without turning and walking to the fork truck. This simple act of turning and walking is determinative to the outcome. Petitioner had to turn around from facing the front of the fork truck and traverse the two steps to accomplish his assigned task. Consequently, the first listed prong of the employment related risks set forth in *Caterpillar*

was established. Petitioner was performing an act which he had been instructed to perform by a supervisor when his left knee injury occurred.

Wherefore, the Arbitrator finds that Petitioner sustained a work-related injury in the course and scope of his employment for Respondent.

In support of the Arbitrator's decision relating to the nature and extent of the injury, the Arbitrator states as follows:

Petitioner was diagnosed with a medial meniscus tear as well as degenerative changes throughout his left knee. He did not undergo surgery. Petitioner testified he sometimes experiences symptoms in his left knee, but the symptoms are not consistent. They include tenderness and sometimes weakness. He further explained there are times when he thinks the knee is completely healed, but then his symptoms return. He described the condition as including pain and stiffness, but he does not believe the condition is debilitating. He only uses Ben Gay and ibuprofen or Aleve when he has symptoms. Petitioner is not taking any prescription medications. He explained that when the knee hurts, he takes the over-the-counter medications.

With respect to his current capabilities, Petitioner testified there are no activities which he could do before the accident that he is not able to do now. The condition of his knee does not affect his ability to perform his two current jobs.

Section 8.1b of the Act sets forth five factors to be considered when assessing a permanent partial disability value. Those factors include: i) an impairment rating; ii) the occupation of the injured employee; iii) the age of the employee at the time of the injury; iv) the employee's future earning capacity; and v) evidence of disability corroborated by the treating medical records. The Arbitrator's assessment is as follows:

i) Impairment Rating

Neither party presented an impairment rating. The Arbitrator assigns no weight to this factor.

ii) The Occupation of the Injured Employee

Petitioner no longer works for Respondent. He is currently working two jobs. One job involves him cleaning large facilities, and his duties include a significant amount of walking. Petitioner testified he is fully capable of performing his job duties. The Arbitrator assigns some weight to this factor.

iii) The Age of the Employee at the Time of the Injury

Petitioner was 64 years of age at the time of the accident. No evidence was presented establishing how Petitioner's age impacted his recovery or any level of disability. The Arbitrator notes Petitioner is approaching retirement age, so he has a limited amount of time during his work life to deal with any limitations with the knee. The Arbitrator assigns some weight to this factor.

iv) The Employee's Future Earning Capacity

Petitioner was discharged from care with no restrictions for his left knee condition. Petitioner no longer works for Respondent, but he is currently working two different jobs. No evidence was presented as to Petitioner's current earnings or to suggest his injury in some way impacted his earning capacity. The Arbitrator assigns no weight to this factor.

v) Evidence of Disability Corroborated by the Treating Medical Records

Petitioner testified to periodic pain and weakness in his left leg. The most recent treatment note from Dr. Rhode corroborates the complaints of pain. However, the treating record does not corroborate any complaints of weakness. Dr. Rhode determined Petitioner was capable of working in a full-duty capacity. The Arbitrator assigns significant weight to this factor.

Based upon the foregoing, the Arbitrator finds Petitioner sustained permanent disability to the extent of 7.5% loss of use of the left leg/knee.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC009956
Case Name	Jack Melton v. Otter Tail Corp/BTD Manufacturing
Consolidated Cases	19WC003280;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0284
Number of Pages of Decision	15
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Hania Sohail
Respondent Attorney	Randall Stark

DATE FILED: 6/27/2023

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JACK MELTON,

Petitioner,

vs. NO: 19 WC 9956

OTTER TAIL CORPORATION
D/B/A BTD MANUFACTURING,

Respondent.

DECISION AND OPINION ON REVIEW

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

Respondent does not dispute that Petitioner's bilateral carpal tunnel syndrome is causally related to his job since its own §12 examiner, Dr. James Williams, also found Petitioner's condition causally related to his work duties. However, Respondent argues that a technicality regarding the manifestation date resulted in it not receiving proper notice, as explained below. As background, Petitioner filed his Application for Adjustment of Claim (Application) on April 2, 2019 alleging a date of accident (DOA) of "on or about 1/1/19" as a result of "repetitive trauma" to "both hands & arms." On August 15, 2019, Petitioner filed an amended application changing the DOA to October 31, 2018. In his decision, the Arbitrator, *sua sponte* after discussing the *Durand* and

Peoria County Belwood cases, found that Petitioner's manifestation date was April 3, 2019[1], which was the date Petitioner first sought medical treatment for his conditions. *Dec. 6*.

There is a plethora of case law regarding how to determine the manifestation date of a repetitive trauma work injury. In *Durand*, the issue was whether the claimant filed her application within the statute of limitations, which made the manifestation date vital to the determination of that issue. *Durand v. Industrial Comm'n (RLI Insurance Co.)*, 224 Ill. 2d 53, 65 (2006). The Court wrote:

> In short, courts considering various factors have typically set the manifestation date on either the date on which the employee requires medical treatment or the date on which the employee can no longer perform work activities. See Peoria County Belwood Nursing Home v. Industrial Comm'n, 138 Ill. App. 3d 880, 887, 487 N.E.2d 356, 93 Ill. Dec. 689 (1985), aff'd, 115 Ill. 2d 524, 505 N.E.2d 1026, 106 Ill. Dec. 235 (1987) (holding that determining the manifestation date is a question of fact and that "the onset of pain and the inability to perform one's job, are among the facts which may be introduced to establish the date of injury"). A formal diagnosis, of course, is not required. The manifestation date is not the date on which the injury and its causal link to work became plainly apparent to a reasonable physician, but the date on which it became plainly apparent to a reasonable employee. See General Electric Co. v. Industrial Comm'n, 190 Ill. App. 3d 847, 857, 546 N.E.2d 987, 137 Ill. Dec. 874 (1989). However, because repetitive-trauma injuries are progressive, the employee's medical treatment, as well as the severity of the injury and particularly how it affects the employee's performance, are relevant in determining objectively when a reasonable person would have plainly recognized the injury and its relation to work. See Oscar Mayer, 176 Ill. App. 3d at 610.

Durand at 72. The Court also wrote:

> The facts must be closely examined in repetitive-injury cases to ensure a fair result for both the faithful employee and the employer's insurance carrier. Three "D" Discount Store, 198 Ill. App. 3d at 49. RLI argues, and we agree, that fairness and flexibility are the common themes in these cases. Indeed, the rule in Peoria County is broad enough to accommodate unique scenarios presented in different cases, and the Commission should weigh many factors in deciding when a repetitive-trauma injury manifests itself.

Durand at 71.

In the case at bar, Respondent argues:

> The Arbitrator's Decision indicates the pre-manifestation date notice was sufficient. Respondent contends the Arbitrator's Decision leads to an illogical conclusion. Notice of a condition provided prior to the manifestation of the condition essentially allows for every employee on his date of hire to advise his employer of repetitive trauma injuries from head

[1] The "Findings" section of the Arbitrator's Decision indicates the date of accident was May 29, 2019. However, the "Conclusions of Law" section clearly states that the Arbitrator found the manifestation date of Petitioner's injuries to be April 3, 2019. *Dec. at 6*.

> to toe even though no condition has manifested. The Arbitrator's Decision would support a finding that appropriate notice to the employer was provided even though it may have been defective. Clearly, this scenario is illogical and is not consistent with the requirements of Section 6(c) of the Act."

R-brief-9956 at 12.

We find Respondent's argument unpersuasive. An employee cannot "on his date of hire" inform the employer of "repetitive trauma injuries from head to toe even though no condition has manifested." This would, obviously, be absurd because the employee would have not yet experienced any repetitive trauma "on his date of hire." Furthermore, the issue here is not whether Petitioner provided notice of any *potential* work injuries that may manifest in the future. The question is whether Petitioner gave proper notice of suspected but *actual* work injuries with varying possible manifestation dates.

In any event, we do agree that finding adequate notice prior to the manifestation date is illogical. How can a claimant provide notice of something that has not yet happened? This case presents an interesting situation. The parties did not cite, and we did not find, a case where the manifestation date was determined to be *after* the date the Application had been filed.

Here, Petitioner was apparently convinced enough that he had a symptomatic condition caused by work-related repetitive trauma that he went to an attorney and filed an Application. We modify the decision to find that Petitioner's manifestation date was March 27, 2019, the date he signed his Application. Pursuant to *Durand,* it was the *actual* date that it became plainly apparent to Petitioner and he reasonably believed that his bilateral hand symptoms were related to his job duties so that he signed the Application. Petitioner did not *know* that causal relationship existed until after his visit with Dr. Rhode on April 3, 2019, but Petitioner had enough of a reasonable belief that the causal relationship existed to formally allege it by signing his Application.

This manifestation date of March 27, 2019 also resolves Respondent's arguments regarding notice because Petitioner's attorney sent Respondent a letter on that same date informing it of Petitioner's claim. *Rx5, T.277*. Therefore, Petitioner provided timely notice of his alleged accident.

On the issue of permanent partial disability, we generally agree with the Arbitrator's analysis, but find that, compared to other surgically-operated carpal tunnel cases, Petitioner's results have been very good. We hereby reduce the awards from 15% to 12.5% of his right, dominant hand and from 12.5% to 10% of the left hand. We also note that both parties agree that the Arbitrator incorrectly based the award on a maximum hand award of 205 weeks when §8(e)9 provides that cases involving carpal tunnel syndrome due to repetitive or cumulative trauma are calculated based upon a hand being worth 190 weeks in total. *R-brief-9956 at 15; P-brierf-9956 at 12 (unnumbered)*. Therefore, Petitioner is awarded permanent partial disability benefits under §8(e)9 of 23.75 weeks for the right hand plus 19 weeks for the left hand.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $596.72 per week for a period of 26 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 $537.05 per week for a period of 42.75 weeks, as provided in §8(e)9 of the Act, for the reason that the injuries sustained caused the loss of use of 12.5% of the right hand and 10% of the left hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $98,855.13 for medical expenses under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a credit of $10,229.66 for temporary total disability paid plus $19,884.84 for other benefits paid, for a total credit of $30,114.50.

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.

June 27, 2023

SE/
O: 5/9/23
49

/s/ *Maria E. Portela*

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC009956
Case Name	MELTON, JACK v. OTTER TAIL CORPORATION D/B/A BTD MANUFACTURING
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Bradley Gillespie, Arbitrator

Petitioner Attorney	Hania Sohail
Respondent Attorney	Randall Stark

DATE FILED: 6/13/2022

THE INTEREST RATE FOR THE WEEK OF JUNE 7, 2022 1.71%

/s/Bradley Gillespie, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Jack Melton
Employee/Petitioner

v.

Otter Tail Corporation d/b/a BTD Manufacturing
Employer/Respondent

Case # **19** WC **009956**

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 **Bradley Gillespie**, Arbitrator of the Commission, in the city of **Bloomington**, on **March 31, 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 29, 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 $**46,544.58**; the average weekly wage was $**895.09**.

On the date of accident, Petitioner was **64** 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 $**10,229.66** for TTD, $**0** for TPD, $**0** for maintenance, and $**19,884.84** for other benefits, for a total credit of $**30,114.50**.

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 $ **$98,855.13** , as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $**596.72**/week for **26** weeks, commencing **November 13, 2019** through **May 13, 2020**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**537.05**/week for **56.375** weeks, because the injuries sustained caused the **15**% loss of the **right hand** and **12.5**% loss of the **left hand** 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.

Bradley D. Gillespie **JUNE 13, 2022**

Signature of Arbitrator

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JACK MELTON,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	**No: 19 WC 009956**
OTTER TAIL CORPORATION, d/b/a,	)	
BTD MANUFACTURING,	)	
Respondent,	)	
	)	

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Jack Melton [hereinafter, "Petitioner"] filed two Applications for Adjustment of Claim alleging accidental injuries occurring while working for Otter Tail Corporation d/b/a BTD Manufacturing [hereinafter, "Respondent"]. Petitioner filed two cases against Respondent. Case number 19WC003280 involves an alleged accident date of January 4, 2019, with claimed injuries to Petitioner's left knee. (PX #2) Case number 19WC009956 involves a repetitive trauma injury with an alleged manifestation date of October 31, 2018. (PX #1) Petitioner claimed bilateral carpal tunnel syndrome. The cases were consolidated for trial. The instant case involves the bilateral repetitive trauma claim.

Petitioner first filed an Application for Adjustment of Claim for his carpal tunnel case April 2, 2019. The Application alleged a manifestation date of "on/about 1-1-19." (PX 1, RX 5) Petitioner filed an Amended Application for Adjustment of Claim August 15, 2019, alleging a manifestation date of October 31, 2018. (PX 1)

Petitioner testified he was hired by Respondent as a welder September 7, 2010. He was laid off by Respondent near the end of September 2019. (T 15) Petitioner testified he worked between 40 and 50 hours per week as a welder. For each shift, he received a 30-minute lunch break and a 15-minute break. (T 17) Petitioner testified he used various tools and equipment. His primary tool was a welder. He also used grinders, needle guns, pry bars, measuring tools, drills, overhead jibs, hammers, and torches. Petitioner adhered to Respondent's 50-pound lifting limit. (T 18)

When describing his job duties as a welder, Petitioner indicated he also operated a fork truck to move products. Petitioner described the grinders, noting they ranged from 3.5 inches to 9 inches in size. (T 19-20) Petitioner testified he is right-handed, but he used both hands when using a grinder. (T 23)

Petitioner next testified he changed positions to that of a material handler position. He mostly operated a fork truck, but he also had to move parts by hand. He performed those job duties for a couple of years. Some grinding duties were required with the material handler position. (T 24) Petitioner explained he used a grinder for an hour a day the entire time he worked for Respondent. (T 25-26) He further testified he worked between 40 and 50 hours per week as a material handler again with a 30-minute lunch and a 15-minute break. (T 26)

In August 2018, Petitioner changed positions to production support. He still operated a fork truck, but he also made sure products were built correctly and he inspected welds to make sure they were right. (T 26-27) He continued to work 40 to 50 hours per week in that position. (T 27) After Petitioner suffered his knee injury, Respondent eliminated the product support job and Petitioner returned to a welding position. (T 28) Petitioner testified he spent two or three months as a laser operator between the time he worked as a material handler and the time he worked in production support. (T 30-31)

When describing the condition of his hands, Petitioner testified he did not have any issues with his hands prior to starting work for Respondent. He testified that while working, he noticed his hands were getting numb in the first three fingers on the left hand as well as on the right hand. Petitioner testified he began experiencing symptoms during the summer or autumn of 2018. (T 31)

Petitioner testified he did not know what the condition was with his hands, but he notified Angie Aries who was the safety representative for Respondent. Petitioner testified October 31, 2018, was probably when he reported his hand problem to Miss Aries. (T 76-77) Petitioner testified he had not spoken to the employer about his hands since 2018. (T 80)

Petitioner testified that Respondent brought in a "walking therapist" for all employees. The therapist was available for workers to talk to, and the therapist instructed Petitioner to perform some hand exercises. (T 32) Petitioner testified the therapist did not say what the condition was with Petitioner's hands. (T 33) As Petitioner continued working, he started losing the ability to use his right hand. He still had full use of his left hand, but he described his right hand as an "open hand." (T 33-34)

Petitioner testified he went to a lawyer and then started seeking medical attention. He saw Dr. Rhode. (T 36) Dr. Rhode first evaluated Petitioner for his bilateral hand issues April 3, 2019. The visit was about two weeks after Dr. Rhode discharged Petitioner from care for his knee injury. (PX 8)

Dr. Rhode's note from April 3, 2019, indicates Petitioner presented for a consultation of bilateral wrist pain, and his symptoms were secondary to an injury while at work. The history portion of the note indicates Petitioner had a work-related bilateral wrist injury with symptomatology that developed in September 2018. Petitioner told Dr. Rhode he developed progressive palmar wrist pain with numbness and tingling to his thumb, index, and long fingers. His symptoms were worse on the left than the right despite being right-handed. Petitioner also told Dr. Rhode his right hand was his main grinding hand. Petitioner reported

performing the duties of a welder for about nine years with Respondent and 15 years total. Before working as a welder, Petitioner was a carpet installer for 15 years. Petitioner next reported that he performed activities requiring a significant amount of force, repetition, and significant vibration. Petitioner specified he used a grinder all the time. (PX 8)

Dr. Rhode referred Petitioner to Dr. Trudeau for nerve testing. Dr. Trudeau evaluated Petitioner April 25, 2019. Dr. Trudeau performed an EMG/NCS on Petitioner's bilateral upper extremities. The testing concluded Petitioner had bilateral carpal tunnel syndrome with the left being worse than the right. (PX 5)

Petitioner returned to see Dr. Rhode on May 29, 2019. Dr. Rhode administered a steroid injection to the left carpal tunnel. He allowed Petitioner to continue working in a full-duty capacity. (PX 8)

Petitioner testified he first had an understanding of his condition when he saw Dr. Rhode following his EMG/NCS. He testified it was his understanding that his carpal tunnel condition was secondary to the repetitive use of his hands and the tools he used at work. (T 38)

Petitioner saw Dr. Rhode on July 11, 2019, reporting only temporary relief from the steroid injection. Dr. Rhode recommended bilateral carpal tunnel releases. He indicated Petitioner could continue working full-duty until surgery. (PX 8)

At the request of Respondent, Petitioner was evaluated by Dr. James Williams on August 15, 2019. (RX 6) Dr. Williams opined that Petitioner's job duties for Respondent at least aggravated Petitioner's bilateral carpal tunnel syndrome condition. He agreed with Dr. Rhode's recommendation for bilateral carpal tunnel releases. He further opined Petitioner could continue performing his regular job duties. (RX 6)

Dr. Rhode performed a left carpal tunnel release January 14, 2020. (PX 9) He also performed a right carpal tunnel release March 3, 2020. (PX 10) Petitioner returned to work May 14, 2020.

Dr. Rhode discharged Petitioner from care noting he was at maximum medical improvement June 10, 2020. Dr. Rhode did not impose any restrictions on Petitioner's activities thereafter. (PX 8)

Petitioner testified he has not received any treatment for his hands since the discharge date in June 2020, and he has not missed any time from work because of his hands or taken any prescription medications for his carpal tunnel syndrome since June 2020. (T 83-84)

Petitioner testified he still has numbness in both of his hands, and his right hand will not open or work properly. He testified the numbness and tingling is constant as is the difficulty he has opening his right hand. (T 58-60)

At the time of trial, Petitioner was working two separate jobs. He works as a cleaner for Service Master and works in the breakage department at RJ Distributing. (T 13-14) Petitioner explained he cleans a FedEx Express facility in Peoria as well as Pracht's Air in Pekin, Illinois. He works 25 hours per week at the FedEx facility and 5 hours per week at the Pracht's Air location. (T 13-14) Petitioner further described his current job duties as a cleaner. He explained he uses a scrubber, which is self-propelled. The FedEx facility is about the length of a football field and at least 150 feet wide. Petitioner testified he has to walk between 1.25 and 2 miles per day for that job. (T 74-75)

For RJ Distributing, Petitioner works in the breakage department. When products are damaged, he sorts them out and repackages the items so they can be returned to a delivery truck. Petitioner testified he works 3-4 hours per day and three or four days per week at RJ Distributing. (T 14)

At the conclusion of Petitioner's testimony and the admission of each party's exhibits, the Arbitrator took the matter under advisement.

CONCLUSIONS OF LAW

In support of the Arbitrator's Decision relating to whether Petitioner sustained an accident that arose out of an in the course of his employment by Respondent and whether timely notice of the accident was given to Respondent, the Arbitrator states as follows:

Petitioner alleges that his job duties for Respondent caused or contributed to the development of bilateral carpal tunnel syndrome. The issue of causation is not in dispute as both the treating physician, Dr. Blair Rhode, and Respondent's examining physician, Dr. James Williams, each rendered opinions that there is a causal relationship between Petitioner's job duties for Respondent and his bilateral carpal tunnel syndrome.

The issues presented are whether the alleged manifestation date is the appropriate date of accident and whether Petitioner provided timely notice of the repetitive trauma injuries.

Petitioner first filed an Application for Adjustment of Claim alleging repetitive trauma injuries with a manifestation date of "on/about 1-1-19." Petitioner signed the original Application March 27, 2019.

An Amended Application for Adjustment of Claim was filed August 15, 2019, changing the date of accident to October 31, 2018.

Petitioner credibly testified he began experiencing symptoms in his hands in the summer or fall of 2018. He testified he notified Respondent's safety representative, Angie Aries, that he was having problems with his hands. Petitioner testified he thought October 31, 2018, was about the time he reported having issues with his hands to Ms. Aries. Petitioner also testified that when he reported having problems with his hands, he did not know what his condition was.

Petitioner first sought medical treatment for his hands after Dr. Rhode discharged him from care for a knee injury. Dr. Rhode first evaluated Petitioner for his hands April 3, 2019. Dr. Rhode's treatment note indicates Petitioner was presenting for a consultation of bilateral wrist pain, and his symptoms were secondary to an injury while at work.

An EMG study was performed by Dr. Trudeau on April 25, 2019, and the results were consistent with bilateral carpal tunnel syndrome. (PX 5) Petitioner testified he first learned of his condition when he saw Dr. Rhode following the EMG study. (T 38) The first visit with Dr. Rhode after the EMG was May 29, 2019. (PX 8) Petitioner testified Dr. Rhode informed him of his condition and its causal relationship to his work activities. *Id.*

In 2007, the Supreme Court of Illinois reversed a Decision of the Appellate Court which denied benefits to a claimant who was alleging repetitive trauma injuries. *Durand v. Industrial Commission*, 224 Ill.2d 53 (2007). In *Durand*, the claimant used the date of an EMG study which conclusively established a carpal tunnel syndrome diagnosis as the manifestation date. The Appellate Court's denial of benefits was based on Petitioner's testimony that she knew she had a problem and thought it was related to her work activities a few years earlier. Relying on previous case law, the appellate court determined the manifestation date was the time when the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person. *Peoria County Belwood Nursing Home v Industrial Commission*, 115 Ill.2d 524 (1987). The claimant's filing of an Application for Adjustment of Claim was more than three years after the manifestation date and was therefore barred.

The Supreme Court in *Durand* reversed the denial of benefits and held the appropriate manifestation date was when the claimant's carpal tunnel syndrome was confirmed with a diagnostic study. Therefore, the filing of the claimant's Application for Adjustment of Claim was not outside the statute of limitations period, and benefits should not have been denied on that basis. In reaching its conclusion, the Supreme Court noted that if the claimant would have filed a claim at the time she was experiencing symptoms and thought her condition was related to her job duties, she would have had a difficult time proving her injury. In the instant case, that would likely have been true as well.

Here, the basis for Petitioner's alleged manifestation date appears to be when Petitioner experienced symptoms in his hands and reported those symptoms to Respondent. However, pursuant to the Supreme Court's pronouncement in the *Durand* case, Petitioner's alleged manifestation date may not have been the appropriate date.

While Respondent contends that with respect to notice, Petitioner testified he never spoke with the employer about his hands after speaking with Angie Aries October 31, 2018, this is not wholly accurate. Petitioner testified that he spoke with a "walk through therapist" provided by the employer and she taught him some hand exercises. (T 33) However, this is inconsequential as will be shown below. Respondent also argues that, if the appropriate manifestation date is April 3, 2019, April 25, 2019, or May 29, 2019, Petitioner failed to provide notice within 45 days of the appropriate date as required by Section 6(c) of the Act.

Nevertheless, Petitioner signed the original Application for Adjustment of Claim on March 27, 2019, just days before his first appointment with Dr. Rhode on April 3, 2019. Therefore, Respondent should have received written notice of Petitioner's claimed repetitive trauma injury sometime around his initial appointment. Petitioner testified that he sought treatment "Because I had numbness in my hands, and I wanted him to check on my hands to see why I had numbness because the therapy wasn't doing nothing for me." (T 78) Even so, Petitioner continued to work at full duty while undergoing EMG/NCS and additional consultation. While May 29, 2019, may have been the most appropriate time to fix the date of manifestation, since Petitioner then became aware of his diagnosis and its relationship to his work, April 3, 2019, was the date upon which Petitioner sought medical evaluation for his condition.

Wherefore, based on the foregoing, Petitioner proved that he sustained accidental injuries which arose out of and in the course of his employment for the Respondent manifesting itself on April 3, 2019 , and Petitioner provided timely, if defective, notice. Any defect in the notice did not unduly prejudice Respondent as they were able to fully defend this claim.

In support of the Arbitrator's Decision relating to the nature and extent of the injury, the Arbitrator states as follows:

Petitioner underwent two surgeries for his bilateral carpal tunnel syndrome. He was discharged from care with no restrictions. Petitioner testified he still has numbness and tingling in his hands, and he is unable to open his right hand without the use of his left hand or a table or some other method. He also testified he still performs all activities, but he is a little slower in doing so.

Section 8.1b of the Act provides that five factors must be considered when determining a permanent partial disability value. Those factors include: i) an impairment rating; ii) the occupation of the injured employee; iii) the age of the employee at the time of the injury; iv) the employee's future earning capacity; and v) evidence of disability corroborated by the treating medical records. The Arbitrator's assessment is as follows:

i) Impairment Rating

Petitioner's treating physician, Dr. Rhode determined Petitioner had an impairment of 2% of each hand. The Arbitrator assigns some weight to this finding.

ii) The Occupation of the Injured Employee

Petitioner no longer works for Respondent. He is currently working two jobs. One of his jobs involves cleaning a large facility, and a second job involves examining and repackaging broken items. Petitioner testified he is able to perform all of his job duties. He no longer uses vibratory tools, and his current jobs are less physically demanding than the work he did for Respondent. The Arbitrator assigns some weight to this factor.

iii) The Age of the Employee at the Time of the Injury

Petitioner was 64 years of age at the time of the alleged manifestation date. No evidence was presented as to the impact Petitioner's age has on his carpal tunnel condition. However, as Petitioner is approaching retirement age, he has a shorter work life during which he will have to deal with his ongoing disability. The Arbitrator assigns some weight to this factor.

iv) The Employee's Future Earning Capacity

Petitioner is currently working two jobs for approximately the same number of hours per week as he worked for Respondent. No evidence was presented as to Petitioner's current earning capacity, but Petitioner did testify he does not allow any limitations to impact his activities. The Arbitrator assigns no weight to this factor.

v) Evidence of Disability Corroborated by the Treating Medical Records

Petitioner testified to having an inability to open his right hand without assistance. He also testified to constant numbness in each hand. However, Petitioner's testimony is not corroborated by the treating records. On June 10, 2020, Dr. Rhode determined Petitioner was at maximum medical improvement. Petitioner reported he had been working in the garden with minimal difficulty. The only complaint was some pain to palpation over the right palm. No mention was made of any ongoing sensory deficits. Petitioner returned to see Dr. Rhode March 20, 2021, in order to document his condition as of that time. No mention was made of any sensory deficits or other issues or limitations with either hand. The Arbitrator assigns significant weight to the medical records documenting an overall good recovery from Petitioenr's bilateral carpal tunnel syndrome.

Based upon the foregoing, the Arbitrator finds Petitioner sustained permanent disability to the extent of 15% loss of use of the right dominant hand and 12.5% loss of use to the left hand.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC005387
Case Name	Guadalupe Ruiz v. Nordstrom Rack
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	23IWCC0285
Number of Pages of Decision	3
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Catherine Krenz Doan
Respondent Attorney	Robert Smith

DATE FILED: 6/29/2023

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GUADALUPE RUIZ,

Petitioner,

vs. NO: 19 WC 5387

NORDSTROM RACK,

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 jurisdiction, causation, medical expenses and temporary total disability, and being advised of the facts and law, reverses the Corrected Arbitration Decision due to lack of jurisdiction.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1) On December 2, 2022, Petitioner filed a "Motion to Consolidate Cases" 19 WC 5387 and 20 WC 3441, which was granted by the Arbitrator.

2) On January 19, 2023, an arbitration hearing was held on the consolidated cases.

3) The Arbitrator issued separate decisions in each of the cases on March 1, 2023.

4) On March 6, 2023, Respondent filed a "Motion to Correct Clerical Error" under §19(f) of the Act, which argued that a clerical error existed in the 20 WC 3441 decision relating to the stipulated average weekly wage. However, although Respondent listed both case numbers on the Motion (and also on the Notice of Motion), it only uploaded the Motion to the 19 WC 5387 case in CompFile.

5) On March 20, 2023, Respondent filed a Petition for Review. This document listed both case numbers but was only uploaded to the 19 WC 5387 case in CompFile.

6) On March 22, 2023, Petitioner filed her own Petition for Review on the 19 WC 5387 case.

7) On May 31, 2023, the Commission issued an Order remanding the 20 WC 3441 case to the Arbitrator to rule on the §19(f) motion to correct the clerical error.

8) On June 15, 2023, the Arbitrator issued a Corrected Arbitration Decision in the 20 WC 3441 case.

9) Also on June 15, 2023, the Arbitrator issued a Corrected Arbitration Decision in the 19 WC 5387 case, which mistakenly contained the facts and analysis of the 20 WC 3441 case instead of the 19 WC 5387 case.

10) On June 22, 2023, Petitioner filed a timely Petition for Review of the Corrected Arbitration Decision in 19 WC 5387.

After reviewing the procedural history, filings and evidence, we find that the Arbitrator did not have jurisdiction to issue a corrected decision in the 19 WC 5387 case. Respondent had filed a §19(f) motion on the 20 WC 3441 case but mistakenly included both case numbers and only uploaded it in CompFile under the 19 WC 5387 case number, which has resulted in some confusion. We find that the Petitions for Review, filed by Respondent on March 20, 2023 and by Petitioner on March 22, 2023, relating to the 19 WC 5387 Arbitration Decision transferred jurisdiction of this case from the Arbitrator to the Commission. The Commission's May 31, 2023 remand order only pertained to the 20 WC 3441 case for the Arbitrator to rule on the §19(f) motion in that case, which he appropriately did. There was no §19(f) motion pending in the 19 WC 5387 case, even though it may have appeared that way in CompFile due to Respondent having uploaded the motion to the wrong case number. In any event, the Arbitrator did not have jurisdiction to issue a corrected decision in the 19 WC 5387 case.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Corrected Arbitration Decision in the 19 WC 5387 case, filed June 15, 2023, is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the original Arbitration Decision in the 19 WC 5387 case, filed March 1, 2023, is hereby reinstated.

IT IS FURTHER ORDERED BY THE COMMISSION that the Petitions for Review, filed by Respondent on March 20, 2023 and by Petitioner on March 22, 2023, remain valid as related to the original 19 WC 5387 Arbitration Decision, filed March 1, 2023, and are pending oral arguments, which will be scheduled at a later date.

This Decision is interlocutory and may not be appealed.

June 29, 2023

/s/ *Maria E. Portela*

SE/
O: 06/28/23
49

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC012980
Case Name	Jonathan Roe v. Peabody Energy
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0286
Number of Pages of Decision	10
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Neil Giffhorn

DATE FILED: 6/29/2023

/s/Maria Portela, 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

Jonathan Roe,

Petitioner,

vs. NO: 22 WC 012980

Peabody Energy,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of nature and extent and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 4, 2023 is hereby affirmed and adopted.

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

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

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.

June 29, 2023

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MEP/ypv
049

/s/ *Maria E. Portela*

/s/ *Kathryn A. Doerries*

/s/ *Amylee H. Simonovich*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC012980
Case Name	Jonathan Roe v. Peabody Energy
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Neil Giffhorn

DATE FILED: 1/4/2023

THE INTEREST RATE FOR THE WEEK OF JANUARY 4, 2023 4.63%

/s/William Gallagher, 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
NATURE AND EXTENT ONLY

Jonathan Roe
Employee/Petitioner

v.

Peobody Energy
Employer/Respondent

Case # 22 WC 12980

Consolidated cases: n/a

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Herrin, on November 22, 2022. By stipulation, the parties agree:

On the date of accident, September 24, 2019, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $91,520.00; the average weekly wage was $1,760.00.

At the time of injury, Petitioner was 37 years of age, single, with 0 dependent child(ren).

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

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. The parties stipulated TTD benefits were paid in full.

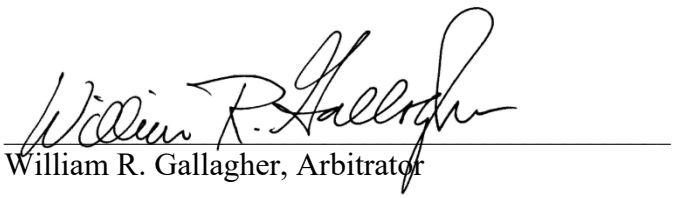
After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $836.69 per week for 175 weeks, because the injury sustained caused the 35% loss of use of the person as a whole, apportioning 22 1/2% permanent partial disability to the person as a whole regarding the cervical spine injury, and 12 1/2% permanent partial disability to the person as a whole in regard to the right shoulder injury, as provided in Section 8(d)2 of the Act.

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

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



William R. Gallagher, Arbitrator

ICArbDecN&E p. 2

January 4, 2023

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 September 24, 2019. According to the Application, Petitioner was "Hanging cable overhead" and sustained an injury to his "Right shoulder, neck, body as a whole" (Arbitrator's Exhibit 2). Petitioner and Respondent stipulated Petitioner sustained a work-related accident and that medical bills and temporary total disability benefits had been paid in full. The only disputed issue was the nature and extent of disability (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a scoop man for approximately 10 years. On September 24, 2019, Petitioner was holding a cable in an overhead position. When he did so, he felt a "pop" in his right shoulder and the right side of his neck. The Petitioner testified he had a prior right shoulder injury which required surgery approximately seven to eight years prior to the time he sustained this accident. However, Petitioner was not experiencing any ongoing right shoulder symptoms at the time he sustained this accident. Petitioner testified he had no history of neck pain prior to the accident.

Following the accident of September 24, 2019, Petitioner sought medical treatment at Occupational Medicine Clinic where he was evaluated by Dr. Kimberly Lashway, on September 26, 2019. At that time, Petitioner complained of right shoulder and right sided neck pain. She diagnosed Petitioner with strains of the fascia/tendons of both the shoulder and neck. She prescribed medication and ordered physical therapy. She subsequently referred Petitioner to Dr. John Davis, an orthopedic surgeon (Petitioner's Exhibit 3).

Dr. Davis evaluated Petitioner on November 6, 2019, and diagnosed Petitioner with right shoulder pain and cervical radiculopathy. He ordered MRI scans of both the right shoulder and cervical spine (Petitioner's Exhibit 5).

An MRI arthrogram was performed on Petitioner's right shoulder on December 3, 2019. According to the radiologist, it revealed tendinosis of the supraspinatus and infraspinatus, a tear of the long head of the biceps tendon, a tear of the glenoid labrum and glenohumeral osteoarthritis (Petitioner's Exhibit 6).

The MRI of Petitioner's cervical spine was performed on December 3, 2019. According to the radiologist, it revealed multilevel degenerative disc disease, severe central canal stenosis and severe bilateral foramin stenosis at C6-C7 (Petitioner's Exhibit 6).

Dr. Davis saw Petitioner on December 9, 2019, and reviewed the diagnostic studies. Dr. Davis recommended additional conservative treatment in regard to the right shoulder and administered a subacromial injection. In regard to Petitioner's cervical spine, Dr. Davis recommended a surgical consultation (Petitioner's Exhibit 5).

On December 18, 2019, Petitioner was evaluated by Dr. Swastik Sinha, an orthopedic surgeon, in regard to his cervical spine condition. At that time, Dr. Sinha diagnosed Petitioner with cervical radiculopathy in the right C6-C7 distribution with right C7 weakness, and decreased C7

dermatomal sensation. He recommended Petitioner undergo a series of epidural injections (Petitioner's Exhibit 7).

Petitioner underwent an epidural injection at C7-T1 on March 18, 2020, but it did not provide Petitioner with any relief of his pain symptoms nor did it improve his radicular symptoms. When Dr. Sinha saw Petitioner on June 3, 2020, he opined Petitioner had maximized non-operative management and should proceed with disc replacement surgery at C5 to C7 (Petitioner's Exhibit 7).

Petitioner was evaluated by Dr. Matthew Gornet, an orthopedic surgeon, on August 20, 2020. At that time, Petitioner continued to complain of right shoulder and right sided neck pain with pain going down the arm as well as numbness/tingling in his fingers. Dr. Gornet reviewed the MRI of December 3, 2019, and opined it revealed disc herniations on the right side at C5-C6 and C6-C7. He ordered both a new MRI and a CT scan of Petitioner's cervical spine (Petitioner's Exhibit 9).

The MRI was performed on August 20, 2020. According to the radiologist, the MRI revealed a central annular tear and protrusion at C6-C7 extending into both foramina and paracentral foraminal and left foraminal protrusions at C5-C6 (Petitioner's Exhibit 10).

The CT scan was performed on August 20, 2020. According to the radiologist, it revealed protrusions at C6-C7 and C5-C6 (Petitioner's Exhibit 11).

Dr. Gornet reviewed the diagnostic studies and recommended Petitioner undergo disc replacement surgery at C5-C6 and C6-C7. He noted Petitioner also had a right shoulder problem which required treatment (Petitioner's Exhibit 9).

On September 29, 2020, Dr. Gornet performed disc replacement surgery on Petitioner's cervical spine. The procedure consisted of disc replacement at C5-C6 and C6-C7 (Petitioner's Exhibit 12).

Following surgery, Dr. Gornet saw Petitioner on October 15, 2020. Petitioner's radicular complaints had resolved, but he continued to have right shoulder pain. Dr. Gornet indicated he was going to refer Petitioner to Dr. Paletta for treatment of the right shoulder (Petitioner's Exhibit 9).

Petitioner was evaluated by Dr. George Paletta, an orthopedic surgeon, on November 24, 2020. Dr. Paletta reviewed the MRI arthrogram of December 3, 2019, and his interpretation was consistent with that of the radiologist. He recommended Petitioner undergo arthroscopic surgery consisting of labral repair or debridement and distal clavicle excision (Petitioner's Exhibit 13).

Dr. Paletta performed arthroscopic surgery on Petitioner's right shoulder on December 21, 2020. The procedure consisted of labile debridement, debridement of a partial thickness rotator cuff tear, acromioplasty, and distal clavicle excision (Petitioner's Exhibit 12).

Dr. Gornet continued to treat Petitioner and Petitioner's cervical spine condition improved. When Dr. Gornet saw Petitioner on January 14, 2021, Petitioner was doing well and Dr. Gornet

released Petitioner to return to work without restrictions in regard to his neck. When he subsequently saw Petitioner on October 7, 2021, he noted Petitioner had done very well and was at MMI (Petitioner's Exhibit 9).

Dr. Paletta continued to treat Petitioner following the right shoulder surgery. When he saw Petitioner on February 24, 2021, he noted Petitioner's shoulder had a good range of motion and Petitioner was continuing physical therapy. He subsequently released Petitioner to return to work without restrictions effective May 3, 2021 (Petitioner's Exhibit 13).

At trial, Petitioner testified he no longer works for Respondent because the mine he worked at was closed. However, Petitioner obtained employment as a scoop man for Reliance Coal, performing the same type of work he performed when employed by Respondent.

Petitioner testified his neck and right shoulder conditions improved following the surgeries that were performed, but he still experiences symptoms. In regard to his neck, Petitioner said looking up/down for long periods of time causes neck symptoms. He stated he does seek help from coworkers to complete various tasks on an as needed basis. Petitioner stated his range of motion of his right shoulder has been restored, but it still "pops" and gets tired especially with repetitive use. Petitioner said he takes hydrocodone on a daily basis for pain. Petitioner's hobbies of basketball, weightlifting and golf have been adversely impacted because of his neck and shoulder injuries.

The Petitioner has not seen either Dr. Gornet or Dr. Paletta since October 7, 2021, and April 7, 2021, respectively. He agreed Dr. Gornet was not prescribing medication for him at the present time.

Conclusion of Law

The Arbitrator concludes Petitioner has sustained 35% permanent partial disability to the person as a whole, apportioning 22 1/2% permanent partial disability to the person as a whole regarding the cervical spine injury, and 12 1/2% permanent partial disability to the person as a whole in regard to the right shoulder injury.

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 a scoop man at the time he sustained the accident. Petitioner was able to return to work to that same occupation after he recovered from the surgeries, but for a different employer. Petitioner testified he does receive assistance from coworkers when performing certain job tasks. The Arbitrator gives this factor moderate weight.

Petitioner was 37 years old at the time he sustained the accident and 40 years old at the time of trial. Petitioner presently has approximately 27 years before he will reach normal retirement age.

He will have to live with the effects of the injury for the remainder of his working and natural life. The Arbitrator gives this factor significant weight.

There was no evidence the injury had any effect on Petitioner's future earning capacity. As noted herein, Petitioner was able to return to work to his regular job, but for a different employer. The Arbitrator gives this factor moderate weight.

Petitioner sustained injuries to the cervical spine and right shoulder, both of which required surgery. In regard to Petitioner's right shoulder, the right shoulder surgery was extensive as it involved labral debridement, debridement of a partial thickness rotator cuff tear, acromioplasty, and distal clavicle excision. Petitioner's cervical spine injury required disc replacement surgery at C5-C6 and C6-C7. While Petitioner was able to return to work to his regular job, he continues to have complaints consistent with the injuries he sustained. The Arbitrator gives this factor significant weight.

William R. Gallagher, Arbitrator

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ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC007518
Case Name	Natasha Waddy v. State of Illinois - Choate Mental Health
Consolidated Cases	19WC008574;
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0288
Number of Pages of Decision	23
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Jon Rosenstengel
Respondent Attorney	Natalie Shasteen

DATE FILED: 6/29/2023

/s/Kathryn Doerries, 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 Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

NATASHA WADDY,

Petitioner,

vs. NO: 19 WC 007518

STATE OF ILLINOIS-CHOATE MENTAL HEALTH,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses and prospective medical, causal connection and temporary 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 modifies the Arbitrator's Decision by making the following changes specified below.

On page 10, under the Arbitrator's Conclusions of Law Section, "Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?" the Commission strikes the second full paragraph beginning with "[a] risk is distinctly …" and everything thereafter through the end of Section (F) on page 12, ending with "…to the work accident." The Commission substitutes the following for those deleted paragraphs:

Illinois courts have decided multiple cases with similar facts and the *Dukich* court summarized previous holdings and the proper risk analysis as follows:

> We acknowledge that both our supreme court and our appellate court have repeatedly held that accidental injuries sustained on property that is either owned or controlled by an employer within a reasonable time before or after work are generally deemed to arise out of and in the course of employment when the claimant's injury was sustained as a result of the hazardous condition of the employer's premises. See, *e.g.*, *Archer Daniels Midland Co. v. Industrial Comm'n*, 91 Ill. 2d 210, 216, 437 N.E.2d 609, 62 Ill. Dec. 921 (1982) ("Where the claimant's injury was sustained as a result of the condition of the employer's premises, this court has consistently approved an award of compensation."); see also *Hiram Walker & Sons, Inc. v. Industrial Comm'n*, 41 Ill. 2d 429, 244 N.E.2d 179 (1968) (holding that claimant's fall in employer's ice-covered parking lot was compensable); *Carr v. Industrial Comm'n*, 26 Ill. 2d 347, 186 N.E.2d 280 (1962) (same); *De Hoyos v. Industrial Comm'n*, 26 Ill. 2d 110, 185 N.E.2d 885 (1962) (same); *Caterpillar Tractor Co.*, 129 Ill. 2d at 62 (suggesting that an injury is causally related to the employment if the injury occurs "as a direct result of a hazardous condition on the employer's premises"); *Mores-Harvey* , 345 Ill. App. 3d at 1040 (the presence of a "hazardous condition" on the employer's premises that causes a claimant's injury, including a hazardous condition located in a parking lot the employer provides for its employees, "supports the finding of a compensable claim"); *Suter v. Ill. Workers' Comp. Comm'n*, 2013 IL App (4th) 130049WC, ¶ 40, 376 Ill. Dec. 261, 998 N.E.2d 971 (where the claimant slipped on ice in a parking lot furnished by her employer shortly after she arrived at work, the claimant was entitled to benefits under the Act "as a matter of law"). The presence of a "hazardous condition" on the employer's premises renders the risk of injury a risk incidental to employment; accordingly, a claimant who is injured by such a hazardous condition may recover benefits without having to prove that she was exposed to the risk of that hazard to a greater extent than are members of the general public. *Archer Daniels Midland*, 91 Ill. 2d at 216; *Mores-Harvey*, 345 Ill. App. 3d at 1040; *Suter*, 2013 IL App (4th) 130049WC, ¶ 40. In other words, such injuries are not analyzed under "neutral risk" principles; rather they are deemed to be risks "distinctly associated" with the employment. *Dukich v. Ill. Workers' Comp. Comm'n*, 2017 IL App (2d) 160351WC, P40, 86 N.E.3d 1161, 1172-1173, 2017 Ill. App. LEXIS 590, *24-26, 416 Ill. Dec. 876, 887-888.

In this case, Petitioner testified that the parking lot where she slipped and fell on ice is where Respondent's employees are required to park and the subject parking lot was owned and controlled by Respondent. (T. 18-19) Respondent's witness, Ms. Kennedy, testified that all of the parking is open to the public. (T. 52) Ms. Kennedy also testified that people that work in dietary and other employees, including herself, park where the fall occurred. (T. 55-56) Finally, Ms. Kennedy testified the parking lot is maintained by Respondent. (T. 56) Therefore, the Commission

finds that Petitioner encountered an employment related risk, no further analysis is necessary and she satisfied her burden of proving her accident arose out of and in the course of her employment.

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

Drs. Gornet and Zelby agreed that the Petitioner was injured in the two incidents. Dr. Zelby found that the first accident caused a thoracic strain, while the second caused a lumbar strain. Dr. Gornet related the Petitioner's continuing low back condition to both accidents and concluded that the Petitioner had a structural disc issue at L3-4 that was causing her continuing symptoms.

It is understandable that Dr. Zelby – as a neurosurgeon – would focus his evaluation on the effects of the Petitioner's injury on pathology and symptoms related to the spinal nerves. However, when it comes to structural back pathology and symptoms, the Arbitrator gives more weight to the opinion of Dr. Gornet as to the cause of the Petitioner's continuing condition.

However, the Arbitrator gives credence to Dr. Zelby's conclusion that the first accident caused only a thoracic strain, as this diagnosis is supported by the records and the Petitioner's reported symptoms. In her initial accident report and medical records, she was not complaining of low back pain. Although the physical therapy seemed to address the Petitioner's low back – in part – the low back symptoms did not make an appearance in the medical records until after the second accident. In 19WC8574, the Arbitrator found that the December 21, 2018, incident caused a thoracic strain that had since resolved.

In this case, the Arbitrator finds that the Petitioner suffered a separate and distinct injury to her low back as a result of the fall. Therefore, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that her low back injuries had their origin in a risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury.

Further, on page 13, paragraph three, of the Arbitrator's Decision the Commission strikes the second and third sentences in their entirety, beginning with "[t]he Arbitrator's internet search…" and ending with "…on July 1, 2020." Finally, on page 14 of the Arbitrator's Decision, the Commission strikes the three question marks in the first line and substitutes "1" so the sentence beginning on page 13, and continued on page 14, reads as follows: "[t]herefore, the Arbitrator orders the Respondent to pay the medical expenses contained in Petitioner's Exhibit 1 incurred after January 21, 2019-with the exception of the MR spectroscopy -- pursuant to Section 8(a) of the Act and in accordance with medical fee schedules.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 8, 2022, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $634.99 per week for a period of 11- 6/7 weeks, commencing October 18, 2019, through January 8, 2020, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services performed after January 21, 2019, with the exception of MR spectroscopy, as set forth in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that pursuant to the agreement of the parties, all medical bills awarded shall be paid directly to the medical providers. Respondent shall have credit for any amounts already paid or paid through its group carrier as provided in Section 8(j) of the Act. Respondent shall indemnify and hold Petitioner harmless from any claims arising out of the expenses for which it claims credit.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall also authorize and pay for prospective medical treatment as recommended by Dr. Gornet including, but not limited to, the recommended back surgery of an AP fusion at L3-4 with lordotic spacer, as provided in Sections 8(a) and 8.2 of the Act.

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

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

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

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

June 29, 2023

KAD/bsd
O050923
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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	19WC007518
Case Name	WADDY, NATASHA v. STATE OF ILLINOIS/ CHOATE MENTAL HEALTH
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Amended Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	18
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Jon Rosenstengel
Respondent Attorney	Natalie Shasteen

DATE FILED: 4/8/2022

/s/ Jeanne AuBuchon, Arbitrator

Signature

INTEREST RATE WEEK OF APRIL 5, 2022 1.11%

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

April 8, 2022

/s/ Michele Kowalski
Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

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

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

Natasha Waddy ,
Employee/Petitioner

v.

State of Illinois/Choate Mental Health ,
Employer/Respondent

Case # **19** WC **007518**

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 **November 30, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **January 21, 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.

Per stipulation of the parties, in the year preceding the injury, Petitioner earned $**49,529.51**; the average weekly wage was $**952.49**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit of $**7,529.68** for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $**7,529.68**.

ORDER

Respondent shall pay reasonable and necessary medical services performed after January 21, 2019, with the exception of MR spectroscopy, as set forth in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act.

Pursuant to the agreement of the parties, all medical bills awarded shall be paid directly to the medical providers. Respondent shall have credit for any amounts already paid or paid through its group carrier as provided in Section 8(j) of the Act. Respondent shall indemnify and hold Petitioner harmless from any claims arising out of the expenses for which it claims credit.

Respondent shall also authorize and pay for prospective medical treatment as recommended by Dr. Gornet including, but not limited to, the recommended back surgery of an AP fusion at L3-4 with lordotic spacer, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $**634.99**/week for **11 6/7** weeks, commencing October 18, 2019 through January 8, 2020, as provided in Section 8(b) of the Act.

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

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

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

Jeanne L. AuBuchon

Signature of Arbitrator

April 8, 2022

ICArbDec19(b)

PROCEDURAL HISTORY

This matter proceeded to trial on November 30, 2021, 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 her employment; 2) the causal connection between the accident and the Petitioner's lumbar spine condition; 3) payment of medical bills; 4) entitlement to TTD benefits from October 18, 2019, through January 8, 2020; and 5) entitlement to prospective medical care to the Petitioner's lumbar spine. For the purposes of trial, this case, which involved an accident on January 21, 2019, was consolidated with 19 WC 8574, which involved an accident on December 21, 2018.

FINDINGS OF FACT

At the time of the accident, the Petitioner was 47 years old and employed by the Respondent as a cook. (AX1, T. 12-13) On January 21, 2019, the Petitioner was returning from a lunch break and fell on ice in the employee parking lot onto her buttocks and felt pain in her lower back and legs. (T. 18) The Respondent's workers' compensation coordinator testified that the parking lot where the Petitioner fell was open to the public. (T. 52) In her accident report completed on January 23, 2019, the Petitioner wrote that she injured her lower back and had pain down her legs. (PX4) The Petitioner said she was physically capable of performing her job duties without difficulties prior to her injury and had no prior injuries to her low back. (T. 13, 30)

The Petitioner testified to a prior accident on December 21, 2018, in which she was picking up a 50-pound case of ground beef from a flatbed cart and felt a pull in her lower back and right side. (T. 14) She testified that her whole back was hurting and she was having muscle spasms and pain in the middle of her back, the lower back, right side and down her legs. (T. 15) After that accident, the Petitioner went to the emergency room at Union County Hospital and complained

of back pain and pain and injury to the posterior right chest wall. (PX5) Another portion of the records refers to pain in the right subscapular area. (Id.) She was diagnosed with a muscle spasm of the back and strain of muscle and tendon of the back wall of the thorax. (Id.) She was given injections of a non-steroidal anti-inflammatory and muscle relaxer, and her condition improved while at the emergency room from 8/10 pain to 4/10 pain. (Id.) In her accident report completed on December 28, 2018, the Petitioner wrote that she injured her right side and the middle of her back. (PX3) The Petitioner testified that she followed up with Physician Assistant Courtney Ledbetter at Convenient Care Clinic and was prescribed physical therapy. (T. 16) Records of these visits were not submitted at arbitration. The Petitioner did attend physical therapy at All Fitness and Physical therapy beginning January 13, 2019. (PX6)

Following the fall, the Petitioner saw PA Ledbetter on January 23, 2019, and reported the incident and that she had low back pain radiating down both legs. (PX5) An X-ray of the lumbar spine showed mild chronic discogenic degenerative disease and transitional vertebral anatomy on the left at the lumbosacral junction. (Id.) PA Ledbetter diagnosed low back pain and prescribed medication. (Id.) The Petitioner returned to the clinic on February 1, 2019, reported that her pain was worse and was prescribed oral steroids. (Id.) On March 1, 2019, the Petitioner again complained of worsening back pain and again was prescribed medication. (Id.) At another visit on March 4, 2019, the Petitioner reported that the medication was helping but still had midline lumbar spine pain with burning radiation up the right side of her back when sitting. (Id.) Medication was continued. (Id.)

During this time, the Petitioner was continuing physical therapy, which she testified provided no relief from her symptoms. (PX6, T. 21) The physical therapy records note that the Petitioner reported improvement with the medication and at the end of therapy sessions. (PX6)

But when she would return for therapy, her pain level had increased. (Id.) The Petitioner attended 12 sessions from January 13, 2019, through March 7, 2019. (Id.)

On March 28, 2019, the Petitioner saw PA Ledbetter and reported that her pain was worse. (PX7) PA Ledbetter referred the Petitioner to Dr. Matthew Gornet, an orthopedic surgeon at The Orthopedic Center of St. Louis. (Id.) The Petitioner previously saw Dr. Gornet in 2006 for complaints of headaches and pain in her neck, upper back, between her shoulder blades and low back. (PX2, Deposition Exhibit 4) Dr. Gornet performed cervical spine surgery on August 4, 2006, from which she had a full recovery. (Id.)

The Petitioner saw Dr. Gornet for her low back on May 30, 2019. (PX2, Deposition Exhibit 3) At that time, she reported low back pain to both sides, both buttocks and down both legs to her knees, with the left greater than the right, and tingling in her legs and occasionally into the bottom of her feet. (Id.) She informed Dr. Gornet of both accidents, saying the later accident made her pain worse. (Id.) Dr. Gornet ordered an MRI, which he said showed a sacralized L5-S1 segment and central disc protrusion at L4-5. (Id.) At L3-4, he said there may have been some mild facet changes on the left side and subtle disc pathology with a tear. (Id.) He recommended steroid injections at L4-5 and L3-4, prescribed medication and placed the Petitioner on light-duty restrictions. (Id.)

On June 19, 2019, the Petitioner underwent an interlaminar epidural steroid injection at L3-4 performed by pain management specialist Dr. Helen Blake at the Orthopedic Ambulatory Surgery Center of Chesterfield. (Id.) Dr. Blake performed another injection at L4-5 on July 2, 2019. (Id.) The Petitioner testified that she experienced temporary relief from the injections. (T. 23) On August 1, 2019, Dr. Gornet reported that the injections helped the Petitioner's leg symptoms but not her structural back pain. (Id.) Dr. Gornet prescribed medication and continued

light-duty restrictions. (Id.) On October 24, 2019, Dr. Gornet ordered a CT discogram and MRI spectroscopy and continued work restrictions. (Id.) The Petitioner underwent the CT discogram on November 13, 2019. (Id.) The date of the MRI spectroscopy was not listed on the report. (Id.)

The Petitioner underwent a Section 12 examination on December 13, 2019, by Dr. Andrew Zelby, a neurosurgeon at Rush University Medical Center. (RX3) The Petitioner reported to him that the lifting incident on December 21, 2018, resulted in severe low back pain radiating down the back of her right thigh halfway to the knee. (Id.) She described the fall on January 21, 2019, as causing more pain in her low back and additional pain down her left leg. (Id.) At the time of the examination, the Petitioner reported constant pain in the low back with more on the right side and intermittent but daily sharp pain down the back of her left thigh. (Id.) She said she had not had symptoms radiating down the right side for many months. (Id.)

Dr. Zelby read the May 30, 2019, MRI as normal – showing mid degenerative disc disease at L3-4 with mild loss of T2 signal intensity as well as a broad-based bulging disc extending inferiorly through the neuroforamina, a little more to the left, and a small left far lateral disc/osteophyte complex. (Id.) He noted a small, chronic partial-thickness annular tear and mild left and modest right foraminal stenosis without neural impingement or canal stenosis. (Id.) At L4-5 there was a modest broad-based bulging disc with slight extension into the inferior aspect of the neuroforamina but no stenosis. (Id.) At L5-S1, there was a miniscule bulging disc without stenosis. (Id.) Dr. Zelby found no acute nor post-traumatic abnormalities and no neural impingement. (Id.) He did not classify the disc bulges as herniations. (Id.) He said his physical examination showed no radicular symptoms, and nothing on the MRI that would cause radiculopathy. (Id.)

Regarding his review of the Petitioner's medical records, Dr. Zelby said he saw no records for treatment following the Petitioner's fall on January 21, 2019. (Id.) He noted that the Petitioner's complaints after the lifting incident on December 21, 2018, related solely to pain in the subscapular thoracic area with no complaints of low back pain. (Id.)

Dr. Zelby concluded that there was no medical evidence that the Petitioner injured her lumbar spine in either incident. (Id.) He said the lifting injury was correctly diagnosed as a thoracic strain. (Id.) He said that if there were records that indicated complaints of low back pain following the fall, then a soft-tissue lumbar strain was probably also a component of her injury. (Id.) He stated that the Petitioner's reported persistence and severity of symptoms were inconsistent with the objective medical findings and the natural history of her objective medical condition. (Id.) He said that the Petitioner was at maximum medical improvement for both incidents by mid-April 2019 and required no work restrictions. (Id.)

Regarding treatment, Dr. Zelby said the Petitioner would require no more than three to four weeks of directed physical therapy. (Id.) He said her spinal treatment had been protracted and excessive for no identifiable medical reasons, and the Petitioner was not a candidate for fusion because such treatment would exceed the guidelines for the treatment of her objective medical condition. (Id.) As to the CT discogram, Dr. Zelby said there was no reason to pursue it because the Petitioner had no condition in her lumbar spine for which a discogram could provide any useful information. (Id.) Regarding MR spectroscopy, he said that although the test can give information about the chemical composition of discs, but that information had not been shown to be of any value in either the diagnosis or treatment of spinal disc disease. (Id.)

The Petitioner testified that she went back to work after Dr. Zelby's report because she probably would have lost her job if she didn't. (T. 45)

At a follow-up visit on January 9, 2020, Dr. Gornet reported that the CT discogram revealed a posterior central annular tear at L3-4 with some mild facet changes on the left. (PX2, Deposition Exhibit 3) The L4-5 level was normal. (Id.) Dr. Gornet said the MRI spectroscopy revealed significant painful chemicals at L4-5 and at L5-S1 to a lesser extent. (Id.) Dr. Gornet prescribed medications and allowed the Petitioner to work full duty. (Id.) The Petitioner testified that she was unable to follow up with Dr. Gornet because of the COVID pandemic. (T. 25) She did return on August 24, 2020, and Dr. Gornet discussed the possibility of fusion surgery with the Petitioner but asked her to continue to try and live with her pain. (Id.)

On September 3, 2020, Dr. Zelby issued an addendum report after reviewing the medical records that showed treatment for her low back after the January 21, 2019, fall, supplemental records from Dr. Gornet that included the CT discogram and MR spectroscopy and physical therapy notes. (RX4) He found that the Petitioner did sustain a lumbar strain/contusion as a result of the fall. (Id.) He stated that the physical therapy for her thoracic and lumbar strains were reasonable, necessary and causally related to the work accidents. (Id.) He maintained his opinions that the Petitioner's complaints when he saw her were inconsistent with the objective medical findings and the natural history of her objective medical condition and that the Petitioner was at maximum medical improvement by mid-April 2019 and required no additional diagnostic studies, treatment, medications or work restrictions since that time. (Id.) He said the Petitioner's complaints appeared to be an exaggeration. (Id.)

Dr Zelby testified consistently with his reports at a deposition on September 28, 2020. (RX5) In explaining his opinion that Dr. Gornet's treatment was not related to the work incidents, Dr. Zelby stated that the Petitioner had no symptoms or findings of radiculopathy on his or Dr. Gornet's examination and nothing in her spine that would cause radiculopathy nor the need for

epidural injections. (Id.) He also stated that PA Ledbetter's referral to Dr. Gornet on April 10, 2019, was not reasonable nor necessary. (Id.)

Regarding his objection to the CT discogram, Dr. Zelby acknowledged that the test can be helpful to sort out a question of whether one lumbar level was more significant than another, but he said no useful information could be gleaned from the test because surgery was not going to be appropriate for the Petitioner due to her having mild degeneration that was not surgically correctible. (Id.) As to the MR spectroscopy, Dr. Zelby said the procedure was experimental, and medical literature indicated that there is no clinical application for it yet because more studies need to be done. (Id.)

On October 8, 2020, the Petitioner reported to Dr. Gornet that she continued to have significant pain, particularly on the right side, right buttock, right hip and right leg and said she was fairly miserable. (PX2, Deposition Exhibit 3) Dr. Gornet opted to move forward with medial branch blocks and facet rhizotomies. (Id.) Dr. Blake performed bilateral L3-4 facet medial nerve branch blocks on October 20, 2020, and a radiofrequency ablation of the bilateral L304 facet nerves on November 17, 2020. (Id.) The Petitioner testified that she had relief from her symptoms for a short period of time. (T. 26) At a follow-up visit to Dr. Gornet on January 4, 2021, the Petitioner reported that she continued to have low back pain to both sides, both buttocks and hips – left greater than right. (Id.) Dr. Gornet recommended a fusion at L3-4. (Id.)

Dr. Gornet testified consistently with his reports at a deposition on May 10, 2021. (PX2) He said that from the information he had, he believed the Petitioner had a back problem with aggravation of that from the fall on ice. (Id.) He said he recommended fusion surgery because conservative measures failed. (Id.) He believed fusion was a better solution than disc replacement because of the Petitioner's anatomy and to stop motion in the injured area. (Id.) He preferred

fusion over replacement because the Petitioner had a combination of facet arthropathy and disc pathology. (Id.)

When asked on cross-examination about the Petitioner reporting different symptoms to different providers and her reports to him of left-sided pain in one instance and right-sided pain in another, Dr. Gornet said that symptoms may alter or vary over time. (Id.) He said Dr. Zelby's opinion that the Petitioner's symptoms should have remained the same was "ludicrous," "flat-out incorrect" and "misleading." (Id.) He said facet changes he noted were pre-existing but could be aggravated, and the Petitioner's complaints of pain in her buttocks and hips radiating into her upper lumbar spine were classic symptoms of a structural problem in the spine. (Id.) He said the midline protrusion at the L3-4 level could irritate either side. (Id.)

Regarding the diagnostic testing he performed, Dr. Gornet testified that was to help determine if the Petitioner had more significant pathology at the L4-5 level. (Id.) On the CT discogram, he quantified the Petitioner's pain as being moderate at the L3-4 level. (Id.) As to the MRI spectroscopy, Dr. Gornet testified that procedure had been approved by the FDA for a diagnostic code. (Id.)

On October 6, 2021, Dr. Zelby issued another supplemental report after having reviewed updated medical records. (RX6) His opinions did not change. (Id.)

The Petitioner testified that she wanted to proceed with the surgery so that she could have some type of normal life again. (T. 27) At the time of arbitration, the Petitioner was working as a cook for the Warren G. Murray Center, where she accommodated with a stool for her to set and rest her back. (T. 12, 28) She stated that she has back spasms at work, and her coworkers have to help her do lifting. (T. 28) She said that when she gets off work, she has to put hot and cold packs on her back. (Id.) She said she unable to do much with her family because of back pain. (Id.)

CONCLUSIONS OF LAW

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

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

To address this issue, the Arbitrator first must weigh in on inconsistencies between the Petitioner's testimony and the medical records. The Petitioner testified that she was experiencing low back pain since the lifting accident on December 21, 2018. However, the medical records immediately following that accident do not reflect that complaint. Because the medical reflect the Petitioner's complaints closer in time to the accident, the Arbitrator will give more credibility to the statements made at that time. In other aspects of her testimony, such as her history of the accidents and current complaints, the Arbitrator finds the Petitioner to be credible to the extent that it is consistent with the medical records.

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.* The courts have consistently held that injuries sustained on employer-provided parking lots are compensable. *De Hoyos v. Industrial*

Commission, 26 Ill.2d 110, 185 N.E.2d 885 (1962); Vill v. Industrial Comm'n, 351 Ill.App.3d 798, 814 N.E.2d 917 (2004); *Suter v. Illinois Workers' Compensation Commission*, 2013 IL App. (4th) 130049WC ¶40. Because the injury occurred from a slip on an icy parking lot provided by the Respondent, the Arbitrator finds that the Petitioner's injury occurred in the course of her employment.

The "arising out of" component is primarily concerned with causal connection. *McAllister, 2020 IL 12484, ¶ 36*. To satisfy this requirement, it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. *Id.* The three categories of risk are: (1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics. *Id. at ¶38.*

A risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing: (1) acts he or she was instructed to perform by the employer; (2) acts that he or she had a common-law or statutory duty to perform; or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties. *Id. at ¶46.* The Arbitrator finds that slipping and falling on an ice-covered parking lot while walking from her vehicle into work was an act the Petitioner might reasonably be expected to perform incident to her assigned duties.

Next is the requirement that the risk created a causal connection between the employment and the accidental injuries.

Drs. Gornet and Zelby agreed that the Petitioner was injured in the two incidents. Dr. Zelby found that the first accident caused a thoracic strain, while the second caused a lumbar strain.

Dr. Gornet related the Petitioner's continuing low back condition to both accidents and concluded that the Petitioner had a structural disc issue at L3-4 that was causing her continuing symptoms.

It is understandable that Dr. Zelby – as a neurologist – would focus his evaluation on the effects of the Petitioner's injury on pathology and symptoms related to the spinal nerves. However, when it comes to structural back pathology and symptoms, the Arbitrator gives more weight to the opinion of Dr. Gornet as to the cause of the Petitioner's continuing condition.

However, the Arbitrator gives credence to Dr. Zelby's conclusion that the first accident caused only a thoracic strain, as this diagnosis is supported by the records and the Petitioner's reported symptoms. In her initial accident report and medical records, she was not complaining of low back pain. Although the physical therapy seemed to address the Petitioner's low back – in part – the low back symptoms did not make an appearance in the medical records until after the second accident. In 19WC8574, the Arbitrator found that the December 21, 2018, incident caused a thoracic strain that had since resolved.

In this case, the Arbitrator finds that the Petitioner suffered a separate and distinct injury to her low back as a result of the fall. Therefore, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that her low back injuries had their origin in a risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury.

When a claimant is injured due to an employment-related risk, it is unnecessary to perform a neutral-risk analysis to determine whether the claimant was exposed to a risk of injury to a greater degree than the general public. *Steak 'n Shake v. Ill. Workers' Comp. Comm'n, 216 IL App 3d 150500WC at ¶38.* Because the Arbitrator finds that an employment risk was present, no further analysis is necessary.

Thus, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that the Petitioner's low back injuries occurred in the course of and arose out of her employment.

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

This issued is addressed above in the analysis of whether the Petitioner's injuries arose out of and in the course of her employment, and the findings above are incorporated herein.

Therefore, the Arbitrator finds that the Petitioner's current 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).*

Dr. Zelby believed the Petitioner required no diagnostics or treatment after mid-April 2019 because she would have been at maximum medical improvement at that time. That conclusion would assume that his recommendation of physical therapy would have resolved the Petitioner's conditions. However, the physical therapy the Petitioner underwent did not resolve her low back symptoms, which continued and worsened.

Another puzzling aspect of Dr. Zelby's conclusion that the Petitioner was at maximum medical improvement by mid-April 2019, was that his opinions were based, in part, on having found no significant pathology on the MRI that was performed on May 30, 2019. It is illogical to find that testing used to form his opinions were not reasonable nor necessary.

Regarding the CT discogram, Dr. Zelby acknowledged that the test is used to determine what spinal level had more significant pathology but did not feel the test was proper because the Petitioner was not a surgical candidate due to her only having mild spinal degeneration.

For these reasons and the reasons stated above regarding causation, the Arbitrator gives more weight to Dr. Gornet opinions as to the diagnostics and treatment that was reasonable and necessary for the Petitioner. Specifically regarding the CT discogram, the Arbitrator finds the test would have been reasonable in light of Dr. Gornet seeing a disc protrusion at L5-6 and mild pathology at C3-4 to determine what level was causing the Petitioner's problems.

Regarding the MR spectroscopy, Dr. Gornet maintained that the test has been approved by the FDA. The Arbitrator's internet search – including the FDA's website – found no such approval for the test in diagnosing lumbar spine conditions. The procedure as a diagnostic tool for the lumbar spine has received a Current Procedural Terminology (CPT) code from the American Medical Association, and that code was added to the billing codes accepted by the Centers for Medicare and Medicaid Services (CMS) on July 1, 2020.

The Appellate Court of Illinois Fifth District recently affirmed a Commission decision finding the test was not reasonable and necessary as a diagnostic tool for lower back pain. See *Lewis v. The Illinois Workers' Compensation Commission*, 2021 IL App (5th) 200302, filed September 24, 2021. There are other Commission decisions with similar findings. See *Cruse v. Choate Mental Health Center*, 19IWCC0419; *Streater v. Bi-State Development Agency*, 20IWCC0034; and *Burwell v. Walgreens*, 21IWCC0505. Based on this precedent, the Arbitrator finds the MR spectroscopy was not reasonable nor necessary.

The Arbitrator finds the other diagnostics and treatment rendered to the Petitioner was reasonable and necessary. Therefore, the Arbitrator orders the Respondent to pay the medical

expenses contained in Petitioner's Exhibit ??? incurred after January 21, 2019 – with the exception of the MR spectroscopy -- 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): Is Petitioner entitled to any prospective medical care?

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13 (1997). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 758 N.E.2d 18 (2001).

The Petitioner has continued to experience pain in her low back that affects her daily living. Conservative treatment failed, and Dr. Gornet has recommended fusion surgery. Dr. Zelby did not believe the surgery was necessary, based on his conclusion that the Petitioner would have been at maximum medical improvement by mid-April 2019. As stated above, the Arbitrator finds this conclusion to be faulty in light of the Petitioner's continuing symptoms. Also, as the Petitioner's treating physician, Dr. Gornet has had more opportunities over an extended period of time to be familiar with the Petitioner's symptoms and the progression of her condition. For these reasons and the reasons stated above, the Arbitrator gives greater weight to the opinions of Dr. Gornet.

The Arbitrator acknowledges that the Petitioner has been working full duty. But this does not mean that the effects of the injury have been relieved or cured. Her employer is providing accommodation for her, and she requires assistance from coworkers. She has stated that she is

"fairly miserable." Considering that these problems did not exist before the accident, further treatment is necessary to try to relieve and/or cure the effects of the Petitioner's injury.

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 as recommended by Dr. Gornet. 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 for the period of October 18, 2019, through January 8, 2020. An employee is temporarily totally incapacitated from the time an injury incapacitates him or her for work until such time as he or she has recovered or restored as the permanent character of his or her injury will permit. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 118 (1990).

During this time, the Petitioner was under work restrictions that were not accommodated by the Respondent. Based on this and the findings above regarding causation, the Arbitrator finds that the Petitioner was entitled to TTD benefits from October 18, 2019 through January 8, 2020. The Respondent is entitled to a credit of $7,529.68 for TTD benefits paid.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC008574
Case Name	Natasha Waddy v. State of Illinois - Choate Mental Health
Consolidated Cases	19WC007518;
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0289
Number of Pages of Decision	15
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Jon Rosenstengel
Respondent Attorney	Natalie Shasteen

DATE FILED: 6/29/2023

/s/ Kathryn Doerries, 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 Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

NATASHA WADDY,

Petitioner,

vs. NO: 19 WC 008574

STATE OF ILLINOIS-CHOATE MENTAL HEALTH,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses and prospective medical, causal connection and temporary disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 1, 2022, is hereby affirmed and adopted.

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

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

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

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

June 29, 2023
KAD/bsd
O050923
42

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC008574
Case Name	WADDY, NATASHA v. STATE OF ILLINOIS/CHOATE MENTAL HEALTH
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Jon Rosenstengel
Respondent Attorney	Natalie Shasteen

DATE FILED: 4/1/2022

THE INTEREST RATE FOR THE WEEK OF MARCH 29, 2022 1.05%

/s/ Jeanne AuBuchon, Arbitrator
Signature

CERTIFIED as a true and correct
copypursuant to820 ILCS 305/14

April 1, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Natasha Waddy ,
Employee/Petitioner

v.

State of Illinois/Choate Mental Health ,
Employer/Respondent

Case # 19 WC 008574

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 **November 30, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **December 21, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

Per stipulation of the parties, in the year preceding the injury, Petitioner earned $**49,529.51**; the average weekly wage was $**952.49**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **2** dependent children.

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

ORDER

Respondent shall pay reasonable and necessary medical services as set forth in Petitioner's Exhibit 1 for services regarding Union County Hospital visit on December 21, 2018; Convenient Care Clinic treatment prior to January 23, 2019; and All Fitness and Physical Therapy treatment from January 13, 2019, through March 7, 2019, as provided in Sections 8(a) and 8.2 of the Act.

Pursuant to the agreement of the parties, all medical bills awarded shall be paid directly to the medical providers. Respondent shall have credit for any amounts already paid or paid through its group carrier as provided in Section 8(j) of the Act. Respondent shall indemnify and hold Petitioner harmless from any claims arising out of the expenses for which it claims credit.

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 **APRIL 1, 2022**

Signature of Arbitrator

ICArbDec19(b)

PROCEDURAL HISTORY

This matter proceeded to trial on November 30, 2021, 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 her employment; 2) the causal connection between the accident and the Petitioner's lumbar spine condition; 3) payment of medical bills; 4) entitlement to TTD benefits from October 18, 2019, through January 8, 2020; and 5) entitlement to prospective medical care to the Petitioner's lumbar spine. For the purposes of trial, this case, which involved an accident on December 21, 2018 was consolidated with 19 WC 7518, which involved an accident on January 21, 2019.

FINDINGS OF FACT

At the time of the accident, the Petitioner was 47 years old and employed by the Respondent as a cook, which entailed putting away cases of frozen vegetables weighing 30 pounds or more and cases of frozen meat that weighed 50 pounds or more. (AX1, T. 12-13) The Petitioner said she was physically capable of performing those job duties without difficulties prior to her injury and had no prior injuries to her low back. (T. 13, 30)

The Petitioner testified that on December 21, 2018, she was picking up a 50-pound case of ground beef from a flatbed cart when she felt a pull in her lower back and right side. (T. 14) She said her whole back was hurting and she was having muscle spasms and pain in the middle of her back, the lower back, right side and down her legs. (T. 15)

After the accident, the Petitioner went to the emergency room at Union County Hospital and complained of back pain and pain and injury to the posterior right chest wall. (PX5) Another portion of the records refers to pain in the right subscapular area. (Id.) She was diagnosed with a muscle spasm of the back and strain of muscle and tendon of the back wall of the thorax. (Id.)

She was given injections of a non-steroidal anti-inflammatory and muscle relaxer, and her condition improved while at the emergency room from 8/10 pain to 4/10 pain. (Id.)

In her accident report completed on December 28, 2018, the Petitioner wrote that she injured her right side and the middle of her back. (PX3)

The Petitioner testified that she followed up with Physician Assistant Courtney Ledbetter at Convenient Care Clinic and was prescribed physical therapy. (T. 16) Records of these visits were not submitted at arbitration. The Petitioner did attend physical therapy at All Fitness and Physical Therapy beginning January 13, 2019. (PX6) The therapy records reflect a referral date of January 11, 2019. (Id.) The therapy appeared to focus on the Petitioner's low back initially, and treatment was added to improve trunk strength. (Id.)

On January 21, 2019, the Petitioner was returning from a lunch break and fell on ice in the employee parking lot onto her buttocks and felt pain in her lower back and legs. (T. 18) The Respondent's workers' compensation coordinator testified that the parking lot where the Petitioner fell was open to the public. (T. 52) In her accident reported completed on January 23, 2019, the Petitioner wrote that she injured her lower back and had pain down her legs. (PX4)

The Petitioner saw PA Ledbetter on January 23, 2019, and reported the fall and that she had low back pain radiating down both legs. (PX5) An X-ray of the lumbar spine showed mild chronic discogenic degenerative disease and transitional vertebral anatomy on the left at the lumbosacral junction. (Id.) PA Ledbetter diagnosed low back pain and prescribed medication. (Id.) The Petitioner returned to the clinic on February 1, 2019, reported that her pain was worse and was prescribed oral steroids. (Id.) On March 1, 2019, the Petitioner again complained of worsening back pain and again was prescribed medication. (Id.) At another visit on March 4, 2019, the Petitioner reported that the medication was helping but still had midline lumbar spine

pain with burning radiation up the right side of her back when sitting. (Id.) Medication was continued. (Id.)

During this time, the Petitioner was continuing physical therapy, which she testified provided no relief from her symptoms. (PX6, T. 21) The physical therapy records note that the Petitioner reported improvement with the medication and at the end of therapy sessions. (PX6) But when she would return for therapy, her pain level had increased. (Id.) The Petitioner attended 12 sessions from January 13, 2019, through March 7, 2019. (Id.)

On March 28, 2019, the Petitioner saw PA Ledbetter and reported that her pain was worse. (PX7) PA Ledbetter referred the Petitioner to Dr. Matthew Gornet, an orthopedic surgeon at The Orthopedic Center of St. Louis. (Id.) The Petitioner previously saw Dr. Gornet in 2006 for complaints of headaches and pain in her neck, upper back, between her shoulder blades and low back. (PX2, Deposition Exhibit 4) Dr. Gornet performed cervical spine surgery on August 4, 2006, from which she had a full recovery. (Id.)

The Petitioner saw Dr. Gornet for her low back on May 30, 2019. (PX2, Deposition Exhibit 3) At that time, she reported low back pain to both sides, both buttocks and down both legs to her knees, with the left greater than the right, and tingling in her legs and occasionally into the bottom of her feet. (Id.) She informed Dr. Gornet of both accidents, saying the later accident made her pain worse. (Id.) Dr. Gornet ordered an MRI, which he said showed a sacralized L5-S1 segment and central disc protrusion at L4-5. (Id.) At L3-4, he said there may have been some mild facet changes on the left side and subtle disc pathology with a tear. (Id.) He continued treating the Petitioner's low back and has recommended surgery.

The Petitioner underwent a Section 12 examination on December 13, 2019, by Dr. Andrew Zelby, a neurosurgeon at Rush University Medical Center. (RX3) The Petitioner reported to him

that the lifting incident on December 21, 2018, resulted in severe low back pain radiating down the back of her right thigh halfway to the knee. (Id.) She described the fall on January 21, 2019, as causing more pain in her low back and additional pain down her left leg. (Id.) At the time of the examination, the Petitioner reported constant pain in the low back with more on the right side and intermittent but daily sharp pain down the back of her left thigh. (Id.) She said she had not had symptoms radiating down the right side for many months. (Id.) Regarding his review of the Petitioner's medical records, Dr. Zelby noted that the Petitioner's complaints after the lifting incident on December 21, 2018, related solely to pain in the subscapular thoracic area with no complaints of low back pain. (Id.)

Dr. Zelby concluded that there was no medical evidence that the Petitioner injured her lumbar spine in either incident. (Id.) He said the lifting injury was correctly diagnosed as a thoracic strain. (Id.) He said that if there were records that indicated complaints of low back pain following the fall, then a soft-tissue lumbar strain was probably also a component of her injury from that incident. (Id.) He stated that the Petitioner's reported persistence and severity of symptoms were inconsistent with the objective medical findings and the natural history of her objective medical condition. (Id.) He said that the Petitioner was at maximum medical improvement for both incidents by mid-April 2019 and required no work restrictions. (Id.) Regarding treatment, Dr. Zelby said the Petitioner would require no more than three to four weeks of directed physical therapy for either injury.

On September 3, 2020, Dr. Zelby issued an addendum report after reviewing the medical records that showed treatment for her low back after the January 21, 2019, fall. (RX4) He found that the Petitioner did sustain a lumbar strain/contusion as a result of the fall. (Id.) He stated that the physical therapy for her thoracic and lumbar strains was reasonable, necessary and causally

related to the work accidents. (Id.) He maintained his opinions that the Petitioner's complaints when he saw her were inconsistent with the objective medical findings and the natural history of her objective medical condition and that the Petitioner was at maximum medical improvement by mid-April 2019 and required no additional diagnostic studies, treatment, medications or work restrictions since that time. (Id.) He said the Petitioner's complaints appeared to be an exaggeration. (Id.)

Dr Zelby testified consistently with his reports at a deposition on September 28, 2020. (RX5) Dr. Gornet testified consistently with his reports at a deposition on May 10, 2021. (PX2) On October 6, 2021, Dr. Zelby issued another supplemental report after having reviewed updated medical records. (RX6) His opinions did not change. (Id.)

CONCLUSIONS OF LAW

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

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

To address this issue, the Arbitrator first must weigh in on inconsistencies between the Petitioner's testimony and the medical records. The Petitioner testified that she was experiencing low back pain since the lifting accident on December 21, 2018. However, the medical records immediately following that accident do not reflect that complaint. Because the medical reflect the Petitioner's complaints closer in time to the accident, the Arbitrator will give more credibility to the statements made at that time.

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.* The Petitioner's lifting injury on December 21, 2018, occurred while at work and performing reasonable activities in conjunction with her employment. Therefore, the Arbitrator finds that the Petitioner's injury occurred in the course of her employment.

The "arising out of" component is primarily concerned with causal connection. *McAllister, 2020 IL 12484, ¶ 36*. To satisfy this requirement, it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. *Id.* The three categories of risk are: (1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics. *Id. at ¶38.*

A risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing: (1) acts he or she was instructed to perform by the employer; (2) acts that he or she had a common-law or statutory duty to perform; or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties. *Id. at ¶46.* The Arbitrator finds that lifting the box of hamburger was an act the Petitioner might reasonably be expected to perform incident to her assigned duties.

Next is the requirement that the risk created a causal connection between the employment and the accidental injury

Drs. Gornet and Zelby agreed that the Petitioner was injured in the two incidents. Dr. Zelby found that the first accident caused a thoracic strain, while the second caused a lumbar strain. Dr. Gornet related the Petitioner's continuing low back condition to both accidents and concluded that the Petitioner had a structural disc issue at L3-4 that was causing her continuing symptoms.

The Arbitrator gives credence to Dr. Zelby's conclusion that the first accident caused only a thoracic strain, as this diagnosis is supported by the records and the Petitioner's reported symptoms. In her initial accident report and medical records, she was not complaining of low back pain. Although the physical therapy seemed to address the Petitioner's low back – in part – the low back symptoms did not make an appearance in the medical records until after the second accident. The evidence is insufficient to show that the Petitioner suffered an injury to her low back as a result of the lifting incident. The Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that her thoracic injuries had their origin in a risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury occurring on December 21, 2018.

Thus, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that the Petitioner's thoracic injuries occurred in the course of and arose out of her employment.

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

This issued is addressed above in the analysis of whether the Petitioner's injuries arose out of and in the course of her employment, and the findings above are incorporated herein.

Therefore, the Arbitrator finds that the Petitioner's thoracic condition is causally related to the work accident.

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The right to be compensated for medical costs associated with work-related injuries is at the very heart of the Workers' Compensation Act. *Hagene v. Derek Polling Const., 388 Ill. App. 3d 380, 383, 902 N.E.2d 1269, 1273 (2009).*

Dr. Zelby believed the Petitioner required no diagnostics or treatment for either of her injuries after mid-April 2019 because she would have been at maximum medical improvement at that time. A review of the medical records to not show any further thoracic complaints after the Petitioner underwent physical therapy. Therefore, the Arbitrator finds that the testing and treatment by the following providers on the following dates was reasonable and necessary for the care of the thoracic injury suffered on December 21, 2018: Union County Hospital visit on December 21, 2018; Convenient Care Clinic treatment prior to January 23, 2019; and All Fitness and Physical Therapy treatment from January 13, 2019, through March 7, 2019.

Therefore, the Arbitrator orders the Respondent to pay the medical expenses contained in Petitioner's Exhibit 1 associated with the above treatment 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): Is Petitioner entitled to any prospective medical care?

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691

N.E.2d. 13 (1997). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 758 N.E.2d 18 (2001).

The Petitioner's thoracic symptoms apparently resolved by the conclusion of her physical therapy on March 7, 2019, as she had no more thoracic complaints. Therefore, the Arbitrator finds that further treatment for the injury sustained in this case is neither reasonable nor necessary.

Issue (L): What temporary benefits are in dispute? (TTD)

According to the Request for Hearing (AX1), the parties dispute temporary total disability benefits for the period of October 18, 2019, through January 8, 2020. The Arbitrator finds that the Petitioner's thoracic condition had resolved by this time, therefore no TTD is awarded in this case.

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	20WC017876
Case Name	Danny Watson v. Silligan Containers
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0290
Number of Pages of Decision	16
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Nicholas M. Schiro
Respondent Attorney	Stephen Klyczek

DATE FILED: 6/30/2023

/s/ Deborah Baker, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DANNY WATSON,

Petitioner,

vs. NO: 20 WC 17876

SILGAN CONTAINERS,[1]

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of the nature and extent of Petitioner's permanent disability, and being advised of the facts and law, corrects the Decision of the Arbitrator and provides additional clarification as stated below, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

FINDINGS OF FACT

The Commission adopts the Findings of Fact in the Decision of the Arbitrator and incorporates such facts herein, but writes additionally to further clarify the Decision, as well as to correct scrivener's errors contained therein.

Initially, the Commission observes that the Request for Hearing form in this case reflects that the only disputed issue is the nature and extent of Petitioner's permanent disability. Request for Hearing, p. 2. However, at trial, the parties stipulated, and the Arbitrator agreed, to specifically award medical bills of $610.00 to Carle Hospital and $871.00 to Spine Consultants as part of the Decision of the Arbitrator in addition to any nature and extent that may be awarded. Trans., p. 4-

[1] The Application for Adjustment of Claim was not included in the record, and it does not appear that the Application was amended to correct Respondent's name. However, the parties stipulated to this spelling at the hearing.

6. We highlight this to explain the existence of a medical expenses award in the Decision of the Arbitrator.

Additionally, the Commission also corrects scrivener's errors contained within the Decision of the Arbitrator. In the Order section of the Decision of the Arbitrator, Petitioner was awarded medical bills for treatment rendered by Spine Consultants in the amount of $871.80. Decision of the Arbitrator, p.2. However, per the stipulations on the Request for Hearing form, this amount should read $871.00 instead. We change the Order section of the Decision of the Arbitrator accordingly.

Next, we observe that in the Conclusions of Law section of the Decision of the Arbitrator, Petitioner was awarded a total of $1,480.00 in medical expenses. Decision of the Arbitrator, p. 8. However, we note that the correct total of medical expenses awarded should read $1,481.00 ($610.00 + $871.00). We change the Decision of the Arbitrator accordingly.

Lastly, the Commission corrects the scrivener's error contained on the initial page of the Decision of the Arbitrator. Therein, the case number is listed as "17 WC 017876." Decision of the Arbitrator, P.1. We change this to the correct case number of 20 WC 17876.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 21, 2022, as clarified and corrected above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the case number on page 1 of the Decision of the Arbitrator shall read "20 WC 17876."

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $610.00 to Carle and $871.00 to Spine Consultants, for a total of $1,481.00 for medical expenses, as provided in section 8(a), subject to section 8.2 the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $833.83 per week for a period of 137.5 weeks, as provided in section 8(d)(2) of the Act, for the reason that the injuries sustained caused a 27.5% loss of use of Petitioner's 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.

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.

June 30, 2023

/s/ *Deborah J. Baker*

DJB/wde

O: 5/24/23

/s/ *Stephen Mathis*

43

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC017876
Case Name	Danny Watson v. Silligan Containers
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Crystal Caison, Arbitrator

Petitioner Attorney	Nick Schiro
Respondent Attorney	Stephen Klyczek

DATE FILED: 12/21/2022

THE INTEREST RATE FOR THE WEEK OF DECEMBER 20, 2022 4.55%

/s/Crystal Caison, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF CHAMPAIGN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DANNY WATSON
Employee/Petitioner

Case # **17** WC **017876**

v.

Consolidated cases: **N/A**

SILGAN CONTAINERS
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 **Crystal L. Caison**, Arbitrator of the Commission, in the city of **Champaign**, on **June 22, 2022**. After reviewing all the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **June 1, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**72,264.68**; the average weekly wage was $**1,389.71**.

On the date of accident, Petitioner was **65** years of age, ***married*** with **0** dependent children.

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

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services of $610.00 to Carle and of $871.80 to Spine Consultants (PX 3, PX 7) as provided in Sections 8(a) and 8.2 of the Act as the Arbitrator finds said bills to be reasonable, necessary, and causally related to the work accident on June 1, 2020.

Based upon the findings as to nature and extent, Respondent shall pay Petitioner the sum of $833.83/week for a period of 137.5 weeks, as provided in Section 8(d)(2) of the Act, because the injuries sustained permanent partial disability to the extent of 27.5% loss of use of 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

December 21, 2022

STATE OF ILLINOIS)
)SS
COUNTY OF CHAMPAIGN)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DANNY WATSON
Employee/Petitioner
v.

SILGAN CONTAINERS
Employer/Respondent

Case # **20** WC **017876**

Consolidated cases: __

FINDINGS OF FACT

This claim came before Arbitrator Crystal L. Caison for trial on June 22, 2022, in Chicago, Illinois on Petitioner's Request for Hearing. The issue in dispute from the June 1, 2020 accident is nature and extent. (AX 1) The parties have stipulated to all other issues including that Respondent is liable for the medical bills to Carle for $610.00 and Spine Consultants for $871.00 to be awarded. (AX1, PX3 72-75, PX7)

TESTIMONY AT ARBITRATION

Petitioner

Danny Watson ("Petitioner") was a 65-year-old married male with no dependent children on June 1, 2020. (AX 1)

Petitioner started working for Respondent in approximately May of 1986. (T. 14) He started out sleeving ends, putting them on a pallet as a packer, and worked his way up with seniority and knowledge to becoming a mechanic.(T. 15) At the time of his injury, Petitioner was working in the position of lead mechanic for the multi-dye presses. *Id*. Petitioner has been in the position as lead maintenance mechanic for the last

ten or so years before the accident. *Id*. His duties and responsibilities as a lead maintenance mechanic was to perform maintenance and production, get parts and things together, and get people together to perform maintenance. *Id*. Petitioner's job primarily involved standing and walking [*sic*] in awkward positions. He averaged about 45 hours a week.

The parties stipulated that Petitioner sustained accidental injuries on June 1, 2020. (T. 17) Petitioner said he was looking for parts to perform maintenance for the following day. He said while on top of the ladder, he pulled a parts box onto his shoulder, turned to go down the ladder and felt an awkward pain in his shoulder and arm. (T. 18) He climbed down the ladder with the part and put it on a table and continued working that day. *Id*. He felt like it was a stinger at the time. *Id*. He reported his accident and went to the ER on June 1, 2020. *Id*. Thereafter, Petitioner came under the care of Dr. Fletcher and Dr. Butler respectively. (T. 18-19) While under Dr. Butler's care, Petitioner underwent surgery and was able to go back to light duty work within a couple of weeks of surgery. (T. 20-21)

After returning to work, Petitioner said he was having more difficulty performing everyday duties, so he decided to retire effective January 14, 2022. (T. 21-22) On an evening when he returned home, he said was wore out and his neck was sore. (T. 22)

Petitioner said he had never injured his neck or had any medical treatment to his neck before his accident. (T. 22-23) He said he currently has limited movement of his neck left to right and cannot tilt his head very far. (T. 23) Petitioner said that his neck is okay if he takes Tylenol for pain every four hours. (T. 24)

Petitioner said he can no longer change his own oil or perform minor construction projects around the house. (T. 24) He said he can no longer mow his grass in two hours because of his neck injury and that is now a two-day chore. *Id*.

Petitioner said that whenever he performs any kind of strenuous activity, the muscles get sore and stiff. (T. 25) Petitioner describes no pain just sitting. *Id*. He said that his pain in the neck comes when he gets active. *Id*. Petitioner explained the more strenuous the activity, the higher the pain level gets. *Id*. Petitioner said his pain level can reach a 6/10 when the neck is aggravated. *Id*.

Petitioner said that his neck injury has affected the ability to lift the amount of weight he used to be able to lift. (T. 26) Currently, he can only lift 30 pounds comfortably. *Id*. Petitioner said prior to his accident, he didn't have any trouble lifting 65 pounds at work. *Id*. He said he can't turn left to right as far as he used to be able to or tilt left to right as far. *Id*.

Petitioner said he has had several nights when pain wakes him up after three or four hours of sleep. (T. 27) Petitioner said when that happens, he gets up, takes Tylenol, and goes back to bed. *Id*. Petitioner said he is limited in his ability to perform or enjoy activities or hobbies he did prior to his accident, including woodworking, playing sports or riding amusement park rides with his grandchildren. (T. 27-29)

Petitioner acknowledged unpaid medical bills as Exhibits 3 and 7, Spine Consultants totaling $871.00 and Carle Clinic totaling $610.00 respectfully. (T. 28) Petitioner said he has no current plans to see a doctor for any reason related to his neck injury. *Id*.

On cross-examination, Petitioner said the weight of the box he was handling at the time of the accident was 48 pounds. (T. 30) He also said there was nothing special about choosing January 14, 2022 to retire other than his neck was bothering him a lot and he might have had a rough week the week before (T. 30)

Petitioner said he receives a pension from Respondent and his pension would not be different if he retired earlier. (T. 30- 31) Petitioner said he was 66 on January 14, 2022 and was not aware of Respondent having a mandatory retirement age. Petitioner

said that to the best of his knowledge, he was the oldest employee at the time he retired. (T. 31)

MEDICAL EVIDENCE

On June 1, 2022, Petitioner sought treatment at the emergency room at Carle Hospital in Hoopeston. There, a CT scan of the cervical spine was done which revealed degenerative changes at C2-3, C4-5, and C5-6. (PX 1)

On June 10, 2020, Petitioner followed up with Dr. Fletcher. Dr. Fletcher prescribed Prednisone and Lyrica and ordered an MRI of the cervical spine. (PX 2, 6-7)

On June 18, 2020, an MRI was done. The results of the MRI were a mild anterior extradural defect causing mild indentation at the thecal sac at C4-5, a moderate left paracentral extradural defect causing an indentation of the thecal sac at C5-6, and a moderately severe anterior extradural defect effacing the thecal sac and in contact with the spinal cord at C6-7. (PX 5)

On June 19, 2020, Petitioner followed up with Dr. Fletcher. Dr. Fletcher referred Petitioner to Dr. Butler, a spine surgeon. (PX 2, 29)

On June 26, 2020, Petitioner presented to Dr. Butler who recommended a course of physical therapy and medication. (PX 8, 29)

On August 21, 2020, Dr. Butler recommended spine surgery. (PX 8, 21)

On March 25, 2021, Petitioner underwent surgery. The surgery involved an anterior cervical discectomy with spinal cord decompression at C5-6 and C6-7, an anterior cervical fusion at C5-6 and C6-7 with implantation of an interbody cage at C5-6 and C67, local bone grafting and allograft bone grafting, and anterior cervical plating at C5-7 with a Zavation plate, operative microscope, SSEP and EMG and MMEP monitoring. (PX 8, 68-69)

On June 24, 2021, Dr. Fletcher released Petitioner to full duty work. (PX 3, 92)

On September 21, 2021, Dr. Butler placed Petitioner at maximum medical improvement and reported that Petitioner stated he had no significant neck pain or radicular complaints in the upper extremities. (PX 8, 3) Dr. Butler did note that Petitioner said he had some stiffness with side-to-side movement and that Petitioner will continue activities as tolerated. (*Id*. at 3-4) Dr. Butler also reported that Petitioner was working without issue, and Petitioner was able to build a deck for his daughter the past summer. *Id*.

ARBITRATOR'S CREDIBILITY ASSESSMENT

Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his testimony. Where a claimant's testimony is inconsistent with his actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972).

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

At arbitration, Petitioner answered all questions asked of him and with no apparent attempt to evade the questions. When asked to describe his symptoms as related to his current conditions, he did not appear to exaggerate his complaints.

The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable. Overall, Petitioner appeared to be a credible witness.

CONCLUSIONS OF LAW

Decisions of an Arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission,* 44 Ill. 2d 214 (1969).

The findings of fact, summaries of medical evidence, and credibility findings, above, are incorporated herein.

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

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 are to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

(i) **Level of Impairment**: Neither Party submitted an AMA rating. Therefore, the Arbitrator gives no weight to this factor.

(ii) **Occupation**: The Arbitrator notes that the record reveals that Petitioner was employed as a lead mechanic at the time of the accident. (T.15) After his surgery,

and on June 24, 2021, Petitioner returned to work in his prior capacity. On September 21, 2021, Dr. Butler reported that Petitioner was working without issue and he had no significant complaints of pain. However, Petitioner testified that he was having more difficulties performing everyday activities. Petitioner said that he experienced a sore neck in the evening after a day's work. Subsequently, Petitioner decided to retire on January 14, 2022. (T.22) The Arbitrator places some weight on this factor.

(iii) **Age**: The Arbitrator notes that Petitioner was 65 years old at the time of his injury. At his age, Petitioner has a relatively shorter life expectancy to live with the results of his injury. Therefore, the Arbitrator gives little weight to this factor.

(iv) **Earning Capacity**: There is no evidence of reduced earning capacity contained in the record. Petitioner was released to full duty on June 24 2021, worked approximately seven months and then decided to retire. The Arbitrator gives little weight to this factor.

(v) **Disability**: On March 25, 2021, Petitioner underwent surgery. The surgery involved an anterior cervical discectomy with spinal cord decompression at C5-6 and C6-7, an anterior cervical fusion at C5-6 and C6-7 with implantation of an interbody cage at C5-6 and C67, local bone grafting and allograft bone grafting, and anterior cervical plating at C5-7 with a Zavation plate, operative microscope, SSEP and EMG and MMEP monitoring. (PX 8, 68-69)

Petitioner said that he currently has limited movement of his neck left to right and cannot tilt his head very far. (T. 23) Petitioner said that his neck is okay as long as he takes Tylenol for pain every four hours. (T. 24)

Although Dr. Butler reports that Petitioner was able to build a deck for his daughter more than a few months after surgery, Petitioner credibly testified his abilities to perform or enjoy activities that he did prior to the June 1, 2020 accident have been impacted. Petitioner said that he can no longer change his own oil or perform minor

construction projects around the house. (T. 24) He also said he can no longer mow his grass in two hours because of his neck injury and that is now a two-day chore. *Id*. Petitioner said that whenever performing any kind of strenuous activity, the muscles get sore and stiff. (T. 25) Petitioner describes no pain just sitting, but the pain in his neck comes when he gets active. *Id*. He said that the more strenuous the activity, the higher the pain level gets. *Id.*

Petitioner said that he has had several nights when pain wakes him up after three or four hours of sleep. (T. 27) Petitioner said that he gets up, takes Tylenol, and goes back to bed. *Id*. He said that he stays away from sporting events and amusement parks with his grandchildren. He also limits woodworking activities that he once enjoyed. (*Id.* at 27-28) Petitioner's testimony is consistent with Dr. Butler's September 21, 2021 note.

Based upon the foregoing evidence, the above factors, and the record taken as a whole, the Arbitrator orders Respondent to pay Petitioner the sum of **$833.83/week** for a period of **137.5 weeks**, as provided in Section 8(d)(2) of the Act, because the injuries sustained caused/resulted in permanent partial disability to the extent of **27.5% loss of a person as a whole**.

Per the Parties' stipulation, the Respondent is liable for the medical bills to Carle for $610.00 and Spine Consultants for $871.00. Accordingly, the Arbitrator awards the medical bills in the total amount of $1,480.00 pursuant to the medical fee schedule.

It is so ordered:

Arbitrator Crystal L. Caison

DATE: **December 21, 2022**