ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC012818
Case Name	Daniel Gonzalez v. Epic Personnel Partners, LLC., Loaning Employer & World Class Distribution, Inc., Borrowing Employer
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0469
Number of Pages of Decision	20
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Damian Flores
Respondent Attorney	Lynn Tellinghuisen, William Brewster

DATE FILED: 11/1/2023

/s/Christopher Harris, 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

DANIEL GONZALEZ,

Petitioner,

vs. NO: 22 WC 12818

EPIC PERSONNEL PARTNERS, LLC,
Loaning Employer, and
WORLD CLASS DISTRIBUTION, INC.,
Borrowing Employer,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent Epic Personnel Partners, LLC and notice given to all parties, the Commission, after considering the issues of accident, causal connection, the reasonableness and necessity of the medical expenses, temporary total disability benefits, and prospective medical treatment 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 27, 2022, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent Epic Personnel Partners, LLC shall authorize hardware removal surgery with a diagnostic right ankle arthroscopy as prescribed by Dr. Anderson on September 27, 2022.

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 Epic Personnel Partners, LLC pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Epic Personnel Partners, LLC 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 Epic Personnel Partners, LLC is hereby fixed at the sum of $41,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

November 1, 2023
O: 10/19/23
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	22WC012818
Case Name	Daniel Gonzalez v. Epic Personnel Partners, LLC., Loaning Employer & World Class Distribution, Inc., Borrowing Employer
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	17
Decision Issued By	Roma Dalal, Arbitrator

Petitioner Attorney	Damian Flores
Respondent Attorney	Lynn Tellinghuisen, William Brewster

DATE FILED: 12/27/2022

THE INTEREST RATE FOR THE WEEK OF DECEMBER 20, 2022 4.55%

/s/ Roma Dalal, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF Will)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)

DANIEL GONZALEZ
Employee/Petitioner
v.

Case # **22** WC **012818**

Consolidated cases: ____

EPIC PERSONNEL PARTNERS, LLC – loaning employer;
& WORLD CLASS DISTRIBUTION, INC. – borrowing employer
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 **ROMA DALAL** , Arbitrator of the Commission, in the city of **Kankakee**, on **October 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. [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. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other - **prospective medical; liability pursuant to the loaning-borrowing agreement between Respondents**

FINDINGS

On **5/4/22,** 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 $**760.00**; the average weekly wage was $**640.00**.

On the date of accident, Petitioner was **40** 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 $**9,493.40** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**9,493.40**.

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule regarding Petitioner's right ankle as outlined in the decision as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for amounts paid. Said bills will be paid directly to Petitioner pursuant to the fee schedule.

Respondent shall pay Petitioner temporary total disability benefits of $426.67/week for 24 & 5/7th weeks, commencing May 5, 2022 through October 24, 2022 as provided in Section 8(a) of the Act for a total of $10,544.84. After taking into account a credit of $9,493.40, the Arbitrator finds Petitioner is owed $1,051.44.

Respondent shall authorize hardware removal surgery as prescribed by Dr. Anderson on 9/27/22.

Pursuant to the loaning-borrowing agreement between the Respondents, Respondent Epic Personnel Partners, LLC, is liable for payment of any and all benefits awarded.

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

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

Signature of Arbitrator

December 27, 2022

STATE OF ILLINOIS)
) SS
COUNTY OF KANKAKEE)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Daniel Gonzalez,)
)
Petitioner,)
)
v.)
) Case No. 22WC012818
Epic Personnel Partners, LLC (loaning employer))
World Class Distribution, Inc. (borrowing employer),)
)
)
Respondent.)

FINDINGS OF FACT

This matter proceeded to hearing on Petitioner's 19(b) Motion in Kankakee, Illinois before Arbitrator Roma Dalal on October 24, 2022. Issues in dispute include accident, causal connection, reasonableness/necessity of accrued medical, TTD and the necessity of surgery as prescribed by Dr. Anderson. (Arb. Ex. 1).

Daniel Gonzalez (hereinafter "Petitioner"), who testified via a Spanish translator, was hired by the loaning employer, Epic Personnel Partners (hereinafter "Respondent"), an employment agency and sent to work for World Class Distribution, a grocery store warehouse distribution center. The parties agree that there is no video of the accident. (T.9).

Petitioner testified he was employed on May 4, 2022 by Epic. (T.23-24). Prior to that he was employed for about a week, roughly for 5 days. (T.25). Petitioner worked second shift from 6:00 PM until 2:30. (T.25). Petitioner testified he began work on April 27. (T.28). On May 3, 2022 Petitioner clocked in at 4:51 pm and clocked out at 2:24 AM. (T.29). Respondent also placed Petitioner's timecard into evidence. On the alleged May 4, 2022 accident Petitioner clocked out at 2:24 am. (RX.4).

Petitioner testified his roommate, Kevin, also known as Guervin, drove him to and from work. (T.31). Petitioner testified they worked for the same company but in different warehouses. (T.32). If Petitioner was working late, he would advise Guervin through WhatsApp. (T.32).

Petitioner testified the warehouse was a food storage. He had to unload and load the merchandise. (T.34). Petitioner testified he unloaded the merchandise from the truck area. The food is packaged with plastic and in pallets. (T.35-36). Petitioner testified the food is moved around the warehouse with a pallet machine, an electronic pallet jack (EPJ). (T.36). Petitioner testified he would utilize the EPJ to move the pallets and would travel 30 minutes, 30 meters or 60 meters. (T.37-38). Petitioner noted he would take about 20-30 trips per shift. (T.38). Petitioner testified he did not receive any formal training or certification to utilize the EPJ. (T.40). He stated people that worked with in the freezer used it. (T.41). With the use of PX 18, a photograph of the EPJ, Petitioner explained that he stood atop the back portion of the EPJ and moved the pallet jack using the handlebars in a manner similar to a motorcycle (T.41). Petitioner's use of the EPJ was witnessed by his supervisors. (T.46).

Prior to incident, Petitioner testified he never had any right foot pain. (T.44). Petitioner stated that when he was coming through the alley to the hall and the machine accelerated more than normal. Petitioner pulled the safety brake and his right foot slipped of the EPJ. (T.47-50). Petitioner reached up to grab the handlebar/accelerator to pull himself back onto the platform (T.50). In doing so, Petitioner accelerated the EPJ thereby crushing his right foot between the EPJ and a metal bars where the merchandise is. (T.50-52). Petitioner did not cry or scream for help. (T.124-125). Petitioner noticed cold and pain in his body after the accident. (T.52). After he went to the break area to sit and evaluate his injury. Petitioner estimated the injury to have occurred around 1:30 AM. He also noted he did not clock out yet. (T.53). Petitioner testified that he advised his friend, Guervin, of the accident at 1:55 AM via a WhatsApp message. (T.57). After refreshing his recollection, Petitioner testified that he called Guervin at 2:09 AM. (T.65).

Petitioner eventually clocked out at 2:24 AM. (T.71). Petitioner's timecard demonstrates the same. Eventually Guervin arrived to Petitioner's location around 3:00 AM (T.69). At Guervin's recommendation, Petitioner proceeded to walk to the office of his supervisor, Ryan Cavanaugh, to report the injury. (T.73). Petitioner testified he told Mr. Cavanaugh about his injury via a phone application. (T.74). Petitioner was then provided some first aid, and an ambulance was called at 3:34 a.m., arriving at 3:53 a.m. A Spanish speaking employee translated between the Petitioner and the paramedics before he was transported to St. Joseph Hospital. (T.75-77).

The incident report noted on May 4, 2022 at approximately 3 am an associate Francisco Rios came to the manager office indicating Petitioner had injured his ankle on an electric pallet

jack (EPJ). It was noted Petitioner was attempting to operate an EPJ when he lost control and struck his ankle which caused the injury. (RX5). Petitioner testified to having met the Respondent's representative Mr. Ryjewski at the hospital where the two communicated through a translation application on his phone. (T.78).

Petitioner testified consistently with his medical records. (T.78-86). Petitioner testified he wished to proceed with recommended hardware removal surgery. He indicated that he was "not walking correctly" and believed his pain and limping at that time might be due to incomplete healing or the implanted hardware. (T.86-90).

On Cross-examination, Petitioner endorsed submitting a job application in Spanish and signing his name to safety rules prohibiting use of equipment or machinery by nonauthorized employees. (T.101-104). Petitioner testified that in the freezer, where he was assigned to work, there were 10 co-workers at any given time with no supervisors. (T.107).

Petitioner testified that prior to working for the Respondent, Petitioner had no prior experience working an EPJ and he neither reported to his supervisors that he had such experience nor was certified by his supervisors to use one. (T.108-109, 151).

As it pertains to the timeline of when the injury occurred and when he sent messages to his roommate, Petitioner stated that he had a general idea of when each event took place but could not recall specific times. The WhatsApp screenshot simply re-affirmed his memory (T.114-115).

Petitioner testified after the injury her remained in the break room for 20-30 minutes and did not notify any supervisor. (T.126). Petitioner testified he went to Mr. Cavanaugh by himself. (T.135). Mr. Cavanaugh requested Kevin's/Guervin's phone number and called him. (T.137-138). He further testified he reported the injury to Mr. Cavanaugh. (T.139). Petitioner testified that he was in "shock" during this period. (T.140-141).

Petitioner testified at the hospital he was administered one COVID-19 test. (T.143). Petitioner testified that he received an "old scooter", which he neither used nor needed. (T. 146).

On Re-direct, Petitioner testified he never went over the rules from the Application at the warehouse. (T.150). Petitioner further noted he did not report the accident immediately because he thought the pain would go away. (T.154).

Mr. Ryan Cavanaugh's Testimony

Mr. Ryan Cavanaugh testified for the Respondent. Mr. Cavanaugh was employed by World Class Distribution as the freezer manager. (T.13-14). He testified he was the overseer of

both the receiving and shipping of all products in and out of the facility for World Class Distribution. He oversees the first and second shift. (T.14). He noted products are taken from the semi or truck into the freezer through EPJ or sit down on forklifts. (T.16). He testified that normally he spends most of his time in his office. (T.17). Mr. Cavanaugh testified Petitioner had worked for him for months. (T.20). He further noted he did not speak Spanish but communicated with his staff with Spanish speaking leads. (T.21).

Mr. Cavanaugh testified no associate is allowed to operate any equipment without first being certified. (T.163). He further noted he was familiar with Petitioner as he worked at World Class Distribution. *Id.* Mr. Cavanaugh testified working on the night of May 3, 2022 – May 4, 2022. He indicated Petitioner was brought to his office by Francisco Rios, another employee. Petitioner was walking "as though something was bothering him." (T.165). Mr Cavanaugh's understanding was that Petitioner had done something on a piece of equipment and was injured. (T.170). Mr. Cavanaugh initially directed Petitioner to the lunchroom, but then realized Petitioner was injured further and moved him to a private conference room. (T.170-171).

Mr. Cavanaugh followed the protocol and contacted Petitioner's supervisor, as he was not Petitioner's supervisor. (T.177). Mr. Cavanaugh then obtained permission to administer first aid, and applied gauze and pressure until receiving further instructions. (T.174). Eventually, Petitioner agreed to the go to the hospital and the ambulance was called. (T.176). Mr Cavanaugh then prepared an incident report. (T.179, RX5).

Mr. Cavanaugh testified that he did not know whether Petitioner was certified to use the electric pallet jack (T.180).

On Cross-Examination, Mr. Cavanaugh reiterated he did not speak Spanish. (T.184).

Kyle Ryjewski Testimony

Respondent's second witness was Mr. Kyle Ryjewski. Mr. Ryjewski is one of 2 on-site supervisors for the Respondent at the World Class Distribution Center. (T.188). Mr. Ryjewski testified that part of his duties is to certify employees on equipment and resolve any issues involving time and attendance. (T.189). Mr. Ryjewski testified Petitioner was sent to the warehouse for certification on an unknown day in April 2022, but he was unable to complete certification due to the language barrier. *Id.* To date, he was not certified. (T.190). Mr. Ryjewski learned of Petitioner's injury from Terrel Davis in the middle of the night. (T.192). He met Petitioner at the hospital and spoke with him through a translator app on their phones. (T.193). It

was his understanding Petitioner was operating the EPJ in the back of the freezer. He stepped off the equipment to get a better handle to be able to properly turn it. When he turned the equipment, he accidentally used a throttle which caused him to pin his ankle between the aisle end cap and the platform of the pallet jack. (T.193-194). Mr. Ryjewski further testified that if he learns of a noncertified employee using equipment, it is his duty to report the same to the safety department, which would be attached to that employee's safety profile. Mr. Ryjewski had no knowledge of Petitioner operating machinery prior to the accident. (T.194-195).

On Cross-Examination, Mr. Ryjewski admitted he never saw Petitioner performing his work duties. He further noted it was possible Petitioner was operating an EPJ and he was not aware of it. (T.199). He further noted he never saw Petitioner work so could not dispute Petitioner's assertion that he utilized the EPJ 20 to 40 times per day. He further indicated he was not Spanish speaking. (T.200).

Medical Summary

The Ambulance records note Petitioner was a 40-year male with a right ankle injury. Petitioner stated he was standing next to an electric pallet jack when he accelerated it. (PX1, p.5). Petitioner was subsequently transferred to Presence St. Joseph Medical Center. The ER records note Petitioner presented for a right ankle injury. Petitioner reported he was attempting to fix heavy machinery at work when he got pinned between the wall and the machine. Petitioner was able to walk after the injury. (PX2, p.61). Petitioner was seen for an orthopedic consultation on May 4, 2022 at the hospital for an evaluation of right ankle pain. Petitioner stepped off an electric pallet jack and it accelerated and pinned his ankle between the machinery and the wall. *Id*. at 67. Petitioner was diagnosed with a laceration of the right posterolateral ankle and bimalleolar ankle fracture. Petitioner seen and evaluated by Dr. Burgess and was to follow up with him. *Id*. at 68.

On May 9, 2022, Petitioner presented to Dr. Brian Burgess at Illinois Bone & Joint Institute for a right foot evaluation. (PX3, p.3). Petitioner was non-weightbearing in a splint and using crutches. Petitioner was diagnosed with a right trimalleolar ankle fracture with a healing laceration. Petitioner was placed in an Unna boot Jones compression dressing and new posterior splint. He was recommended surgery consisting of an open reduction with internal fixation right ankle syndesmosis. *Id*. at 4.

On May 19, 2022 Petitioner sought a second opinion with Dr. Joel Anderson. (PX4). Petitioner noted he utilized machinery that stopped, and he slipped with the machinery striking

the lateral right ankle. *Id*. at 2. Dr. Anderson confirmed Petitioner's diagnosis of a contusion of the right ankle, right ankle sprain, and open trimalleolar fracture of right ankle. An open reduction and internal fixation (ORIF) were recommended. Petitioner was authorized off work and placed in a Cam boot. *Id*. at 3.

On May 24, 2022, Dr. Nazir cleared Petitioner for the ankle surgery. (PX5). On May 27, 2022 Petitioner underwent surgery at Rogers Park Surgery Center. Preoperative and postoperative diagnoses were displaced trimalleolar right ankle fracture and syndesmosis disruption. Procedures were open reduction and internal fixation of trimalleolar right ankle fracture and of syndesmosis disruption of right ankle. (PX4, p.4, PX6).

Petitioner followed up with Dr. Anderson on June 7, 2022. Petitioner was recommended ongoing use of a cold compression therapy unit and the use of the CAM boot with crutches for ambulation. Petitioner was to remain off work. (PX4, p. 8-9).

On June 28, 2022, Petitioner returned to Dr. Anderson. Petitioner had been noticing inflammation and purple discoloration about his ankle. Petitioner was recommended a course of physical therapy 2-3 times a week for 6-8 weeks. Petitioner was to transition from crutches to the boot. (PX4, p.11). Petitioner testified he did not attend PT because he did not have transportation. (T.84). Instead, he engaged in therapy at home.

Petitioner followed up with Dr. Anderson on September 6, 2022. Petitioner was wearing regular gym shoes. He noted he still had ongoing pain on the medial side of the ankle when walking and doing physical therapy at home. Petitioner advised the doctor he got called for therapy but wanted to do his own therapy at home. (PX4, p.12). Petitioner wished to have the hardware removed. Petitioner was recommended to resume home therapy with a formal therapy program recommended. He would continue the CPM and TENS unit. Petitioner would likely need the hardware removed. He was to return in four weeks. (PX4, p.13). Petitioner was last seen by Anderson on September 27, 2022. (PX4, p.14). Petitioner was contacted via teleconference regarding his right ankle injury. Petitioner was recovering well but had irritation at the hardware sites. Petitioner was wishing to have the hardware removed as discussed. Dr. Anderson recommended hardware removal surgery with diagnostic arthroscopy of the ankle. He was to remain off work until surgery. (PX4, p.14).

CONCLUSIONS OF LAW

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

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

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

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds him to be a credible witness. While the Arbitrator did note some inconsistencies, the Arbitrator recognizes that there was no evidence to contradict his 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 regard to issue "C", whether an accident occurred that arose out of and in the course of Petitioner's employment, the Arbitrator finds as follows:

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

Respondent maintains no compensable accident occurred because of the timeline of events and the fact Petitioner was not certified to drive an EPJ. The Arbitrator acknowledges that the timeline is not exact. Petitioner testified he injured himself on May 4, 2022 while operating an EPJ around 1:30 AM. Eventually, it was reported to Mr. Cavanaugh around 3:00 AM.

Respondent seems to be alleging Petitioner was not certified to utilize the EPJ at the time of the accident in violation of company policy. Petitioner disputes this allegation. Petitioner claimed he worked for Respondent for five days and repeatedly used the EPJ to complete his work duties, i.e., move product throughout the warehouse. The Arbitrator notes that even though Petitioner was not certified to operate the EPJ, he regularly used the machine. Petitioner testified his supervisors witnessed his use of the EPJ at approximately 50 times during his five days of employment. Petitioner's testimony regarding his work duties and how he specifically accomplished said duties on the date of accident is undisputed. The Arbitrator notes Petitioner was clearly in the course of his employment when he was on the EPJ and injured his foot. He was putting the food away utilizing the EPJ.

With regard to the "arising out of aspect" of the issue of accident, the decisive issue is whether the employee was, at the time of the accident, violating a rule while still in the scope of his employment, or whether the alleged rule violation took him outside its sphere. *Heyman Distribution Co. v. Industrial Comm'n* 32 N.E.2d 894 (1941). In *J. S. Masonry, Inc. v. Industrial Comm'n*, 861 N.E.2d 202 (2006), the appellate court considered the issue of whether an injury arose out of the employment relationship without regard to the facts in dispute as to whether the Petitioner had violated a company rule regarding safety. In upholding benefits, the court found that "though he may have been performing his duties in a negligent manner, the claimant was "doing exactly the thing he was employed to do." *Id.* In *Republic Iron & Steel Co. v. Industrial Comm'n*, 302 Ill. 401, 134 N.E. 754 (1922), the supreme court set forth the proposition which governs cases in which an employee violates a rule and is injured. The rule is, that where the violation of a rule or order of the employer takes the employee entirely out of the sphere of his employment and he is injured while violating such rule or order it cannot be then said that the accident arose out of the employment, and in such a case no compensation can be recovered. If, however, in violating such a rule or order the employee does not put himself out of the sphere of his employment, so that it may be said he is not acting in the course of it, he is only guilty of negligence in violating such rule or order and recovery is not thereby barred. * * * [I]t does not matter in the slightest degree how many orders the employee disobeys or how bad his conduct may have been if he was still acting in the sphere of his employment and in the course of it the accident arose out of it." *Republic*, 302 III. at 406, 134 N.E. 754.

The Arbitrator notes the safety rules were noted in the Application that Petitioner filled out. There was no testimony about trainings Petitioner may or may not received regarding the EPJs. The Arbitrator also notes Petitioner had never previously reprimanded for violating company policy. Petitioner testified several supervisors and other employees saw him drive the EPJ. In addition, Mr. Cavanaugh's testimony does not support Petitioner violated company policy. Mr. Cavanaugh testified that he did not know what time the accident occurred and did not see Petitioner until 3:00 AM, after the injury had been sustained. Mr. Cavanaugh testified he did not think Petitioner was certified to operate the EPJ, nevertheless, he did not dispute Petitioner's account of how often he used the EPJ and how the accident occurred. Further, Mr. Cavanaugh did not state Petitioner was engaged in horseplay or any activity which was outside Petitioner's scope of employment.

The testimony of Respondent's second witness, Kyle Rejewski, also does not support a denial of accident. Mr. Rejewski simply stated that Petitioner was not certified to operate the EPJ. Mr. Rejewski was not present at the warehouse when the accident occurred and did not directly dispute Petitioner's account of how often he used the EPJ. Ultimately, Mr. Rejewski agreed he was not in a position to dispute Petitioner's testimony regarding how and when he injured himself. Based on the same, there the Arbitrator finds that it is unclear if Petitioner was in violation of company policy.

The Arbitrator finds that, regardless of this safety violation dispute, Petitioner's testimony regarding his work duties and how he specifically accomplished said duties on the date of accident is undisputed. Petitioner completing his job tasks is not a bar to compensability because Petitioner was still within the "sphere of employment" at the time of the accident. Petitioner was coming through the alley to the hall, completing his job tasks, when he slipped and fell. When he went back on, he accidently accelerated the EPJ thereby crushing his right foot between the EPJ and a metal bars where the merchandise is. Petitioner was "doing exactly the thing he was employed to do" when he was injured. *J. S. Masonry, Inc. v. Industrial Comm'n*, 861 N.E.2d 202 (2006). Therefore, even if Petitioner was utilizing the EPJ in violation of the company policy, the violation is not a bar to compensability, because Petitioner was in the act of completing his job duties, i.e., putting merchandise away, which is well within the sphere of employment and is thus compensable under *J.S. Masonry*.

Petitioner testified he used the EPJ in front of all his co-workers and there is nothing in the record to show he was ever reprimanded by either Respondent for using the EPJ. Whether or not he was certified to operate the EPJ, as a warehouse worker, Petitioner's testimony regarding his regular use of the EPJ to complete his work duties is undisputed. The Arbitrator finds that Petitioner regularly used the EPJ for a total of four days in furtherance of Respondent's interest. Petitioner's testimony regarding his actual use of the EPJ, the mechanism of injury and the time of the accident is undisputed. In addition, Petitioner's accident report confirms Petitioner was injured on the EPJ. Accordingly, there is no dispute within the record that Petitioner injured himself on May 4, 2022 while physically at his workplace and engaged in an activity he was reasonably expected to perform. The Arbitrator, thus, finds Petitioner satisfied his burden of proof and established he sustained a work accident on May 4, 2022.

With regard to issue "F", whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

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

In this case, the Arbitrator finds Petitioner's current condition of ill-being as related to his right ankle is causally related to his work accident of May 3, 2022.

This finding is based on the credible testimony of Petitioner, the medical records submitted by Petitioner and the opinions and conclusion of Dr. Anderson. The Arbitrator finds there is no dispute within the record as it pertains to causal connection.

It is well established law that 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. *Navistar International Transportation Corporation*, 315 Ill. App. 3d 1197, 1206 (2000). The Court specifically stated that causal connection between work duties and a condition may be established by a chain of events, including Petitioner's ability to perform duties before the date of the accident and inability to perform the same duties following that date. *Id.* Petitioner testified he was able to complete his work duties prior to the May 4, 2022 injury. Petitioner testified to ongoing complaints after the accident, which is supported by the submitted records, particularly the ER records, Dr. Burgess's records and Dr. Anderson's records, documenting continued complaints and symptoms after the accident. Dr. Anderson diagnosed Petitioner with a contusion of the right ankle, right ankle sprain, and open trimalleolar fracture of right ankle. An open reduction and internal fixation (ORIF) was recommended. There was no evidence of any prior right ankle problems or treatment and no evidence of any intervening injury or event. Such circumstantial evidence supports the existence of a causal connection. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59 (1982). In addition, Respondent offered no evidence to dispute the opinions of Dr. Anderson and Dr. Burgess.

Based on the evidence as presented, the Arbitrator finds Petitioner had a previous condition of good health, an accident, and a subsequent injury resulting in disability which proves a causal nexus between the accident and Petitioner's injury. For the reasons discussed above, the Arbitrator finds Petitioner's condition of ill-being as it relates to his right ankle causally related to his work accident suffered on May 4, 2022.

With regard to issue "J", whether the medical services provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for reasonable and necessary medical services, the Arbitrator finds as follows:

The Arbitrator incorporates by reference the above Findings of Fact and refers to them by reference herein. In reviewing the medical services provided to Petitioner, the Arbitrator finds that Respondent has not paid all appropriate charges for all reasonable and necessary medical services. The Arbitrator finds the medical services provided to Petitioner were partially reasonable and necessary.

Section 8(a) of the Act states a Respondent is responsible … "for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services

thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury…" A claimant has the burden of proving that the medical services were necessary, and the expenses were reasonable. See *Gallentine v. Industrial Comm'n*, 201 Ill.App.3d 880, 888 (2nd Dist. 1990).

Based on Petitioner's testimony, he did not report Covid-19 exposure at the hospital. Despite that, the hospital records (Px. 2) and bill (Px. 8) indicate 3 separate Covid-19 tests were administered with 3 separate charges entered, $195.00, $379.00, and $26.00. The Arbitrator find that the initial testing is reasonable and necessary, however nothing in the record supports the need for or reasonableness of additional multiple testing to be completed during the Petitioner's less than 8 hours stay at the hospital. The Arbitrator also notes Petitioner testified that he only underwent one Covid-19 test. Similarly, Petitioner testified for his recovery he was provided with an "old" scooter, which stood at the place Petitioner used to live at without ever being used. (T. 146-147). Petitioner's testimony contradicts the modifier "NU" used by the provider. Based on that testimony, the Arbitrator finds the device was not necessary.

In regard to the remaining treatment, the Arbitrator finds it to be reasonable and necessary and finds Respondent has not paid for said treatment. As such, the Arbitrator orders Respondent to pay Petitioner directly for the remaining outstanding medical services, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for amounts paid.

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

In order to prove entitlement to TTD benefits, a claimant must establish not only that he did not work, but that he was unable to work. *Sharwarko v. Illinois Workers' Compensation Comm'n,* 2015 IL App (1st) 131733WC. An employee is temporarily totally disabled from the time that an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118 (1990). Once an injured employee's physical condition stabilizes or he has reached MMI, he is no longer eligible for temporary total disability benefits. *Archer*

Daniels Midland Co., 138 Ill. 2d at 118. A claimant reaches MMI when he is as far recovered or restored as the permanent character of his injury will permit. *Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1067, 1072 (2004). Factors to be considered in determining whether a claimant has reached MMI include whether he has been released to return to work, medical evidence, testimony concerning the claimant's injury, the extent of his injury, and whether the injury has stabilized. *Nascote Industries*, 353 Ill. App. 3d at 1072. The period of time during which a claimant is temporarily and totally disabled is a question of fact to be determined by the Commission, and its resolution of the issue will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Archer Daniels Midland*, 138 Ill. 2d at 119-20.

Petitioner is claiming TTD benefits beginning on May 5, 2022 through October 24, 2022 as provided in Section 8(b) of the Act. The Arbitrator finds Petitioner has not recovered from his injuries and has not reached Maximum Medical Improvement. Respondent provided no evidence regarding any light duty work. The Arbitrator further finds Petitioner's physicians have not allowed him to return to unrestricted work since his May 4, 2022 accident.

Based on the same, TTD benefits are awarded at a rate of $426.67 per week for 24 5/7 weeks, commencing May 5, 2022 through October 24, 2022 as provided in §8(b) of the Act. Respondent shall receive credit for amounts paid of $9,493.40.

In support of the Arbitrator's decision relating to "O," liability as between Respondent Epic and Respondent World Class pursuant to the loaning-borrowing agreement, the Arbitrator makes the following conclusions:

Section 1(a)4 of the Act discusses liability between loaning and borrowing employers. The default rule set forth in the Act is that "the borrowing employer is primarily liable and the loaning employer secondarily liable" for payment of workers' compensation benefits for any borrowed employees. *Fort Dearborn Cartage Co. v. Rooks Transfer Co.*, 136 Ill.App.3d 371, 373-374 (1st Dist. 1985). However, employers party to a loaning-borrowing agreement can reverse the payment priority established by the Act by entering into an agreement to the contrary. *Chaney v. Yetter Mfg. Co.*, 315 Ill.App.3d 823, 827 (4th Dist. 2000).

Here, the parties stipulated that Respondent Epic and Respondent World Class entered into an agreement to the contrary with the Agreement for Services submitted into evidence. All parties agreed on the records that if any workers' compensation benefits were to be awarded, Respondent Epic would be liable for payment of those benefits.

Therefore, the Arbitrator finds that a loaning-borrowing agreement existed between Respondent Epic and Respondent World Class that renders Respondent Epic liable for workers' compensation coverage for Petitioner and payment of any workers' compensation benefits owed for the accidental injury at issue in this case.

With regard to issue "O", whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows

The Arbitrator incorporates by reference the above Findings of Fact and refers to them by reference herein. As stated above, the Arbitrator has found Petitioner's condition is causally related to his work accident and has not stabilized or otherwise reached MMI. Petitioner seeks prospective care in the form of a surgery consisting of a hardware removal.

The Arbitrator finds Petitioner is entitled to prospective medical care as recommended by his treating physician. For the reasons stated above, Respondent shall authorize and pay for this and such other reasonable medical treatment pursuant to the statutory fee schedule.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC023007
Case Name	Abdellatif Bentalha v. CR Express, Inc
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0470
Number of Pages of Decision	17
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Peter Bobber
Respondent Attorney	Lauren Witkowski

DATE FILED: 11/1/2023

/s/Marc Parker, 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

Abdellatif Bentalha,

Petitioner,

vs. NO: 18 WC 023007

CR Express, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by both parties herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, medical expenses, prospective medical treatment, and penalties and fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. 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).

Findings of Fact

On March 8, 2018, Petitioner was employed by Respondent as a truck driver. He had performed his pre-trip inspection of his truck and noted that his anti-freeze level was low, so he had gone to Respondent's warehouse on-site to obtain the needed supplies. On his way out of the warehouse, he slipped on a plastic mat and landed primarily on his left side. He noticed immediate pain in his left shoulder, left knee, and right wrist. Petitioner reported his accident to the dispatcher, then sought emergency room evaluation at Advocate Christ Medical Center. X-rays revealed no fractures, and he was advised to follow up with his primary care physician. Dr. Joudeh took Petitioner off work, prescribed pain medication, a left shoulder MRI, and physical therapy. Dr.

Joudeh also noted Petitioner's complaints of a pulling in the left side of his cervical spine and low back and left shoulder pain which persisted throughout his treatment.

Dr. Sokolowski assumed Petitioner's care on May 3, 2018, reviewed his left shoulder MRI, and diagnosed him with left rotator cuff tendinitis, left cubital tunnel syndrome and low back pain. He ordered additional physical therapy, medications and an EMG/NCV for the left arm. The EMG/NCV showed neuropathy at the left elbow affecting the ulnar and radial nerves. Dr. Sokolowski continued to treat Petitioner for his cervical and lumbar complaints but referred him to Dr. Burra for further evaluation and treatment of his left arm and shoulder. Dr. Burra ordered an MRI arthrogram of the shoulder, which revealed a partial thickness tear along the subscapularis tendon insertion and a probable labral tear. On September 18, 2018, Dr. Burra recommended left elbow and shoulder surgeries. Respondent refused to authorize or pay for the recommended surgeries.

Eight months later, Respondent obtained a §12 evaluation by Dr. Balaram. On May 28, 2019, Dr. Balaram agreed with Dr. Burra's diagnoses and surgical recommendations and concluded that Petitioner's left arm conditions were causally related to his work accident. Respondent finally authorized the two surgeries in October 2020, over two years after Dr. Barra had recommended them and 16 months after its own §12 expert had agreed they were medically necessary and causally related to Petitioner's work accident.

Dr. Burra performed an open anterior transposition of the ulnar nerve on January 14, 2021, and a left rotator cuff repair, biceps tendon tenodesis and subacromial decompression acromioplasty on March 18, 2021. Petitioner underwent extensive post-operative physical therapy from March through December 2021 but continued to complain of pain in the AC joint and neck pain radiating to his left shoulder. Dr. Burra recommended that Dr. Sokolowski address Petitioner's cervical issues before he administered AC injections.

Respondent obtained a second §12 evaluation on May 5, 2022. Dr. Singh evaluated Petitioner's cervical condition and diagnosed him with cervical spondylosis, a degenerative condition unrelated to his work accident. Respondent continued to dispute the causal connection between Petitioner's cervical complaints and his fall at work.

Dr. Sokolowski ordered facet block injections at C5-6 and C6-7, which were performed on May 9, 2022. Petitioner reported only temporary relief, and Dr. Sokolowski advised him that sometimes three sets of injections are required before permanent improvement occurs. Respondent did not approve additional injections.

Petitioner underwent a functional capacity exam (FCE) on June 13, 2022, which was deemed valid and showed Petitioner was able to meet only approximately 80% of his job demands. He was placed at medium physical capacity, and Dr. Sokolowski returned him to work with permanent restrictions based upon the FCE. Respondent did not offer to accommodate Petitioner's restrictions and refused his request for vocational rehabilitation.

On October 31, 2019, Petitioner filed a Petitioner for Penalties and Attorneys' Fees and attached copies of six written demands for payment of TTD and for authorization of medical treatment recommended by his treating physicians. PX11. At that time, Respondent had paid TTD only for the period between March 8, 2018, and May 14, 2018 ($4,503.12 paid on May 18, 2018). According to the Petition, Respondent refused to tender the demanded benefits or to provide a reasonable explanation for its denial of benefits. On December 5, 2019, Respondent advanced Petitioner $20,000.00 toward permanent partial disability. No additional TTD was paid until 125 weeks later on October 8, 2020, when Respondent issued a check for $9,569.13 for the 17 weeks between June 12, 2020, and October 8, 2020. As of October 8, 2020, Respondent began to make regular weekly TTD payments of $562.89, which continued until May 26, 2022. On that date, Respondent terminated benefits, citing Dr. Singh's May 5, 2022, §12 report finding Petitioner's cervical complaints nonanatomic and unrelated to his work accident. On February 1, 2021, Respondent paid $40,792.12 toward the total TTD owed to Petitioner. No reason or explanation for Respondent's refusal to pay TTD from May 15, 2018, through October 7, 2020, is contained in the record.

Petitioner filed a request for immediate hearing under §19(b), seeking medical expenses, TTD, prospective medical care to include the facet injections Dr. Sokolowski had recommended, and penalties and fees for Respondent's vexatious and unreasonable delay in paying benefits and in authorizing treatment. The Arbitrator found that Petitioner's cervical condition was causally related to his work accident and awarded him medical expenses, TTD, and prospective care. However, the Arbitrator denied Petitioner's petition for penalties and fees, "based on the prior consistent payment of TTD and the good faith efforts to resolve this matter."

Respondent sought review of the Arbitrator's Decision regarding causal connection of Petitioner's cervical condition and his award of medical expenses, TTD, and prospective medical care related to that injury. Respondent did not dispute causal connection with regard to Petitioner's shoulder and elbow conditions of ill-being. Petitioner cross-appealed the Arbitrator's denial of penalties and fees.

Conclusions of Law

The standard for granting penalties pursuant to §19(l) differs from the standard for granting penalties and attorney fees under §19(k) and §16. Section 19(l) provides, in pertinent part:

> "If the employee has made written demand for payment of benefits under Section 8(a) [820 ILCS 305/8] or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In the case of demand for payment of medical benefits under Section 8(a), the time for the employer to respond shall not commence until the expiration of the allotted 30 days specified under Section 8.2(d) [820 ILCS 305/8.2]. 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." 820 ILCS 305/19(l) *(Emphases added).*

Penalties under §19(l) are in the nature of a late fee. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 763 (2003). In addition, the assessment of a penalty under §19(l) is mandatory, "[i]f the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay." *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515 (1998). The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. *Mechanical Devices*, 344 Ill. App. 3d at 763. The employer has the burden of justifying the delay, and the employer's justification for the delay is sufficient only if a reasonable person in the employer's position would have believed that the delay was justified. *Board of Education of the City of Chicago v. Industrial Comm'n*, 93 Ill. 2d 1, 9-10 (1982).

The standard for awarding penalties under §19(k) is higher than the standard under 19(l). Section 19(k) of the Act provides, in pertinent part:

> "In case where there has been any *unreasonable* or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award. Failure to pay compensation in accordance with the provisions of Section 8, paragraph (b) of this Act shall be considered unreasonable delay." *(Emphasis added.)* 820 ILCS 305/19(k).

Section 16 of the Act provides for an award of attorney fees when an award of additional compensation under §19(k) is appropriate. 820 ILCS 305/16. Section 16 provides, in pertinent part:

> "Whenever the Commission shall find that the employer, his or her agent, service company or insurance carrier *** has been guilty of unreasonable or vexatious delay, intentional underpayment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section 19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his or her insurance carrier." *Id*.

Sections 19(k) and 16 require more than an "unreasonable delay" in payment of an award. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 514-15 (1998). 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. *Id*. at 515. Instead, §19(k) penalties and §16 fees are "intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose." *Id*. In addition, while §19(l) penalties are mandatory, the imposition of penalties and attorney fees under §19(k) and §16 is discretionary. *Id*.

In this case, Petitioner's attorney sent multiple written demands for payment of TTD beginning on September 5, 2018. Respondent offered no explanation for its refusal to pay TTD for the period between May 15, 2018, through October 7, 2020. Authorization for the shoulder and elbow surgeries recommended by Dr. Burra was denied for over two years. This withholding of both medical and lost time benefits persisted despite Dr. Balaram's June 5, 2019, findings of that Petitioner's left shoulder and elbow conditions and need for surgeries were causally related to his work accident.

The Commission finds that Section 19(l) penalties are mandatory in this case. Respondent provided no explanation for the 2.5-year delay in payment of the TTD benefits. The §19(l) late fee is $30 per day and is capped at $10,000. Respondent's delay in this case was well over two years and clearly would exceed the statutory maximum penalty. Based on the foregoing, the Commission awards the statutory maximum of $10,000 of §19(l) penalties to Petitioner.

The Commission also finds that penalties under §19(k) and fees under §16 of the Act are warranted in this case. Respondent denied Petitioner TTD benefits during a period for which its own expert found Petitioner's treatment and disability to be causally related to his work accident. Respondent delayed eight months before obtaining Dr. Balaram's §12 report and 17 months in authorizing treatment after that report was issued finding that the recommended surgeries were causally related, reasonable, and necessary. The record contains no explanation whatsoever for these delays. Respondent's conduct in this case was unreasonable, vexatious and the result of bad faith.

The Commission finds that Respondent failed to make timely TTD payments for the 125 weeks between May 15, 2018, and October 7, 2020. At Petitioner's TTD rate of $562.89 per week, the total amount of the unreasonably delayed payments was $70,361.25. Accordingly, the Commission modifies the Decision of the Arbitrator to award Petitioner §19(k) penalties of $35,180.63 and §16 attorneys' fees of $14,072.25.

All else is affirmed and adopted, and the matter is remanded to the Arbitrator for further proceedings.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 6, 2023, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition for Penalties pursuant to Section 19(k) and Section 19(l) and Attorneys' Fees pursuant to Section 16 of the Act is hereby granted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of $35,180.63, as provided in §19(k) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of $10,000.00, as provided in §19(l) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner's attorney additional compensation of $14,072.25, as provided in §16 of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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.

November 1, 2023

mp/dak
o-10/19/23
068

/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC023007
Case Name	Abdellatif Bentalha v. CR Express, Inc
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	William McLaughlin, Arbitrator

Petitioner Attorney	Peter Bobber
Respondent Attorney	Lisa Barbieri

DATE FILED: 3/6/2023

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 28, 2023 4.98%

/s/*William McLaughlin, 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)

Abdellatif Bentalha
Employee/Petitioner
v.
CR Express, Inc.
Employer/Respondent

Case # **18** WC **023007**

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 **William McLaughlin**, Arbitrator of the Commission, in the city of **Chicago**, on **1/12/2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **3/8/2018**, 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 $**43,905.68**; the average weekly wage was $**844.34**.

On the date of accident, Petitioner was **42** 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 $**102,710.02** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**$20,000.00** for other benefits, for a total credit of $**122,710.02**.

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

ORDER

Respondent shall pay petitioner reasonable and necessary medical services of **$3,792.18**, as provided in Section 8(a) of the Act and pursuant to the Medical Fee Schedule.

Respondent shall pay Petitioner temporary total disability benefits of **$562.89**/week for **251 5/7ths** weeks, commencing **3/9/2018** through **3/11/2018, 3/20/2018** through **1/12/2023** and ongoing, as provided in Section 8(b) of the Act.

Respondent shall authorize the prospective medical care for petitioner's cervical spine including facet injections as ordered by Dr. Sokolowski.

Respondent does not have to pay Petitioner fees or penalties.

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

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

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

MARCH 6, 2023

FACTS

Petitioner was 42 on March 8, 2018, the date of his work accident. He is married and has 2 minor children. (T.p.10-11). He was born in Morocco and his native languages are Arabic and French and speaks English. (T.p.11)
Petitioner came to the United States in 2008 with a green card, and subsequently earned U.S. citizenship in 2013. (T.p.11). He never had any formal education in the United States, and he did not complete high school in Morocco. (T.p.13-14). He did obtain his commercial drivers' license in 2012 with a hazardous materials endorsement. (T.p.13).
Prior to the March 8, 2018 work accident, petitioner testified that never suffered an injury to, underwent treatment for, or lost time for work due to any problem with his left shoulder, left elbow, right wrist or left knee. (T.p.14). As to his neck and low back, petitioner did have conservative treatment to both following a 2015 motor vehicle accident, but from 2016 through the date of accident in question, he had no treatment to, or missed anytime from work due to, his neck or back injuries. (T.p.14-15).
Respondent began work for the petitioner as a truck driver in 2017. (T.p.16). In addition to driving a semi-tractor/trailer, petitioner was required to climb into and out of the tractor, connect/disconnect trailers including pulling the 5th wheel lock handle, cranking up and down the trailer's dolly legs, opening and closing the trailer doors, and conducting freight counting verification which could require moving boxes of freight weighing up to 35 pounds. (T.p.16-18).
On March 8, 2018, petitioner performed his pre-trip inspection of his truck and determined additional antifreeze was required. (T.p.18). He went into the warehouse where a worker named Juan assisted him in filling a container of antifreeze fluid. (T. p.18-20). As petitioner turned to walk out of the warehouse and return to his truck, he was carrying the container of antifreeze in his right hand. (T.p.19-20). He stepped on a plastic mat that had oil on it, and he unexpectedly slipped and fell forward to the ground. (T. p.19). As he fell, he dropped the anti-freeze container and fell forward landing mostly on his left side. (T.p.19-20). After the fall, petitioner noticed pain in his left shoulder, left knee and right wrist. (T.p.21). shortly after the fall ,petitioner got up, walked outside for a few minutes, then went to his boss in dispatch to advise him about the accident and his need for medical attention. (T.p. 22-23).
Petitioner then left work and presented to the emergency department at Advocate Christ Medical Center. (T.p.23). There, after noting a consistent history of injury, pain to the left shoulder, left knee and right wrist were noted. (PX1, pp.33, 35). He was advised to use ice and pain medication, to stay off work until 3/12/2018, and to follow up with his primary care provider. (PX1, pp.19, 23).
On March 12, 2018, petitioner returned to work but experienced significant difficulty picking anything up or attaching and detaching trailers due to pain in his left shoulder, left knee and left hip area. (T.p .23-24). Petitioner followed up with Dr. Joudeh, his primary care physician, on March 20, 2018. (T.p.24-25). Dr. Joudeh noted a consistent history of the fall at work and noted petitioner complained of injury to the left shoulder, low back, left knee and right wrist. (PX2, p.2). Dr. Joudeh prescribed medications and took petitioner off work. (PX2, pp. 3,5). At the March 29, 2018 follow-up visit, Dr. Joudeh noted improved left knee pain, but continued back and left shoulder pain for which he continued medications, ordered physical therapy, and maintained petitioner's off work status. (PX2, pp. 6-7, 9). Dr. Joudeh then again extended the off work status at the 4/9/2018 office visit as well as ordered an MRI of the left shoulder and continued therapy, (PX2, pp. 14, 16), and ultimately referred petitioner for an orthopedic consult of the left shoulder. (PX2, pp.19, 21).
Petitioner underwent an initial round of therapy from 4/4/2018 through 6/12/2018 at Conroy Orthopedic and Sports Physical Therapy. (PX3). There, the noted initial history of the 3/8/2018 work accident was entirely consistent with petitioner's testimony. (PX3, p.6). His "primary concern/chief complaint" was noted as left shoulder pain, left low back pain and pulling in the left side of the cervical spine. (PX3, p.6). Those complaints continued throughout the treatment (PX3, pp. 23, 29).
Orthopedic spine specialist, Dr. Mark Sokolowski assumed petitioner's care on May 3, 2018. (T.p.25). Dr. Soklowski noted a consistent history of injury and noted petitioner improving back and knee pain

with persistent left shoulder and arm pain as well as numbness and tingling of the left ulnar digits. (PX5, p.2). He noted that the 4/16/2018 left shoulder MRI revealed supraspinatus tendinosis, joint effusion, edema in the bicipital grove and degenerative changes in the AC joint. (PX4, PX5, p.2). His diagnosis was left rotator cuff tendinitis, left cubital tunnel syndrome and low back pain for which he ordered more therapy and medications as well as an EMG/NCV study of the left arm. (PX5, p.3). He also maintained petitioner's off work status through June 22, 2022 when he imposed restrictions. (PX5). The July 16, 2018 EMG/NCV revealed neuropathy at the left elbow effecting the ulnar and radial nerves. (PX5, p.13).

Petitioner underwent a second round of physical therapy from 5/10/2018 through 8/8/2018 at MidAmerican Physical Therapy. (PX6). There, the therapy focused on treatment to the left shoulder and "upper arm." (PX6).

On August 8, 2018, Dr. Sokolowski referred petitioner to Dr. Burra for consideration of surgical intervention into the left shoulder and left elbow. (PX5, pp.23-24). Dr. Burra first examined petitioner's left shoulder and elbow on August 22, 2018. (PX7, pp.2-7). After noting a consistent history of the March 8, 2018 work accident, Dr. Burra, ordered an MRI arthrogram of the left shoulder and opined that the ulnar neuropathy in the left elbow would explain a significant portion of his clinical exam, but there may be possibly a double crush also involving brachial plexus. (PX7, p.6). The 9/6/2018 MRI arthrogram revealed tendinosis with partial thickness articular-sided tear along the subscapularis tendon insertion and a probable labral tear. (PX7, pp.9-10).

At the 9/18/2018 follow-up visit, Dr. Burra noted that in addition to the shoulder and elbow pathology, that the parasthesias extended beyond the ulnar distribution now extending into the third and second digits as well. (PX7, p.11). Further, he noted complaints of some localized pain into the right shoulder even with activities of daily living due to limitations on the left. (PX7, p.11). Dr. Burra recommended surgeries to the left elbow and left shoulder at that time. (PX7, pp.14-15). Petitioner wished to undergo the recommended surgeries, but they were delayed while waiting for approval from the workers' compensation insurance carrier. (T.p.28).

Concurrently, in the fall of 2018, petitioner continued to see Dr. Sokolowski for his low back pain as well as for his neck pain which traveled from behind his left ear going down into the left shoulder. (T.p.27). He started noticing the neck pain after the accident, but it would come and go. (T.pp.27-28). Dr. Sokolowski ordered a cervical MRI on 5/13/2019. (PX5, p.32). Then, for the next two and one-half years, Dr. Sokolowski continued to diagnose left shoulder and arm pain as well as neck pain/radiculopathy subsequent to fall at work. (PX5, pp.35,38,40,42,44,45,49,51,53).

Respondent ultimately arranged for a section 12 examination with Dr. Balaram on May 28, 2019, over seven months following Dr. Burra's surgical recommendation. (T.p.28). Dr. Balaram diagnosed left elbow cubital tunnel syndrome and left should intersectional rotator cuff tendinopathy including the supraspinatus and subscapularis as well as proximal biceps tendinopathy with instability of the subscapularis sling. (RX1, p.5). He agreed that these conditions were related to the March 8, 2018 work accident and agreed with Dr. Burra that surgeries are medically necessary to address both issues. (RX1, p.6). Respondent did not authorize these surgeries until October of 2020. (See PX7, p.20).

Dr. Burra performed the left elbow surgery which included an open anterior transposition of the ulnar nerve secured with a fascial sling on January 14, 2021.(PX7, pp.27-28). Next, Dr. Burra performed the left shoulder surgery including subscapularis rotator cuff repair, biceps tendon tenodesis and subacromial decompression acromioplasty on 3/18/2021. (PX7, pp.29-31).

Postoperatively, petitioner underwent extensive physical therapy and work conditioning at Athletico from March of 2021 through December of 2021. (PX8, T.p.30). Although petitioner's left arm functioning improved with therapy, he still was experiencing pain in the AC joint and pain in the neck radiating down into the left shoulder. (PX7, p.44). Dr. Burra considered possible injections into the AC joint, but he wanted Dr. Sokolowski to address the cervical issues first. (PX7, p.46). Ultimately, Dr. Burra ordered a repeat shoulder MRI arthrogram in addition to the cervical MRI previously ordered by Dr. Sokolowski. (PX7, p.50).

After undergoing a cervical MRI in January of 2022, (T.p.30), on 3/2/2022, Dr. Sokolowski diagnosed C5-7 facet joint pain for which he prescribed facet joint injections. (PX5, p.55).
Respondent retained a second section12 examiner in 2022. Dr. Kern Singh performed his IME on May 5, 2022. (T.p.30-31). Dr. Singh diagnosed cervical spondylosis which he opined did not relate to the March 8, 2018 work accident. (RX2, pp.4-5).
Dr. Sokolowski also ordered a functional capacity evaluation which took place at Team Rehabilitation on June 13, 2022. (PX5, pp.62-67). That evaluation showed petitioner gave consistent, full effort throughout the testing and he was functioning only at the medium physical demand level and only able to perform 79.6% of the physical demands of his job as a truck driver. (PX.5, p.62). Specifically, the testing revealed he was limited to occasional bilateral lifting of 27 pounds (17 pounds frequently), with bilateral shoulder lifting limited to 17 pounds, bilateral carrying of 22 pounds and pushing of 70 pounds and pulling of 50 pounds. (PX5, p.62). Dr. Sokolowski adopted the restrictions as per the FCE on 6/22/2022 while still recommending the cervical facet injections. (PX5, p.68).
Following Dr. Sokolowski's 6/22/2022 work release with restrictions per the FCE, petitioner presented those restrictions to respondent, but they never offered him any work. (T.p.33). Further, respondent never offered petitioner any assistance in locating alternative employment. (T.p.33).
Upon referral from Dr. Sokolowski, petitioner underwent cervical facet block injections at C5-C6 and C6-C7 under fluoroscopy performed by Dr. Kurzydlowksi on May 9, 2022. (PX9, p.3). Following the procedure, petitioner noted temporary relief, but the pain returned after a couple weeks. (T.p.31). Petitioner was informed that a series of three injections would be the appropriate treatment protocol to obtain the best possible result. (T.p.31-32). Although he wished to undergo the additional injections, Respondent did not authorize same. (T.p.32).
Dr. Sokolowski has continued to order further facet injections through the present. (PX5, pp. 71-72). Petitioner wishes to undergo the additional injections. (T. p.42) Dr. Burra wanted the cervical issues addressed prior to him proceeding with AC joint injections. (PX7,p.46).
At arbitration, petitioner identified the medical bills contained in Petitioner's Exhibit 12 as the outstanding bills of which he is aware. (T.p. 34-35). Those outstanding charges total $7,818.84. (PX12). That bill also contains a Medical Bill Fee Schedule analysis showing that pursuant to said schedule, the amount owing on the outstanding bills in question would be $3,792.18.
Regarding his work status, petitioner testified that initially, he was off work from March 9, 2018 through March 11, 2018 when the emergency department doctor at Christ Hospital kept him off work. (T.p.35). Then, he was kept off work by his doctors from March 20, 2018 through June of 2022 when Dr. Sokolowski issued permanent restrictions as per the FCE. (T.p.35). Since being taken off work on March 20, 2018, petitioner has not worked anywhere. (T.p.35). Throughout his medical care, petitioner has always provided respondent his off work and light duty notes. (T.p.35). Petitioner identified Petitioner's Exhibit 10 as a TTD payment summary from respondent's workers' compensation insurance company, not only reflecting the amount of payments but also when payments were made. (T.p.36).
Since his March 8, 2018 work accident, petitioner testified that he has suffered no new injury to his neck, left shoulder, left knee, low back right wrist or left knee. (T.pp.36-37).
Petitioner testified that his right wrist is fine, and he has no problem with it. (T.p. 37). Regarding the left knee, petitioner indicated that it has improved but he does feel pain when the weather is cold. (T.p.37). Petitioner testified that his lower back currently is painful especially when sitting in a position for a long time or when driving more than 30 minutes. (T.p.37-38). In regard to petitioner's left elbow, petitioner presently no longer has tingling into his fingers, but he does feel pain in the elbow when driving and when using his arm even if he is not lifting anything heavy. (T.p.38-39). Petitioner's left shoulder is still painful and his is prohibited from performing certain movements like reaching behind his back or reaching overhead. (T.pp. 39-40). Lastly, regarding his neck, petitioner still is in constant pain emanating from his left ear going down into his shoulder which is aggravated by any activity which requires exertion. (T.pp.40-41).

Petitioner's current neck pain significantly impacts his ability to perform any activity. Specifically, anything requiring any effort causes his pain level to increase to the point that he must cease the activity. (T.p.41). To address the pain, he will walk around, massage his neck, lay down, change positions, and sometimes will take a hot shower. (T.pp.41-42).
Regarding activities impacted because of his injuries, petitioner testified that he used to do everything around his home from fixing things, to deep cleaning, to gardening and playing with his children. (T. p.42). Further, he used to assist his wife with lifting heavy things or reaching something high in the kitchen, but he is no longer able to do that. (T.p.43). Petitioner now must hire help for things like snow removal which he used to do himself. (T.pp.43-44). His wife has also had to take on more activities due to petitioner's inability to do them (T.p.44-45).

CONCLUSIONS OF LAW

In support of the Arbitrator's decision relating to (C), DID AN ACCIDENT/EXPOSURE OCCUR THE AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT, the Arbitrator finds the following:

Petitioner testified unrebutted to his March 8, 2018 work accident. (T.pp.18-21). Juan, a co-worker, witnessed the fall as did two other people fixing something in the warehouse. (T.p.20). Further, the area of where the accident occurred has surveillance cameras. (T.p.21). Following petitioner's slip and fall, he reported the occurrence to his boss in dispatch. (T.p.22). Petitioner then left work and went to the hospital where a consistent history of the accident was noted. (T.p.22-23, PX1, p.33,35). The Arbitrator in reaching this conclusion finds petitioner's testimony was credible.
The Arbitrator notes there is nothing as far as evidence or testimony to the contrary, therefore Arbitrator finds that on March 8, 2018, petitioner suffered an accident which arose out of and in the course of his employment by respondent. Further, the Arbitrator fails to appreciate any reasonable basis for respondent disputing accident given the evidence in the record.

In support of the Arbitrator's decision relating to (F) IS PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, the Arbitrator finds the following:

Petitioner testified that prior to his March 8, 2018 work accident, he never suffered any injury to his left shoulder and elbow, his left knee or his right wrist. (T.p.14). As for his neck and low back, petitioner did obtain three months of conservative car flowing a car accident in 2015, but he had no treatment to his spine for over two years prior to the accident at issue. (T.p.14-15). Immediately following the March 8, 2108 work accident, petitioner left work and presented to the emergency department at Advocate Christ Medical Center. There, a consistent history of the work accident was noted, (P1,pp.33,35), and his chief complaint was pain in the right wrist, left shoulder and left knee. (PX1,p.33).

Thereafter, petitioner followed up with Dr. Joudeh, his primary care physician, on March 20, 2018 who, after noting a consistent history of the fall at work, noted petitioner had injured his left shoulder, low back, left knee and right wrist. (PX2,p.2). Following a round of therapy, (PX3), and a left shoulder MRI on April 16, 2018, (PX4), Dr. Joudeh referred him for orthopedic follow-up on 4/26/2018. (PX2,p.19). Starting on April 4, 2018 and continuing throughout that course of therapy, petitioner complained of a pulling sensation in the left side of the cervical spine traveling into the left arm. (PX3,pp.6,23,29).
Dr. Sokolowski then assumed petition's care. He too noted a consistent history of the March 8, 2018 work accident. (PX5,p.2). Petitioner complained mostly of pain in the left shoulder and left arm as well as tingling in the ulnar digits of the left hand while also noting that the back and

knee pain have improved. (PX5,p.2). It is noteworthy that petitioner's pain diagram completed at the first visit on May 3, 2018 includes notations of pain all through the left shoulder into the left cervical area. (PX5,p.6).

Dr. Burra took over the care of petitioner's left shoulder and elbow since Dr. Sokolowski concentrates his orthopedic practice to treatment of the spine. The first visit with Dr. Burra was on August 22, 2018. (PX7, p.2) Then, a consistent history of the March 8, 2018 fall at work was noted. (PX7,p.2). Dr. Burra diagnosed left shoulder rotator cuff tear, subscapularis tear, biceps tendinitis, AC joint pain with impingement and cubital tunnel syndrome of the left elbow. (PX7,p.7). Dr. Burra also noted a possible double crush injury involving the left brachial plexus which could account for symptoms above petitioner's left shoulder. (PX7,p.6) As for causation, Dr. Burra opined the following:

> It is my continued opinion after review of the radiological findings, the condition of ill being of his left shoulder and elbow are causally related to the work-related injury he describes.

(PX7,p.14).

While Dr. Burra and petitioner awaited authorization for the left shoulder and elbow surgeries from the workers' compensation insurance company for over two years, Dr. Sokolowski continued to treat petitioner's spine. At the November 9, 2018 visit, Dr. Sokolowksi noted increased lumbar pain and developing neck pain. (PX5,p28). Petitioner testified that he felt pain/pulling from behind his ear into the shoulder on the left side. (T.p.27). Throughout the course of petitioner's treatment with Dr. Sokolowski, the doctor consistently indicated that the neck and low back conditions as well as the left shoulder and elbow conditions are causally related to the work injury. (PX7, pp.28,30,32,35,38,40,42,44,49,51,53,55,60, 68,70,72).

Dr. Balaram of Hand to Shoulder Associates, respondent's fist second12 examiner, only examined petitioner's left shoulder and elbow conditions. He found both conditions related to petitioner's May 18, 2018 work accident and agreed with Dr. Burra's recommendation for surgeries to the left shoulder and left elbow. (RX1,pp.5-6). Dr. Balaram did offer the opinion that any condition involving the left hand, right shoulder and cervical spine would not be related to work accident, (RX1,pp.5-6), but the Arbitrator is not persuaded by this portion of Dr. Balaram's opinion as petitioner is not claiming any condition of ill-being involving the right shoulder or left hand, Arbitrator give consideration that Dr. Balaram treats conditions of the cervical spine and his report is void of any notation that he examined petitioner's cervical spine. (*See* RX1,pp.2-3).

The only other evidence respondent offered to refute causal connection of petitioner's spinal conditions was the narrative report from Dr. Kern Singh, respondent's second Section12 examiner. Dr. Singh diagnosed petitioner with cervical spondylosis which he indicates is incidental in nature and not related to the March 8, 2018 work accident. (RX2,p.5).

The Arbitrator gives less weight to Dr. Singh's opinions for the following reasons:

> -Dr. Singh opined petitioner could work full duty, but the valid FCE, which Dr. Singh did not consider, showed petitioner was limited to the medium physical demand level with lifting and sitting limitations.
>
> -He opined that petitioner's pain complaints in the spine are nonanatomic in nature, but at the same time he confirms that there were no positive Waddell findings.
>
> -He failed to note that petitioner makes multiple complaints of pulling in the left side of his neck during his first round of physical therapy following the work accident (*See* PX3,p. 6,23,29).
>
> -He failed to consider that Dr. Burra was considering a possible brachial plexus injury which could account for symptoms petitioner was experiencing above his left shoulder. (*See* PX7,p.6).

-He failed to note that petitioner conveyed that he was experiencing symptoms into the left side of his neck in the pain diagram he drew when first seeing Dr. Sokolowski on May 3, 2018. (*See* PX5,p.6).

The Arbitrator also notes that petitioner testified with no evidence to the contrary that since his March 8, 2018 work accident. (T.p.35-37).
Given the above medical treatment records, petitioner's credible testimony, the consistent and credible opinions of petitioner's treating doctors, Dr. Sokolowski, Dr. Burra and Dr. Joudeh, and the absence of persuasive evidence to the contrary, the Arbitrator find petitioner's conditions of ill-being involving his left shoulder, left elbow, left knee, low back and neck are causally related to his March 8, 2018 work accident.

In support of the Arbitrator's decision relating to (J) HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL CHARGES, the Arbitrator finds the following:

Petitioner identified Petitioner's Exhibit 12 as the outstanding medical bills of which he is aware. (T.p.34-35). Given the Arbitrator's findings as to causal connection in issue F above and the absence of any credible evidence to the contrary, the Arbitrator orders Respondent to pay petitioner for the medical bills noted in Petitioner's Exhibit 12 totaling $7,818.84, which to the extent of the Medical Fee Schedule total $3,792.18.

In support of the Arbitrator's decision relating to (K) IS PETITIONER ENTITLED TO PROSEPCTIVE MEDICAL CARE, the Arbitrator finds the following:

As noted above in issue F, the Arbitrator was persuaded by Dr. Sokolowski and petitioner, and found Dr. Singh not persuasive. Dr. Sokolowski continues to recommend further cervical facet injections as of his most result consultation with petitioner on November 14, 2022. (PX5,p.72). Petitioner has indicated he wishes to undergo these injections in hope that they will help relieve his relentless neck pain. (T.p.42). Further, Dr. Burra indicated AC joint injections could be administered once the cervical issues are addressed. (PX7,p.46). Given the credible, persuasive evidence, the Arbitrator orders respondent to authorize the facet injections as ordered by Dr. Sokolowski and the AC joint injections Dr. Burra prescribed.

In support of the Arbitrator's decision relating to (L) WHAT TEMPORARY BENEFITS ARE IN DISPUTE, the Arbitrator finds the following:

On Arbitrator's Exhibit 1, respondent stipulates petitioner was temporarily totally disabled from 3/20/2018 through 5/14/2018, 5/15/2018 through 6/11/2020 and 10/9/2020 through 5/6/2022. Petitioner claims he was also temporarily totally disabled from 3/9/2018 through 3/11/2018, 6/12/2020 through10/8/2020 and 5/7/2022 through 1/12/2023 (the date of the hearing) and ongoing.
First, for the period 3/9/2018 through 3/11/2018, petitioner testified that while obtaining initial treatment for his injuries at the Christ Hospital's Emergency Department, he was instructed to stay off work until 3/12/2018. (T.p.23). The medical record supports petitioner's testimony in this regard. (PX1,p.23). Based on the evidence in the record, the Arbitrator finds respondent tendered no defense for not tendering petitioner TTD benefits for the period 3/9/2018 through 3/11/2018.
Regarding the period from 6/12/2020 through 10/8/2020, petitioner was treating with Drs. Sokolowski and Burra and was specifically awaiting approval of the cervical MRI ordered by Dr. Sokolowski (PX5,p.40), and the shoulder and elbow surgeries ordered by Dr. Burra. (PX7,p. 15, 20-24, T.p.28). Petitioner did not work anywhere during this period, (T.p.35), and Drs. Sokolowski and Burra maintained petitioner's off work status. (PX5,p.40-41, PX7,p.15,24). Additionally, the Arbitrator notes that although Dr. Balaram, respondent's Section 12 examiner,

opined on June 5, 2019 that petitioner could work with no use of the left arm, petitioner testified unrebutted that respondent never offered him any work, light-duty or otherwise, since going back off work on March 18, 2018. (*See* T.p.33,35). Based on the evidence in the record, the Arbitrator finds respondent tendered no defense for not tendering petitioner TTD benefits for the period 6/12/2020 through 10/8/2020.
Lastly, petitioner alleges entitlement to TTD benefits from 5/7/2022 through the date of hearing and ongoing. Initially, Dr. Sokolowski still had petitioner off work during this period. (PX5,pp.60-61). On June 22,2022, he imposed restrictions per the June 13, 2022 valid FCE, but was still ordering cervical spine treatment including facet injections. (PX5,pp.68-69). Dr. Sokolowski maintained those work restrictions and prescription for further treatment to the cervical spine through the date of hearing. (PX5,pp.70-72). Petitioner testified unrebutted that he had not worked anywhere during this period and despite tendering respondent his light duty restrictions, and respondent never offered him work or assistance finding work. (T.pp.32-33, 35).
Arbitrator finds petitioner has not yet attained maximum medical improvement as he is still under the care of Drs. Burra and Sokolowski, and was temporarily totally disabled from 5/7/2022 through 1/12/2023 (the date of hearing) and ongoing.

In support of the Arbitrator's decision relating to (M) SHOULD PENALTIES OR FEES BE IMPOSED UPON RESPONDENT, the Arbitrator finds the following:

"Section 19(k) of the Act provides in relevant part that a penalty may be imposed when there has been an unreasonable or vexatious delay in payment of compensation or when proceedings instituted by the employer are frivolous or for purposes of delay." *Boker v. Industrial Commission*, 141 Ill. App. 3d 51, 56, 489 N.E.2d 913, 917, 95 Ill. Dece.351 (1986). Section 19(l) of the Act similarly provides for the imposition of a penalty when the employer
'without good and just cause' fails to pay or delays payment of TTD payments. *Boker, 141 Ill.App. 3d at 56, 489 N.E.2d at 917*.

The Respondent did pay the TTD as owed while the Petitioner completed his treatment for the left shoulder and left arm conditions as evidenced by the TTD payment ledger entered into evidence by the Petitioner. (PX-10) The Petitioner continued to treat for the cervical maintenance payments after the completion of the left shoulder and left arm treatment. The parties attempted settlement and negotiations in good faith that the case Arbitrator finds based on the prior consistent payment of TTD and the good faith efforts to resolve this matter, the imposition of penalties and fees is not appropriate.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC006207
Case Name	Heather Clarkson v. School Town of Griffith
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0471
Number of Pages of Decision	13
Decision Issued By	Maria Portela, Commissioner, Amylee Simonovich, Commissioner

Petitioner Attorney	Mark Slavin
Respondent Attorney	Andrew Fernandez

DATE FILED: 11/1/2023

/s/Maria Portela, Commissioner

Signature

DISSENT: /s/Amylee Simonovich, 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 WILL	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Heather Clarkson,

Petitioner,

vs. NO: 22 WC 006207

School Town of Griffith,

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, accident, employer-employee relationship, medical expenses and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. 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 12, 2022 is hereby affirmed and adopted.

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

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

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

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.

November 1, 2023
O101723
MEP/yp

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

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

DISSENT

After carefully considering the totality of the evidence, I respectfully dissent from the opinion of the majority and would reverse the Decision of the Arbitrator on the issue of jurisdiction.

At issue in this case is where the last act necessary to give validity to claimant's contract for hire occurred. A contract for hire is made where the last act necessary to give validity to the contract occurs. *Youngstown Steel & Tube Co. v. Industrial Comm'n*, 79 Ill. 2d 425, 433 (1980). The place of acceptance is the place of contract. *Cowger v. Indus. Comm'n*, 313 Ill. App. 3d 364, 370 (5th Dist. 2000). To be valid, acceptance must be objectively manifested, otherwise, no meeting of the minds would occur satisfying the mutual assent requirement for valid contract formation. *Id*., citing *Energy Erectors, Ltd. v. Indus. Comm'n*, 230 Ill. App. 3d 158, 161 (5th Dist. 1992).

Petitioner argues Illinois has jurisdiction over this claim because a contract for hire was formed when she verbally accepted the job offer from Respondent during a video conference on September 9, 2020, while at home in Monee, Illinois, and I agree. This established the employment relationship between Petitioner and Respondent.

This is evinced by the email Petitioner received from Toni Loomis at 11:02 a.m. on September 10, 2020, which begins, "On behalf of Meghan Damron, Director of Business Services, we wish to extend our congratulations on accepting the MS Computer Science Teacher position with Griffith Public Schools! We are excited to have you working with us!" PX2, p. 3. This email confirmed Petitioner's salary and start date. This email also listed a number of items for Petitioner

to complete "for our records prior to working with our students." *Id*. The email closes, "Thank you for accepting the offer. We look forward to you joining our team!" PX2, p. 4.

This email shows that Petitioner was welcomed to the team, given a start date, and was asked to complete certain tasks, not before being hired, but before working with the students. A "meeting of the minds" had to have occurred during the video conference the night before or Petitioner would not have received such an email.

On September 11, 2020 at 9:43 a.m., Ms. Loomis advised Petitioner, "I also forgot to tell you that I have your contract here for you to sign. It was signed by the Board last night." PX2, p. 1. The Board signed the contract on the evening of September 10, 2020, *after* Petitioner was already sent the "welcome to the team" email with her start date. The Arbitrator found the Board's signature was the last act to give validity to the contract for hire. I disagree.

If the Board's signature on the evening of September 10, 2020 was necessary to give validity to the contract, then Petitioner would not have been welcomed to the team and given a start date on the morning of September 10, 2020. If the Board's signature was necessary to give validity to the contract, then Petitioner's signature should also have been necessary. Petitioner worked for weeks without signing the contract. T. 43-44.

The Arbitrator found support for her conclusion in the testimony of Ms. Tracy Whitman, director of human resources. Ms. Whitman testified, "The school board will then say yes or no to that hiring person. And then the onboarding documents will go out from our secretary and she'll send out what we need for that person to complete before or during their work time." T. 51. The Arbitrator found Ms. Whitman's testimony unrebutted. However, this was not the way the process was done for Petitioner. The evidence shows that Petitioner was sent the onboarding documents before the school board signed the contract. This undercuts Ms. Whitman's assertion that the Board must approve the hire.

I find persuasive *Aureus Med. Grp. v. Ill. Workers' Comp. Comm'n*, (3rd Dist. 2021). In *Aureus*, the Commission originally found that the contract for hire occurred in Illinois at the time the respondent became aware the claimant had accepted the offer of employment. The Appellate Court agreed with the Commission, finding the Commission's conclusion that the contract for hire occurred in Illinois was not against the manifest weight of the evidence. *Id*., citing *Energy Erectors, Ltd. v. Indus. Comm'n*, 230 Ill. App. 3d 158, 162 (1992) and *Cowger v. Indus. Comm'n*, 313 Ill. App. 3d 364, 371 (2000).

For these reasons, I would reverse the Decision of the Arbitrator and find the contract for hire was formed in Illinois, thus giving Illinois jurisdiction.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC006207
Case Name	Heather Clarkson v. School Town of Griffith
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	Monte Beaty
Respondent Attorney	Matt Gorski

DATE FILED: 10/12/2022

THE INTEREST RATE FOR THE WEEK OF OCTOBER 12, 2022 4.03%

/s/Roma Dalal, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Heather Clarkson
Employee/Petitioner
v.
School Town of Griffith
Employer/Respondent

Case # **22** WC **006207**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Roma Dalal**, Arbitrator of the Commission, in the city of **Joliet, Illinois**, on **August 12, 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 8, 2021**, Respondent ***was not*** operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**71,820.00**; the average weekly wage was $**1,381.15**.

On the date of accident, Petitioner was **51** years of age, **single** with **0** dependent children.

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

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

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

ORDER

The Arbitrator finds that Illinois does not have jurisdiction over this claim. Based on the same, all other issues are moot.

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

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

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

OCTOBER 12, 2022

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Heather Clarkson,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 22 WC 006207
School Town of Griffith,	)	
	)	
	)	
Respondent.	)	

STATEMENT OF FACTS

This matter proceeded to hearing on August 12, 2022 in Joliet, Illinois before Arbitrator Roma Dalal. Issues in dispute include employer-employee relationship/jurisdiction, accident, causal connection, and prospective medical treatment.

This action was pursued under the Illinois Workers' Compensation Act by Heather Clarkson (hereinafter "Petitioner") and sought relief from School Town of Griffith (hereinafter "Respondent) pursuant to her 19(b) Petition for Immediate Hearing.

Petitioner testified she is employed with the School Town of Griffith in Griffith, Indiana. (T.10). Petitioner testified she was hired in September of 2020 and is currently employed as a junior senior high school computer science teacher. (T.10).

Petitioner testified that, on February 8, 2021, she was working with Respondent in Griffith, Indiana, when she slipped and fell in the teacher work room in a puddle of water injuring her right wrist. (T.12). After her fall, Petitioner was transported via ambulance to Community Hospital. (PX3, T.14). Petitioner was seen at Community Hospital on February 8, 2021. Petitioner was a 51-year-old female who presented for right sided wrist pain and left knee pain. (PX6, p. 86). X-rays revealed a nondisplaced acute fracture of the distal radial metaphysis. *Id*. at 91. Petitioner was to follow up with Dr. Jeffrey Staron. *Id*. at 92.

On February 9, 2021, Petitioner presented to CHS Occupational Health complaining of right wrist pain. Petitioner presented following a fall on February 8, 2021. Petitioner was diagnosed with a fracture of the right wrist and hand. Petitioner was placed off work and was referred to orthopedics. (PX4).

Petitioner testified that shortly after her visit at CHS Occupational Health she presented herself to Dr. Daniels Woods. (T.17-18). She testified Maggie Harris, the "Indiana workmen's comp or our insurance person," called and told her to see Dr. Woods. (T.18). Petitioner testified Dr. Woods advised she would

need surgery. (T.19). Petitioner was screened for pre-op clearance at Community Hospital the same day. (T.18; PX6, p.72).

Petitioner testified she underwent surgery and was off work. She eventually returned to work a month after the accident. (T.19-20). Petitioner testified she underwent therapy. (T.21). She eventually underwent an EMG and was referred for carpal tunnel surgery. (T.21-22). Petitioner subsequently underwent surgery. (T.23). Petitioner testified she eventually was able to return to work and last saw Dr. Woods around December 29, 2021. (T.24).

Dr. Woods placed Petitioner at MMI as of December 29, 2021. Petitioner was recommended to avoid prolonged handwriting and typing. (RX3).

Petitioner testified as to her medical care. The Arbitrator notes no corresponding medical records were placed into evidence.

On January 21, 2022, Dr. Woods opined Petitioner was a right dominant hand female who sustained a distal radius fracture. She underwent an open reduction, internal fixation of a displaced distal radius fracture with no intra-articular involvement on February 17, 2021. She improved with occupational therapy after surgery. Petitioner eventually underwent an open carpal tunnel release on September 3, 2021 and did therapy post-operatively. Her grip strength improved as well as the numbness and tingling. She now had difficulty grasping a pen and difficulty with writing. Petitioner reached maximum medical improvement on December 29, 2021. Accordingly, the AMA guidelines he provided her with a Permanent Impairment rating of 4% of the upper extremity and 2% of the whole person. (RX4).

On May 9, 2022 Petitioner was seen at Marcotte Medical Group with Jodi Bult, nurse practitioner. Petitioner noted she broke her wrist in February of 2021 and was still having pain. Petitioner was diagnosed with right wrist pain and was to undergo physical therapy. Petitioner was referred to Dr. Robert Wysocki. (PX7).

At trial, Petitioner testified her job required her to perform prolonged handwriting and typing. (T.24). Since her release, Petitioner testified she has continued pain and some swelling. (T.25). Petitioner testified she attempted to seek treatment after this date but could not recall any of the names of the providers she contacted. (T.27). Petitioner later testified she saw a nurse practitioner on May 9, 2022. (T.27). She referred Petitioner to an orthopedic, Dr. Wysocki, and referred her for therapy for her right hand/wrist. (T.28). Petitioner testified she cannot set an appointment because it was denied. (T.28). Petitioner, however, later testified she does not recall if she attempted to see her primary care physician for her right wrist before May 2022. (T.47). Petitioner may have seen her primary care physician for unrelated issues. (T.47). The Arbitrator notes no other medical records were placed into evidence. Petitioner testified although she has daily pain and swelling of the right arm, she does not take anything for the pain. (T.48).

Regarding the hiring process, Petitioner testified she was referred by a friend. (T.30). Petitioner conducted the job interview over video conference with Christine Brenner, the principal. (T.31). Petitioner stated she received a copy of the invite via email. (T.32, PX1). Petitioner testified the meeting lasted about an hour and Petitioner was in her dining room in Monee, Illinois. (T.33). Petitioner testified she understood a job offer was provided to her and she accepted the same over the call. (T.33). She testified she interviewed on a Wednesday, and she was to start the job the following Monday. (T.34).

The next day, Petitioner received a series of e-mails from Respondent with additional steps Petitioner needed to complete prior to starting her employment with Respondent as well an email congratulating her about the offer. (T.34-35, PX2). Petitioner stated she was in Matteson, Illinois when she received this email. (T.38). The additional steps included: completing tax paperwork, completing a drug test, and signing her employment contract. (T.38, PX2). There were several email exchanges on Friday, September 11, 2020 between Petitioner and Respondent as well. One of these exchanges are as follows:

> "I forgot to tell you that I have your contract here for you to sign. It was signed by the Board last night. I'm here today until 3 P.M., but don't make a special trip…you [sic] can stop by Monday if you don't make it today!" (T.42, PX2)

Petitioner testified that she was instructed to complete her drug test at Occupational Health in Munster, Indiana, prior to starting work. (T.40, 43). Petitioner testified after taking the drug test she brought the results of the drug test to the central office in Griffith prior to starting on Monday, September 14, 2020. (T.43). These e-mails also instructed Petitioner to sign her employment contract in person at the Central Office in Indiana prior to starting work. (PX2). Petitioner testified she signed her employment contract a couple weeks after starting with the school district. (T.44).

Petitioner further testified she was first hired as a junior high computer science teacher and now works with both junior high and high school students. (T.44-45).

Respondent called Tracy Whitman as a witness. (T.49). Ms. Whitman is the Director of Curriculum and Human Resources for Respondent. (T.50). Ms. Whitman has held this position for one year. She was not involved with the hiring process of Petitioner as she was the Assistant Principal at that time. (T.52).

As part of her position in Human Resources she maintains employee personnel files and is familiar with Respondent's hiring process. (T.50). Ms. Whitman explained the hiring process as follows: Ms. Whitman will create a job posting for the open position, collect job applications, then send them to the administrator hiring for a particular position, that administrator will review the applications, conduct interviews, will make an offer to a particular candidate, and then submit that recommendation to the Superintendent. (T.51, 57). The Superintendent will then sign off on that recommendation and the School Board will either approve or deny that person for hire. (T.51, 57). The School Board then signs the employment contract. (T.55) Once the School Board has approved of the hire, onboarding documents will be sent out to the individual along with items the person needs to complete prior to starting with Respondent. (T.55).

Ms. Whitman testified that employment contracts are signed by new hires in person at their Central Office which located in Griffith, Indiana. The Central Office is at the same location as Griffith Junior Senior High School. (T.56).

CONCLUSIONS OF LAW

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

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).

The Arbitrator notes Petitioner has the burden of proving all of her case by a preponderance of the evidence. *Chicago Rotoprint v. Industrial Comm'n*, 157 Ill.App.3d 996, 1000 (1987). Liability cannot rest upon imagination, speculation, or conjecture. *See United Airlines v. Comm'n*, 991 N.E.2d 458, 463 (2013).

With regards to Issue (A), Were Petitioner and Respondent operating under the Illinois Workers' Compensation Act, the Arbitrator finds as follows:

The threshold issue in this case is whether Illinois has jurisdiction over this claim. Section 1(b)2 of the Illinois Workers' Compensation Act sets out the language for Illinois jurisdiction in workers' compensation claims. It states as follows:

- [e]very person in service of another under any contract of hire, express or implied, oral or written, including persons whose employment is outside of the State of Illinois where the contract of hire is made within the State of Illinois, persons whose employment results in fatal or non-fatal injuries within the State of Illinois where the contract of hire is made outside the State of Illinois, and persons whose employment is principally localized within the State of Illinois, regardless of the place of the accident or the place where the contract of hire was made. 820 ILCS 305/1(b)2.

The Illinois Appellate Court in *Cowger v. IWCC,* 313 Ill.App.3d 364, 728 N.E.2d 789, 793, 245 Ill.Dec. 707 (5th Dist. 2000), simplified the language of Section 1(b)2 into three factors. The three factors are as follows:

1. Contract for hire was made in Illinois,
2. The accident occurred in Illinois, OR
3. The claimant's employment was principally located in Illinois

At trial, Petitioner acknowledged she was both injured and principally employed in Griffith, Indiana. Accordingly, Illinois only has jurisdiction over this claim if the contract for hire was made in Illinois.

A contract for hire is made where the last act necessary to give validity to the contract occurs. *Youngstown Steel & Tube Co. v. Industrial Comm'n*, 79 Ill.2d 425, 433 (1980) In determining whether a contract has been formed, the principles of contract law govern. *Cowger v. Industrial Comm'n*, 313 Ill. App. 3d 364, 370 (5th Dist. 2000). It is a principle of contract law is that "The place of acceptance is the place of contract." *Id*. To be valid, acceptance must be objectively manifested, otherwise, no meeting of the minds would occur satisfying the mutual assent requirement for valid contract formation. *Id*. citing *Energy Erectors, Ltd. v. Industrial Com'n*, 230 Ill.App.3d 158, 161 (5th Dist. 1992)

A "condition precedent" is a condition which must be met before a contract becomes effective or one which must be performed by one party to an existing contract before the other party is obligated to perform. *Catholic Charities of Archdiocese of Chicago v. Thorpe*, 318 Ill. App. 3d 304, 307 (1st Dist.

2000). "Whether an act is necessary to formation of the contract or to the performance of an obligation under the contract depends on the facts of the case." *Id*. Further, if "a condition goes solely to the obligation of the parties to perform, existence of such a condition does not prevent the formation of a valid contract." *Id*.

Petitioner argues Illinois has jurisdiction over this claim because her contract for hire was made in Illinois when she verbally accepted the job offer from Respondent during a video conference while at home in Monee, Illinois.

The Arbitrator finds Petitioner is incorrect in her analysis of *Cowger*. *Cowger* initiated the "last act" theory. This set forth that the contract for hire is made where the last act necessary to complete Petitioner's employment occurs. In the present case, Petitioner testified that while she was offered a position with Respondent over video conference, she was instructed to complete several other tasks prior to starting her position. This is confirmed by the unrebutted testimony of Ms. Whitman as well as an e-mail exchange between Petitioner and Respondent. This exchange occurred on Friday, September 11, 2020 and established that Petitioner was required to complete a drug test in Indiana, drop off the drug test in Indiana, and sign her employment contract in person. Petitioner testified that all of these tasks were completed in Indiana.

Ms. Whitman also testified regarding the hiring process for employees with Respondent. Her testimony was unrebutted at trial. She testified that even after an offer is extended to a candidate, both the Superintendent and School Board must approve the hire and the School Board then signs an employment contract. This contract must then be signed by the new hire. While Petitioner was extended a job offer during her video interview, the 'last act' her contract for hire was completed in Indiana, i.e., the School Board signing the employment contract.

Further, in *Mahoney v. Industrial Commission,* 218 Ill.2d 358, 843 N.E.2d 317, 300 Ill.Dec. 59 (2006) provided insight into the location of contract for hire factor. Petitioner was hired by United Airlines in Illinois. He requested a voluntary transfer nearly 30 years later to Florida. He was injured in Florida. The court held Illinois had jurisdiction, and "situs" of the contract was the controlling factor in establishing jurisdiction.

In the present case, Petitioner signed her employment contract in Indiana. Further, Ms. Whitman testified that while a job offer can be extended to a candidate during an interview, ultimately, the School Board has the authority to approve or deny the hire. Once the hire is approved, the School Board signs the employment contract and then the new hire must sign the contract. This was completed by Petitioner in person, in Griffith, Indiana. In the present case, the situs of the employment contract was clearly Griffith, Indiana.

Even though Petitioner testified she did not sign her employment contract until several weeks after starting work, Ms. Whitman confirmed every employee is required to sign their employment contract in person. In addition, every employee signs an annual contract with the District.

Based upon the witness testimony and evidence admitted at hearing, the Arbitrator finds Petitioner failed to establish that Respondent was operating under the Illinois Workers' Compensation Act, as her contract

for hire was completed in Indiana. As such, she does not have a compensable claim under the Illinois Workers' Compensation Act and Illinois does not have jurisdiction in this matter.

With regards to Issue (B), whether there was an employee-employer relationship, the Arbitrator finds as follows:

As Illinois does not have jurisdiction over this claim, this issue is moot.

The Arbitrator finds with respect to Issue (C), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Issue (F), whether Petitioner's current condition of ill-being is causally related to the injury and with respect to (K), whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows:

The Arbitrator adopts the Statement of Facts in support of the Conclusions of Law.

The Arbitrator has previously found that jurisdiction does not lie in Illinois. Even if the opposite conclusion could reasonably be reached, and even if accident had been conceded, Petitioner failed to meet her burden of proof on the disputed issue of causation as well as the need for prospective care. It is incumbent on the Arbitrator to point out that the record contains only a few pages of treatment records and very little information concerning the two surgeries and post-operative care. As such any conclusion would be speculative.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC014452
Case Name	Paul Telphia v. ABF Freight Systems
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0472
Number of Pages of Decision	22
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Michael E. Mahay
Respondent Attorney	Lindsay Vanderford

DATE FILED: 11/3/2023

/s/Marc Parker, 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 Accident	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Paul Telphia,

Petitioner,

vs. No. 18 WC 014452

ABF Freight Systems,

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, temporary total disability, permanent partial disability, and penalties and attorney's fees, and being advised of the facts and law, reverses the Decision of the Arbitrator, which is attached hereto and made a part hereof.

On April 16, 2018, Petitioner, a 51-year old truck driver, injured his back while exiting his truck's cab at a customer's loading dock. He testified that in order to exit the cab backwards to climb down to the ground, he had to twist his body to the right, while seated behind the steering wheel. As he twisted, he heard a popping sound and felt a sharp pain in his low back which shot down to his legs. When Petitioner reached the ground, he was unable to move his legs. An ambulance was called and transported him to Lutheran General Hospital. In the emergency room, Petitioner received medication and was diagnosed with a low back strain, before being discharged.

Petitioner followed up with Dr. Brotherson, who treated him for 3 months with medications, physical therapy, and rest. Dr. Brotherson diagnosed Petitioner with low back pain and sciatica. Dr. Brotherson released Petitioner to his usual weights during work hours, on July 16, 2018.

At Petitioner's request, Dr. Brotherson referred him to a neurosurgeon, Dr. Graf. Petitioner saw Dr. Graf four times between June 2018 and September 2018. Dr. Graf reported Petitioner's lumbar spine MRI showed mild disc degeneration, but no evidence of herniation or fracture. Petitioner's condition improved with treatment, and on September 21, 2018, Dr. Graf released Petitioner from care at MMI. Petitioner has not received any further treatment for his back since that date.

The Arbitrator found Petitioner failed to prove an accident which arose out of and in the course of his employment with Respondent. The Arbitrator did not believe Petitioner's action of twisting to get out of his cab was a risk incidental to his employment. Instead, the Arbitrator found it appropriate to apply a neutral risk analysis, and he concluded that under such an analysis, Petitioner's act of turning his body to the right was, "an activity of everyday life," which was not made more difficult and did not occur more frequently than the same risk posed to the general public.

<u>*Accident:*</u>

The Commission views the evidence differently than the Arbitrator, and finds Petitioner proved he sustained an accident which arose out of and in the course of his employment.

There is no question that at the time of Petitioner's injury, he was on a delivery for Respondent. Respondent does not dispute that Petitioner's injury occurred "in the course of" his employment.

Regarding whether Petitioner's injury "arose out of" his employment, Illinois courts which have considered this issue have determined there are three categories of risk to which an employee may be exposed: (1) risks that are distinctly associated with one's employment, (2) risks that are personal to the employee, such as idiopathic falls, and (3) neutral risks that have no particular employment or personal characteristics, such as those to which the general public is commonly exposed. *McAllister v. Ill. Workers' Comp. Comm'n,* 2020 IL 124848; 2020 LEXIS 561.

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. 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.*

We find that Petitioner's act of twisting in his truck's cab, in order to exit backwards down cab's steps, was an action distinctly associated with his duties as a truck driver, and therefore was an act which his employer might reasonably have expected him to perform incident to his assigned duties. Petitioner testified the proper way to exit a semi-tractor's cab was to twist and then go out

the door backward to climb down the steps. Although Respondent offered into evidence a short video depicting an unidentified person exiting a truck cab while facing forward, Respondent offered no evidence which contradicted Petitioner's testimony that exiting backward was the proper way to exit a cab.

Causal Connection:

Having found Petitioner proved an accident on April 16, 2018, we also find that he proved a causally related injury to his low back. Petitioner testified he suffered no lumbar injuries prior to April 16, 2018, other than a minor back strain in 2008 which resolved after a couple months. His testimony of developing severe low back pain while exiting his truck was corroborated by the ambulance report, the records of Lutheran General Hospital, and his treating doctors' records. Petitioner was variously diagnosed with low back pain, a lumbar sprain/strain, and sciatica as a result of his accident.

The Commission is not persuaded by the opinions of Respondent's Section 12 expert, Dr. Phillips; some of which are contradictory. Dr. Phillips opined that Petitioner sustained a lumbar sprain/strain with underlying lumbar disc degeneration, but believed it unrelated to Petitioner's work accident. In Dr. Phillips' October 25, 2018 report, he stated he found no specific information in Petitioner's records connecting his symptoms to a specific work injury, and he, "[did] not believe getting out of a truck is a specific mechanism for injuring a back…" However, in his same report, Dr. Phillips acknowledged that, "twisting in a vehicle could be a cause of a lumbar sprain/strain," and, "disk herniations can certainly occur absent trauma as well as in the course of everyday activities."

We find the record as a whole supports a finding that Petitioner's low back condition was causally related to his April 16, 2018 accident. Petitioner was discharged from care at MMI by Dr. Graf on September 21, 2018. We find Petitioner's low back treatment through September 21, 2018 – the date Dr. Graf discharged Petitioner from care at MMI – to have been causally related to his work accident.

Medical Expenses:

Having found Petitioner proved an accident on April 16, 2018, we also find he proved the medical expenses he incurred for treatment to his low back were reasonable, necessary and causally related. The Commission awards Petitioner those medical expenses incurred for treatment to his low back between April 16, 2018 and September 21, 2018, pursuant to the fee schedule.

Temporary Total Disability:

Having found Petitioner proved an accident on April 16, 2018, we also find he proved he was temporarily disabled for 13 weeks, from April 17, 2018 through July 16, 2018. During that

period, Petitioner was unable to perform his usual job duties, and he testified Respondent did not offer him a light duty position.

Permanent Partial Disability:

Pursuant to §8.1b of the Act, permanent partial disability from injuries occurring after September 1, 2011, is to be established using the following criteria: (i) the reported level of impairment from a physician; (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). The Commission has considered these factors, and now assigns the following relevance and weights and to them:

(i) **Disability impairment rating:** some relevance and some weight, because Dr. Phillips provided an AMA 6th Edition Guideline Impairment Rating of 0%, based on Petitioner's history of sustaining a lumbar sprain/strain that has resolved, with occasional low back pain complaints with no objective findings.

(ii) **Employee's occupation:** moderate relevance and weight, because although Petitioner was released to his usual job as a truck driver, it is a heavy job, and Petitioner has to load and unload trucks, in addition to the time he spends driving.

(iii) **Employee's age at time of injury:** moderate relevance and moderate weight, because Petitioner was 51 years old at the time of his injury, and has many years left in the work force.

(iv) **Future earning capacity:** little relevance and weight, because there was no evidence that Petitioner's future earning capacity was affected by his work accident.

(v) **Evidence of disability corroborated by the treating records:** significant relevance and weight, because Petitioner was diagnosed with a back sprain/strain, and he experienced sciatica and radicular pain. Although Petitioner was able to return to his usual job, he still experiences low back pain. Dr. Graf noted Petitioner's pain is exacerbated when hitting bumps with his truck, and Petitioner has been instructed to continue performing a home exercise program.

Based upon our consideration of the above factors, we find that the injury Petitioner sustained as a result of his April 16, 2018 accident caused a 5% loss of use of person as a whole under §8(d)2.

Penalties and Attorneys' Fees:

Petitioner's claim for Penalties and Attorney's Fees is denied. At arbitration, Petitioner failed to offer any Petition for Penalties and Attorney's Fees into evidence; in addition, Petitioner did not check off Penalties and Fees as a disputed issue on his Petition for Review of Arbitration Decision.

Notwithstanding the above, we find Respondent's reliance upon the opinions of its Section 12 expert, Dr. Phillips, was not unreasonable, vexatious, or in bad faith. Dr. Phillips opined Petitioner's symptoms were not specifically caused by a work accident. In the workers' compensation context, generally, when the employer acts in reliance upon reasonable medical opinion or when there are conflicting medical opinions, penalties ordinarily are not imposed; the relevant question is whether the employer's reliance was objectively reasonable under the circumstances. *Global Products v. Workers' Compensation Comm'n,* 392 Ill.App.3d 408 (2009).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 31, 2023, is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner proved he sustained an accident which arose out of and in the course of his employment at Respondent on April 16, 2018.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $836.06 per week for 13 weeks, for the period of April 17, 2018 through July 16, 2018, as provided by §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the outstanding reasonable and necessary medical expenses incurred in treating his lumbar spine condition between April 16, 2018 and September 21, 2018, pursuant to the fee schedule, as provided by §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $752.45 per week for 25 weeks, because the injuries sustained to Petitioner's low back caused the 5% loss of use of the body as a whole, under §8(d)2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for penalties and attorney's fees is denied.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $46,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

NOVEMBER 3, 2023

/s/ *Marc Parker*
Marc Parker

MP/mcp
o-09/07/23
068

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

SPECIAL CONCURRENCE

I write separately as I find Petitioner's injury compensable under a neutral risk analysis; not an employment risk analysis as employed by the majority.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC014452
Case Name	Paul Telphia v. ABF Freight Systems
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	15
Decision Issued By	David Kane, Arbitrator

Petitioner Attorney	Michael E. Mahay
Respondent Attorney	Lindsay Vanderford

DATE FILED: 1/31/2023

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

/s/*David Kane, Arbitrator*

Signature

23IWCC0472

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

Paul Telphia
Employee/Petitioner

v.

ABF Freight Systems
Employer/Respondent

Case # **18 WC 14452**

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 David Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **December 27, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to Respondent?

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

G. ☐ What were Petitioner's earnings?

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

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

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

K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD

L. ☒ What is the nature and extent of the injury?

M. ☒ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other

FINDINGS

On the date of accident, April 16, 2018, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $65,212.68; the average weekly wage was $1,254.09.

On the date of accident, Petitioner was 51 years of age, ***married*** with 1 dependent child.

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

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

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

ORDER

The Arbitrator finds Petitioner did not establish by a preponderance of the evidence that he sustained an accident arising out of or occurring in the course of his employment with Respondent.

The Arbitrator denies Petitioner's request for temporary total disability benefits, medical benefits under Section 8(a) and permanent partial disability benefits. All other issues are considered moot.

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

JANUARY 31, 2023

Paul Telphia v. ABF Freight Systems 18 WC 14452

In support of the Arbitrator's decision, the Arbitrator finds the following facts:

Petitioner testified he had been working for Respondent for 28 years and his job title was driver. Tx, pg. 6-7. Petitioner testified he did inside delivery, ground delivery, lift gate service, transport items up and down the stairs, and tasks that involved lifting, twisting, pushing, and pulling. Tx, pg. 6. Petitioner testified he did those tasks every day for the past 28 years while working for Respondent. Tx, pg. 7. Petitioner testified on April 16, 2018, he was heading to pick up a load from Juno Lighting, backed his truck into the dock, went into the office and informed them he had arrived and returned to his 18-wheeler semi-tractor trailer to wait for the load. Tx, pg. 7-8. Petitioner testified he did not load the truck, he waited in his car for about 30 minutes for them to load the truck. Tx, pg. 9. Petitioner testified the red light at the dock, which indicated you are not ready and should not move your truck, was on for about half an hour. Tx, pg. 9. Petitioner testified the red light means the truck is locked in and they are still loading and when the light turns green, the truck is ready and the driver can go in and get their paperwork. Tx, pg. 9-10.

Petitioner testified the light turned green and he twisted to the right to get out of his truck to get his paperwork. Tx, pg. 10. Petitioner testified as he was twisting to get out backwards, he felt a sharp pain in his back. Tx, pg. 10. Petitioner testified he felt the pain in his low back. Tx, pg. 11. Petitioner testified he was seated and twisted to the right to step out of his truck. Tx, pg. 11. Petitioner testified as he twisted he felt a shocking popping sound and it started shooting down his legs. Tx, pg. 11. Petitioner testified he was getting out of the truck thee correct and typical way of getting out of his truck. Tx, pg. 11-12. Petitioner this was a three-point contact, which was the proper way to get out of the truck. Tx, pg. 12. Petitioner testified a three point contact is hold on with your right hand, hold on with your left hand and place your foot somewhere firm before making your next move. Tx, pg. 12. Petitioner testified he was holding the seat, the steering wheel and had his foot on the ground when he twisted and felt the pop, but proceeded down. Tx, pg. 12. Petitioner testified that the last step of the truck was about four and a half feet. Tx, pg. 13.

Petitioner testified he was five foot and seven inches and the steps came up to right below his neck. Tx, pg. 14. Petitioner testified he got to the bottom of the steps and felt excruciating pain. Tx, pg. 14. Petitioner testified he knelt down next to the truck and had horrible pain, and had to hold back tears and hold onto the handrail on the side of the truck because of the shooting pain down his legs. Tx, pg. 14. Petitioner testified someone came out of the office, asked him what was taking him so to come get the paperwork, and noticed him there on the ground. Tx, pg. 15. Petitioner testified he said to the office worker that he didn't know what happened to his back but he couldn't feel his legs, and the office worker called for an ambulance. Tx, pg. 15. Petitioner testified he asked for his phone to call his dispatcher about the situation and Respondent sent two guys to get the truck. Tx, pg. 16. Petitioner testified it was actually his boss that called for the ambulance and he did not finish the drive that day. Tx, pg. 16-17. Petitioner testified the ambulance came to the truck, put him on a stretcher and brought him to Lutheran General Hospital. Tx, pg. 17. Petitioner testified he sat in the hospital for about an hour when they started helping him and he was released to go home that day. Tx, pg. 18. Petitioner testified while he was in the hospital, he said he was feeling okay and went to use the bathroom but collapsed while he was in the bathroom. Tx, pg. 18-19. Petitioner testified he started to feel a little better and called his wife to come pick him up, the hospital wanted him to stay, but he could leave and needed to see his regular doctor the next day. Tx, pg. 19. Petitioner testified the hospital wheeled him into the hallway and put him on a bench, he collapsed, so they brought him back and gave him more medication. Tx, pg. 19-20. Petitioner testified his wife had to carry him home because of the pain. Tx, pg. 20.

Petitioner testified he did not see his doctor until April 19th, three days after the incident and he stayed at home on his back. Tx, pg. 20. Petitioner testified his primary care doctor was Dr. Kurt Brotherson. Tx, pg. 21. Petitioner testified Dr. Brotherson put him in therapy, did x-rays, and ordered an MRI. Tx, pg. 21. Petitioner testified his therapy was done at Rush Oak Park Hospital and he saw Dr. Carl Graf at Illinois spine Institute. Tx, pg. 21. Petitioner testified he only saw Dr. Graf three times and released him to return to work light duty, and then back to full duty in mid-July of 2018. Tx, pg. 22. Petitioner

testified he saw Dr. Graf one time in September of 2018 and Dr. Graf released him from treatment and told him to return as needed. Tx, pg. 22. Petitioner testified when he returned to work for light duty, they said he was not on light duty and denied his workmen's comp. Tx, pg. 23. Petitioner testified he returned to work because he had to and took ibuprofen and continued his exercises from Dr. Brotherson to manage the pain. Tx, pg. 23. Petitioner testified between the July 13th and September 21st visits with Dr. Graf he continued working taking ibuprofen and doing his exercises. Tx, pg. 23.

Petitioner testified the total lost time was from April 17 2018, to July 16, 2018. Tx, pg. 24. Petitioner testified he did not receive any disability pay or workers' comp checks for that period of time. Tx, pg. 24. Petitioner testified he did not receive any short-term or long-term disability pay but did receive a check from the union, but he was not sure how much from the union. Tx, pg. 24. Petitioner testified all of his medical bills were put through his regular union group health insurance and thee union sent a letter to him that if the injury was compensable, they wanted reimbursement. Tx, pg. 25. Petitioner testified in 2008, he had a minor strain that was not as severe as this, and he was back to work after a few months. Tx, pg. 25. Petitioner testified it was a strain from lifting and he given hard exercises to complete during his months off from work. Tx, pg. 26. Petitioner testified from thee injury in 2008 to the injury in April 2018, he had occasional back issues with pushing and heavy lifting, and he would take ibuprofen to help, but never saw a doctor. Tx, pg. 26-27. Petitioner testified h never had a specific incident with his back during this time period, it hurt with every day pushing, twisting, and climbing. Tx, pg. 27.

Petitioner testified in the time between his last visit with Dr. Graf in September 2018 and this day, he had not gotten any medical treatment for his back. Tx, pg. 27. Petitioner testified he had not reinjured his back at work or home after his September visit with Dr. Graf. Tx, pg. 28. Petitioner testified he cannot do as much as he used to, and he noticed his back will start to hurt and he will have to sit down, rest, and do his therapy exercises. Tx, pg. 28. Petitioner testified that hinders him from doing things around the house and at home, and he has to rest more since the accident. Tx, pg. 28-29. Petitioner testified he does his physical therapy exercises, take ibuprofen and sit in

a hot bath to help his lower back. Tx, pg. 29-30. Petitioner testified he also occasionally used some kind of IcyHot to relieve thee pain but he does not have any assistive devices to use at work. Tx, pg. 30. Petitioner testified he wears a big wide brace every day and that helps support his back, but it was not prescribed to him by any doctor. Tx, pg. 31.

Petitioner testified he felt an onset of symptoms when twisted to the right on the date of the incident. Tx, pg. 32. Petitioner testified he was twisting to the right to exit the truck backwards. Tx, pg. 32. Petitioner testified he maintained a three-point contact when exiting, which is what everyone is taught at ABF. Tx, pg. 33. Petitioner testified he first felt the pain when he had only twisted his body to the right. Tx, pg. 33-34. Petitioner testified he had not begun to pull himself out of the truck when he felt his symptoms, he felt the pain when he twisted before he started to come out of the truck. Tx, pg. 34-35. Petitioner testified he was sitting on an Air Ride seat, which is similar to the other seats he had been sitting on in tractor trailers with ABF. Tx, pg. 35. Petitioner testified the soreness and achiness he felt before and since the incident occurs in the same spot of his lower back. Tx, pg. 36-37. Petitioner testified the soreness is in the same spot where he injured himself when twisting but it was shooting down his back on the date of the incident. Tx, pg. 37. Petitioner testified the pain he was experiencing was soreness in his lower back not shooting down his legs. Tx, pg. 38. Petitioner testified if he continues what he is doing when he feels the pain it will turn into the same feeling he had on thee date of the incident, but prior to the incident he would try to work through the pain. Tx, pg. 38.

The Arbitrator entered the Request for Hearing Form into evidence as Arbitrator's Exhibit No. 1 without any objections. Tx, pg. 40.

Petitioner was taken to the hospital by ambulance on April 16, 2018. PX1. Petitioner was examined and observed for a low back strain and was given pain medications until he was released from Advocate Lutheran General Hospital. PX3.

Petitioner underwent a course of physical therapy at Rush Oak Park Hospital's physical therapy program for a period of 3 months. PX6.

Petitioner was treated conservatively by Dr. Carl Graf until he was eventually released on September 21, 2018 for a final follow up relating to his low back pain. PX7,

RX3. Petitioner was doing well overall and had returned to work full duty without any problems and only minimal pain. PX7, RX3. Dr. Graf's assessment was low back pain but he placed Petitioner at Maximum Medical Improvement and recommended he continue his at home exercises and follow-up as needed. PX7, RX3. Petitioner was released to full duty work and pronounced MMI. PX7, RX3.

Petitioner presented to Dr. Frank Phillips for an Independent Medical Exam on October 25, 2018. RX1. Dr. Phillips noted Petitioner had developed some back pain and possible radicular symptoms around April 2018, but the initial records did not indicate any specific work-related injury. RX1. Petitioner's low back pain was attributed to degenerative disk disease and Dr. Phillips noted Petitioner had disk dislocation and degeneration at L4-5 and aggravated symptoms related to the injury. RX1. Dr. Phillips noted Petitioner's symptoms had mostly resolved and he believed Petitioner's condition developed through the course of everyday activities and not specifically casually related to a specific work incident. RX1. Dr. Phillips noted there was no evidence to suggest Petitioner's pre-MMI condition was specifically related to the April 16, 2018, work injury. RX1.

On February 25, 2019, Dr. Frank Phillips completed an AMA Impairment Rating of Petitioner's condition. RX2. Dr. Phillips noted after seeing the video of an individual climbing into the truck he did not believe that mechanism would not support any specific lumbar injury as related to Petitioner climbing in and out of the vehicle. RX2. Dr. Phillips' diagnosis for Petitioner was a history of lumbar sprain/strain that had resolved with occasional low back complaints and assigned Petitioner a 0% impairment rating. RX2.

Respondent submitted a video into the record which was reviewed by Dr. Frank Phillips in conjunction with his Section 12 expert opinion. RX4. The Arbitrator notes this video does not portray Petitioner and depicts someone first entering and then exiting the drivers' seat of what appears to be a cab of a semi-tractor trailer with Respondent's company logo on the drivers' side door. RX4.

Respondent submitted a recorded statement that was taken on April 24, 2018 by Travis Sharp. RX5. In his recorded statement, Petitioner explained he arrived at a customer, left his truck, went into the customer's office and returned to his truck. RX5.

Petitioner explained he sat in his truck for approximately a half hour and waited for the "green light" to indicate his truck was ready to pull out. RX5. Petitioner explained when he received the "green light," he started to exit his truck and when he went to turn his body to exit the truck, he felt pain in his low back and was able to leave the truck. RX5. Petitioner explains he could not return to his truck after feeling pain and getting out of the truck and had to have an ambulance called. RX5. Petitioner testified to his experience at the hospital thereafter. RX5.

Respondent submitted to the record its 19(b) responses filed on June 8, 2018 and December 3, 2018. RX7, RX8.

Respondent submitted to the record its responses to Petitioner's petition for penalties and fees filed on December 3, 2018 and February 8, 2019. RX 9, RX 10.

Conclusions of Law

With respect to issue (C), whether an accident occurred that arose out of and in the course of Petitioner's employment with Respondent, the Arbitrator finds as follows:

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. *McAllister v. Illinois Workers' Compensation Commission,* 2020 IL 124848 ¶ 32; *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill. 2d 193, 203 (2003). The "arising out of" component is primarily concerned with causal connection. *McAllister*, 2020 IL 124848, ¶ 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*. ¶ 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. *Id*. ¶ 36; *Purcell v. Illinois Workers' Compensation Comm'n*, 2021 IL App (4th) 200359WC, ¶ 18.

"To determine whether a claimant's injury arose out of his or her employment, we must first categorize the risk to which the employee was exposed. *Id*. ¶ 36; *Baldwin v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 472, 478 (2011). Illinois courts

recognize three categories of risks: (1) risks distinctly associated with the employment, (2) risks personal to the employee, and (3) neutral risks. *Id*. ¶ 38; *Baldwin*, 409 Ill. App. 3d at 478.

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." *Id*. ¶ 40; *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d. 149, 162 (2000). 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." *Id*. ¶ 40; *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 106 (2006). 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. *Id*. ¶ 40; *Steak 'n Shake v. Illinois Workers' Compensation Comm'n,* 2016 IL App (3d) 150500WC, ¶ 35.

The second category of risks involves risks personal to the employee. "Personal risks include nonoccupational diseases" and "injuries caused by personal infirmities such as a trick knee." *Id*. ¶ 40; *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d. at 162-63. Injuries resulting from personal risks generally do not arise out of employment. *McAllister*, 2020 IL 124848, ¶ 40. An exception to this rule exists when the workplace conditions significantly contribute to the injury or expose the employee to an added or increased risk of injury. *Rodin v. Industrial Comm'n*, 316 Ill. App. 3d 1224, 1229 (2000).

The third category of risks involves neutral risks that have no particular employment or personal characteristics. *McAllister*, 2020 IL 124848, ¶ 44. 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*. ¶ 44; *Springfield Urban League v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 120219WC, ¶ 27. Such an increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a

common risk more frequently than the general public. *Id*. ¶ 44; *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1014 (2011)." *Rodney Buckley v. Illinois Workers' Compensation Commission*, 2022 Il. App. (2d) 210055WC-U (2nd Dist.).

The Arbitrator notes although the Illinois Supreme Court seemingly overruled *Adcock v. Illinois Workers' Compensation Commission* in deciding *McAllister*, the Appellate Court 2nd District has continued to implement the "neutral risk analysis" for risks that are not inherently tied to a claimant's employment. As defined by *Adcock*, the act of "turning in a chair" is an "activity of everyday life" and is subject to the neutral risk analysis as set forth in *Buckley*. *Adcock v. Illinois Workers' Compensation Commission,* 2015 Ill. App. (2d) 130884WC (2nd Dist.).

Under this "neutral risk" analysis, Petitioner testified he turned his body away from the door of the cab of his truck once and felt pain in his lower back. Tx 11. Petitioner did not testify he was shifting his weight or lifting himself up or bracing himself in anyway. Petitioner testified this was a single, identifiable incident and not the result of a repetitive trauma type injury. Petitioner's testimony is definitive that it was the act of turning his body to the right that elicited pain symptoms which precipitated Petitioner's need for medical treatment. As such, Petitioner cannot prove, by a preponderance of the evidence, that this "activity of everyday life" was made more difficult or occurred on a more frequent basis than the same risk posed to the general public. Under the neutral risk analysis as demonstrated in *Buckley*, the Arbitrator finds Petitioner did not sustain an accident arising out of or occurring in the course of Petitioner's employment and all benefits are denied as such.

With respect to issue (F), whether the Petitioner's present condition of ill-being causally related to the alleged injury, the Arbitrator finds as follows:

It is the burden of every Petitioner before the Workers' Compensation Commission to establish with evidence every disputed issue litigated at trial, including the issues establishing Respondent's liability for benefits. *Board of Trustees of the University of Illinois v. Industrial Commission*, 44 Ill.2d 207 at 214 (1969), *Edward Don v Industrial Commission,* 344 Ill.App.3d 643 (2003). A petitioner seeking an award before the

Commission must prove by a preponderance of credible evidence each element of the claim. *Illinois Institute of Technology v. Industrial Commission*, 68 Ill.2d 236 (1977). Mere possibility that claimant may have become afflicted with condition of ill-being in course of her employment is not sufficient to support award of workers' compensation. *Weekley v. Industrial Com'n*, 245 Ill.App.3d 863 (1993).

The Arbitrator finds Petitioner did not prove, by a preponderance of the evidence, that he suffered an accident arising out of or occurring in the course of his employment. As such, The Arbitrator finds issue (F) is moot.

The Arbitrator finds with respect to Issue (J) whether the medical services that were provided to the Petitioner were reasonable and necessary:

The workers' compensation claimant bears the burden of proving, by a preponderance of the evidence, his entitlement to an award of medical expenses. *Westin Hotel v. Industrial Com'n of Illinois*, 372 Ill.App.3d 527, (2007). The Arbitrator finds Petitioner did not prove, by a preponderance of the evidence, that he suffered an accident arising out of or occurring in the course of his employment. As such, Petitioner's request for TTD benefits is denied.

The Arbitrator finds with respect to Issue (K), what temporary benefits are in dispute?:

It is a well-settled principle that when a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized, i.e., whether the claimant has reached maximum medical improvement. *Interstate Scaffolding, Inc. v. Illinois Workers' Comp. Comm'n*, 236 Ill. 2d 132, (2010).

The Arbitrator finds Petitioner did not prove, by a preponderance of the evidence, that he suffered an accident arising out of or occurring in the course of his employment. As such, Petitioner's request for TTD benefits is denied.

The Arbitrator finds with respect to Issue (L), what is the nature and extent of the injury?

A Workers' compensation claimant has burden of proving each part of his claim. *Dolce v. Industrial Com'n, App.*, 286 Ill.App.3d 117 (1996). As the Arbitrator has found Petitioner did not prove, by a preponderance of the evidence, that he sustained an

accident occurring in the course of or arising out of his employment, permanent partial disability benefits are denied.

Furthermore, Consistent with the Illinois Workers' Compensation Act, the Arbitrator is to base the permanency determination on the following factors:

(i.) The reported level of impairment pursuant to subsection (a) (e.g.; the AMA rating)

(ii) The occupation of the injured employee

(iii) The age of the employee at the time of the injury

(iv) The employee's future earning capacity

(v) Evidence of disability corroborated by the treating medical records.

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 Dr. Phillips provided an impairment rating of 0% of the person. As such, the Arbitrator assigns moderate weight to Dr. Phillips' impairment rating.

With regard to subsection (ii) of § 8.1b(b), the Arbitrator notes Petitioner testified he continued to work the same job he worked prior to his alleged incident he alleges occurred on April 16, 2018. Petitioner testified his job duties include driving and making deliveries to customers of Respondent. Petitioner testified prior to his alleged injury, he would feel soreness in his lower back at the end of a work day or work week. Petitioner testified that after his alleged injury, he feels that same type of soreness in the same location however it may feel more intense at times however it does not keep him from working his full duty job. The Arbitrator assigns significant weight to Petitioner's ability to perform his job with no complications and the fact Petitioner testified his job duties cause him similar symptoms before and after his alleged injury.

With regard to subsection (iii) of § 8.1b(b), the Arbitrator notes Petitioner was 51 years old on the date of his accident and was 55 years old on the date of his hearing. The Arbitrator notes Petitioner's age has not complicated his recovery, noting Petitioner's treating physician placed him at full duty and maximum medical

improvement. The Arbitrator assigns moderate weight to the fact Petitioner is 55 years old in light of the seeming lack of role Petitioner's age played in Petitioner's recovery.

With regard to subsection (iv) of § 8.1b(b), the Arbitrator notes Petitioner testified he is working the same job he was prior to his alleged injury. As Petitioner's injury did not affect his earning capacity, the Arbitrator assigns moderate weight to the lack of effect Petitioner's injury had on Petitioner's wages.

With regard to subsection (v) of § 8.1b(b), the Arbitrator notes Petitioner's medical records indicate Petitioner treated conservatively, without complication and was returned to full duty within 5 months of his alleged injury. The Arbitrator assigns significant weight to Petitioner's relatively conservative and uncomplicated course of treatment and his full recovery from his alleged injury.

Had Petitioner been able to establish a compensable low back injury, the Arbitrator would have awarded 0% of a person as a whole resulting in a PPD award of $0.00, however as Petitioner has not proven a compensable injury occurred, PPD benefits are denied.

The Arbitrator finds with respect to Issue (M) should penalties or fees be imposed upon Respondent?:

Petitioner alleges Respondent's failure to pay temporary total disability benefits and failure to issue medical benefits has caused undue delay and is vexatious and unreasonable.

"It is not enough for workers' compensation claimant to show that the employer simply failed, neglected, or refused to make payment or unreasonably delayed payment without good and just cause in order to obtain additional compensation and attorney fees under workers' compensation statute, providing that, in case where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, then Workers' Compensation Commission may award additional compensation, and under statute providing for an award of attorney fees when an award of additional compensation is appropriate; instead, penalties and attorney fees under these statutes 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." *Jacobo v. Illinois Workers' Compensation Com'n*, 355 Ill.Dec. 358, 959 N.E.2d 772 (2011).

Respondent's 19(b) response and Respondent's response to Petitioner's petition for penalties and fees addresses Petitioner's allegations adequately. Respondent's reliance on its Section 12 examining physicians is made in good faith. Specifically, the Section 12 examining physicians describe ample evidence as to why Petitioner's alleged injury did not cause his current condition.

A failure to pay because of a good faith belief that no payment is due will not warrant a penalty. See generally, *Avon Products, Inc. v. Industrial Commission*, 82 Ill.2d 302, 412 N.E.2d 470 (1980). In the workers' compensation context, generally, when the employer acts in reliance upon reasonable medical opinion or when there are conflicting medical opinions, penalties ordinarily are not imposed; the relevant question is whether the employer's reliance was objectively reasonable under the circumstances. *Global Products v. Workers' Compensation Com'n*, 392 Ill.App.3d 408 (2009).

Based upon the Arbitrator's finding that Petitioner did not sustain an accident arising out of or occurring in the course of his employment and based upon Respondent's good faith reliance on its Section 12 examining physician, Petitioner's request for penalties and fees is denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC002774
Case Name	Keveon Harris, v. TrueBlue, Inc.,
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	23IWCC0473
Number of Pages of Decision	17
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	James Ruppert
Respondent Attorney	Patrick Jesse

DATE FILED: 11/3/2023

/s/*Maria Portela, Commissioner*

Signature

DISSENT

/s/*Kathryn Doerries, 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

KEVEON HARRIS,

Petitioner,

vs. NO: 22 WC 002774

TRUEBLUE, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission affirms the Arbitrator's Decision as to causation, medical expenses, prospective medical treatment and duration of temporary total disability benefits. However, the Commission adds the following analysis in support of the Arbitrator's award of temporary total disability through the date of the hearing.

The parties stipulated that temporary total disability benefits were due and owing between August 31, 2021 through January 10, 2022, but Respondent alleged that it did not owe temporary total disability benefits after that time on the basis that Petitioner had merely sustained a left knee hematoma on the date of accident and that the hematoma and recovery were complete by January 10, 2022, following the procedure performed by Dr. Dixon to drain the hematoma. Dr. Dixon had taken Petitioner off work between the date of the procedure on December 27, 2021, through January 10, 2022. Petitioner returned to Dr. Dixon on January 18, 2022 wherein he continued to complain of left leg pain. Dr. Dixon gave Petitioner an off work slip for January 18, 2022 and released Petitioner from care, although he gave Petitioner a referral to Southern Bone & Joint. (Px3) Respondent did not authorize the visit to Southern Bone & Joint. (T. 19) Petitioner testified that due to the condition in his left leg and knee, he had not been able to return to work after the August 30, 2021 work accident. (T. 22)

Respondent sent Petitioner to see Section 12 examiner, Dr. Jeffcoat, on July 20, 2022. Dr. Jeffcoat opined that the Petitioner was unable to return to his prior job without undergoing therapy and work hardening because the Petitioner had lost stamina and was deconditioned. (Rx3, p. 29, 75, 77, 79-80) Dr. Jeffcoat testified that "Petitioner had not participated in a manual work for 9+ months. I agree that from August 30 through January 18 he was not participating in manual labor because he was getting care for a work-related injury." (Rx3, p. 75) "He could have probably gone to work then, but he'd not – been off, then, after that another 6 months, you know doing nothing. So it was really the combination of the 4 months and the 6 or 9 months, whatever it is, thereafter. Some of the loss of his stamina had to occur before January 19, 2022. I just think a lot more of it happened after January 19, 2022." (Rx3, p. 77)

The Commission finds the opinions of Dr. Jeffcoat persuasive. Ultimately, Dr. Jeffcoat opined that Petitioner needed therapy and work conditioning as a result of his becoming deconditioned during the period of August 30, 2021 though January 18, 2022 for the treatment of the hematoma above the left knee, and then became futher deconditioned when he did nothing after being released from care for the hematoma. The Commission therefore finds that as Petitioner's deconditioning was resultant from both the time period he was being treated for the hematoma and the time after which he was released from care by Dr. Dixon, that ultimately the work injury of August 30, 2021 contributed to the deconditioning and subsequent need for the continued therapy and work hardening. Therefore, the award for temporary total disability benefits from August 31, 2021 through October 27, 2022 is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 13, 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 $50,948.00. 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.

NOVEMBER 3, 2023
MEP/dmm
O:090523
49

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

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

DISSENT

I respectfully dissent from the majority on the issues of causation, temporary total disability (TTD), medical, and prospective medical. Therefore, I would vacate the decision of the Arbitrator and would find that Petitioner reached maximum medical improvement (MMI) on January 18, 2022, and deny TTD and medical benefits thereafter, for the following reasons.

Causation

I would find Petitioner failed to prove his condition after January 18, 2022, was causally related to the work accident. The record as a whole contains no documented evidence of any complaints related to a meniscus problem, or symptoms thereof, until eight months after Dr. Dixon's final office visit on January 18, 2022, and more than one year after the work accident. The first mention of mechanical symptoms of popping and locking in Petitioner's lateral joint line do not appear until more than one year after the accident, when Petitioner sees Dr. Folse. The mechanism of injury involved getting hit above the left knee which was consistently documented in all of the treating records between the date of accident and January 18, 2022. Petitioner had no documented problems of weightbearing after the work accident. There was never any documentation of joint line pain after the accident or of any complaints in the vicinity of the lateral meniscus. These conclusions are based, in pertinent part, on the following.

Petitioner was examined at Walthall General Hospital on September 5, 2021, six days after the work accident. Petitioner's chief complaint was listed as "Leg injury ("LEG" METAL POLE FELL ON LT LEG MONDAY)." The visit Diagnosis was "hematoma of leg, left, initial encounter." (PX2, 3) The history provided states "Leg Injury" and describes an incident that occurred 6 days prior. The injury mechanism described a "[h]eavy metal pipe fell over 6 feet and bounced up and hit left leg *above the knee*." (emphasis added) (PX2, 4) Under the section, "Physical Exam" the Musculoskeletal section notes, "Left upper leg: Swelling and tenderness present." Immediately below illustrates an explicit diagram of Petitioner's pain that leaves no room for interpretation. The pain diagram shows a triangle drawn above the left knee pinpointing the location of the Petitioner's pain complaint. Further, the "Comments" below the pain diagram describe the area: "6 x 6 cm area of swelling and tenderness just above the left knee. There is fluctuance". (PX2, 7) After a CT scan of Petitioner's femur was performed, the "ED Diagnosis" was "Hematoma of leg, left, initial encounter" and "Elevated blood pressure reading." (PX2, 10) The triage notes reiterate the Petitioner's statement at the time that a metal pole hit the floor and bounced off of the floor and the Petitioner's left leg where swelling and a contusion were noted to be above the knee. *Id.*

On October 12, 2021, Petitioner saw Dr. William Dixon with a chief complaint of "left leg contusion." Although Dr. Dixon at times appears to use left "leg" and "knee" interchangeably, his notes are explicit regarding the area that was injured. The October 18, 2021, ultrasound showed a pattern "typical of an ill-defined hematoma." (PX3, 6) The November 15, 2021, follow-up visit with Dr. Dixon specifically notes that the "Patient stated his actual knee joint does not hurt and just is tender right above his knee." (PX4, 6)

Notably, when Dr. Dixon last saw Petitioner on January 18, 2022, the exam findings confirmed a reduction in the size of the hematoma with no evidence of reoccurrence. Up to that point, the diagnoses by both nurse practitioner Dillon and Dr. Dixon varied between a left leg contusion and hematoma, with complaints of thigh pain.

In fact, Dr. Jeffcoat, who examined Petitioner at Respondent's request pursuant to §12 on July 20, 2022, interviewed Petitioner and reviewed Petitioner's treating medical records. Dr. Jeffcoat diagnosed Petitioner with a left leg contusion resulting in a hematoma. Dr. Jeffcoat opined that Petitioner's condition, if any, at the time of his examination, was not related to the work accident, relying upon Dr. Dixon's last office visit notes. At the time of Dr. Dixon's office visit on January 18, 2022, four months after getting hit in the leg, Dr. Dixon notes that Petitioner's pain score is zero (-0-). (PX3, 17) Dr. Jeffcoat opined that there was nothing from the work accident that would cause Petitioner to need any additional treatment. (RX3, 27) Dr. Jeffcoat opined that in reviewing the records, he thought Dr. Dixon pretty well discharged Petitioner on January 18, 2022 and that would mean he was at MMI on January 18th. (RX3, 28) It was Petitioner who demanded a referral for a second opinion at his two last appointments with Dr. Dixon, however, the demand for a second opinion was never based upon the symptoms that Dr. Folse found in his examination eight months later, in September 2022. Petitioner demanded a second opinion on December 27, 2021, only when Dr. Dixon discussed Petitioner returning to work at that time.

(PX3, 14) Notably, Petitioner's only pain complaints at that time concerned tenderness in his left thigh. *Id.*

On January 18, 2022, Petitioner told Dr. Dixon that his primary care doctor could not refer him for a second opinion. His complaint at that time was "left leg pain." (PX3, 17) There was nothing specific in Petitioner's pain complaints. Petitioner did not seek medical treatment with Dr. Folse for another eight months.

I also note on the first page of Dr. Folse's September 20, 2022, office note that the visit was requested as a second opinion by the firm of "Hassakis & Hassakis" and, as noted in the History of Present Illness, "[p]revious medical encounters related to this incident have been provided by his lawyers for this second opinion." While Dr. Folse notes the Petitioner had a work related accident, it is significant that Dr. Folse does not proffer a medical opinion regarding causation.

The fact that Petitioner did not seek any further medical treatment between his release by Dr. Dixon on January 18, 2022, and September 20, 2022, infers that there was no acute medical condition in Petitioner's lateral meniscus that was related to the work accident. The new pain was documented over one year after the accident at his appointment with Dr. Folse. "The burden of proof is upon the claimant, and unless the evidence considered in its entirety shows the injury resulted from a cause connected with the employment there is no right to recover under the act." *Revere Paint & Varnish Corp. v. Industrial* Comm'n., 41 Ill. 2d 59, 63, 242 N.E.2d 1, 3.

It would appear that something changed in Petitioner's condition between Dr. Jeffcoat's examination in July, 2022, and at the time that Petitioner was seen by Dr. Folse.
Dr. Jeffcoat testified in pertinent part:

> [I]f you look into it further you may find things but not necessarily because of the of the pole hitting him on the side of the leg. The area where the pole hit him or the ---or the pipe hit him was proximal to the knee and had nothing to do with the knee. The knee itself was stable when I examined him. The knee itself was not swollen, had no tenderness, and really was not involved in the complaint that he had. The problem was just above the knee on the medial side. (RX3, 82)

Therefore, I would find causal connection between Petitioner's work accident and his condition of ill-being through January 18, 2022, but that Petitioner failed to establish a causal connection between his work accident and his condition of ill-being thereafter.

Temporary Total Disability

I would vacate the Arbitrator's award of TTD after January 18, 2022, based, *inter alia*, on my conclusions regarding causation and based upon the following.

First and foremost, the Petitioner presented no medical evidence supporting an off-work status after January 18, 2022. Petitioner testified that when he saw Dr. Dixon on January 18, 2022, he excused Petitioner from work for the day of that appointment, January 18, 2022. (T. 27) In fact, after being discharged by Dr. Dixon on January 18, 2022, Petitioner did not seek further medical treatment until eight months later, on September 20, 2022 and by his own admission to Dr. Jeffcoat, he had been sitting around with his leg up. (T. 38)

"Once an injured employee's physical condition stabilizes, he is no longer eligible for TTD benefits." *Archer Daniels*, 138 Ill.2d at 118, 561 N.E.2d at 627. This court has held, "[t]he duration of TTD is controlled by the claimant's ability to work and his continuation in the healing process." *City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087,1090, 666 N.E.2d 827, 829. *Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC, P23, 14 N.E.3d 16, 22.

Further, the appointment with Dr. Folse was sought only after the §12 evaluation performed on July 20, 2022 by Dr. Jeffcoat. Dr. Folse did not provide a work status report or a causation opinion. Therefore, Petitioner did not sustain his burden of proving TTD entitlement after January 18, 2022, because he had no medical treatment, no work status reports and he made no showing that he was unable to work prior to the arbitration hearing.

The majority's opinion in support of the Arbitrator's Conclusions of Law with respect to temporary total disability relies upon Dr. Jeffcoat's opinion regarding Petitioner's deconditioned state as of the date of his §12 evaluation. The majority finds Petitioner's deconditioned state as a reason to award Petitioner lost time benefits after January 18, 2022, through the date of the arbitration hearing without any work status reports and without medical treatment, until the one appointment with Dr. Folse eight months after Dr. Dixon's release.

Dr. Jeffcoat specifically opined that Petitioner's deconditioning was not related to the subject work accident. Thus, the majority's "cherry picked" reliance upon Dr. Jeffcoat's opinion that Petitioner is deconditioned, but not relying on Dr. Jeffcoat's opinion that Petitioner's deconditioned state is not related to the work accident, is incongruous with the entirety of the evidence. Relying upon a portion of Dr. Jeffcoat's opinion regarding the fact that Petitioner could use work conditioning activities while ignoring his opinion with respect to causal connection also misconstrues Dr. Jeffcoat's conclusions.

In his July 20, 2022, report, Dr. Jeffcoat noted on physical exam that Petitioner's left knee is stable, posteriorly, anteriorly, laterally and medially with no effusion noted with ROM of -0- to 125 degree flexion. He noted mild swelling above the knee at the site of the previous I & D. Dr. Jeffcoat stated, "Whatever the Petitioner's current condition of ill-being may be, it has no causal relation to his 08-30-21 work injury contusion (hematoma) as documented in Dr. Dixon's 01-18-2022 clinic note which indicated that during that last clinic follow-up, the claimant reported no pain since the I & D procedure, after which the referenced hematoma had also gotten much smaller, indicating no additional treatment was warranted or scheduled." (RX1, 3)

Further, Dr. Jeffcoat specifically opined, "No. I do not believe that the claimant's need for work-hardening physical therapy is related to his work injury. That injury, judging from his treating surgeon's documented clinic notes indicates the work injury has been resolved. What this claimant is now facing is getting his physical stamina back since he's done nothing physically strenuous for the last nine+ months but gain weight by his own admission during today's examination." (RX1, 4) Finally, Dr. Jeffcoat specifically opined, "After reviewing Dr. Dixon's clinic notes and his comments relative to the claimant's last follow-up visit on January 18, 2022, it is my contention that Mr. Harris had reached MMI by that time." *Id.*

During his evidence deposition on October 12, 2022, Dr. Jeffcoat testified consistent with his report. (RX3) Dr. Jeffcoat maintained Petitioner's knee was stable when he examined him, the knee was not swollen and "really was not involved in the complaint that he had. The problem was just above the knee on the medial side." (RX3, 82, 93)

Finally, the idea that Petitioner is deconditioned because of the work accident is also inconsistent with the rest of medical evidence where it is noted by Petitioner's treating medical providers since the date of the accident, Petitioner is found to be morbidly obese. There are no qualifiers noting, or even implying, that he was morbidly obese but in otherwise good physical condition. Within weeks of the accident, on September 20, 2021, Nurse Practitioner (NP) Dillon notes Petitioner is 6' 3" and 383.8 pounds with a BMI of 47. 97. NP Dillon found that fact so significant that her Assessment on that day was listed as 1. Contusion of left lower leg, subsequent encounter. 2. Body mass index [BMI] 45.0-49.9, adult. (PX1, 2) Petitioner was then referred to Surgical Southwest General Surgery for the reason "hematoma of left leg." It should also be noted that the NP Dillon released Petitioner to resume regular activities on September 20, 2021, slightly less than one month post accident. (PX1, 9)

During his evidence deposition, Dr. Jeffcoat also testified that Petitioner weighs 400 pounds. He noted his age as well and the fact that "he's probably got some degenerative changes in the knee already. And he's probably got some wearing of his--of his cartilage. He's got some wearing of his meniscus. He's got a lot of wearing going on." (RX3, 82) Dr. Jeffcoat further testified, "Because of his size and his 400-and-something pounds, those two knee joint are going to wear out. But that has nothing to do with this-- this pipe falling against him." (RX3, 95)

At his visit with Dr. Dixon on December 13, 2021, Petitioner's weight at that time was listed as 403 pounds and his pain score was zero-indicating that he could proceed with self-directed activities or conditioning at that time. (PX3, 12) It appears from the evidence, Petitioner did not want to return to work when Dr. Dixon brought it up at the next visit, and instead, Petitioner demanded a "second opinion."

Given my opinions regarding causation, the evidence and the above regarding the majority's opinion, I would vacate the Arbitrator's award of TTD after January 18, 2022.

Medical and Prospective Medical

"[A]n employee is entitled to recover only those medical expenses which are reasonable and causally related to an industrial accident." *Zarley v. Industrial Comm'n*., 84 Ill. 2d 380, 389, 418 N.E.2d 717, 721. Given my opinion regarding causation after January 18, 2022, above, I would find further that Petitioner is not entitled to medical treatment after January 18, 2022, when the Petitioner reached MMI as a result of the hematoma injury he sustained as a result of the work accident on August 30, 2021.

Therefore, I dissent from the majority and would vacate the Arbitrator's award of TTD, medical and prospective medical after January 18, 2022.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC002774
Case Name	Keveon Harris v. TrueBlue, Inc.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	James Ruppert
Respondent Attorney	Sarah Hocking

DATE FILED: 12/14/2022

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

/s/William Gallagher, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Keveon Harris
Employee/Petitioner

Case # 22 WC 02774

v.

Consolidated cases: n/a

TrueBlue, Inc.
Employer/Respondent

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

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to Respondent?

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

G. ☐ What were Petitioner's earnings?

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

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

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

K. ☒ Is Petitioner entitled to any prospective medical care?

L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other

FINDINGS

On the date of accident, August 30, 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 $3,768.00; the average weekly wage was $1,318.87.

On the date of accident, Petitioner was 30 years of age, single with 0 dependent child(ren).

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

Respondent shall be given a credit of $9,310.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $9,310.00.

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 6, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall receive a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

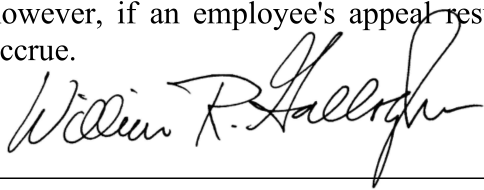
Respondent shall authorize and pay for prospective medical treatment, including but not limited to, physical therapy, injections and an MRI, as recommended by Dr. Jacob Folse.

Respondent shall pay Petitioner temporary total disability benefits of $879.25 per week for 60 3/7 weeks, commencing August 31, 2021, through October 27, 2022, as provided in Section 8(b) of the Act.

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

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

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



DECEMBER 14, 2022

William R. Gallagher, Arbitrator
ICArbDec19(b)

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment by Respondent on August 30, 2021. According to the Application, Petitioner was "Injured in the course of work" and sustained an injury to his "left leg and other body parts" (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills and temporary total disability benefits as well as prospective medical treatment. Respondent stipulated Petitioner sustained a work-related accident, but disputed liability on the basis of causal relationship (Arbitrator's Exhibit 1).

In regard to medical bills, Respondent disputed liability for medical bills for medical services provided to Petitioner subsequent to January 18, 2022. In regard to temporary total disability benefits, Petitioner claimed he was entitled to temporary total disability benefits of 60 3/7 weeks, commencing August 31, 2021, through October 27, 2022 (date of trial). Respondent claimed Petitioner was entitled to temporary total disability benefits of 18 6/7 weeks, commencing August 31, 2021, through January 10, 2022. Petitioner also claimed he was entitled to prospective medical treatment, specifically, diagnostic studies and treatment as recommended by Dr. Jacob Folse, an orthopedic surgeon (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a laborer. On August 30, 2021, Petitioner was installing pipe in a solar field. Petitioner was on a break and was standing adjacent to a forklift which had several pipes in the air. Another employee touched the pipes which caused them to fall to the ground. When they did so, one of them bounced off the ground and struck Petitioner's left knee.

Petitioner resides in Mississippi and while working in Illinois, he stayed in a hotel. Following the accident, Petitioner went to his hotel room, propped up his leg and put ice packs on it. Shortly afterward, he returned to his home in Mississippi.

Petitioner initially sought medical treatment from Pamela Dillon, a Nurse Practitioner, who evaluated Petitioner on September 3, 2021. At that time, Petitioner complained of left knee pain and advised NP Dillon that a pipe fell on him at work. NP Dillon opined Petitioner had pain in the left leg and an infection of the skin and subcutaneous tissue. She also noted Petitioner was 6'3" tall, weighed 394.2 pounds and had a BMI of 49.27. She prescribed medication and ordered an x-ray of the left knee. For some reason, the x-ray was not performed (Petitioner's Exhibit 1).

On September 5, 2021, Petitioner was seen in that ER of Walthall General Hospital. According to the ER record, Petitioner sustained an accident at work six days prior when a heavy metal pipe fell and bounced up striking Petitioner's left leg above the knee. Petitioner complained of pain of 7/10 in the left thigh and left knee. A CT scan of Petitioner's left femur was performed which revealed a hematoma in the subcutaneous fat in the distal medial thigh. Petitioner was prescribed medication, directed to apply ice and follow up with his physician (Petitioner's Exhibit 2).

Petitioner was subsequently seen by NP Dillon on September 20, 2021. She noted Petitioner was being seen for left knee swelling, but her record of that date contained the note "No Pain Present LEFT KNEE, Pain severity quantified; pain present". NP Dillon diagnosed Petitioner with a

hematoma of the left leg and referred him to Dr. William Dixon, a general surgeon (Petitioner's Exhibit 1).

Dr. Dixon evaluated Petitioner on October 12, 2021. Dr. Dixon's record of that date noted he was seeing Petitioner in regard to a contusion of the left knee which occurred at work on August 30, 2021. On examination, Dr. Dixon noted tenderness of the left knee. He suspected Petitioner had a hematoma and ordered an ultrasound of Petitioner's left knee. The ultrasound was performed on October 18, 2021, and revealed a palpable abnormality above the left knee typical of a hematoma (Petitioner's Exhibit 3).

Petitioner saw Dr. Dixon on October 25, 2021. On examination, Petitioner's left knee was tender to palpation. Dr. Dixon discussed the ultrasound findings with Petitioner and whether Petitioner wanted to proceed with conservative or surgical treatment. At that time, Petitioner decided to proceed with conservative treatment (Petitioner's Exhibit 3).

Dr. Dixon again saw Petitioner on November 15, 2021. At that time, Petitioner advised the knee joint did not hurt, but he still had tenderness above the knee. Dr. Dixon recommended Petitioner proceed with surgery which consisted of an incision and drainage of the hematoma (Petitioner's Exhibit 3).

On November 29, 2021, Dr. Dixon performed surgery on Petitioner's left knee. The procedure consisted of incision and drainage of the hematoma on Petitioner's left leg. Dr. Dixon saw Petitioner on December 13, 2021. At that time, Petitioner's condition had improved, but he still had some tenderness. Dr. Dixon provided Petitioner with instructions regarding wound care (Petitioner's Exhibit 3).

Dr. Dixon evaluated Petitioner on December 27, 2021. At that time, Dr. Dixon noted the wound was healing, but Petitioner continued to experience pain in the left thigh. Dr. Dixon noted he had spoken to Petitioner about returning to work, and Petitioner indicated he wanted a second opinion. Dr. Dixon informed him he would need to obtain a referral from his primary care physician. Dr. Dixon authorized Petitioner to remain off work through January 10, 2022 (Petitioner's Exhibit 3).

Petitioner last saw Dr. Dixon on January 18, 2022. In Dr. Dixon's record of that date he noted, "Patient states not had any pain since the procedure." However, in the same paragraph, it was noted "Patient stated still having left leg pain." Dr. Dixon also noted Petitioner informed him that his primary care physician could not refer him to another physician. Dr. Dixon authorized Petitioner to be off work that day because of his appointment with him (Petitioner's Exhibit 3).

At the direction of Respondent, Petitioner was examined by Dr. Thomas Jeffcoat, an orthopedic surgeon, on July 20, 2022. In connection with his examination of Petitioner, Dr. Jeffcoat reviewed medical records provided to him by Respondent. When seen by Dr. Jeffcoat, Petitioner complained of swelling in the left distal thigh which was at the side of the hematoma. On examination, Dr. Jeffcoat noted fluid continued to collect at the site of the hematoma. In regard to Petitioner's left knee, Dr. Jeffcoat noted the knee was stable, but slightly valgus. He observed the range of motion of flexion was 0 to 125° (Respondent's Exhibit 1).

Dr. Jeffcoat opined Petitioner had sustained a contusion to his left leg proximal to the left knee which resulted in a hematoma that was subsequently evacuated by Dr. Dixon. Dr. Jeffcoat opined Petitioner's current condition of ill-being was not related to the accident of August 30, 2021, because Petitioner had informed Dr. Dixon he had no pain after the surgical procedure. However, because of the fact Petitioner had been inactive for such a long period of time, Dr. Jeffcoat opined Petitioner should undergo a period of physical therapy/work hardening to prepare him to return to his manual work duties. He did not attribute this recommendation for further treatment to the accident, and opined Petitioner was at MMI regarding same (Respondent's Exhibit 1).

On September 20, 2022, Petitioner was evaluated by Dr. Jacob Folse, an orthopedic surgeon. In connection with his examination of Petitioner, Dr. Folse reviewed medical records which were provided to him by Petitioner's counsel. When examined by Dr. Folse, Petitioner advised the incision and drainage of the hematoma relieved some of the pain, but he continued to have knee symptoms. Specifically, Petitioner complained of swelling, popping and locking in the lateral joint line. Petitioner stated the symptoms were worse with weight bearing and bending and he was no longer able to squat (Petitioner's Exhibit 5).

Dr. Folse's examination of Petitioner revealed a valgus deformity and he did not observe any ligamentous instability. However, Dr. Folse opined Petitioner's complaints were consistent with a lateral meniscus tear and Petitioner had a well-functioning knee prior to the accident. He recommended Petitioner receive physical therapy and steroid injection, but if Petitioner's condition did not improve, an MRI would be indicated (Petitioner's Exhibit 5).

Dr. Jeffcoat was deposed on October 12, 2022, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Jeffcoat's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Specifically, Dr. Jeffcoat testified Petitioner had sustained a contusion of the left leg which caused a hematoma which was drained by Dr. Dixon. He stated the hematoma was a collection of fluid and, after it was drained, an open space was created which permitted some fluid to accumulate in it; however, he also stated this would eventually go away and would not cause any problem. He also testified that, because of Petitioner's long period of inactivity, Petitioner needed some physical therapy to strengthen his body to return to work, but that the need for physical therapy was not related to the accident (Respondent's Exhibit 3; pp 25-27).

On cross-examination, Dr. Jeffcoat was interrogated about Petitioner's left knee condition. He did agree that when Dr. Dixon evaluated Petitioner on October 12, 2021, Petitioner's left knee was tender on examination when palpated. However, Dr. Jeffcoat also testified the knee was not involved and the area that was injured was proximal to or above the knee (Respondent's Exhibit 3; pp 52-53, 83).

At trial, Petitioner testified he continues to experience pain/swelling in and above his left knee. Petitioner stated he had not had left leg/knee symptoms prior to the accident of August 30, 2021. Petitioner has not worked since the accident because of his symptoms and stated he keeps his leg propped up and uses ice packs. Petitioner's left leg/knee symptoms are worsened with certain

activities, specifically, walking, standing and squatting. The symptoms are worsened with cold weather.

Petitioner testified that when he saw Dr. Dixon on December 27, 2021, Dr. Dixon could not or would not refer him out for a second opinion. Petitioner stated that when he was examined by Dr. Jeffcoat, he informed him that he had pain about the knee and inside the front top part of his kneecap and his knee locked up on him. Petitioner wants to proceed with the medical treatment as recommended by Dr. Folse.

Conclusions of Law

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

The Arbitrator concludes Petitioner's current condition of ill-being is causally related to the accident of August 30, 2021.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained a work-related accident on August 30, 2021, which caused a hematoma above Petitioner's left knee.

Petitioner's testimony that he had no left leg/knee symptoms prior to the accident of August 30, 2021, was unrebutted.

Initially, the primary injury to Petitioner's left leg was the hematoma above the left knee which required surgery consisting of an incision and drainage.

Petitioner testified that when the pipe bounced off of the ground, it struck his left knee.

When Petitioner was seen by NP Dillon on September 3, 2021, her record of that date noted Petitioner complained of left knee pain.

When Petitioner was seen at Walthall General Hospital on September 5, 2021, the record noted the pipe struck Petitioner's left leg above the knee, but Petitioner complained of pain in both the left thigh and left knee.

NP Dillon's record of September 20, 2021 is confusing because it stated both there was left knee pain present and there was no left knee pain present.

Dr. Dixon's record of October 25, 2021, noted Petitioner's left knee was tender to palpation on examination.

When Petitioner last saw Dr. Dixon on January 18, 2022, Dr. Dixon's record of that date noted Petitioner had no pain since the procedure, but also indicated that Petitioner still had left leg pain.

Respondent's Section 12 examiner, Dr. Jeffcoat, opined Petitioner's current condition was not related to the accident of August 30, 2021. In regard to Petitioner's left knee, Dr. Jeffcoat stated Petitioner did not sustain a left knee injury because it was not involved in the accident even though he acknowledged Dr. Dixon observed tenderness on palpation when he examined him on October 12, 2021.

The Arbitrator finds the medical treatment records are not very clear about what left knee symptoms Petitioner had subsequent to the accident and that they focused primarily on the hematoma. As noted herein, there are contradictory statements in the medical records from both NP Dillon and Dr. Dixon as to Petitioner's left leg symptoms or the lack thereof.

Dr. Folse examined Petitioner and opined Petitioner had complaints consistent with a torn lateral meniscus and Petitioner had a well functioning knee prior to the accident.

Petitioner credibly testified about the circumstances of the accident and his continuing left leg/knee symptoms.

Given the preceding, the Arbitrator is persuaded by the opinion of Dr. Folse and Petitioner's testimony in regard to causality.

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

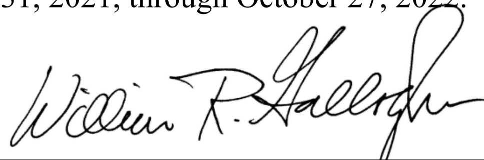
Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 6, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall receive a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

Based upon the Arbitrator's conclusion of law in disputed issue (F) the Arbitrator concludes Petitioner is entitled to prospective medical treatment including, but not limited to, physical therapy, injections and an MRI, as recommended by Dr. Folse.

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

Based upon the Arbitrator's conclusion of law in disputed issue (F) the Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 60 3/7 weeks, commencing August 31, 2021, through October 27, 2022.



William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC021857
Case Name	Kenneth Courier v. Chester Mental Health Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0474
Number of Pages of Decision	20
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Aaron Wright

DATE FILED: 11/3/2023

/s/*Amylee Simonovich, Commissioner*

Signature

STATE OF ILLINOIS)		
) SS.		
COUNTY OF MADISON)		

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KENNETH COURIER,

Petitioner,

vs. NO: 18 WC 21857

CHESTER MENTAL HEALTH CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

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

While the Commission agrees with the Arbitrator's analysis of the five factors under Section 8.1(b), we disagree with the Arbitrator's determination of the level of disability with regard to the left leg. The Commission therefore modifies the Arbitrator's decision to reduce the award for the left knee injury from 30% loss of use of the left leg to 23% loss of use of the left leg.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 3, 2021 is otherwise hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the reasonable and necessary medical services as outlined in Petitioner's Exhibit 1, pursuant to § 8(a) of the Act. Respondent shall be given credit for medical benefits that have been paid through its group carrier, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in § 8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary total disability benefits of $574.16/week for an additional 6-1/7ths weeks, for Petitioner's period of disability from 4/10/19 to 5/23/19, as provided in 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits of $516.72/week for a period of 179.45 weeks, because the injuries sustained caused the 1% loss of the body as a whole for a concussion, 25% of the body as a whole for cervical injuries, and 23% loss of the left leg for left knee injuries, as provided in § 8(d)2 and § 8(e) 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.

Pursuant to Section 19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review.

NOVEMBER 3, 2023

O: 9/5/23
AHS/kjj
051

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC021857
Case Name	COURIER, KENNETH v. CHESTER MENTAL HEALTH CENTER
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	17
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Aaron Wright

DATE FILED: 12/3/2021

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 30, 2021 0.09%

/s/ *Jeanne AuBuchon, Arbitrator*
Signature

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

December 3, 2021

/s/ *Brendon O'Rourke*
Brendan O'Rourke, Assistant 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

KENNETH COURIER
Employee/Petitioner

Case # **18** WC **21857**

v.

Consolidated cases:

CHESTER MENTAL HEALTH CENTER
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeanne L. AuBuchon**, Arbitrator of the Commission, in the city of **Collinsville**, on **June 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? With regard to the second knee surgery
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? With regard to the second knee surgery.
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD With regard to the 6 3/7ths weeks after the second knee surgery.
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other ______

FINDINGS

On **6/24/18**, 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 $**44,782.40**; the average weekly wage was $**861.20**.

On the date of accident, Petitioner was **53** 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 $**-** for TTD, $**-** for TPD, $**-** for maintenance, and $**-** for other benefits, for a total credit of $**-**.

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

ORDER

Respondent shall pay the reasonable and necessary medical services of outlined in Petitioner's Exhibit 1, as provided in § 8(a) of the Act. Respondent shall be given credit for medical benefits that have been paid through its group carrier, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in § 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $**574.16**/week for an additional **6 1/7**ths weeks, for Petitioner's period of disability from 4/10/19 to 5/23/19, as provided in 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**516.72**/week for a period of **194.5** weeks, because the injuries sustained caused the **1**% loss of the **body as a whole** for a **concussion**, **25**% of the **body as a whole** for **cervical injuries** and **30**% loss of the **left leg** for **left knee injuries**, as provided in § 8(d)2 and § 8(e) of the Act.

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

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

Jeanne L. AuBuchon
Signature of Arbitrator

DECEMBER 3, 2021

PROCEDURAL HISTORY

This matter proceeded to trial on June 15, 2021. The issues in dispute are: 1) the causal connection between the accident and the Petitioner's left knee condition; 2) liability for medical bills pertaining to treatment of the Petitioner's left knee; 3) TTD benefits from April 10, 2019, to May 25, 2019, and 3) the nature and extent of the Petitioner's injuries. His cervical spine and head injuries were accepted by the Respondent.

FINDINGS OF FACT

At the time of the accident, the Petitioner, who was 54 years old, was employed by the Respondent as a security therapy aide at Chester Mental Health Center. (AX1, T. 12) On June 24, 2018, the Petitioner was working one-on-one with a patient who was becoming agitated. (T. 17) Another staff member entered the room, and the patient attacked the staff member. (Id.) When the Petitioner intervened, the patient attacked him, pushing his head into a wall and hitting him. (Id.) The Petitioner testified that he injured his neck, face, shoulder and left knee. (Id.)

The Petitioner had suffered a meniscal tear to his left knee on September 9, 2017, while breaking up a fight between patients at work. (T. 13) That injury was accepted by the Respondent. (See 17WC36644) An MRI scan conducted on November 1, 2017, revealed a meniscal tear and small joint effusion. (Id.) Before that incident, the Petitioner had no prior injuries nor treatment for his left knee. (T. 13) He underwent an arthroscopic partial medial meniscectomy surgery on January 5, 2018, and had been returned to work full duty prior to the June 24, 2018, incident. (PX4)

On the day of the accident at issue herein – June 24, 2018 – the Petitioner filled out a Notice of Injury form that described the incident consistently with the Petitioner's testimony. (PX15) In describing his injuries, the Petitioner wrote: "Back of head, forehead, rt face, right neck and

shoulder, left knee." (Id.) A Staff Injury Summary completed that day by a nurse supervisor on site reported that the Petitioner was complaining of pain in his left knee. (RX2) Supervisor and staff incident reports also mentioned injury to the Petitioner's left knee. (Id.)

On the day of the second accident June 24, 2018, the Petitioner went to Memorial Hospital and reported that he was attacked by a patient, hit his head on a cinderblock wall and bed frame and was punched in the face. (PX3) He complained of pain in his right lateral neck radiating into his right hand, mild pain in his left knee and headache. (Id.) He underwent a head CT scan that showed no evidence of acute intracranial hemorrhage. (Id.) A cervical spine CT scan showed no evidence of acute fracture, subluxation or dislocation but did show spondylosis and degenerative disc disease at C5-6 and C6-7 with bilateral foraminal encroachment at those levels. (Id.) The emergency room doctor diagnosed the Petitioner with acute cervical strain. (Id.)

The Petitioner returned to the emergency room the next day with a sudden onset of weakness, nausea, drowsiness, headache, blurred vision and a feeling of his legs buckling. (Id.) He underwent another head CT scan and was then diagnosed with a brain concussion. (Id.)

On June 28, 2018, the Petitioner saw his primary care physician, Dr. James Krieg, at Chester Clinic, and complained of dizziness, headache, right shoulder pain and left knee soreness. (Id.) Dr. Krieg diagnosed the Petitioner with a concussion and sprains of the right shoulder and left knee. (Id.) The Petitioner underwent a cervical spine MRI on July 12, 2018, that revealed disc bulges at C4-5 and C5-6 and a disc protrusion at C6-7, with evidence of cord impingement at C6-7. (Id.) At a follow-up visit on July 14, 2018, Dr. Krieg diagnosed the Petitioner with cervical radiculopathy, prescribed medication and ordered physical therapy. (Id.) The Petitioner underwent physical therapy for his neck and shoulder at Memorial Hospital Rehab Center from July 18, 2018, to August 13, 2018, for a total of 11 visits. (Id.)

On July 9, 2018, the Petitioner saw Dr. Matthew Bradley, an orthopedic surgeon who performed the prior knee surgery. (PX4) He reported that prior to the June 24, 2018, accident, his knee "was doing just fine," and he had returned to his normal work duties, working 15 or 16 hours per day. (Id.) The Petitioner described his knee injury as a "twisting injury" and complained of swelling in his knee, inability to stand for four to five hours without pain and pain along the medial aspect of his patellar tendon. (Id.) Dr. Bradley examined the Petitioner and found mild effusion and pain to palpation along the medial aspect of the patellar tendon and hear his tibial tubercle but no significant pain to palpation along the joint line but good stability and strength. (Id.) He opined that the Petitioner likely had some patellar tendinitis with some underlying strain to his knee and tearing of some of his scar tissue from the prior surgery. (Id.) He said it was too early for another injection and recommended continued use of medication, ice, compression and activity modification. (Id.)

The Petitioner saw Dr. Krieg on July 14, 2018, regarding his neck and shoulder pain. (PX5) Dr. Krieg diagnosed cervical radiculopathy, prescribed medication and ordered physical therapy. (Id.) PT The Petitioner returned to Dr. Krieg on August 5, 2018, and stated that the medications and physical therapy did not result in improvement. (Id.) Dr. Krieg referred the Petitioner to pain management. (Id.) The Petitioner also complained of pain and swelling in his left knee, and Dr. Krieg opined that he may need to return to his orthopedic surgeon if the knee did not improve. (Id.) On August 28, 2018, Dr. Krieg referred the Petitioner to Dr. Matthew Gornet, an orthopedic surgeon at The Orthopedic Center of St. Louis, for his continued cervical spine complaints. (Id.) The Petitioner saw Dr. Krieg again on September 3, 2018, and continued to complain of left knee discomfort and associated decreased range of motion. (Id.) Dr. Krieg recommended follow-up with an orthopedist. (Id.)

The Petitioner saw Dr. Gornet on September 7, 2018, and underwent an interlaminar epidural steroid injection on September 11, 2018, and disc replacements at C4-5, C5-6 and C6-7 on October 2, 2018. (PX6, PX10, PX11)

The Petitioner testified that before the cervical surgery, he experienced pain in his neck, between his shoulder blades and going down his right shoulder. (T. 20) He said the surgery helped his neck condition, but his left knee continued to hurt "bad," and he had trouble ambulating and walking up and down stairs. (T. 20-21)

At follow-up visits with Dr. Gornet on November 15, 2018, and January 14, 2019, the Petitioner's neck symptoms had improved, but he reported continued knee pain. (PX6) Dr. Gornet kept the Petitioner off work until he saw Dr. George Paletta, another orthopedic surgeon at The Orthopedic Center of St. Louis, for his knee complaints, but found he could return to work full duty regarding his neck. (Id.) Dr. Gornet ordered a left knee MRI that was conducted on January 14, 2019, that showed a recurrent horizontal oblique undersurface recurrent tear of both the medial meniscal body and posterior horn. (PX7) There was also medial compartment grade III chondral thinning with probably medial tibial plateau weightbearing grade IV chondral fibrillation. (Id.) Dr. Gornet found the Petitioner to be at maximum medical improvement regarding his cervical spine on October 15, 2020. (PX6)

The Petitioner saw Dr. Paletta on January 18, 2019, and complained of pain along the anterior and medial aspects of his left knee. (PX9) Dr. Paletta's examination revealed no effusion or soft tissue swelling, normal patella mobility no lateral joint line tenderness an intact ligaments. (Id.) He did find mild patellofemoral crepitus and mild peripatellar tenderness. (Id.) X-rays demonstrated moderately advanced medial compartment degenerative joint disease and clear medial joint space narrowing. (Id.) Dr. Paletta reviewed the January 14, 2019, MRI and found

that the meniscus was completely extruded from the joint. (Id.) He saw significant medial compartment chondrosis with high grade partial thickness and focal full thickness loss, along with subchondral edema involving the medial tibial plateau and a popliteal cyst. (Id.) Dr. Paletta referred the Petitioner back to Dr. Bradley for consideration of knee replacement, which Dr. Paletta said he did not perform. (Id.)

The Petitioner returned to Dr. Bradley on January 30, 2019, with complaints of pain in the anterior mid tibia of the left knee and radiating up to the thigh. (PX4) He described the pain as "stinging" and said it was aggravated by climbing stairs and internal rotation of the knee. (Id.) He said the pain came and went and that he felt and heard popping. (Id.) An examination revealed no effusion or instability, but his range of motion had decreased since his last visit to Dr. Bradley. (Id.) X-rays showed significant narrowing of the medial tibiofemoral joint space, marginal osteophyte formation and subchondrial sclerosis over the medial compartment. (Id.) There was no evidence of laxity of the medial collateral ligament. (Id.) An ultrasound showed moderate joint effusion and that the medial meniscus had ab extruded appearance. (Id.) Dr. Bradley diagnosed the Petitioner with post-meniscal degenerative disease and acute medial meniscus injury/extrusion and recommended a partial knee replacement. (Id.) He gave the Petitioner light duty work restrictions that included no standing more than 30 minutes and no kneeling, squatting, ladders or stairs. (Id.)

The Petitioner saw Dr. Bradley again on February 27, 2019, reporting that his left knee gave out and buckled on January 31, 2018, causing a twisting injury to his right knee, for which he received a corticosteroid injection. (Id.) On March 12, 2019, Dr. Bradley performed a left medial unicompartmental arthroplasty, prepatellar bursectomy and medial partial patellectomy. (Id.) At a follow-up visit to Dr. Bradley on March 26, 2019, the Petitioner was "doing well" but

still had moderate joint pain he described as a sharp and pulling sensation aggravated by "being on it too long." (PX4) Dr. Bradley continued off-work orders. (Id.)

On March 27, 2019, the Petitioner underwent a Section 12 examination conducted by Dr. Michael Nogalski, an orthopedic surgeon at Orthopedic Associates. (RX 3) Regarding the first knee injury on September 9, 2017, Dr. Nogalski diagnosed a knee contusion and possible strain and said the meniscal tear was degenerative in nature and not caused by that incident. (Id.)

Regarding the accident of June 24, 2018, Dr. Nogalski stated that the event "did not yield any complaints of knee injury or pain," but there were some complaints of knee pain at the Petitioner's visit with Dr. Krieg four days later. (Id.) In looking at the November 1, 2017, MRI study, Dr. Nogalski wrote: "There was already extrusion and loss of normal meniscal position in his initial MRI study, consistent with degenerative change and time related issues." (Id.) Dr. Nogalski also stated that the Petitioner was "a somewhat vague historian who presented a variable history that was not consistent with the ones initially offered to treating doctors and co-workers/supervisors." (Id.) He found no evidence of the Petitioner's knee having twisted in reports at and closest to the time of the injury. (Id.)

In conclusion, Dr. Nogalski reported that he could not identify that the Petitioner sustained a knee injury relative to the June 24, 2018, incident and stated that the need for partial knee replacement was related to preexisting degenerative issues. (Id.) He did state that the medical treatment received to date appeared to have been reasonable and necessary. (Id.)

On April 9, 2019, the Petitioner stopped receiving workers' compensation benefits and used his accumulated time off work. (T. 22-23) At another follow-up visit to Dr. Bradley on April 23, 2019, the Petitioner reported that he was slowly getting better but still had moderate pain and could not be on his feet more than three hours a day without having to rest. (PX4) Dr. Bradley

continued off-work orders because the Petitioner's knee was "very inflamed." (Id.) On May 23, 2019, the Petitioner saw Dr. Bradley and denied significant pain but complained of stiffness in the morning that was improving. (Id.) He said he experiences pain with daily activities – squatting and kneeling eliciting the worst pain – and had occasional "catching" in his knee. (Id.) The Petitioner testified that he asked to be returned to work. (T. 23) Dr. Bradley allowed the Petitioner to return to work with no restrictions but limited his work hours to eight hours per day, five days per week. (PX4) The Petitioner testified that the Respondent did not allow him to return to work with this restriction, so he saw Dr. Bradley who released him to work without restrictions. (T. 23-24) The Petitioner stated that when he returned to work, his knee still hurt, but he took pain pills to get through it. (T. 24) On June 20, 2019, the Petitioner saw Dr. Bradley and reported some pain and discomfort with kneeling but was able to kneel. (PX4) On August 14, 2019, the Petitioner reported his knee was "doing great," and Dr. Bradley found him to be at maximum medical improvement. (Id.)

Dr. Paletta testified consistently with his reports at a deposition on December 18, 2019. (PX16) Dr. Paletta confirmed from Dr. Bradley's surgical report of January 5, 2018, that at the time of the surgery, the Petitioner had moderate arthritic cartilage degeneration on the end of the thighbone and top of the shinbone on the inside part of the knee (medial compartment). (Id.) Dr. Paletta compared the MRI scans from November 1, 2017, and January 14, 2019, and pointed out a recurrent tear of the meniscus, a meniscus extrusion and "clearly advanced' arthritis or damage to the cartilage that resulted in a bone-on-bone condition that were present on the later MRI scan. (Id.) He opined that the June 14, 2018, accident either caused or contributed to the meniscus extrusion and increased the pain related to the Petitioner's arthritis and necessitated additional treatment. (Id.) He felt that based on the Petitioner's age and the fact that the rest of his knee

"really looked pretty good," partial knee replacement would be the best option versus injecting a lubricant into the knee to treat the Petitioner's symptoms. (Id.) He believed the need for partial knee replacement was causally related to the June 14, 2018, injury. (Id.)

Regarding Dr. Nogalski's report, Dr. Paletta testified that he disagreed with Dr. Nogalski's opinion that the Petitioner's meniscal tear from the first accident in 2017 was degenerative. (Id.) Dr. Paletta explained that the tear was oblique – more typically a pattern seen with an acute or traumatic tear – while a degenerative tear typically has a more complex pattern, meaning the tear goes in multiple different directions. (Id.) He also pointed to the mechanism of injury reported by the Petitioner as evidence of a distinct injury. (Id.) He also disagreed with Dr. Nogalski's opinion that the Petitioner sustained no injury to his left knee from the June 24, 2018, incident and reiterated the changes he saw in the MRI studies as objective evidence of injury. (Id.) Further, Dr. Paletta disagreed that the Petitioner was a "vague" historian and said the reports to him and Dr. Gornet were not vague. (Id.)

Dr. Nogalski testified consistently with his report at a deposition on March 9, 2020. (RX4) He said that in his review of the records provided, he did not see a direct reference to a knee injury from the June 24, 2018, incident until the Petitioner saw Dr. Bradley on July 9, 2018 – although he said Dr. Krieg noted soreness in the knee on June 27, 2018. (Id.) He said that fact was pertinent in his findings and contrary information could change his opinion. (Id.) However, Dr. Nogalski did not have the incident reports from the June 24, 2018, accident stating that the Petitioner injured his left knee. (Id.) Regarding emergency room records from the day of the incident in which the Petitioner reported left knee pain, Dr. Nogalski stated that the documents he had did not support that assertion. (Id.) He reiterated his opinion that the November 1, 2017, MRI showed a meniscal extrusion that was unchanged on the January 14, 2019, MRI.

The Petitioner testified that the surgery helped his knee condition. (T. 21) The Petitioner testified that after returning to work from the second surgery, he has had to refuse to work overtime because of knee pain and had to take medical leave. (T. 25) At the time of the arbitration hearing, he said he was experiencing pain in his left knee and could not kneel on the ground because of the pain. (T. 26-27) He compared kneeling to getting on a bed of nails. (T. 27) He said his knee would swell and get stiff or after being on his feet for a long time and would ache when the weather was cold or wet. (T. 27) He said the range of motion in his knee was not as good as it should be, but he was able to do his job – at times having to ask for help. (T. 28)

Regarding his neck, the Petitioner testified that he had loss of range of motion in his neck – sideways mostly and some back and forth – and could not turn his head like he used to. (T. 28) His hobbies of deer hunting, gardening and working on engines have been adversely affected by not being able to kneel. (T. 29-30) He takes Tramadol, Naproxen and Tylenol daily. (T. 30-31) At work, he feels "whooped" at the end of a shift. (T. 31)

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

CONCLUSIONS OF LAW

Issue F: Is Petitioner's current condition of ill-being, specifically his left knee condition, causally related to the accident?

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, 96-97, 631 N.E.2d 724 (4th Dist. 1994); *Int'l Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 63-64, 442 N.E.2d 908, 66 ILll.Dec. 347 (1982).

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, 471, 397 N.E.2d 834, 34 Ill.Dec. 162 (1979); *Gano Electric Contracting*, 260 Ill.App.3d at 96–97; *Int'l Harvester*, 93 Ill.2d at 63-64.

When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *St. Elizabeth's Hospital v. Workers' Comp. Comm'n,* 371 Ill. App. 3d 882, 888, 864 N.E.2d 266, 309 Ill.Dec. 400 (2007). Accidental injury need only be a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill.Dec. 70 (2003). Even when a preexisting condition exists, recovery may be had if a claimant's employment is a causative factor in his or her current condition of ill-being. *Id.* at 673. Employers are to take their employees as they find them. *General Electric Co. v. Industrial Comm'n*, 89 Ill. 2d 432, 434, 433 N.E.2d 671. (1982).

The Petitioner had pre-existing degenerative joint disease in his left knee that was asymptomatic until the accident of September 9, 2017. After the surgery on January 5, 2018, the Petitioner appeared to be back to his pre-accident condition by the time of the second accident on June 24, 2018. After the second accident, the Petitioner experienced a new onset of pain that was recorded on the incident reports, emergency room report and reports to his doctors. Dr. Nogalski testified that the existence of a knee injury after the second accident did not become apparent until

the Petitioner saw Dr. Bradley on July 8, 2018. Admittedly, Dr. Nogalski did not see the incident reports prepared immediately after the accident that listed a left knee injury. Apparently, Dr. Nogalski did not see the references to knee pain in the emergency room records.

This circumstantial evidence leads to an inference that – at a minimum – the accident aggravated or accelerated the Petitioner's degenerative knee condition. However, there is more persuasive medical evidence that the accident of June 24, 2018, caused entirely new injuries. Dr. Paletta testified to his comparison of the November 1, 2017, and January 14, 2019, MRI studies and noted new injuries in the second MRI that did not exist in the first – most notably a meniscal extrusion. On the other hand, Dr. Nogalski saw no differences. Out of four doctors who read the November 2, 2017, MRI study, Dr. Nogalski was the only one to see a meniscal extrusion. The radiologist, Dr. Bradley and Dr. Paletta did not see an extrusion on the first MRI.

For all of these reasons, the Arbitrator gives greater weight to Dr. Paletta's opinions than to Dr. Nogalski's. Therefore, the Arbitrator finds that the Petitioner has met his burden of proving by a preponderance of the evidence that the accident of June 24, 2018, was a causal factor to his left knee condition.

Issue J: Were the medical services that were provided to Petitioner reasonable and necessary, specifically regarding treatment of the Petitioner's left knee? 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, 327 Ill.Dec. 883 (2009). A claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be 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, 534, 758 N.E.2d 18, 259 Ill.Dec. 173 (1st Dist. 2001).

Aside from his causation opinion, Dr. Nogalski stated that the treatment the Petitioner received was reasonable and necessary. Based on the findings above regarding causation. Dr. Paletta's opinion that a partial knee replacement was the Petitioner's best option and Dr. Bradley reports outlining his attempts to return the Petitioner to his pre-accident condition, the Arbitrator also finds that the diagnostic studies, partial knee replacement surgery and consequent rehabilitative treatment were reasonable and necessary, and the Respondent has not paid the bills for this treatment. Therefore, the Respondent is ordered to pay the medical expenses contained in Petitioner's Exhibit 1 pursuant to Section 8(a) of the Act and in accordance with medical fee schedules.

<u>Issue K</u>: 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 April 10, 2019, through May 25, 2019.

An employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 118 (1990).

When the Petitioner's TTD benefits were terminated on April 9, 2019, the Petitioner was still off work per Dr. Bradley's orders from his surgery. He was returned to work on May 23, 2019. Therefore, the Petitioner was entitled to TTD benefits from April 10, 2019, through May 23, 2019, for a total of 6 1/7 weeks.

<u>Issue L</u>: What is the nature and extent of the Petitioner's injury?

Pursuant to Section 8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011, is to be established using the following criteria: (i) the reported level of

impairment pursuant to subsection (a) of Section 8.1; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." *Id.*

(i) **Level of Impairment.** No AMA impairment ratings were produced, therefore the Arbitrator gives this factor no weight.

(ii) **Occupation.** The Petitioner remains in the same occupation with the same physical demands. Therefore, the Arbitrator places some weight on this factor.

(iii) **Age.** The Petitioner was 54 years old at the time of the injury. He has several work years left during which time he will need to deal with the residual effects of the injuries. The Arbitrator places significant weight on this factor.

(iv) **Earning Capacity.** The Petitioner testified that since the second knee surgery, he has had to refuse to work some overtime because of the pain that long work hours cause him to suffer in his knee. Therefore, the Arbitrator places some weight on this factor.

(v) **Disability.** The Petitioner testified that he still experiences pain, swelling, stiffness and loss of range of motion in his left knee and could not kneel on the ground because of the pain that he compared kneeling to getting on a bed of nails. Regarding his neck, the Petitioner testified that he had loss of range of motion in his neck. He still takes pain relievers and anti-inflammatories daily, and his hobbies have been adversely affected. The Arbitrator puts significant weight on this factor.

Therefore, the Arbitrator finds the Petitioner's permanent partial disability to be 1 percent of the body as a whole pertaining to the Petitioner's concussion, 25 percent of the body as a whole regarding the Petitioner's cervical injuries and 30 percent of the left leg.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC006067
Case Name	Robert Amling v. US Foods Inc
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0475
Number of Pages of Decision	29
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Joseph J. Leonard, James Babcock
Respondent Attorney	Steven Miller

DATE FILED: 11/8/2023

/s/Amylee Simonovich, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROBERT AMLING,

Petitioner,

vs. NO: 18 WC 06067

US FOODS, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of whether Petitioner's medical care related to Persistent Rx bills was reasonable and necessary, 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.

FINDINGS OF FACT

The Commission adopts the Findings of Fact in the Decision of the Arbitrator and incorporates such facts herein, but adds additional findings of fact as noted below.

Suburban Orthopedic/Dr. Howard Freedberg

On February 26, 2018, Petitioner presented to Dr. Freedberg, noting a consistent mechanism of injury, and complaining of left knee pain, swelling, stiffness, popping and clicking. Petitioner had clicking and limited bending with range of motion. He indicated therapy had not helped with pain. He was taking Ibuprofen. Physical examination revealed mild swelling and tenderness, crepitus, snapping and pain. X-rays revealed severe degenerative changes with bone-on-bone in the patellofemoral compartment, and mild changes medially and laterally. Dr. Freedberg diagnosed a left knee medial collateral ligament sprain with possible medial meniscal

osteoarthritis. A left knee MRI and home exercises were recommended, and Petitioner was prescribed Nalfon and Aciphex, continued use of a knee brace, and cryotherapy as needed. Petitioner's restrictions were decreased to no lifting over 20 pounds, and included partial restrictions on pulling, pushing, and carrying, no manual transmission driving, and were increased to include no stooping, kneeling, repeated bending, or climbing. PX 2,p.6-9.

On February 27, 2018, a left knee MRI revealed:

> "1. Small effusion. Significant lateral tilting of the patella and shallow trochlear sulcus consistent with underlying patellofemoral instability/ tracking abnormality. There is also prominent chondromalacia patella and chondromalacia with the trochlear sulcus with subchondral marrow edema.
> 2. 9mm loose body within the posterior joint space directly adjacent to the distal PCL.
> 3. Menisci and ligaments are intact." PX 2, p.10-11.

On March 1, 2018, Petitioner's complaints continued, and his physical exam was similar. After reviewing the MRI, Dr. Freedberg diagnosed left knee patella chondromalacia with patellar instability and loose body knee osteoarthritis. Dr. Freedberg noted that the prescribed Nalfon and Aciphex were not helping, so topicals were given. He noted Petitioner had persistent neuropathic pain, and that the oral neuropathic medication did not sufficiently reduce it. Thus, a trial of topical 5% Lidocaine, as well as Terocin patches (Menthol 4%, Lidocaine 4%) were given to assess their effectiveness, which would be re-evaluated at Petitioner's next visit. Petitioner was taken off work, prescribed physical therapy, was to continue using a knee brace and recommended for cryotherapy as needed. PX 2, p.12-15.

On March 27, 2018, Petitioner followed up with Dr. Freedberg and noted no improvement. Dr. Freedberg noted Petitioner was taking Ibuprofen, Nalfon (3 times a day) and applying Terocin patches (1 per day) and Lidocaine cream (1-3g, 4 times daily). The effectiveness was to be re-evaluated at Petitioner's next visit. Physical examination revealed moderate knee swelling, patellafemoral [*sic*], lateral, and medial joint line tenderness with crepitus, pain, and snapping. Petitioner was kept off work. PX 2, p.30-33, 35.

On April 24, 2018, Petitioner indicated his knee was about the same and that his pain "comes and goes depending on the position and activity." He complained of occasional swelling, as well as pain in the medial and lower knee, although at times pain is over the entire knee. Physical examination was the same. Petitioner was still taking Nalfon and applying Terocin patches and Lidocaine cream. He was now also applying Diclofenac Sodium 1.5% (10-40 drops up to 5 times daily), taking Hydrocodone (every 4-6 hours as needed), and Tramadol (once daily). Dr. Freedberg noted the Diclofenac Sodium was a trial added to reduce pain and inflammation. He would assess the clinical benefit on Petitioner's next visit. Dr. Freedberg noted that "topicals refilled as it is helping." A steroid injection was also performed on the left knee. Petitioner was placed on light duty-sedentary work. PX 2, p.44-48.

Also on April 24, 2018, Dr. Freedberg drafted a Letter of Medical Necessity for the Terocin patches, Lidocaine cream, and Diclofenac Sodium prescriptions. Dr. Freedberg noted these prescriptions were provided "as an adjunct to oral medications to synergistically increase the

clinical benefit of our conservative regimen in effort to improve the patient's feeling of well-being and ultimately avoid surgery." He added that the drugs were recommended per ODG guidelines. He also noted the following:

"The following conditions were met when prescribing the above medications:

(a) Evidence of consistent localized pain.
(b) First-line medications have not effectively alleviated pain to a satisfactory level.
(c) The area for treatment was designated as well as duration for use.
(d) A trial was recommended to assess effectiveness.
(e) No other medication changes were made during the trial period.
(f) Continued assessment will be measured."

Dr. Freedberg opined that these medications would limit potential systemic side effects (such as sedation, drug-drug, and liver-kidney side effects, etc.), and prevent oral opioid tolerance, addiction, and abuse. He opined these medications were medically necessary. PX 6, p.5.

Peer Review/Dr. Andrew E. Farber

On May 7, 2018, Dr. Farber, an orthopedic surgeon, drafted a peer review report of Dr. Freedberg's topical prescriptions. Regarding the Diclofenac Sodium, Dr. Farber opined that since there was no evidence of the failure of Ibuprofen, Nalfon, Terocin patches, and Lidocaine cream, there was no medical necessity for the use of Diclofenac Sodium. Dr. Farber noted that while the 2018 ODG guidelines listed Diclofenac as recommended option for pain treatment, there was also a risk for liver damage or fatalities. It was noted Diclofenac should only be used for the shortest duration possible in the lowest effective dosage due to reported serious adverse events. RX 14, p.3.

Regarding the Lidocaine cream, Dr. Farber noted that the efficacy was not documented, thus there was no evidence that further use would be of benefit to Petitioner's condition. He opined the Lidocaine was not medically necessary. RX 14, p.4.

Regarding the Terocin patches, Dr. Farber again noted the efficacy was not provided, and that there was no documentation of pain reduction or functional improvement with use. He opined the Terocin patches also were not medically necessary. RX 14, p.4.

Respondent's §12 Examiner/Dr. Nikhil Verma

On June 4, 2018 Petitioner underwent a §12 examination at Respondent's request with Dr. Verma. Petitioner reported a consistent mechanism of injury. Dr. Verma reviewed medical records, diagnostic images, and examined Petitioner. Dr. Verma noted a mild antalgic gait, left knee effusion, patellofemoral crepitation, pain with patellar compression, medial and lateral patellar translation with discomfort, anteromedial and anterolateral joint line tenderness. He diagnosed a left knee strain with aggravation of a preexisting patellofemoral chondromalacia. He noted Petitioner was asymptomatic prior to the work injury. Dr. Verma opined that treatment to date appeared to have been reasonable and necessary, although he did not see any indication for topicals in the management of an arthritic condition. He opined appropriate medication was an oral anti-

inflammatory. Petitioner had failed conservative care, including anti-inflammatories, activity modification and an injection. Accordingly, Dr. Verma recommended an arthroscopic debridement and patellofemoral arthroplasty. PX 4, p.11-14.

CONCLUSIONS OF LAW

I. Medical Expenses

Preliminarily, the Commission addresses the scrivener's error contained in the "Order" section of Decision of the Arbitrator. The Arbitrator referenced and denied the unpaid medical bills in Petitioner's Exhibit #6 in the amount of *$7,606.59*. However, a review of this exhibit shows the amount in question is actually *$7,606.54*. PX 6, p.4. The Commission modifies the bill amount accordingly.

Regarding Petitioner's entitlement to the medical bills themselves, the Commission has reviewed the record closely and views the evidence differently than the Arbitrator. The Arbitrator declined to award the medical expenses listed in Petitioner's Exhibit #6, finding that they were not medically necessary. The Arbitrator found that Petitioner reported no change in his symptoms upon using the topical medications. The Arbitrator also referenced the §12 examination report of Dr. Nikhil Verma of June 4, 2018, who opined that although treatment to date for Petitioner's knee condition appeared to be reasonable and necessary, there was no indication for topicals in the management for an arthritic condition. Moreover, a May 7, 2018 utilization review performed by Dr. Andrew E. Farber found that neither the Lidocaine cream, Terocin patches, nor Diclofenac Sodium prescriptions were medically necessary.

§8.7 of the Act provides, in pertinent part,: "When an employer denies payment of or refuses to authorize payment of…medical…services under Section 8(a) of this Act, if that denial or refusal to authorize complies with a utilization review program…then there shall be a rebuttable presumption that the employer shall not be responsible for payment of additional compensation…" 820 ILCS 305/8.7(j).

Moreover, §8.7 of the Act also provides, in pertinent part,: "When a payment for medical services has been denied or not authorized by an employer or when authorization for medical services is denied pursuant to utilization review, the employee has the burden of proof to show by a preponderance of the evidence that a variance from the standards of care used by the person or entity performing the utilization review…is reasonably required to cure or relieve the effects of his or her injury."
820 ILCS 305/8.7(i)(4).

The Commission finds that Petitioner has rebutted the presumption that is in Respondent's favor created by Dr. Farber's utilization review. The April 24, 2018 medical record of Dr. Freedberg indicates the topical Terocin patches, Lidocaine cream, and Diclofenac Sodium were helping with Petitioner's pain. Additionally, a Letter of Medical Necessity drafted by Dr. Freedberg on the same day indicated that the conditions necessary to prescribe these medications had been met. These records corroborate Petitioner's trial testimony indicating the same, and contradict the Arbitrator's finding that Petitioner reported no change in his symptoms after implementing these topicals.

The Commission finds the evidence supports a conclusion that a variance from the standard of care used by Dr. Farber in his utilization review was reasonably required to *relieve* the effects of Petitioner's injury. The aforementioned medical records of Dr. Freedberg in conjunction with Petitioner's testimony show by a preponderance of evidence that the topical medications provided efficacy, in that they relieved Petitioner's knee pain. Accordingly, the Commission finds Petitioner has rebutted the statutory presumption and met his burden of proof. Thus, Petitioner has proven entitlement to the unpaid medical expenses of $7,606.54 for topical prescriptions listed in Petitioner's Exhibit #6.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 27, 2022, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical expenses of $7,606.54, pursuant to the medical fee schedule, as provided in §8(a) and subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall receive credit for temporary total disability benefits paid in the amount of $65,168.99.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall receive credit for temporary partial disability benefits paid in the amount of $1,410.50.

IT IS FURTHER ORDERED BY THE COMMISSION that permanent partial disability benefit shall not be awarded in this case, as such benefits are awarded in the consolidated case 19 WC 31591, which involves an injury to the same body part.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a stipulated temporary total disability overpayment credit in the amount of $9,046.92. This credit shall be applied against any permanent partial disability award in the consolidated case 19 WC 31591.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §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 $7,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

November 8, 2023

/s/*Stephen J. Mathis*

wde

/s/*Deborah L. Simpson*

D: 9/20/23

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/s/*Amylee Simonovich*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC006067
Case Name	ROBERT AMLING v. US FOODS, INC.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	23
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Joseph J. Leonard
Respondent Attorney	Steven Miller

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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

ROBERT AMLING Case # **18**WC **6067**
Employee/Petitioner
v.

US FOODS, INC
Employer/Respondent

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

DISPUTED ISSUES

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

FINDINGS

On **FEBRUARY 9, 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 $**91,470.57**; the average weekly wage was $**1,759.05**.

On the date of accident, Petitioner was **45** years of age, **MARRIED** with **2** dependent children.

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

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

Respondent shall be given a credit of **$65,168.99** for TTD, $**1,410.50** for TPD, $**0** for maintenance.

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

ORDER

See the Attached Consolidated Decision of the Arbitrator for findings of fact and conclusions of law.

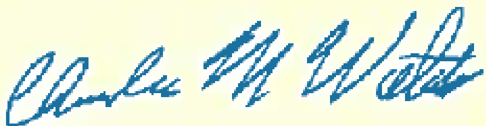
The Arbitrator declines to award PPD to petitioner in this case as the consolidated companion case 19 WC 31591 involved an injury to the same body part. Pursuant to City of Chicago v Illinois Workers Compensation Commission, 409 Ill.App.3d 258, PPD is awarded in 19 WC 31591;

The parties stipulated (see Transcript of Proceedings on Arbitration at Page 6) that Respondent was entitled to a credit for a TTD overpayment of $9,046.92 having paid Petitioner TTD benefits at an incorrect rate; Respondent paid TTD benefits at the rate of $1,361.74 per week (see RX3) when the correct TTD rate as stipulated to by the parties (Arb.EX1) was $1,172.70; Respondent to be given a credit of $9,046.92 as against the PPD awarded in consolidated case 19 WC 31591;

The Arbitrator denies petitioner the unpaid medical bill of Persistent RX in the amount of $7606.59 as submitted in PX 6.

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 27, 2022

STATE OF ILLINOIS
COUNTY OF COOK

BEFORE THE ILLINOIS WORKERS COMPENSATION COMMISSION

ROBERT AMLING	)	
PETITIONER	)	**18 WC 06067**
	)	**19 WC 31591**
V.	)	
	)	
US FOODS, INC.,	)	
RESPONDENT	)	

MEMORANDUM IN SUPPORT OF DECISION OF ARBITRATOR
FINDINGS OF FACT

These consolidated cases appeared for trial before arbitrator Charles Watts on August 17th 2021. In case number 18 WC 06067 the issues in dispute were (1) medical services, (2) credit for temporary total disability benefits paid, and (3) the nature and extent of petitioners' injury. In case number 19 WC 31591 the issues in dispute were (1) accident, (2) earnings, (3) causal connection, (4) medical services, (5) credit for temporary total disability benefits paid, and (6) the nature and extent of petitioners' injury.

ARBITRATION TESTIMONY

The petitioner testified that he worked as a delivery driver for the respondent for 23 years. He testified that he had surgery on his left knee 26 years ago for a non-work-related dislocated kneecap. He also had conservative treatment on his left knee in 2016 from a work injury but did not file a workers compensation claim nor did he receive a settlement. Following the 2016 event he was able to return to his full duty occupation for the respondent as a delivery driver and he worked up until February 9, 2018 without incident or the need for ongoing treatment to his left knee.

On February 9th 2018 he was bringing a stack on a two-wheeler into a restaurant and as he pulled the two-wheeler his knee buckled and he felt pain. Petitioner sought treatment at Concentra / Occupational Health Centers of Illinois on February 12, 2018 through February 24, 2018, attending physical therapy. He then came under the care of Dr. Howard Freedberg, an orthopedic surgeon at Suburban Orthopedic on February 26, 2018. Dr. Freedberg ordered an MRI scan.

On June 4, 2018, the petitioner saw Dr. Nikhil Verma with Midwest Orthopedics at Rush for an independent medical examination. He testified that Dr. Verma recommended surgery.

Petitioner testified he underwent surgery on August 13, 2018. Following surgery he continued to follow up with Dr Freedberg. He testified he had extensive physical therapy transitioning into a work hardening program. He testified he was ultimately released to return to full duty work by doctor Freedberg on January 29th 2019. He testified he did in fact return to work. He testified he returned to work in the capacity of a delivery driver. He was able to perform all the essential functions of that occupation as a delivery driver.

He testified he saw Dr Freedberg a final time on March 11, 2019 and was discharged at maximum medical improvement. He testified that he continued to work full duty for U.S. Foods as a delivery driver from March 12, 2019 through October 23, 2019 a period in excess of seven months. He was shown a copy of his job description that was contained in a subpoena response to Dr. Verma's office. He confirmed that that was in fact his job description. He reviewed all six pages and testified that he when he returned to work following doctor Freedberg' s full duty release he was able to perform all essential functions outlined in this Job Description/Work Smart Analysis Report. He was able to climb 20 to 50% of the day without incident. He was able to kneel and

stoop less than 20% of the day without difficulty. He was able to lift up to 100 pounds and able to perform each and every function as itemized on the Work Smart Analysis Report.

He did not have to call in to Dr Freedberg' s office to refill any medication after being placed at MMI. He did not go and speak to any US Food supervisors and tell them he wanted to return to the clinic because his knee was sore upon his return to work. He testified he did not require any medical attention from any medical provider whatsoever from the period March 12 2019 through October 23, 2019. The medical records submitted by both petitioner and respondent corroborated this testimony.

Petitioner continued to work in the occupation of a US Foods delivery driver up until October 24, 2019. On that date he was at his first stop in the morning and he was pulling a 1000-pound pallet off his truck to the liftgate with a pallet jack. He lowered the liftgate down to the ground and pulled the pallet towards the back door to make the delivery. As he made a turn with the pallet he positioned his left knee forward to brace himself and in doing so his left knee gave out. He caught himself but he felt a sharp pain he called his supervisor and told him he couldn't work anymore.

He was not able to complete the delivery. Another driver had to come out and took over his truck. This was the same left knee that Dr. Freedberg had operated on in 2018. His ability to work full duty changed immediately after this accident. He needed to immediately seek medical treatment after this accident. He testified his pain level changed from a 0 to 1 upon his return to work to a 8 or 9 after this new injury.

He testified he was seen at the Occupational Clinic on October 24, 2019. He testified the driver that took over his truck showed up in a van and he was able to drive the van to the clinic. He was examined and instructed to follow up with Dr. Freedberg.

He saw Dr. Freedberg on October 28, 2019. He testified Dr. Freedberg put him back in therapy and provided an injection on November 19, 2019. He testified that Dr. Freedberg eventually recommended surgery as his condition did not improve.

He testified he ultimately underwent a second surgical procedure by Dr Freedberg on March 20, 2020 at Ashton Center for Day Surgery. Following surgery he consulted with Dr. Freedberg and was put in extensive physical therapy and again in a work hardening program.

He testified he was placed at maximum medical improvement from this second surgical procedure on August 24, 2020 and that he did return to work for US Foods as a delivery driver.

At the time of Arbitration he had been working in that position for almost a year since being discharged by Dr Freedberg. He testified his knee is better than it was. He testified he is still sore on real heavy days as they've gotten busier with the pandemic and that the workload has gotten heavier. He testified he is able to perform the essential functions of his job on a full-time basis.

He testified that Dr Freedberg did prescribe a lot of physical therapy during the course of both injuries both before and after surgery. He attended the therapy as instructed by Dr. Freedberg. He did not miss any therapy. He found the therapy beneficial. When questioned about physical therapy he testified that the goal of physical therapy before surgery was to strengthen all the muscles around the knee and that after surgery physical therapy worked to strengthen the muscles back up.

He was shown some medical bills of Dr Freedberg. He testified that he has received these bills and there is an unpaid balance of $1,921.69. He testified that in addition to physical therapy, injections, and rest, that Dr Freedberg prescribed cream. He testified it was lidocaine and that he rubbed it on his knee. He testified that Dr Freedberg told him to use it. He felt like it numbed his knee a little bit and made it feel better. He felt it worked and it helped with the pain.

He testified he still has some cream leftover and he uses it at times on really bad days. He will use it at night after bad days when his left knee is real sore. He testified he will take over the counter medication as a substitute at times after really bad days when he has climbed a lot of stairs a lot or basements. He was shown the medical bills from Persistent RX regarding these creams. He acknowledged receiving these bills and that they remain unpaid.

At the time of arbitration he had not been back to see Dr Freedberg. He was not taking any narcotic medication to control the pain in his left knee. He was able to work 12 to 13 hours a day five days a week on average.

He testified he still uses the manual pallet jack but that he now uses it differently. He testified that when it gets too hard to pull, he will stop and he will use his two-wheeler to take the product the rest of the way. Before that he was able to pull the pallet as close to the door and walkway as possible and then would wheel it in, he uses the two-Wheeler for longer distances instead of risking reinjury using the pallet jack. He testified he does this because he does not want to hurt his knee again.

Currently he is delivering product anywhere from one pound to 100 pounds. The skids carrying the product on his truck can weigh anywhere from 500-600 hundred to 2,500 pounds.

With regard to lifestyle activities he testified his left knee gets sore working around the house especially if he's kneeling on it too long. He does ok with walking for a mile or so. Respondent did not call any rebuttal witnesses.

III. CONCLUSIONS OF LAW

The Arbitrator adopts the Statement of Facts in support of the Conclusions of Law.

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d).

To obtain compensation under the act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of her claim (*O'Dette v. Industrial Commission*, 79 Ill.2d 249, 253 (1980) including that the accidental injury both arose out of and occurred in the course of his employment (*Horvath v. Industrial Commission*, 96 Ill.2d. 349 (1983)) and that there is some causal relationship between the employment and her injury. *Caterpillar Tractor Co. v. Industrial Commission*, I29 Ill. 2d 52, 63 (1998). Decisions of an Arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e).

Credibility is the quality of a witness which renders her evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with her testimony. Where a claimant's testimony is inconsistent with her actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission*, 39 Ill. 2d 396 (1968); Swift v. Industrial Commission,

52 Ill. 2d 490 (1972). While it is true that an employee's uncorroborated testimony will not bar a recovery under the Act, it does not mean that the employee's testimony will always support an award of benefits when considering all the testimony and circumstances shown by the totality of the evidence. *Caterpillar Tractor Co. v. Industrial Commission*, 83 Ill. 2d 213 (1980). The mere existence of testimony does not require its acceptance. *Smith v. Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much her testimony might be contradicted by the evidence, or how evidence it might be that her story is a fabricated afterthought. *U.S. Steel v. Industrial Commission*, 44 Ill2d 207, 214, 254 N.E.2d 522 (1969); see also *Hansel & Gretel Day Care Center v. Industrial Commission*, 215 Ill. App. 3d 284, 574 N.E.2d 1244 (1991).

The Petitioner bears the burden of proving every aspect of her claim by a preponderance of the evidence. *Hutson v. Industrial Commission,* 223 Ill App. 3d 706 (1992). "Liability under the Workmen's Compensation Act may not be based on imagination, speculation, or conjecture, but must have a foundation of facts established by a preponderance of the evidence…" *Shell Petroleum Corp. v. Industrial Commission,* 10 N.E.2d 352 (1937). The burden of proof is on a claimant to establish the elements of her right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment there is no right to recover. *Revere Paint & Varnish Corp. v. Industrial Commission*, 41 Ill.2d. 59 (1968). Preponderance of the evidence means greater weight of the evidence in merit and worth that which has more evidence for it than against it. *Spankroy v. Alesky*, 45 Ill. App.3d 432 (1st Dist. 1977).

The Arbitrator observed Petitioner's demeanor at trial and finds that his manner of speech, easy and direct answers to questions, and overall presence to be indicative of sincerity. The

Arbitrator finds that Petitioner's testimony was credible. The Arbitrator also finds that Petitioner's testimony was consistent with the histories, treatment and objective findings documented in the medical records, which were offered into evidence at the time of the hearing.

ARBITRATORS DECISION 18 WC 6067

On the disputed issue of what is the nature and extent of petitioner's injury the arbitrator states as follows. In awarding permanent partial disability benefits in a matter where petitioner has sustained two separate and distinct injuries to the same body part and the claims are consolidated for hearing and decision, unless there is some evidence presented at the consolidated hearing to delineate and apportion the nature and extent of permanency attributable to each accident, it is proper for the Commission to consider all the evidence presented to determine the nature and extent of claimants permanent disability as of the date of hearing. *City of Chicago v. Illinois Workers Compensation Commission, 409 Ill.App.3rd 258.* The arbitrator therefore elects not to award an apportionment of PPD in this case for loss of use of the left leg, instead electing to award petitioner a singular PPD award in 19 WC 31591.

On the disputed issue of TTD and the credit due the respondent the arbitrator states as follows. The parties stipulated that petitioner's AWW was $1,759.05 which corresponds to a TTD rate of $1,172.70. **Arb.Ex1.** TTD benefits were paid at the incorrect rate of $1,361.74 **(see RX3)** per week for the period of incapacity of 47 6/7 weeks thereby creating a TTD overpayment of $9,046.92. Petitioner did not dispute this overpayment. Respondent to be given a credit of $9,046.92 as against the PPD award in 19 WC 31591 as stipulated to by the parties.

On the disputed issue of unpaid medical bills, the petitioner has submitted additional bills from billing provider Persistent RX with a P.O. Box located in Los Angeles, CA, relating to

outstanding charges with a balance of $7,606.54. (PX 6) These relate to charges for prescription medication relative to Lidocaine, Diclofenac topical solution, and Terocin patches.

With respect to the $7,606.54 in charges associated with Lidocaine, Diclofenac topical solution, and Terocin patches, the arbitrator finds that these prescriptions were not medically necessary. For support, the arbitrator finds that Dr. Nikhil Verma addressed the use of these prescriptions in his June 4, 2018 report (RX. 7). Specifically, Dr. Verma writes, "treatment to date appears reasonable and necessary in regard to the knee condition. However, I do not see any indication for topical in the management for an arthritic condition. Appropriate medications would be an oral anti-inflammatory, which could be taken over-the-counter or prescription based. There is no evidence to suggest that topicals are appropriate in the management of an underlying arthritic condition."

Additionally, Dr. Andrew Farber's Utilization Review report dated May 7, 2018 was admitted into evidence without petitioner's objection. A peer review was attempted multiple times, but Dr. Freedberg did not respond to the requests. (RX. 14).

Therefore, based on Section 8.7 of the Act, if a denial of medical services "complies with a utilization review program…then there shall be a rebuttable presumption that the employer shall not be responsible for payment of additional compensation…" This section further states that "the employee has the burden of proof to show by a preponderance of the evidence that a variance from the standards of care used by the person or entity performing the utilization review…is reasonably required to cure or relieve the effects of his injury."

The arbitrator specifically finds that the petitioner has failed to meet his burden of proof to show by preponderance of the evidence that a variance from the standard of care used by the utilization review physician is reasonably required to cure or relieve the effects of his injury.

The petitioner testified that he remembered Dr. Freedberg prescribing him cream for use on his left knee. He specifically stated that it was, "Lidocaine, I think that's what it was; it was a cream, rubbed it on my knee. He told me to use it and I rubbed it on my knee, and it felt like it numbed it a little bit and it made it feel better, and it worked, you know, it helped with the pain." (T. 34-35). There is no trial testimony from the petitioner regarding any relief of the use of Diclofenac topical solution, or Terocin patches.

Further, Dr. Freedberg originally prescribed the topicals to the petitioner on a trial basis during his 3/1/18 visit, with the effectiveness to be assessed the following visit. (PX 2). Respondent authorized and paid for this prescription (RX 1). On 3/27/2018, without addressing the effectiveness of the medication provided on 3/1/18, Dr. Freedberg prescribed additional Lidocaine, Diclofenac and Terocin patches to petitioner. On 4/24/2018, almost 2 months since the original prescription, Dr. Freedberg refilled the topicals prescriptions despite petitioner's reports that his symptoms remained unchanged. (PX 2)

What is more telling against the necessity of topicals in petitioner's treatment is the fact petitioner still had the medication from April 2018 during his 2020 treatment following the October 2019 knee sprain. Based on that, the petitioner declined Dr. Freedberg's suggestion for additional supplies of topicals. See 12/10/19, 12/31/19, 1/14/20, 2/11/20, 2/25/20, and 3/10/20 (PX2, PX3). Had the medication been necessary or effective in April 2018, the petitioner would likely have used it much sooner than a 2-year mark from their prescription.

Under the circumstances, the respondent is not responsible for the $7,606.54 in charges from Persistent RX relative to the Lidocaine, Diclofenac topical solution, and Terocin patches as those prescriptions were not medically necessary.

ARBITRATORS DECISION 19 WC 31591

On the disputed issue of whether petitioner sustained accidental injuries that arose out of and occurred in the course of his employment with the respondent on October 24th, 2019 the arbitrator states as follows.

To obtain compensation under the Act, the claimant bears the burden of showing by a preponderance of the evidence that the disabling injury arose out of and in the course of his employment. Baggett v. Industrial Comm'n, *201 Ill. 2d 187, 266 Ill. Dec. 836, 775 N.E.2d 908 (2002).* The "arising out of" component is primarily concerned with causal connection. To satisfy this requirement it must be shown that the injury had some origin in some risk connected with, or incidental to, the employment in the accidental injury. *Sisbro v. Industrial Comm'n, 207 Ill. 2d 193, 278 Ill. Dec. 270 (2003). Baggett v. Industrial Comm'n, 201 Ill. 2d 187, 266 Ill. Dec. 836, 775 N.E.2d 908 (2002)*

In the instant case petitioner testified he was at his first stop on October 24, 2019. He was pulling a pallet to the liftgate of his truck with a pallet jack. Once positioned he lowered the liftgate down to the ground and began to pull the pallet towards the back door to make the delivery. He testified he went to make a turn while pulling the 1000-pound .pallet with the jack with his left knee forward to brace himself and while pulling his knee gave out. He caught himself but felt a sharp pain. The Arbitrator finds this activity particular to petitioner's employment and finds in favor of petitioner on the issue of accident.

On the disputed issue of causal connection, the Arbitrator finds Petitioner met his burden. Petitioner claims that his condition of ill being is due to the injury sustained on October 24, 2019. **Arb.Ex2**. Conversely respondent claims that if petitioner did sustain an accidental injury

on October 24, 2019, then any condition of ill-being is due to the injury of February 9, 2019 in 18 WC 06067.

It is long been recognized that, in pre-existing conditions 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 employees' current condition of ill-being can be said to be causally connected to the work injury and not simply the result of a normal degenerative process of the pre-existing condition. *Caterpillar Tractor Co. v. Industrial Comm'n, 92 Ill. 2d 30, 65 Ill. Dec. 1, 427 N.E.2d 861 (1982)*

Thus, even though an employee has a pre-existing 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 v. Industrial Comm'n, 207 Ill. 2d 193, 278 Ill. Dec. 270 (2003).* 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. *Rock Road Construction Co. v. Industrial Comm'n, 37 Ill. 2d 123, 227 N. E. 2d 65 (1967).*

Additionally, a chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability and medical treatment may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury. *International Harvester v. Industrial Comm'n, 93 Ill. 2d 59, 442 N.E. 2d 908(1982).*

These long standing principals were reinforced by the Commission in the case *of David Morrison v Keystone Steel and Wire, 14 WC 31081, 17 IWCC 0353.* In Morrison, the respondent

argued against causal connection when a post-accident MRI did not show any acute changes and therefore argued that there can be no aggravation. Commissioner's Luskin, DeVriendt and Coppoletti disagreed stating, *"Nothing in our Act places such a requirement of proof on the petitioner. Evidenced based medicine has not been added to our Act. The change in petitioner's symptoms, which he proved by his consistent histories to his doctors, is enough to prove his claim."* *David Morrison v Keystone Steel and Wire, 14 WC 31081, 17 IWCC 0353*

Petitioner clearly and credibly testified that he was able to return to the usual and customary duties of his occupation as US Foods delivery driver following the February 9, 2018 injury and surgery performed by Dr. Freedberg. It is undisputed that he was able to perform those activities up until the reinjury on October 24, 2019. It is also undisputed by his testimony and corroborated in the records offered by both parties that he did not seek medical treatment at all during the interval between these two injuries or require any days off work.

He rated his pain a 0 or 1 upon his return from the first accident verses a 9 or a 10 immediately following the injury of October 24, 2019. He immediately sought treatment at the employer's occupational health actually driving himself there in a company van after having reported the injury to his supervisor. He immediately stopped work and was no longer able to remain gainfully employed. He was ultimately advised by the company clinic to return to Dr. Freedberg for follow up treatment.

Petitioner saw Dr Freedberg on October 28, 2000. **PX3 at pg. 4**. Petitioner told Dr Freedberg that he re-injured his left knee at work or pulling a pallet and he instantly felt pain. He denied any pain or complications to the left knee after his initial surgery. Following examination Dr Freedberg' s impression was left knee effusion status post trauma following patella femoral

arthroplasty from August 13, 2018. In an addendum to Dr Freedberg clarified the injury to have occurred on October 24th 2019. **PX3 at pg.6.**

Petitioner returned to Dr Freedberg for revaluation on February 11, 2020. **PX3 at page 81.** His left knee pain was worsening. It was sharp and stabbing. Dr. Freedberg discussed surgery as a current option consisting of arthroscopy to evaluate the prosthesis and possible open removal HO, open patellar tendon debridement, possible revision UKA PFJ, possible revision to total knee arthroplasty.**PX3 at pg. 83**. Again Dr Freedberg listed the onset date of these reoccurring problems as October 24, 2019 as a result of a reinjury to his left knee.**PX3 at page 81**.

Petitioner was seen by Dr. Verma for an independent medical examination.**RX8**. The petitioner reported to Dr. Verma that he sustained another "re-injury' to his left knee while pushing a pallet. He reported pain and swelling. He was not able to perform his normal work duties. At the time Dr. Verma saw the petitioner he was not working and Dr. Freedberg was recommending arthroscopy of the knee with debridement and possible need for future transition to a total knee arthroplasty.**RX8**

Dr. Verma opined that the petitioner's *diagnosis* was left knee bone formation with persistent patellofemoral pain status post-patellofemoral arthroplasty. Dr. Verma wrote, "I see no indication the petitioner sustained an anatomic work injury as a result of the October 24, 2019 work injury. Although a strain may have been sustained, his current symptoms are laterally based with crepitation, grinding and pain consistent with patellofemoral heterotrophic bone formation related to his prior surgery."**RX.8.**

Dr. Verma opined that further treatment would be necessary in regard to a left knee arthroscopy with potential open hardware removal. Dr. Verma did not see an indication for a conversion to a total knee arthroplasty. Dr. Verma opined that the current need for treatment is unrelated to the work injury of October 24, 2019 but rather "related to the prior patellofemoral procedure resulting in heterotrophic bone formation.**RX8**

Dr. Verma went on to opine that the petitioner had reached maximum medical improvement with regard to any alleged work injury on October 24, 2019 and that there were no restrictions necessary with regard to that incident.**RX8.**

Ultimately the petitioner underwent surgery on March 20, 2020 at Ashton Center For Day Surgery.**PX3 at pgs. 97-98**. Following post-operative care and treatment the petitioner returned to work full duty on August 11, 2020 and was placed at maximum medical improvement by Dr. Freedberg on August 24, 2020.**PX 3**.

Based on the totality of circumstances including the testimony of petitioner and the chain of events analysis, it is clear that petitioner was able to function before October 24, 2019 and then immediately unable to function thereafter. He was no longer able to work. He resumed medical treatment and ultimately required a second surgical procedure.

Under Illinois law causation can be proven buy a "chain of events" which demonstrates proof of a state of health before work injury followed by deterioration afterwards. *International Harvester v. Industrial Comm'n, 93 Ill. 2d 59, 442 N.E. 2d 908(1982).* For the above reasons the arbitrator finds a causal relationship between petitioner's present condition of ill-being as it relates to his left leg/knee and need for a second surgical procedure performed by Dr. Freedberg and the accidental injuries sustained on October 24, 2019.

On the disputed issue of average weekly wage having found in favor of the petitioner as to accident and causation, the arbitrator finds the correct average weekly wages to be applied in this case to be the wages earned by petitioner in the year prior to the accident of October 24, 2019 and not the average weekly wage used in 18 WC 6067. For that reason the arbitrator finds petitioner's average weekly wage to be $1,782.34 and that the earnings in the year preceding the injury to be $67,729.00 as claimed by petitioner.**Arb.Ex2.**

On the disputed issue of what medical bills are the responsibility of the respondent the arbitrator state as follows. Petitioner claimed $1,921.69 in unpaid medical services provided to petitioner stemming from the accidental injuries sustained on October 24, 2019 that remain unpaid.**PX5**. The arbitrator finds these charges to be reasonable and necessary pointing out that petitioner did return to a very heavy occupation following the services provided by Dr Freedberg. For this reason the arbitrator rewards these unpaid charges in favor of petitioner and against the respondent to be paid by respondent pursuant to the fee schedule and section 8.2.

On the disputed issue of temporary total disability benefits and an overpayment alleged by the respondent the arbitrator makes the following decision. On the stipulation sheet **(Arb.Ex2)** the parties agreed that 41 weeks of temporary total disability were due and owing to petitioner from 10/29/19 through 8/10/2020. Both parties agreed that all TTD has been paid. Both parties agreed that respondent paid $57,727.59 in TTD benefits for this period. Having found petitioner's average weekly wage to be $1,782.37 the corresponding TTD rate that should have been paid to petitioner was $1,188.22. However the respondent actually paid TTD benefits at the rate of $1407.99 thereby resulting in a TTD overpayment of $9,010.16. The respondent is to receive a credit against any PPD awarded below equal to this amount as fully set forth below.

On the disputed issue of what is the nature and extent of petitioner's injuries the arbitrator states as follows. As a result of the first injury to his left knee on February 9th 2018, petitioner underwent a left knee arthroscopy and removal of loose bodies, partial lateral meniscectomy with an open patellofemoral arthroplasty and medial retinacular reefing by Dr. Freedberg on August 13th 2018.**PX2 at pgs.82-84.** As a result of the second injury sustained On October 24, 2019 petitioner underwent a revision left knee arthroscopy with removal of loose bodies, excision of the medial femoral condyle osteophyte with osteoplasty of the patella and open removal of the heterotopic ossification under fluoroscopic control.**PX3 at pgs.97-99.**

In determining the nature and extent of this injury, Section 8.1(b) states that:

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 (i) the arbitrator has reviewed the impairment rating provided by Dr. Verma.**RX9.** Dr. Verma provided an impairment rating of 20% lower extremity or 8% whole person. The Arbitrator gives this some weight. With regard to (ii) at the time of the time of Arbitration petitioner was employed as a delivery driver for US Foods. His job is very heavy.**PX4 at pgs.39-44**. The Arbitrator gives this moderate weight. With regard to (iii) petitioner is 45 years

of age and has perhaps 22 plus years of further employment as a delivery driver before retirement. The Arbitrator gives this significant weight. With regard to (iv), the petitioner's future earning capacity was not yet affected. He was released full duty following 2 extensive left knee surgeries and was working full duty at the time of Arbitration as a delivery driver. The Arbitrator gives this some weight. With regard to (v), petitioner testified at Arbitration that he is able to perform the essential functions of his job as a delivery driver. Of note is that he testified he has changed the way in which he performs his job. He is no longer capable of pulling the heavy pallet jack all the way to the delivery entrance. He credibly testified that given the two surgeries to his left knee he now lowers the lift gate to the street level and no longer pulls the pallet to the delivery entrance for risk of reinjury but instead delivers the product with a hand truck. The Arbitrator gives this considerable weight.

For the following reasons and pursuant to *City of Chicago v. Illinois Workers Compensation Commission, 409 Ill.App.3rd 258*, the Arbitrator awards petitioner 40% loss of use of the left leg or 86 weeks PPD at the permanent partial disability rate of $836.69 per/week, pursuant to Section 8(e)11 of the Workers' Compensation Act commencing on August 24, 2020 which was the date of petitioner's MMI determination by Dr. Freedberg. **PX3 at pg.128** Respondent is given a credit against this PPD award equivalent to the sum of $18,057.08 representing TTD overpayments in case 18 WC 6067 and 19 WC 31591.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC008834
Case Name	Garrett Williams v. State of Illinois - Vienna Correctional Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0476
Number of Pages of Decision	9
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Aaron Wright

DATE FILED: 11/9/2023

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GARRETT WILLIAMS,

Petitioner,

vs. NO: 19 WC 008834

STATE OF ILLINOIS-VIENNA CORRECTIONAL CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by both parties herein and notice given to all parties, the Commission, after considering the issue of nature and extent of the injury, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 29, 2022, is hereby affirmed and adopted.

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

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

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

November 9, 2023
KAD/bsd

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

O11/07/23
42

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC008834
Case Name	Garrett William v. State of Illinois/Vienna Correctional Center
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Aaron Wright

DATE FILED: 8/29/2022

THE INTEREST RATE FOR THE WEEK OF AUGUST 23, 2022 3.11%

/s/Linda Cantrell, Arbitrator
Signature

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

August 29, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

GARRETT WILLIAMS
Employee/Petitioner

Case # **19** WC **008834**

v.

Consolidated cases: _____

STATE OF ILLINOIS/VIENNA CORRECTIONAL CENTER
Employer/Respondent

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 **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Herrin, Illinois**, on **6/16/22**. By stipulation, the parties agree:

On the date of accident, **2/4/19**, 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 $**48,432.00**, and the average weekly wage was $**931.38**.

At the time of injury, Petitioner was **24** years of age, ***married*** with **1** dependent child.

Necessary medical services and temporary compensation benefits have been **or will be** provided by Respondent.

Respondent shall be given a credit of $**All TTD paid**, $**0** for TPD, $**0** for maintenance, and $**3,725.70** for overpayment of TTD benefits, for a total credit of $**3,725.70, plus all TTD paid**.

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

ORDER

Respondent shall pay Petitioner the sum of $**558.83**/week for a period of **87.5** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused permanent partial disability to the extent of **17.5%** loss of Petitioner's body as a whole related to his right shoulder. Respondent shall receive credit for overpayment of temporary total disability benefits of $3,725.70.

Respondent shall pay Petitioner compensation that has accrued from **5/11/21** through **6/16/22**, 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.

AUGUST 29, 2022

Arbitrator Linda J. Cantrell

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

GARRETT WILLIAMS,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No.: 19-WC-008834**
	)	
STATE OF ILLINOIS/	)	
VIENNA CORRECTIONAL CENTER,	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Mt. Vernon on June 16, 2022. This matter was arbitrated on August 13, 2020, pursuant to Section 19(b) of the Act. This Arbitrator found in favor of Petitioner on the issue of causal connection and awarded medical bills, temporary total disability benefits, and prospective medical care. (PX8) The Arbitrator incorporates the findings of the Decision dated 10/21/20 as if said findings were set forth fully herein.

Respondent stipulates that it has or will pay all reasonable, necessary, and causally connected medical bills. The parties stipulate that Respondent is entitled to a credit for all medical bills paid through its group medical plan under Section 8(j) of the Act. The parties stipulate that all temporary total disability benefits have been paid and Respondent is entitled to a credit for all TTD benefits paid. The parties further stipulate that Respondent shall be entitled to a credit for any overpayment of temporary benefits paid or shall be liable for any underpayment of temporary benefits. The sole issue in dispute is the nature and extent of Petitioner's injuries.

TESTIMONY

Petitioner was 24 years old, married, with one dependent child at the time of accident. Petitioner testified that following the Arbitrator Decision dated 10/21/20, he underwent a right shoulder surgery by Dr. Paletta. He testified that prior to his surgery he had daily pain and loss of motion. Petitioner testified that his condition improved with surgery and physical therapy. He was released to full duty work without restrictions and has returned to employment with Respondent.

Petitioner testified he still experiences soreness in his shoulder every morning. Physical activities such as work, hobbies, and chores increase his symptoms. He has tightness and sharp pain with overhead activity and decreased strength with lifting. He takes over-the-counter Ibuprofen and Tylenol five days per week.

Petitioner testified that his hobbies of playing disc golf, basketball, bowling, and playing with his two children have been adversely affected. Petitioner is right hand dominant and forceful or quick motions with his right shoulder results in tightness and pain. Petitioner testified he is able to bass fish with an open face reel. He testified that the doors at Respondent's facility are older and heavy, and he has difficulty unlocking and turning them. He has not missed work for his work-related condition since being released full duty.

MEDICAL HISTORY

On 11/11/20, Dr. Paletta noted Petitioner's right shoulder symptoms were unchanged and his recommendation for surgery remained the same. He kept Petitioner on work restrictions of no overhead work or lifting over 10 pounds.

On 11/23/20, Dr. Paletta performed a right shoulder biceps tenotomy, debridement of the superior labrum, excision of os acromiale, subacromial decompression, bursectomy, acromioplasty, and distal clavicle excision. (PX5) Intraoperative objective findings consisted of a type II SLAP tear, postop scarring at the rotator interval, proliferative subacromial bursitis, instability of the os acromiale, articular cartilage erosion at the distal clavicle, and anterolateral acromial spurs.

Petitioner was released to light duty work on 12/1/20. He underwent physical therapy at Massac Memorial Hospital.

On 2/10/21, Petitioner reported he still had discomfort with cross-body activities. Dr. Paletta noted that his physical therapy had not been approved by workers' compensation and he had been performing home exercises. Physical examination revealed supraspinatus weakness and residual pain on cross-body adduction testing. Dr. Paletta continued his work restrictions and prescribed an additional four weeks of physical therapy.

Petitioner underwent therapy at CORE Physical Therapy. He returned to Dr. Paletta on 3/30/21 and stated he was doing well, but he still had pain along the anterior shoulder to the bicipital groove that was noticeable with cross-body activities. Examination revealed pain at the end of forward flexion, tenderness to palpation at the bicipital groove, and discomfort with O'Brien's testing. Dr. Paletta believed Petitioner had bicipital groove pain status post biceps tenotomy. He recommended an ultrasound-guided injection and a Prednisone taper. Dr. Paletta continued his light duty restrictions.

Petitioner underwent right shoulder injections into the glenohumeral joint and bicipital groove at CT Partners of Chesterfield. (PX7) On 5/11/21, Petitioner returned to Dr. Paletta and reported significant relief for the first four to five days, and that although it had worn off slightly, his symptoms were overall improved. Dr. Paletta noted Petitioner had some residual symptoms

and fatigue with repetitive activities but was overall doing well. He recommended expectant observation and symptomatic treatment, including over-the-counter anti-inflammatories or Tylenol, and placed Petitioner at maximum medical improvement without restrictions.

CONCLUSIONS OF LAW

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

(i) **Level of Impairment**: Neither party submitted an AMA rating. Therefore, the Arbitrator gives no weight to this factor.

(ii) **Occupation**: Petitioner was released to full duty work without restrictions, and he continues to serve as a Correctional Officer for Respondent. The Arbitrator places greater weight on this factor.

(iii) **Age**: Petitioner was 24 years old at the time of accident. 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. Petitioner was released to full duty work and returned to his pre-accident position with Respondent. The Arbitrator gives some weight to this factor.

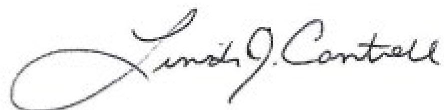
(v) **Disability**: Petitioner sustained injuries to his right shoulder that required two surgeries. Petitioner underwent a right shoulder arthroscopy with posterior labral repair on 5/28/19. On 11/23/20, Petitioner underwent an arthroscopic debridement of the superior labrum from anterior to posterior, subacromial decompression, bursectomy and acromioplasty, biceps tenotomy, excision of os acromiale, and distal clavicle excision. He was released to full duty work without restrictions.

Petitioner testified that his condition improved following his second surgery, however, he continues to experience soreness, decreased strength with lifting, and pain and tightness with overhead activities and forceful or quick motions. His hobbies of playing disc golf, basketball, bowling, and playing with his children have been adversely affected. He experiences increased difficulty with unlocking

and opening heavy doors at Respondent's facility. He takes over-the-counter medications five days per week to manage his symptoms. The Arbitrator places greater weight on this factor.

Based upon the aforementioned factors, the Arbitrator finds Petitioner sustained permanent partial disability to the extent of 17.5% loss of his body as a whole related to his right shoulder, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from 5/11/21 through 6/16/22, 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	20WC000522
Case Name	William L. Crase v. State of Illinois - Northern Illinois University
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0477
Number of Pages of Decision	10
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Gregory Szul
Respondent Attorney	Drew Dierkes

DATE FILED: 11/9/2023

/s/Amylee Simonovich, Commissioner

Signature

STATE OF ILLINOIS	)	☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
	) SS.		☐ Rate Adjustment Fund (§8(g))
COUNTY OF KANE	)		☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
			☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM L. CRASE,

Petitioner,

vs. NO: 20 WC 00522

STATE OF ILLINOIS – NORTHERN ILLINOIS UNIVERSITY,

Respondent.

DECISION AND OPINION ON REVIEW

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

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

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

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

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.

November 9, 2023
O110123
AHS/ldm
051

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC000522
Case Name	CRASE, WILLIAM L. v. STATE OF ILLINOIS/NORTHERN
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Gerald Granada, Arbitrator

Petitioner Attorney	Gregory Szul
Respondent Attorney	Drew Dierkes

DATE FILED: 9/6/2022

THE INTEREST RATE FOR THE WEEK OF AUGUST 30, 2022 3.23%

/s/Gerald Granada, Arbitrator

Signature

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

September 6, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

William L. Crase
Employee/Petitioner

Case # **20** WC **000522**

v.

Consolidated cases: **n/a**

State of Illinois / Northern Illinois University
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **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. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other ______

FINDINGS

On **5/30/19**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**99,690.73**; the average weekly wage was $**1,917.13**.

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 for any for any TTD it has paid.

Respondent is entitled to a credit for any expenses that have been paid under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $2,489 to Rockford Anesthesiologists and $165.84 to Ortho Illinois, and shall reimburse Petitioner $62.92 for out of pocket medical expenses, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit for any medical benefits that it may have paid under Section 8(j) of the Act, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

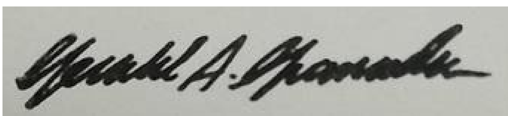
Respondent shall pay Petitioner temporary total disability benefits of $1,278.09/week for 62 weeks, commencing 2/1/20 through 4/9/21, as provided in Section 8(b) of the Act and Respondent shall receive a credit for any TTD it has paid.

Respondent shall pay Petitioner permanent and total disability benefits of $**1,278.09**/week for life, commencing **4/10/21**, as provided in Section 8(f) of the Act. Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) of the Act.

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

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

SEPTEMBER 6, 2022



Signature of Arbitrator **Gerald Granada**

FINDINGS OF FACT

This case involves Petitioner William L. Crase, who alleges to have sustained injuries while working for the Respondent Northern Illinois University on May 30, 2019. Respondent disputes Petitioner's claim, with the issues being: 1) causation; 2) medical expenses; 3) TTD; and 4) nature and extent.

Petitioner began working for Respondent in December of 2004 as a roofer foreman. His duties included maintaining and performing general repairs of all the roofs at Northern Illinois University. He worked full time and never missed any significant time from work until May 30, 2019. Petitioner never had any right knee symptoms prior to May 30, 2019.

On May 30, 2019, Petitioner was working on a roof when he tripped over a "parapet" wall, or a short wall that divides different parts of a roof. Upon tripping, he twisted his right knee and fell to the ground, and immediately felt a tearing and burning sensation in his right knee. He reported the accident to his supervisor and returned to the main office.

On the day of the accident, Petitioner was first seen for medical treatment at Monroe Clinic Urgent Care. (PX1). He was diagnosed with a knee sprain, given a brace and crutches, and taken off work. On June 4, 2019, Petitioner followed up with Monroe Clinic and was referred to an orthopedic surgeon and kept off work.

On June 10, 2019, Petitioner was first seen by Dr. Geoffrey Van Thiel, an orthopedic surgeon at Ortho Illinois. (PX2). Dr. Van Thiel diagnosed him with knee pain and ordered an MRI. On June 13, 2019, Petitioner underwent a right knee MRI which demonstrated a complex horizontal tear of the medial meniscus, subcutaneous fluid, and mild osteoarthritis. (PX2 – 6). On June 21, 2019, Dr. Van Thiel recommended surgery.

On July 18, 2019, Petitioner underwent a right knee arthroscopy and partial medial and lateral meniscectomy. (PX2 – 18). Dr. Van Thiel noted intraoperatively a large medial meniscal tear and small lateral meniscal tear.

From July 31, 2019 to October 25, 2019, Petitioner underwent post-op therapy at Freeport Health Network. (PX3).

On September 23, 2019, Petitioner was seen by Dr. Van Thiel noting ongoing symptoms and limitations. (PX2 – 26). Dr. Van Thiel ordered an MRI. On October 3, 2019, an MRI was performed which demonstrated chondromalacia in the medial and lateral compartments with chondral loss in the medial femoral condyle, along with post-surgical changes. (PX2 – 28).

On October 7, 2019, Petitioner returned to Dr. Van Thiel who noted continued limitations and pain. (PX2 – 32). Dr. Van Thiel ordered an FCE to establish permanent restrictions. He also indicated that Petitioner may need further treatment which would include activity modification, anti-inflammatory use, or a knee arthroplasty. (PX2 – 32). On June 22, 2020, Dr. Van Thiel testified evidence deposition. (PX7) His testimony was consistent with his medical reports, and he opined that Petitioner's permanent work restrictions as set forth in his FCE were causally related to his work injury.

On December 16, 2019, Petitioner was seen by Dr. Daniel Troy at Respondent's request pursuant to Section 12 of the Act. (RX3) On September 19, 2020, Dr. Troy testified via evidence deposition. Dr. Troy opined Petitioner was status post diagnostic right knee arthroscopy with continued symptomatology around the medial tibiofemoral compartment that appears to correlate with underlying degenerative changes. Dr. Troy found Petitioner lacked objective findings and his subjective complaints went hand-in-hand with his preexisting,

longstanding, degenerative changes of the medial tibiofemoral compartment. Dr. Troy found that treatment to that point had been reasonable and necessary, but any future treatment would be for non-workers' compensation related medial based pain. Dr. Troy opined Petitioner was able to return to work full duty from the workers' compensation associated meniscal pathology.

On January 20, 2020, Petitioner was seen by Dr. Robin Borchardt at Ortho Illinois. (PX2 – 37). Dr. Borchardt diagnosed him with chondromalacia and status post complex tear of the medial meniscus, and referred him to the Ortho Illinois total joint team.

On February 28, 2020, Petitioner began treatment with Dr. Mark Barba, an orthopedic surgeon at Ortho Illinois. (PX4). Dr. Barba noted the commencement of symptoms on May 30, 2019, the July 2019 arthroscopy, and Petitioner's continued knee complaints. A knee x-ray was performed. Dr. Barba noted that the diagnostic imaging revealed significant joint destruction and cartilage loss and recommended a right knee replacement.

On May 18, 2020, Petitioner underwent a right total knee replacement. (PX4 – 17). He underwent post-op therapy in 2020 at FHN Memorial Hospital (PX5), and later in 2020-2021 at the Answer Physical Therapy. (PX6).

Petitioner continued to treat with Dr. Barba after the knee replacement. Dr. Barba kept him off work or placed him on sedentary duties. Petitioner has never returned to work since the accident date and Respondent has never accommodated his restrictions. On January 13, 2021, Dr. Barba testified via evidence deposition. (PX8) His testimony was consistent with his medical records, and he opined that the Petitioner's work injury caused further damage to Petitioner's mildly degenerative knee condition and accelerated the wear and ultimate need for a total knee replacement. (PX8 – 17).

On April 2, 2021, Petitioner was again examined by Dr. Barba. (PX4 – 51). At that time, Dr. Barba noted that Petitioner had plateaued with therapy and that he "will need to consider permanent disability, as he will not be able to return to roofing." Dr. Barba noted that "sedentary work is permanent." A "sedentary permanent work only" work slip was given. (PX4 – 55).

On April 9, 2021, Dr. Barba placed Petitioner at maximum medical improvement with the sedentary permanent work restriction but noted he would follow up with Petitioner twice per year for insurance purposes. (PX4 - 56). Petitioner has been seen by Dr. Barba again on September 10, 2021 and March 11, 2022 with no change in his condition.

Petitioner testified he continues to have daily swelling, pain, and weakness in his right knee. He wears a sleeve brace for support, has to sit with his leg extended straight, and has difficulty bending the knee. He cannot squat or walk for any significant distance. His wife has taken over general upkeep of the house such as mowing the lawn. Petitioner testified he never had any right knee problems before the accident and that he used to walk his dog daily for 2-4 miles.

Petitioner testified he graduated Foreston High School in 1983. He has had no subsequent education. From 1983 to 1986, he worked as an auto body technician. From 1986 to 2004, he worked at Freeport Industrial, performing similar roofing duties as he did for the Respondent from 2004-2019. He has never worked at an office and is not good with computers. He has a smart phone from which he can call and text, but does not use e-mail or know how to upload a document. His keyboarding skills are basically "hunting and pecking."

On August 18, 2021, Petitioner met with Kathleen Mueller, a certified rehabilitation specialist, who testified via evidence deposition on July, 6, 2022. (PX9). She testified that Petitioner has a singular work history in that he

has primarily worked in the roofing industry through the date of his accident. She confirmed that Petitioner cannot return to his prior line of work based on his sedentary work restrictions and that there are really no employment opportunities for Petitioner without any additional training.

After the accident, Petitioner did receive some Disability benefits through a private policy he purchased through Prudential. As part of receiving those benefits, Prudential had him work with a vocational counselor to attempt to obtain employment within his permanent sedentary restriction. Petitioner did not find any employment he was qualified for within his restrictions. Petitioner's date of birth is March 12, 1965 and he was 56 years of age when released with permanent restrictions in April of 2021.

CONCLUSIONS OF LAW

1. Regarding the issue of causation, the Arbitrator finds that the Petitioner has met his burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's unrebutted testimony and the medical evidence from Petitioner's various medical providers that show Petitioner sustained an injury to his right leg following his undisputed May 30, 2019 work accident. The Arbitrator finds persuasive the opinions Petitioner's treating physicians Dr. Van Thiel and Dr. Barba on this issue: that Petitioner's right leg condition is causally related to the May 30, 2019 work accident. Although Respondent disputes this issue primarily on the opinions of their IME Dr. Troy – who opined that the Petitioner's current right leg condition are due to longstanding, preexisting arthritis - the Arbitrator notes that Petitioner testified that he was not experiencing any pain or problems with his right knee prior to this accident and there was no medical evidence to the contrary. The Arbitrator finds reasonable Dr. Barba's opinion that the Petitioner's work injury caused further damage to Petitioner's mildly degenerative knee condition and accelerated the wear and ultimate need for a total knee replacement. Accordingly, the Arbitrator concludes that the Petitioner's current condition of ill-being relating to his right knee are causally connected to his May 30, 2019 work accident.

2. Regarding the issue of medical expenses, the Arbitrator finds that the Petitioner's medical expenses related to his right knee condition have been reasonable and necessary in addressing his work-related conditions. As such, the Arbitrator awards the Petitioner the medical expenses set forth in Petitioner's Exhibits, subject to the Fee Schedule. This includes an outstanding $2,489.00 bill for Rockford Anesthesiologist, a $165.84 bill that is still outstanding to Ortho Illinois, and Petitioner's $62.92 paid out of pocket toward the Ortho Illinois bills – Respondent shall pay those providers directly in accordance with the Fee Schedule and shall pay Petitioner his out-of-pocket expenses. Respondent shall be given a credit for medical benefits that have been paid and Respondent shall hold Petitioner harmless from any claims by any providers for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

3. Regarding the issue of TTD, the Arbitrator finds that the Petitioner was temporarily totally disabled from May 30, 2019 through April 9, 2021. In support of this finding, the Arbitrator relies on the testimony of both Petitioner and his treating physicians, and the Petitioner's medical evidence. Petitioner testified that he has not returned to work since the accident date. The medical evidence shows that the Petitioner's treating physicians either completely took Petitioner off work or gave him work restrictions which Respondent did not or could not accommodate during this time period. Petitioner was found to be at maximum medical improvement on April 9, 20201. Accordingly, the Arbitrator awards Petitioner TTD for the time period indicated above. Respondent shall receive a credit for any TTD it has already paid.

4. Regarding the issue of nature and extent, the Arbitrator concludes that based on the Petitioner's medical evidence and his unrebutted testimony regarding his medical treatment, complaints and physical limitations following his work accident, the Petitioner's injuries stemming from his May 30, 2019 accident have resulted in him becoming permanently totally disabled under the "odd lot" category. The Appellate Court held in Pisano v Ill Workers Comp Comm'n, 2018 IL app (1st)172712WC, if an employee's disability is limited and it is not obvious that the employee is unemployable, the employee may nevertheless demonstrate an entitlement to permanent total disability by proving he or she fits within the "odd lot" category, which consists of employees who, "though not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market." The Appellate Court further noted that an employee generally fulfills the burden of establishing that he or she falls into the "odd lot" category in one of two ways: 1) by showing a diligent but unsuccessful search for employment; or 2) by demonstrating that because of age, training, education, experience, and condition, there are no available jobs for a person in his or her circumstance. Pisano v IL Worker's Compensation Comm'n, 2018 IL App (1st)172712WC, paragraph 73. In the present case, the Petitioner has shown a diligent but unsuccessful search for employment – thereby satisfying the first criteria of falling into an odd-lot category per Pisano. Furthermore, the facts show that Petitioner has satisfied the second criteria set forth in the Pisano decision, given Petitioner's current age of 56, his 12th grade education, his limited work experience in roofing, his permanent work restrictions, and his inability to find work after a self-directed job search with the assistance of a vocational rehabilitation consultant Kathleen Mueller. Therefore, the Respondent shall pay Petitioner permanent and total disability benefits of $ 1,278.09/week for life, commencing April 10, 2021 – the date Petitioner reached maximum medical improvement - as provided in Section 8(f) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC025878
Case Name	Jeff Keck v. Vee-Jay Cement Contracting Company Inc.
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0478
Number of Pages of Decision	11
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	David Galanti
Respondent Attorney	Donald Murphy

DATE FILED: 11/14/2023

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JEFF KECK,

Petitioner,

vs. NO: 16 WC 25878

VEE-JAY CEMENT
CONTRACTING COMPANY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of vocational rehabilitation and maintenance benefits, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission 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 14, 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 shall authorize and pay for vocational rehabilitation services as provided in Section 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 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 $400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

November 14, 2023
O: 10/05/23
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	16WC025878
Case Name	Jeff Keck v. Vee Jay Cement Contracting Company
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	David Galanti
Respondent Attorney	Donald Murphy

DATE FILED: 11/14/2022

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

/s/*William Gallagher, Arbitrator*

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jeff Keck
Employee/Petitioner

Case # 16 WC 25878

v.

Consolidated cases: n/a

Vee Jay Cement Contracting Company
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on 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 Vocational Rehabilitation Services

FINDINGS

On the date of accident, August 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 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 $39,897.84; the average weekly wage was $763.42.

On the date of accident, Petitioner was 42 years of age, married with 0 dependent child(ren).

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

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

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

ORDER

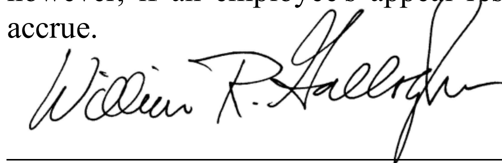
Respondent shall pay Petitioner temporary total disability benefits of $508.95 per week for 4/7 weeks, commencing May 22, 2022, through May 25, 2022, as provided in Section 8(b) of the Act.

Respondent shall authorize and pay for vocational rehabilitation services, 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.



NOVEMBER 14, 2022

William R. Gallagher, Arbitrator
ICArbDec19(b)

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment by Respondent on August 9, 2016. According to the Application, Petitioner "Tripped on rebarb carrying wood" and sustained an injury to his "Left foot" (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of temporary total disability benefits and that Respondent be ordered to provide vocational rehabilitation services to Petitioner. In regard to temporary total disability benefits, Petitioner claimed he was entitled to temporary total disability benefits of 18 5/7 weeks, commencing May 22, 2022, through the date of trial, September 29, 2022 (Arbitrator's Exhibit 1).

This case was previously tried before the Arbitrator on two separate occasions, both of which were 19(b) proceedings. The Arbitrator initially heard the case on June 8, 2021, and his Decision was entered on August 2, 2021. The Arbitrator ruled Petitioner had sustained an injury to his left foot/ankle and ruled Respondent was liable for the medical expenses incurred by Petitioner. However, the Arbitrator ruled Petitioner's low back condition was not related to the accident and denied the claim for medical services provided to Petitioner and prospective medical treatment for his back condition (Petitioner's Exhibit 1).

Petitioner filed a Review of the Arbitrator's Decision to the Commission. In an order dated January 13, 2022, the Commission modified the Arbitrator's Decision and ruled in favor of the Petitioner awarding medical bills and prospective medical treatment in regard to Petitioner's low back condition (Petitioner's Exhibit 1). Respondent filed an Appeal of the Decision of the Commission, and it is presently pending in the Appellate Court.

The Arbitrator subsequently heard another 19(b) proceeding on March 29, 2022, and the Decision was entered on May 3, 2022. The Arbitrator ruled in Petitioner's favor and awarded temporary total disability benefits and directed Respondent to pay for an examination with Dr. Bagwe, Petitioner's treating physician, and a Functional Capacity Evaluation (FCE), if Dr. Bagwe ordered same (Petitioner's Exhibit 2). Respondent did not file a Review of the Arbitrator's Decision to the Commission.

Pursuant to the Arbitrator's Decision of May 3, 2022, Dr. Bagwe evaluated Petitioner on May 25, 2022. At that time, Petitioner complained of ongoing difficulties with his left foot/ankle. Petitioner advised that his left foot/ankle felt like it was going to go out on him, had occasional numbness over the side of his ankle and soreness over the top of the foot. Petitioner was concerned about walking on uneven surfaces and carrying heavy weights. On examination, Dr. Bagwe noted some loss of motion and discomfort over the site of the peroneal tendon surgery (Petitioner's Exhibit 3).

Dr. Bagwe noted Petitioner had undergone surgeries and multiple evaluations and was videoed being active. Because of the residual stiffness he noted on examination and a slight loss of motion, he opined Petitioner would have difficulty and should avoid carrying more than 50 pounds on poorly compacted, ungraded or inclined surfaces. He opined this was a permanent restriction and Petitioner was at MMI. Dr. Bagwe did not order an FCE (Petitioner's Exhibit 3).

At trial, Respondent tendered into evidence the deposition testimony of Dr. John Krause dated November 24, 2021, the written summary of the surveillance of Petitioner which was conducted on May 24, 2021, and the surveillance video of Petitioner of May 24, 2021 (Respondent's Exhibits 1, 2 and 3). The Arbitrator previously referenced Dr. Krause's deposition testimony and the video surveillance of Petitioner in his prior Decision of May 9, 2022. The Arbitrator does not see any need to restate same at this time.

Petitioner testified that, at the time he sustained the accident, he had been a union laborer for over eight years. When Petitioner was working, he routinely carried objects which weighed 50 pounds or more over uneven surfaces. Some of the objects carried by Petitioner were cinder blocks, wood and five gallon buckets with concrete pins. The Petitioner testified he was never disciplined for carrying 50 pounds or more on a worksite and he never observed anyone being disciplined for carrying greater than 50 pounds. Petitioner testified he had a GED and did not believe he could make as much in the open labor market. This was the basis of the demand Respondent provide him with vocational rehabilitation services.

On cross-examination, Petitioner acknowledged he was no longer a member of the union because he had not paid a reinstatement fee. He could not recall the last time he paid union dues. Petitioner agreed he was terminated by Respondent because he had failed a drug test. He was not aware of what steps he needed to take to get back on the list of union workers permitted to return to work after failing a drug test. He believed it was only necessary for him to pay his union dues to be reinstated.

Brandon Royer, the union Business Manager, was deposed on September 27, 2022, and his deposition testimony was received into evidence at trial. Royer's job duties consist of sending union laborers out to work for various contractors when they call in for same. Royer has been the Business Manager for the union since 2013 and previously worked as a laborer beginning in 2003. Royer stated he was familiar with Respondent because it is one of the larger contractors that he deals with on a regular basis (Petitioner's Exhibit 4; pp 4-6).

As the Business Manager, Royer testified he has never sent anyone to work for a contractor that had permanent work restrictions because prospective employers do not have light duty work. He was not aware of Petitioner's work restrictions; however, the union does not have any members who are physically incapable of carrying over 50 pounds while walking on uneven surfaces. During the time Royer worked as a laborer, he personally lifted over 50 pounds and it was common for laborers to do so (Petitioner's Exhibit 4; pp 6-7, 13).

On cross-examination, Royer acknowledged Petitioner was no longer a member of the union and not on the master list. When questioned about safety training, Royer agreed he was familiar with the NIOSH recommendation no one lift over 50 pounds without assistance. He has undergone safety training and confirmed the union provides safety training for its members (Petitioner's Exhibit 4; pp 8-10).

Royer testified that if one of the members had physical restrictions, he would not know unless the member told him. He testified members do not provide him with medical documentation and

he does not review their medical records. He was aware Petitioner was terminated by Respondent for failing a drug test and testified there is a three step process that a member must go through afterward. If a member does not complete three step process, the union membership will be terminated (Petitioner's Exhibit 4; pp 10-15).

Dan Boyd testified for Respondent. Boyd has worked for Respondent for 15 years and is the Safety Director. He confirmed Petitioner was terminated by Respondent for failing a drug test and the letters from Respondent to the Petitioner and union were tendered into evidence (Respondent's Exhibits 6 and 7).

Boyd testified there would be no issues about Petitioner returning to work for Respondent with a restriction of carrying no more than 50 pounds on poorly compacted, ungraded and inclined surfaces. He stated the 50 pound limit was pursuant to NIOSH standards which Respondent followed. He testified that if someone was observed lifting more than 50 pounds without assistance, a verbal reprimand would be given, possibly followed by a written disciplinary statement which could lead to termination. Boyd testified individuals employed by Respondent have been disciplined for exceeding the lifting restriction.

On cross-examination, Boyd testified employees have been written up for violating the lifting restriction, but none have been terminated. When asked about the last time he wrote someone up for violating the lifting restriction, he could not provide a specific date, but stated it was probably within the last six months.

At trial, Petitioner testified he continues to have left foot/ankle symptoms and is subject to work restrictions. He wants vocational rehabilitation/training. Petitioner conceded on cross-examination that he has not attempted to find work within his restrictions.

Conclusions of Law

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

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 4/7 weeks, commencing May 22, 2022, through May 25, 2022.

In support of this conclusion the Arbitrator notes the following:

Petitioner's treating physician, Dr. Bagwe, opined Petitioner was at MMI, when he evaluated him on May 25, 2022.

In the Arbitrator's Decision of May 3, 2022, he noted both Dr. Bagwe, Petitioner's primary treating physician, and Dr. Krause, Respondent's Section 12 examiner, had evaluated Petitioner and watched the surveillance video. He ruled the opinion of Dr. Bagwe to be more persuasive than that of Dr. Krauss in regard to the need of obtaining a Functional Capacity Evaluation (FCE) to determine Petitioner's work restrictions.

When Dr. Bagwe evaluated Petitioner on May 25, 2022, he opined Petitioner had permanent restrictions of no carrying more than 50 pounds on poorly compacted, ungraded or inclined surfaces and Petitioner was at MMI. The Arbitrator is unable to determine why Dr. Bagwe did not order an FCE; however, the Arbitrator finds the opinion of Dr. Bagwe to be more persuasive than that of Dr. Krause in regard to Petitioner's work restrictions.

Both Petitioner and Brandon Royer, the union Business Manager, testified there was no light duty work available for the union laborers.

Petitioner testified that, when he worked as a laborer, he would routinely lift/carry objects which weighed in excess of 50 pounds, was never disciplined for doing so and never observed anyone else being disciplined for doing so.

Royer likewise testified that, when he worked as a laborer, he would lift objects which weighed in excess of 50 pounds and was it customary for other laborers to do so.

As the Business Manager for the union, Royer testified he would not send anyone to work for a contractor who had permanent work restrictions because prospective employers did not have light duty work available.

Dan Boyd, Respondent's Safety Director, testified that, pursuant to NIOSH, Respondent imposed a 50 pound lifting restriction on its employees. He testified about the disciplinary steps that would be taken if someone violated the lifting restriction. However, he had no real specific information as to the frequency of such disciplinary measures and only recalled having written someone up within the last six months.

Based on the preceding, the Arbitrator finds the testimony of Petitioner and Royer to be more persuasive than that of Boyd. While Respondent may have had such a lifting restriction rule in place, actual compliance/enforcement of same appears to be highly questionable.

The fact that Petitioner could not return to work for Respondent because of the failed drug test and his noncompliance with the union rules regarding same is not relevant to determine Petitioner's entitlement to temporary total disability benefits. The basis of Petitioner's entitlement to temporary total disability benefits are the work restrictions imposed by Dr. Bagwe and the inability of Respondent to offer work consistent with said restrictions. *Interstate Scaffolding v. Workers' Compensation Commission*, 896 N.E.2d 1132 (3rd Dist. 2008).

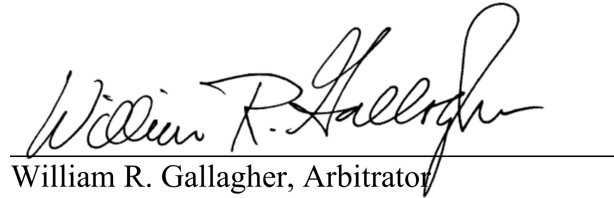
Petitioner's entitlement to temporary total disability benefits is limited to May 25, 2022, when he was found to be at MMI by Dr. Bagwe, his treating physician. *Gallianetti v. Industrial Commission*, 734 N.E.2d 482 (3rd Dist. 2000).

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

The Arbitrator concludes Petitioner is entitled to vocational rehabilitation services to be provided at Respondent's expense.

In support of this conclusion the Arbitrator notes following:

As noted herein, the Arbitrator has determined Petitioner is not able to return to work to his customary employment as a laborer because the work restrictions imposed by his treating physician. Petitioner has a limited education and work background.



William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC010805
Case Name	Norberto Lara v. Olympic Oil Ltd
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0479
Number of Pages of Decision	25
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Matthew Smart
Respondent Attorney	Jeffrey Powell

DATE FILED: 11/14/2023

/s/Christopher Harris, Commissioner
Signature

DISSENT: /s/Christopher Harris, Commissioner
Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

NORBERTO LARA,

Petitioner,

vs. NO: 18 WC 10805

OLYMPIC OIL,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission finds that the Arbitrator's Decision and the parties' Briefs regarding causal connection were limited to Petitioner's right knee. The Arbitrator determined that Petitioner's right knee meniscal tear and symptomatic degenerative osteoarthritis and chondromalacia were the result of the March 15, 2018 undisputed work accident. Notwithstanding, some of the medical bills that the Arbitrator awarded were not related to treatment for the right knee. While the Commission affirms the Arbitrator's Decision with respect to causal connection, the Commission modifies the Arbitrator's award of medical bills to only award the following outstanding charges that are reasonable, necessary and related to medical services for the right knee:

a) PX3: St. Jude: $150.00 (1/4/19);
b) PX6: Chicago Pain & Orthopedic Institute: $11,762.60;
c) PX7: Archer Open MRI: $1,950.00 (4/20/18); $205.00 (4/21/18); $205.00 (8/7/18); $175.00 (8/16/18);
d) PX8: Bone and Joint Clinic: $4,618.79;
e) PX9: Procare DME: $1,800.00;
f) PX10: Windy City Anesthesia: $3,201.00;
g) PX11: Accredited Ambulatory Care: $15,937.14;
h) PX12: Rx Development: $194.30;

i) PX14: ATI Physical Therapy: $2,947.80;
j) PX15: Advanced Rx Management: $3,578.22; and,
k) PX16: IWP: $74.14.

TOTAL: $46,798.99

The Commission next modifies the Arbitrator's award for temporary benefits. The Arbitrator awarded TTD benefits from April 9, 2018 [the date Dr. Sclamberg first took Petitioner off work] through February 25, 2019 [the date Dr. Sclamberg discharged Petitioner from treatment with permanent work restrictions pursuant to the FCE]. The evidence demonstrated that Petitioner was off work per Dr. Sclamberg's instructions during this claimed TTD period. However, Dr. Sclamberg's February 25, 2019 follow-up office visit note specifically stated: "The patient will return back to work per the valid FCE *in three weeks* placing him at the light to medium physical demand level. He will follow up with pain management for further treatment. Follow up with us as needed." The patient status report also signed by Dr. Sclamberg and dated February 25, 2019, indicated that Petitioner was to "[r]eturn to limited duties on 3/18/19 per valid FCE…". Accordingly, the Commission finds that the TTD period should be extended and modified to April 9, 2018 through March 18, 2019 to conform with Dr. Sclamberg's recommendation as contained in the medical records.

The Commission also addresses Petitioner's entitlement to maintenance benefits. The Arbitrator awarded maintenance for the period of time commencing February 26, 2019 through trial on March 28, 2022. The Commission modifies this award of maintenance and finds that Petitioner is entitled to maintenance benefits commencing March 19, 2019 through June 24, 2019, the period of time during which Petitioner performed a self-directed job search.

Under Section 8(a) of the Act, an employer shall pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto. *820 ILCS 305/8(a)*. Thus, Section 8(a) of the Act permits an award of maintenance benefits while a claimant is engaged in a prescribed vocational-rehabilitation program. Our Courts have instructed that vocational rehabilitation may include, but is not limited to, counseling for job searches, supervising job search programs, and vocational retraining that may involve education at an accredited learning institution. An employee's self-directed job search may also constitute as a vocational-rehabilitative program. *Roper Contr. v. Indus. Comm'n*, 349 Ill. App. 3d 500, 506 (2004); see also *W. B. Olson v. Ill. Workers' Comp. Comm'n*, 2012 IL App (1st) 113129WC, ¶ 39; see also *Euclid Bev. Ill. Workers' Comp. Comm'n*, 2019 IL App (2d) 180090WC, ¶ 30.

In this claim, the valid FCE results, dated February 21, 2019, indicated that Petitioner could return to work in the light to medium physical demand level. His job as a machine operator was categorized in the medium physical demand level. Dr. Sclamberg released Petitioner to work with permanent restrictions per the FCE. The Commission finds credible Petitioner's testimony that he presented his restrictions to Respondent, looked for work for some time, and that he completed job logs which he provided to his attorney but ultimately could not obtain employment due to his limitations. Petitioner was asked what he did for money after he was released by Dr. Sclamberg and Petitioner testified, "I have my savings. I began to look for jobs, but there were no jobs given

to me due to my limitations." (T.20). Thereafter, at Respondent's request, and without the receipt of benefits, Petitioner attended another Section 12 examination with Dr. Cherf on June 24, 2019. Dr. Cherf noted, "Mr. Lara states that he is really not looking for a new job at this time…". The record further indicates that Petitioner reported that he applied for unemployment benefits, eventually applied for SSDI benefits and was in fact on SSDI at the time of trial.

Based on the preponderance of the credible evidence, the Commission finds that Petitioner engaged in a self-directed job search and is thus entitled to maintenance benefits during that search. Accordingly, the Commission modifies the Arbitrator's award and finds that Petitioner was entitled to maintenance benefits commencing March 19, 2019 through the date he stopped looking for work as indicated in Dr. Cherf's Section 12 report dated June 24, 2019.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 27, 2022 is hereby modified 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 consistent with this Decision in the amount of $46,798.99 and 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 $345.87 per week for 49 1/7 weeks, from April 9, 2018 through March 18, 2019, that being the period of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit for TTD previously paid to Petitioner in the amount of $3,853.98.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner maintenance benefits of $345.87 per week for 14 weeks, from March 19, 2019 through June 24, 2019, pursuant to Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner permanent partial disability benefits of $319.00 per week for 53.75 weeks because the injuries sustained caused 25% loss of use of the leg pursuant to Section 8(e) of the Act.

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

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

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

November 14, 2023
CAH/pm
O: 10/19/23
052

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

/s/ *Marc Parker*
Marc Parker

DISSENT

I would affirm and adopt the Arbitrator's award of TTD benefits from April 9, 2018 through February 25, 2019, the date Dr. Sclamberg determined Petitioner's condition had stabilized. TTD benefits are awarded for the period in 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. *Freeman United Coal Mining Co. v. Indus. Comm'n*, 318 Ill. App. 3d 170, 177 (2000). In the case at bar, Dr. Sclamberg's February 25, 2019 office visit note provided several recommendations including that Petitioner follow-up with pain management for further treatment unrelated to this claim, that he return to work per the valid FCE in three weeks and to follow-up as needed. Dr. Sclamberg's additional recommendations do not change the fact that as of February 25, 2019, he believed Petitioner's work-related right knee condition had stabilized and he recommended no further treatment for the right knee. As such, Petitioner was only entitled to TTD benefits through February 25, 2019.

With respect to maintenance benefits, I would strike the Arbitrator's award in its entirety. Maintenance benefits are incidental to participation in a vocational rehabilitation program or a self-directed job search. Here, Petitioner was not engaged in any vocational rehabilitation program. He offered testimony that he looked for work after Dr. Sclamberg discharged him from treatment and testified that he completed job logs. Petitioner's testimony lacked sufficient information as to how many and what types of jobs he applied to, through what methods he had applied for jobs, and the date range of his alleged search. The alleged job logs were not entered into evidence and there was no corroborating testimony that he had engaged in any job search.

Furthermore, while the Majority gives great weight to Petitioner's testimony with respect to maintenance benefits, the testimony relied upon contradicts the specific award. Petitioner testified that he started a job search on some unspecified date and admitted that he stopped once he applied for Social Security disability benefits which he eventually received – another unspecified date. The Majority awards maintenance benefits through Dr. Cherf's June 24, 2019 Section 12 report but that report only states that Petitioner was not looking for a new job at the time. This does not provide the Commission with a legitimate date as to when Petitioner stopped looking for work. Petitioner could have stopped looking for work the day before, weeks before or even months before.

In total, I do not find Petitioner's lone testimony with respect to his job search credible and assuming *arguendo* that Petitioner's testimony was sufficient to award maintenance benefits due to a good faith job search, it is inherently insufficient to inform the Commission as to how long

those benefits should run. Absent any such information, an award of maintenance benefits is not supported by the record and would be arbitrary.

For these reasons, I respectfully dissent from the Majority's opinion.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC010805
Case Name	Norberto Lara v. Olympic Oil Ltd
Consolidated Cases	
Proceeding Type	
Decision Type	***Corrected*** Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	19
Decision Issued By	William McLaughlin, Arbitrator

Petitioner Attorney	Matthew Smart
Respondent Attorney	Jeffrey Powell

DATE FILED: 12/27/2022

THE INTEREST RATE FOR THE WEEK OF DECEMBER 20, 2022 4.55%

/s/William McLaughlin,Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

Norberto Lara
Employee/Petitioner

Case # **18** WC **010805**

v.

Consolidated cases: ____

Olympic Oil
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **William McLaughlin**, Arbitrator of the Commission, in the city of **Chicago**, 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. ☒ 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 **03/15/2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**26,977.60**; the average weekly wage was $**518.80**.

On the date of accident, Petitioner was **51** years of age, ***married*** with **2** dependent children.

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

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

Respondent shall be given a credit of $**3853.98** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

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

ORDER

Based on the attached findings, and the record taken as a whole, the Arbitrator finds that Petitioner sustained an injury to his right knee that arose out of and in the course and scope of his employment with Respondent. Petitioner is due TTD for the period April 9, 2018 through February 25, 2019 (46 weeks), and maintenance benefits for the period February 26, 2019 through the present (160.86 weeks). Petitioner's permanent right knee injury cause him to lose his customary trade, and for such injury, Respondent shall pay Petitioner Permanent Partial Disability (PPD) benefits in the amount of 25% loss of use of a leg, or 50 weeks.

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

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

Signature of Arbitrator ______________________

December 27, 2022

STATEMENT OF FACTS

Petitioner testified that on March 15, 2018, he was employed by Olympic Oil in Cicero, Illinois. (Tr. at P. 7). He worked as an operator, but due to staff shortages, he was often asked to perform "stacking" where he was required to take boxes from the line and place them on pallets. (Tr. at P. 7-8). He testified that his general job duties varied from light physical demand and sometimes heavy in terms of physical demand. (Tr. at P. 8). Those instances where the job was particularly heavy in terms of physical demand occurred when he was required to clear barrels out of a trailer, with the barrels often being stacked three barrels high. (Tr. at P. 8).

On the morning of March 15, 2018, around noon, Petitioner and a co-worker Heriberto Jalestro were performing stacking activities when a pallet struck the outside of petitioner's right knee. (Tr. at P. 8-9). Petitioner testified that he did not feel the impact as much, but as soon as he got home, he had difficulty getting up. (Tr. at P. 10). He noted that his right knee was swollen. (Tr. at P. 10). On cross-examination, Petitioner testified that he did complete his work day after the incident. (Tr. at P. 23). Petitioner testified that he did not report the incident until the following Monday, March 18, 2018, as he was off the next few days after the incident. (Tr. at P. 11).

Petitioner testified that he sought treatment with his primary care physician, Dr. Manish Shukla, on March 18, 2018. (Tr. at P. 11). The records from Dr. Shukla are contained in Petitioner's Exhibit 3, and actually show the first visit was on March 19, 2018 (which the Arbitrator notes for the sake of accuracy). Under the History of Present Illness portion, the note states "Pt accidentally hit himself with a pallet at work." (PX 3). The note also states that the pain was located on Petitioner's right knee and was described as "catching." *Id*. X-rays were

ordered and medications were prescribed. *Id*. Petitioner followed up with Dr. Shukla on March 22, 2018, where the doctor diagnosed a loose body and unilateral primary osteoarthritis in the right knee. *Id*. The doctor referred Petitioner for orthopedic consultation. *Id*.

Petitioner testified that his employer had him seek treatment at Concentra, the occupational health clinic, on March 23, 2018. (Tr. at P. 12). Petitioner was diagnosed with a right knee contusion and given a brace for his right knee. (PX5). Eventually, the Concentra clinic ordered an MRI of the right knee on April 3, 2018. (PX5).

Petitioner testified that prior to getting the MRI, he consulted with Dr. Steven Sclamberg on April 9, 2018. (Tr. at P. 13-14). On that date, Dr. Sclamberg noted Petitioner had an antalgic gait along with effusion in the right knee. (PX 6). The doctor also noted medial and lateral joint line tenderness. *Id*. He diagnosed a right knee contusion, and he also ordered physical therapy and an MRI of the right leg. *Id*. The doctor also ordered Petitioner off work at that time. *Id*. Petitioner testified that he got an MRI scan of his right knee on April 20, 2018. (Tr. at P. 14). Following the MRI, Petitioner returned to seek treatment with Dr. Sclamberg on April 30, 2018, where he actually complained of bilateral knee pain. (PX 6). The doctor performed an injection of Kenalog and lidocaine in each knee. Petitioner followed up with Dr. Sclamberg again on June 1, 2018, complaining of right greater than left knee pain. (PX6). The doctor again injected each knee and ordered Petitioner remain off work. (PX6).

Respondent sent Petitioner for an independent medical examination with Dr. John Cherf, which was conducted on June 27, 2018. (RX 2). In relevant part, Dr. Cherf found Petitioner to have sustained a right knee contusion as a "direct result" of his work injury on March 15, 2018. (RX2, P. 5). The doctor also noted moderate-to-advanced osteoarthritis, which the doctor opined to be a preexisting condition and independent of the work injury. *Id*. He further stated the mechanism of injury, in his opinion, would be an insignificant contributing factor to the

advanced osteoarthritis of the right knee. *Id*. Dr. Cherf opined that Petitioner should reach maximum medical improvement (MMI) no later than July 15, 2018. *Id*. The doctor opined that any treatment or work restrictions past that point would be unrelated to the work accident, but rather related to Petitioner's osteoarthritis. (RX 2 at P. 5-6).

Petitioner continued to treat with Dr. Sclamberg, including a follow up appointment that occurred on August 13, 2018. (PX6). At that visit, it was noted Petitioner still had complaints of right knee pain with clicking and clunking in the right knee. *Id*. Dr. Sclamberg reviewed the MRI and noted it demonstrated moderate medial compartment arthritis with tearing in the meniscal body and extrusion of the body. *Id*. Dr. Sclamberg opined that while there was preexisting arthritis, Petitioner was asymptomatic prior to his work accident, and was currently plagued by audible clunking in the knee. *Id*. He further noted that non-weightbearing radiographs demonstrated no degenerative changes. He ordered standing x-rays to determine final recommendations for Petitioner. *Id*.

Petitioner returned to Dr. Sclamberg on August 27, 2018. (PX 6). The doctor noted that the x-rays of the knees were "essentially negative." *Id*. The doctor diagnosed a right meniscus tear and recommended arthroscopic surgery. *Id*. Petitioner testified that he underwent arthroscopic surgery at Accredited Ambulatory Care on September 10, 2018. (Tr. at P. 16). The operative report notes, "There was tearing in the posterior and medial meniscus, subacute in nature with displacing elements. There was grade I chondromalacia of the tibia and grade II on the femur and the kissing area with the meniscal tearing." (PX6).

Petitioner followed up with Dr. Sclamberg on September 24, 2018 where the doctor recommended he begin a course of post-operative physical therapy. (PX6). Petitioner followed up with Dr. Sclamberg on November 5, 2018, where the doctor noted that Petitioner had not

completed any post-operative physical therapy at that point. *Id*. Dr. Sclamberg reiterated his request that Petitioner begin physical therapy. *Id*.

Petitioner testified that he began physical therapy at Bone and Joint Clinic in Chicago on December 10, 2018. (Tr. at P. 17-18). He testified that he eventually had to stop physical therapy because Bone and Joint Clinic was not getting any authorization for treatment. (Tr. at P. 18). Petitioner's therapy at Bone and Joint Clinic lasted through only December 26, 2018. (PX8).

On February 4, 2019, Dr. Sclamberg noted that Petitioner was still having discomfort in his right knee, but that there was no catching, clicking, locking, or giving way at that point. (PX6). He recommended Petitioner undergo a functional capacity evaluation (FCE) at that time. *Id*.

Petitioner had his FCE completed at ATI Physical Therapy on February 21, 2019. (PX14). The effort of Petitioner, and therefore the results of the examination as a whole, were deemed valid by the examiner. *Id*. Of note, the report details that Petitioner's job title of machine operator falls into the Medium physical demand level, but that his demonstrated physical demand level fell in the Light to Medium category. *Id*. The examiner determined that Petitioner could stand for a maximum of 5-6 hours in a work day, but for durations no longer than 60 minutes. *Id*. The examiner found that Petitioner could perform walking activities for no more than 2-3 hours in his work day, and only on an occasional basis for short distances. *Id*. The examiner wrote: "[Petitioner] demonstrated most difficulties with knee flexion based activities. [Petitioner] demonstrated most difficulties with crouching, *sic* and squatting in which they are listed at minimally occasional 1-5% (0 to .5 hrs)." *Id*.

Petitioner consulted with Dr. Sclamberg on February 25, 2019 where the doctor released him to return to work pursuant to the restrictions outlined in his FCE. (PX6). Petitioner testified that he did not return to work with Respondent. (Tr. at P. 19). He testified that he eventually gave

up looking for work and applied for Social Security Disability, and that he was receiving SSDI benefits at the time of trial. (Tr. at P. 21-22). Petitioner testified that he never returned to work in any capacity since he went off of work in April of 2018. (Tr. at P. 22). On cross-examination, he testified that he did look for work, but that he did not have any job logs documenting said job search. (Tr. at P. 26).

Petitioner lastly testified that he had a repeat IME with Dr. Cherf, and that his attorneys sent him for an IME with Dr. Matthew Jimenez at Illinois Bone and Joint Institute on September 12, 2019. (Tr. at P. 20-21). He lastly testified that as he sat for testimony in the hearing, his knee still bothered him in cold weather and when he tried to bend it. (Tr. at P. 22). On cross-examination, Petitioner testified that the right knee surgery did not help his pain very well, noting that he fell following the surgery and injured his right arm that required surgery. (Tr. at P. 25).

Deposition Testimony

Deposition testimony from the treating physician, Dr. Steven Sclamberg, and the two IME physicians, Dr. Matthew Jimenez, and Dr. John Cherf, was entered into evidence. The relevant portions of their testimony are as follows:

Dr. Steven Sclamberg

Dr. Sclamberg testified that he is a board-certified orthopedic surgeon who performs roughly more than 400 surgeries a year. (PX1 at P. 5). He testified that on the first visit, Petitioner was limping with swelling. (PX1 at P. 6). Dr. Sclamberg reviewed the MRI films at his deposition, noting it showed a medial meniscal tear as well as chondromalacia, which he defined as softening of the cartilage, on the medial side of the joint as well as on the patellofemoral side of the joint. (PX1 at P. 7).

Dr. Sclamberg also talked about the operative findings. He noted that there was grade 1 to grade 2 chondromalacia in the medial joint line, based on a scale of 0 to 4. (PX1 at P. 8). He also noted a meniscal tear on the medial side that was unstable and displacing within the joint. *Id*. Dr. Sclamberg was questioned about the nature of the meniscus tear which he described as being subacute in nature. *Id*. at P. 8-9. In response, he stated, “It was a clear meniscal tear with unstable---an unstable fragment of the meniscus moving the joint. That’s not--to me, that’s more characteristic of a tear from an injury that then has become chronic because it’s been six months.” *Id*. at P. 9. He was asked about the difference between an acute-appearing tear and one that he might deem to be more related to degenerative changes or by arthritis, to which he responded, “There’s more fraying [in chronic or degenerative tears], more diffuse tearing. Sometimes there’s some chondrocalcinosis, there’s some calcium in the meniscus associated with it, and there’s no history of injury.” *Id*. at P. 9-10. He did state that there was some fraying in the meniscus, but he qualified that statement with the fact that the surgery was performed 6 months after the claimed incident. *Id*. at P. 10.

Dr. Sclamberg stated that he agreed with the findings of the FCE examiner, and that he released Petitioner from care with permanent restrictions. (PX1 at P. 10-11). He testified that he believed the mechanism of injury was sufficient to cause an acute tear in the meniscus. *Id*. at P. 11. He was asked whether he believed that Petitioner’s problems were caused by a degenerative condition, to which he testified that Petitioner was asymptomatic prior to the injury, and he had a discrete meniscus tear. *Id*. He testified that if there was a degenerative condition, it would have been made worse by the accident. *Id*. He went on to say that the displacing elements seen on the arthroscope are less typical in a degenerative-type tear. *Id*. at P. 12.

Dr. Sclamberg was questioned about the findings of the IME physician, Dr. John Cherf. He opined that he agreed with Dr. Cherf that Petitioner did sustain a knee contusion in the work

accident, but that he disagreed with Dr. Cherf's opinion that the contusion was the only injury related to the work accident. (PX1 at P. 12). Dr. Sclamberg testified that he disagreed with Dr. Cherf's reading the April 2018 MRI, noting that there was no mention of the meniscus tear in the doctor's IME, and that the radiologist's report and he saw the tear on the arthroscope. *Id*. at P. 12-13. Dr. Sclamberg also noted that while Dr. Cherf noted signs of symptom magnification in his initial IME report, throughout his care of Petitioner, he did not note any signs of symptom magnification or malingering by Petitioner. *Id*. at P. 14.

On cross-examination, Dr. Sclamberg was questioned about Petitioner's complaints of back pain towards the end of his treatment, and he was also asked about the possible lack of post-operative physical therapy. When asked whether a lack of participation in physical therapy would have prevented Petitioner from recuperating to the point of being able to return to full duty work, Dr. Sclamberg testified that it probably prevented him from maximizing his outcome, but that he did not think it prevented him from not returning to full duty work. (PX1 at P. 23).

Dr. Matthew Jimenez

Petitioner was sent for an IME with Dr. Matthew Jimenez on September 12, 2019. (PX2 at P. 5). Dr. Jimenez stated that he did not agree with Dr. Cherf's opinion that Petitioner's lone injury was that of a knee contusion. *Id*. at P. 6. Dr. Jimenez opined that Petitioner injured his cartilage on March 15, 2018, defining cartilage as the medial lateral menisci. *Id*. Dr. Jimenez opined that the work injury was the cause of the damage to the meniscus, stating, "[T]hat if a patient is working at a job that is arduous in a pain-free manner and then there's an event that's documented and then after that subsequent event the patient is symptomatic with signs and symptoms consistent with a given pathology- - in this case the patient had a pain-free interval; then an event; then clicking, popping, swelling, cartilage-type symptoms…. It all fits with the history with causation from that inciting event." *Id*. at P. 6-7. He disagreed that the tear in the

knee might be more related to age-related degenerative changes or from arthritis, stating that he was not able to see a history of chronic knee pain or treatment from Petitioner that would lead him to believe that the arthritis was the underlying cause. *Id*. at P. 7-8. Dr. Jimenez further opined that arthroscopic intervention on the knee was a reasonable course of action for Dr. Sclamberg to take, stating that arthroscopic intervention would increase the likelihood of a positive outcome as opposed to conservative and non-surgical care. *Id*. at P. 8-9. He stated that he would have treated the knee in the same manner as Dr. Sclamberg did. *Id*. at P. 9. Dr. Jimenez lastly testified that he did not note any symptom-magnification on the part of Petitioner, and that he would agree with the FCE examiner's findings as to the permanent restrictions. *Id*. at P. 9-10.

Dr. John Cherf

Dr. Cherf performed two IMEs in this matter, the first occurring on June 27, 2018 (RX2), and the other on June 24, 2019 (RX3). He also testified in this matter. Dr. Cherf opined that Petitioner suffered from "primary idiopathic osteoarthritis." (RX1 at P. 15). Dr. Cherf opined that Petitioner's complaints of right knee pain with stairs is consistent with arthritis in the patellofemoral joint. *Id*. at P. 17. He opined that idiopathic arthritis tended to appear symmetrically, meaning similar in the right and left knees. *Id*. at 16. Dr. Cherf stated that he ordered X-ray examination of the right knee at his initial IME, noting that he found the results to show arthritis in the patellofemoral compartment, medial compartment, and the lateral compartment, which he opined to be consistent with primary osteoarthritis. *Id*. at P. 19. He did note that the right knee was a little worse than the left. *Id*. at P. 19-20.

Dr. Cherf noted that on his initial IME examination, Petitioner complained of 10 out of 10 pain, which he opined to be a sign of symptom magnification. (RX1 at P. 20-21). The doctor stated he reviewed the MRI of the right knee, and that the MRI did not document any significant contusion of the knee, but qualified that statement by saying that lack of evidence of contusion

on the MRI was not necessarily evidence that he did not have a contusion. *Id*. at P. 22. He opined that the lack of signs of contusion on the MRI meant that it "wasn't a real big contusion." *Id*. at 22-23. The doctor stated that he believed Petitioner should have concluded his treatment for the work-related injury roughly four months after the incident. *Id*. at P. 27.

Dr. Cherf also testified about his second examination of Petitioner which took place in June of 2019, after his discharge from Dr. Sclamberg's care. He testified that he reviewed the medical records tendered to him, including the treatment notes and operative report from Dr. Sclamberg. (RX1 at P. 33). He testified that in his review of the records, he did not have access to the arthroscopic findings or images from the procedure, but he offered his willingness to look at them "to help determine if [the tear was] chronic or acute. *Id*. at P. 40. Dr. Cherf opined that arthroscopic intervention in patients who are middle-aged with moderate to advanced arthritis are known to have unpredictable or poor results. *Id*. He stated that the fact that Petitioner continued to have pain in both knees after the surgery was indicative of the fact that the meniscal tear was not the source of Petitioner's pain. *Id*. at P. 40-41.

On cross-examination, the doctor was questioned about Dr. Sclamberg's findings on the operative report of a subacute tear, stating, "[S]ubacute might be six weeks to maybe three months. …I would not use that term on an arthroscopic finding very often, especially if it's…six months," from the date of the incident. (RX1 at P. 51-52). He opined that after three months, he would define an injury as chronic. *Id*. at P. 52. He went on to state that most people that are 50 years old are going to have meniscal pathology on an MRI study. *Id*. at P. 54-55. When asked about what he saw on the MRI findings versus those noted by Dr. Sclamberg in his arthroscopic findings, he stated "the arthroscopic findings sort of trump the MRI findings." *Id*. at P. 55. On cross-examination, the doctor admitted that he had not been given any medical records to indicate a history of right knee pathology or significant medical treatment in the right knee that

pre-dated the work accident. *Id*. at P. 61-62. He also admitted under cross-examination that he saw no evidence in the medical records to indicate that after his suggested date of maximum medical improvement (July 2018) that Petitioner's right knee returned to its pre-injury state. *Id*. at P. 63-64.

CONCLUSIONS OF LAW

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

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to his March 15, 2018 work accident. There is no dispute among the parties, or the medical doctors who examined Petitioner, whether Petitioner sustained at least some injury on that date. The dispute arises as to what the nature of that injury was. Petitioner argues, through the opinions of Drs. Sclamberg and Jimenez, that he sustained an injury to the right knee that required arthroscopic repair of the meniscus and left him with permanent work restrictions. Respondent argues, in reliance on the opinions of Dr. Cherf, that Petitioner only sustained a right knee contusion on the date in question, and that all treatment after July of 2018 and any work restrictions would be unrelated to the March 15, 2018 work accident. Dr. Cherf was of the opinion that any such treatment would be unrelated to the work accident, but more related to his diagnosis of osteoarthritis, which he opined to be independent of this incident. The Arbitrator places more weight on the opinions of Drs. Sclamberg and Jimenez than with Dr. Cherf's opinions.

Under Illinois law, to obtain compensation under the Workers' Compensation Act, a Petitioner must show by a preponderance of the evidence that he suffered a disability arising out of and in the course of his employment. 820 ILCS 305/2. The arising out of component under the Workers' Compensation Act addresses the causal connection between a work-related injury and

the Petitioner's condition if ill-being. 820 ILCS 305/2. To satisfy the "arising out of" component for obtaining workers' compensation, 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 injury. *Sisbro, Inc. v. Industrial Commission*, 797 N.E.2d 665 (Ill.Sup.Ct. 2003). A workers' compensation claimant need prove only that some act or phase of the employment was **a causative factor** in the ensuing injury. 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 the workers' compensation claimant's ill-being. *Brian Vogel v. Industrial Commission*, 821 N.E.2d 807 (Ill.App.2 Dist. 2005). A work activity is a sufficient cause of the aggravation of a pre-existing condition if the work activity presented risks greater than those to which the general public is exposed. *Twice Over Clean, Inc. v. The Industrial Commission*, 809 N.E.2d 778 (Ill.App.3 Dist. 2004). Even though a workers' compensation claimant has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long it can be shown that the employment was also a causative factor. *Sisbro, Inc. v. Industrial Commission*, 797 N.E.2d 665 (Ill.Sup.Ct. 2003). When it comes to the issue of causation, greater weight must be given to petitioner's physicians. *International Vermiculite v. Industrial Commission*, 77 Ill.2d 1, 394, N.E. 2d 1166; *ARA Services, Inc. v. Industrial Commission* 226 Ill App. 3d 225, 590 N.E. 78.

Sisbro is highly informative in this matter. It must first be noted that Dr. Sclamberg, the treating physician, did not document significant degenerative findings in the right knee, in contrast to the findings of Dr. Cherf in his examinations. As *International Vermiculite* states, Dr. Sclamberg's opinion should be given greater weight. Further, Dr. Jimenez concurred with the findings of Dr. Sclamberg, adding even greater weight. The reason *Sisbro* is most informative here is that even if Petitioner had underlying osteoarthritis, he was otherwise asymptomatic and

working full duty at the time of the March 15, 2018 accident. The records of Petitioner's primary care physician were introduced at trial, and they did not document any significant history of right knee. This lack of active care and treatment is indicative of an otherwise healthy right knee up until the date of the incident. Petitioner was leading an otherwise normal existence with regard to his right knee and his ability to work, up until the point where he has this work accident.

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

The Arbitrator finds that the services that were provided to Petitioner were reasonable and necessary to treat this work-related injury. The Arbitrator further finds that Respondent has not paid all appropriate charges for said medical care. The Arbitrator finds Petitioner's current condition to be causally related to the work incident, and the Arbitrator grants greater weight to the opinions of Drs. Sclamberg and Jimenez in arriving at that conclusion. Dr. Cherf opined that arthroscopic intervention in a patient of middle age and with arthritis, as he deemed Petitioner to be, often produced poor results. He believed that to be shown by the fact that Petitioner did not recover to the point where he could return to full-duty work.

While the Arbitrator does grant weight to Dr. Cherf's opinion that Petitioner did not have the optimal result of returning to full duty work, that is not *per se* evidence that arthroscopic intervention was the wrong course of action. Both Dr. Sclamberg and Dr. Jimenez stated that it was their medical opinion that arthroscopic intervention was the proper course to take in this situation. Dr. Jimenez even stated in his testimony that he would have treated Petitioner in the same manner as Dr. Sclamberg had. While there may be divergence in schools of thought as to the benefits of arthroscopic surgery on a patient who is demographically similar to Petitioner, that is not enough to state that the treatment was unreasonable, as two licensed and board-

certified orthopedic surgeons opined as to the reasonableness of the procedure. The Arbitrator will not differ with their opinions, believing the arthroscopic procedure and its sequalae to be reasonable and necessary for Petitioner's work injury.

Petitioner submitted bills for St. Jude Medical Clinic (PX3), Concentra Clinic (PX5), Chicago Pain and Orthopaedic Institute (PX6), Archer Open MRI (PX7), Bone and Joint Clinic (PX8), ProCare DME (PX9), Windy City Anesthesia (PX10), Accredited Ambulatory Surgery Center (PX11), Rx Development (PX12), American MRI/Berwyn Diagnostic Imaging (PX13), ATI Physical Therapy (PX14), Advanced Rx Management (PX15), and Injured Workers Pharmacy (PX16). The Arbitrator finds all of these bills to be reasonable and necessary for the treatment of Petitioner's work-related injuries. While the bill for American MRI/Berwyn Diagnostic Imaging was for a lumbar MRI, Petitioner had continued issues with gait and even testified as to a fall that occurred after his knee surgery was completed. Dr. Sclamberg documented post-operative low back pain in his notes, which is enough to meet the burden to show at least **A** causal connection to his work accident.

With regard to the bills of Rx Development, Advanced Rx Management, and Injured Workers Pharmacy, and ProCare DME, the Arbitrator notes that these pharmacies filled Petitioner's prescribed medications and medical equipment following this injury, as opposed to a general pharmacy such as Walgreens or CVS. The Arbitrator notes that following the IME opinions of Dr. Cherf, Petitioner had no recourse but to avail himself of these companies in order to get his required pain medications and medical equipment in order to maximize his outcome.

The Arbitrator finds that Respondent has not paid for all of the reasonable and necessary care, and holds Respondent accountable to pay said bills in accordance with the Fee Schedule.

K. What temporary benefits are in dispute? TTD, Maintenance

The Arbitrator finds that Petitioner is owed TTD benefits for the period covering April 9, 2018 through February 25, 2019, or 46 weeks, and he is owed maintenance benefits from that period through the date of hearing, a period of 160.86 weeks. The Arbitrator finds that since Petitioner's current condition of ill-being is related to the work incident of March 15, 2018, the resulting off-work orders would likewise be related to the work incident. The evidence submitted at trial shows that following his FCE and his discharge from Dr. Sclamberg, Petitioner did not return to Respondent's employ. Respondent did not tender any evidence to show that it offered Petitioner employment within his restrictions, or otherwise could accommodate said restrictions. Petitioner testified that he conducted a job search, though no job logs were submitted at hearing. He testified that he eventually applied for Social Security Disability and that he was receiving SSDI benefits at the time of hearing. The Arbitrator finds that Petitioner evidenced an inability to work and a search for employment before he was effectively removed from the workforce through his application for SSDI. The Arbitrator therefore finds that Petitioner would be entitled to maintenance covering the period from his discharge up until the date of trial.

L. What is the nature and extent of the injury?

In determining permanent partial disability, the Arbitrator takes into consideration the five factors set forth in Section 8.1b 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."

(i) The reported level of impairment pursuant to subsection (a)

No AMA rating was obtained in this matter. The Arbitrator finds that an impairment rating is not required in order for the Arbitrator to award permanent partial disability benefits. *Corn Belt Energy v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150311 WC

(3d Dist. 2016). Given that no rating was obtained, the Arbitrator will not consider this factor when weighing the nature and extent of the injury.

(ii) The occupation of the injured employee

The Arbitrator notes that on March 15, 2018, Petitioner was employed as a machine operator for Respondent. The FCE report submitted into evidence classified this position as being in the medium physical demand category. The FCE placed Petitioner's physical capabilities in the light to medium physical demand category. As such, Petitioner's physical capabilities following the work accident fell below those required to do his job. There was no evidence submitted at hearing that Respondent offered to accommodate, or that Respondent *could* accommodate, a worker with Petitioner's restrictions. As such, the Arbitrator finds that Petitioner was unable to return to his customary employment as a result of the injuries he sustained on March 15, 2018. Petitioner did apply for and is receiving SSDI benefits, effectively removing him from the work force at this point.

(iii) The age of the employee at the time of the injury

The Arbitrator notes that Petitioner was 55 years old at the time of hearing, and only 51 years old at the time of his work incident. The IME physician Dr. Cherf opined that Petitioner's age increased his likelihood of issues related to arthritis, the Arbitrator gives weight that Petitioner would have had roughly fifteen or more years remaining in his work-life, which is a significant portion of time to deal with such disabilities evidenced at hearing. The Arbitrator gives weight that finds that Petitioner's moderately advanced age makes it more difficult to for him to bounce back or recover from such injuries.

(iv) The employee's future earning capacity

The Arbitrator notes that Petitioner was unable to return to his pre-injury employment. He was earning an average of $518.80 at the time of his work incident. The Arbitrator finds that

the evidence submitted through Petitioner's treating physician as to his permanent restrictions, and his own testimony regarding his inability to return to any kind of employment following the incident shows that his future earning capacity was greatly impacted by the work incident. The evidence submitted at hearing portends that Petitioner's future earnings will be diminished as a result of the work incident. The Arbitrator gives weight to this factor.

(v) Evidence of disability corroborated by the treating medical records

The Arbitrator finds that Petitioner required a right knee arthroscopy and meniscal repair which resulted in him having permanent work restrictions. The treatment and resultant restrictions are causally related to his work incident. Of note, the FCE report of ATI Physical Therapy documented significant restrictions as to Petitioner's ability to squat, walk, and stand. These are activities involved in manual-labor positions for which Petitioner can no longer apply.

Dr. Sclamberg noted that Petitioner still had ongoing complaints of right knee pain at his final visit in February of 2019, and he further concurred with the findings of disability notated in the FCE report. The IME physician Dr. Jimenez also concurred with said findings. The Arbitrator finds that the medical evidence submitted at trial indicate Petitioner continues to suffer disability in his right knee as it relates to this work incident. The Arbitrator gives significant weight to this factor.

The Arbitrator finds that Petitioner sustained an injury to his right knee which resulted in him losing his employment as a machine operator. The Arbitrator finds that Petitioner sustained a loss of 25% loss of use of a leg due to the work related knee injury Petitioner sustained.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC003609
Case Name	Laura Maldonado v. Flossmoor School District 161
Consolidated Cases	
Proceeding Type	Remand From the First District Appellate Court
Decision Type	Commission Decision
Commission Decision Number	23IWCC0480
Number of Pages of Decision	4
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Paul Luka
Respondent Attorney	Trevor Granberg

DATE FILED: 11/15/2023

/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

Laura Maldonado,

Petitioner,

vs. No. 15 WC 3609

Flossmoor School District #161,

Respondent.

DECISION AND OPINION ON REMAND

This cause comes before the Commission on remand from the First District Appellate Court of Illinois, Workers' Compensation Commission Division, which affirmed in part, and reversed in part, the Circuit Court's decision, which confirmed the Commission's March 17, 2021 decision in this matter. The Appellate Court remanded this matter back to the Commission, stating:

> "Because it is not clear from the record whether the Commission considered the factors set forth in *section 8.1b of the Workers' Compensation Act (Act) (820 ILCS 305/8.1b* (West 2014)) before awarding permanent partial disability benefits, we (2) vacate the award and remand for an affirmative indication of such consideration and a determination as to whether the awarded benefits are duplicative."

Petitioner, a 39-year-old school secretary, testified that on November 24, 2014 she slipped and fell on the school's slippery, snow-covered parking lot. She twisted her left foot and fell on top of it. Petitioner was taken by ambulance to St. James Hospital, where she was diagnosed with a complex ankle fracture-dislocation. Doctors there reduced the dislocation and referred Petitioner to orthopedics for treatment of her fractured left medial and lateral malleoli.

Two days later, on November 26, 2014, Dr. Rosenblum performed a left ankle bimalleolar open reduction with internal fixation. During that procedure, he affixed a metal plate to

Petitioner's fractured distal fibula and inserted 6 screws. Petitioner testified that two 4-inch incisions were made on her leg, one on each side.

Following that surgery, Petitioner continued to experience pain and had difficulty bearing weight on her left leg. On April 27, 2015, Dr. Rosenblum performed a second surgical procedure: an arthroscopic synovectomy and removal of loose bodies and a screw from Petitioner's left ankle. Petitioner's problems continued. On March 25, 2016, Dr. Rosenblum performed a third surgery to Petitioner's left ankle: a synovectomy, removal of loose bodies, and microfracture and remodeling of the talar dome. Petitioner testified at arbitration that she still experiences constant pain in both her left leg and left ankle.

The Arbitrator awarded Petitioner 50% loss of use of her left foot and 35% loss of use of her left leg pursuant to §8(e) of the Act. In our March 17, 2021 Decision, we affirmed and adopted those permanency awards.

Pursuant to the Appellate Court's mandate, we now address the five factors of §8.1b, in consideration of our permanency award. That section of the Act states that permanent partial disability from injuries occurring after September 1, 2011, is to be established using the following criteria: (i) the reported level of impairment from a physician; (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. That section further provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b). Having considered these factors, we assign the following relevance and weights to them:

(i) **Disability impairment rating:** no relevance or weight, because neither party offered an impairment rating from a physician into evidence.

(ii) **Employee's occupation:** little relevance and weight, because on April 4, 2016, Petitioner was able to return to her usual job as a school secretary, and has continued working in that position.

(iii) **Employee's age at the time of the injury:** little relevance and weight, because although Petitioner was 39 when she was injured and has years left to work with the effects of her injuries, her position is not particularly physical.

(iv) **Future earning capacity:** little relevance and weight, because Petitioner offered no evidence that her future earning capacity would be adversely affected by her injuries.

(v) **Evidence of disability corroborated by the treating records:** significant relevance and weight. Petitioner's injuries affected her left foot: she sustained displaced fractures of her medial and lateral malleoli, and underwent three surgeries. On March 25, 2016, Dr. Rosenblum found Petitioner's ankle to be completely synovitic, with adhesions and osteochondral lesions at the medial talus and tip of the tibia. We also find that Petitioner's injuries affected her left leg. In the emergency room, Petitioner was placed

in a long leg cast. In addition to sustaining a transverse medial malleolus fracture, she sustained a left fibula spiral oblique fracture – which required two 4-inch incisions be made to her left leg in order to insert a metal plate and screws. Subsequently, Dr. Rosenblum reported Petitioner developed posttraumatic arthritic changes to her left fibula and tibia. At arbitration, Petitioner testified she still had the metal plate in her leg and experienced pain in her leg, "all the time." Based upon the foregoing, we find the evidence of disability corroborated by the treating medical records established that Petitioner's left foot *and* left leg were both substantially affected by her injuries. We find it warranted, and not duplicative, to award Petitioner 50% loss of her left foot and 35% loss of her left leg under §8(e) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the sum of $360.00 per week for 83.5 weeks, as provided in §8(e)11 of the Act, for the reason that the injuries sustained caused a 50% loss of use of the left foot.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the sum of $360.00 per week for 75.25 weeks, as provided in §8(e)12 of the Act, for the reason that the injuries sustained caused a 35% loss of use of the left leg.

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

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

Under §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.

November 15, 2023

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/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	19WC019264
Case Name	Carmen Perez v. People Ready
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0481
Number of Pages of Decision	22
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Eduardo Salgado
Respondent Attorney	Susan John

DATE FILED: 11/15/2023

/s/Deborah Simpson, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Carmen Perez,

Petitioner,

vs. NO: 09 WC 19264

People Ready,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §§19(b) and 8(a) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, benefit rates, medical, penalties and fees and temporary disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 9, 2023, is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $60,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

November 15, 2023
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/s/*Deborah L. Simpson*
Deborah L. Simpson

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC019264
Case Name	Carmen Perez v. People Ready
Consolidated Cases	
Proceeding Type	19(b)/8(a) Petition
Decision Type	Corrected Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	19
Decision Issued By	Ana Vazquez, Arbitrator

Petitioner Attorney	Eduardo Salgado
Respondent Attorney	Mark Vizza

DATE FILED: 2/9/2023

THE INTEREST RATE FOR THE WEEKOF FEBRUARY 7, 2023 4.75%

/s/*Ana Vazquez, Arbitrator*

Signature

STATE OF ILLINOIS)
)SS
COUNTY OF COOK)

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

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

Carmen Perez
Employee/Petitioner

v.

People Ready
Employer/Respondent

Case # **19** WC **019264**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Ana Vazquez**, Arbitrator of the Commission, in the city of **Chicago**, on **August 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, **February 11, 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 $**37,020.36**; the average weekly wage was $**711.93**.

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

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

Respondent shall be given a credit of $**14,880.00** for TTD, $**0** for TPD, $**0** for maintenance, and $**0,** for other benefits, for a total credit of $**14,880.00**.

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

ORDER

Respondent shall pay for the reasonable and necessary medical services, as provided in Px1 through Px4, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and is liable for the prospective medical treatment plan recommended by Dr. Thomas Poepping, including a right knee arthroscopy, chondroplasty, evaluation of the tracking of the patella, partial lateral meniscectomy, and synovectomy, as provided in Section 8(a) and 8.2 of the Act.

Respondent shall pay to Petitioner temporary total disability benefits of **$474.62/week** for **55 2/7** weeks, commencing **June 29, 2019** through **July 19, 2020**, as provided in Section 8(b) of the Act.

Respondent shall pay to Petitioner temporary partial disability benefits of **$137.12/week** for **13 1/7** weeks, commencing **July 20, 2020** through **October 19, 2020**, **$124.62/week** for **7 6/7 weeks**, commencing **October 20, 2020** through **December 13, 2020**, and **$88.95/week** for **88 3/7 weeks**, commencing **December 14, 2020** through **August 24, 2022**, the date of arbitration, as provided in Section 8(a) of the Act.

Respondent is entitled to a credit in the amount of **$14,880.00** for temporary total disability benefits paid by Respondent to Petitioner.

Respondent shall pay **$4,410.00** in penalties pursuant to Section 19(l) of the Act. Penalties pursuant to Section 19(k) and attorney's fees pursuant to Section 16 of the Act are not awarded.

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.

FEBRUARY 9, 2023

Signature of Arbitrator

ICArbDec19(b)

FINDINGS OF FACT

Petitioner was employed by Respondent on December 10, 2018 and on February 11, 2019. Transcript of Proceedings on Arbitration ("Tr.") at 7. Petitioner began her employment with Respondent as a front desk clerk and was promoted to assistant manager. Tr. at 7. Petitioner testified that on December 10, 2018, she was an assistant branch manager. Tr. at 41. Petitioner did not receive a promotion at the end of 2018. Tr. at 41. Petitioner testified that Respondent is a staffing company, and that it sends temporary workers to other companies to work. Tr. at 8. Petitioner testified that her duties as an assistant manager included duties performed in the office and duties performed "out in the field" which required that she visit potential customers and existing customers to request more business. Tr. at 8.

December 10, 2018 accident

Petitioner testified that December 10, 2018 was a field day. Tr. at 9. Petitioner went to the office, signed in, and went out to the field. Tr. at 10. She was assigned to different retailers in the LaPorte area on December 10, 2018. Tr. at 10. Petitioner testified that on December 10, 2018, she was at a retail plaza, and she stepped in a pothole, twisted her ankle, and fell onto her right knee while walking to her car. Tr. at 10-11. Petitioner testified that she immediately sent an email to her manager about her fall. Tr. at 11. Petitioner did not seek medical attention after the fall, and testified that she used ice and took Tylenol because she was in pain and her knee was swollen. Tr. at 11-12, 18. Petitioner testified that she continued to work with Respondent through February 11, 2019. Tr. at 12. Petitioner testified that she did not have any treatment to her right knee prior to December 10, 2018. Tr. at 39.

February 11, 2019 accident

Petitioner testified that on February 11, 2019, she was closing Respondent's Crest Hill office and there was snow and rain outside. Tr. at 12-13. Petitioner testified that "when I went out to start my car it was – remember it was they were giving you warnings about the freezing. So we would have to start the car because I was going to Indiana. So I went to start the car to make sure my car started, and on my way to the car I fell right down." Tr. at 12. Petitioner testified that the Crest Hill office was not the office she was normally assigned to. Tr. at 13. Petitioner testified that "[a]fter I got hurt in December, one of the managers in the office quit at the Crest Hill office, and considering that I was hurt, Abby said if I wanted to go and work at the Crest Hill office so they could take me off the field." Tr. at 13. Petitioner was compensated for her mileage to and from the Crest Hill office. Tr. at 13. On cross examination, Petitioner testified that she fell as she was going to her car and leaving for the day. Tr. at 51.

Petitioner was shown Petitioner's Exhibit ("Px") 10, which she testified was a picture of the Crest Hill office and the parking lot. Tr. at 14. Petitioner testified that Px10 was an accurate and complete depiction of her memory of the Crest Hill office, and also identified the door that she would go through and the employee parking. Tr. at 14. Petitioner was asked to point to the location where she fell on February 11, 2019, and Petitioner testified that she fell "[r]ight outside the door. I walk outside the door and right here." Petitioner marked the location with an "x." Tr.

at 14-15. Petitioner testified that she fell "right at the end of the building." Tr. at 15. Petitioner testified that she fell on the sidewalk. Tr. at 51, 54.

Petitioner testified that after she fell, she immediately notified the office manager, David, via text message of the fall. Tr. at 15. Petitioner was shown Px9 and identified Px9 as a printout of her text messages with David, the office manager. Tr. at 15-16. Petitioner testified that after the fall, she got up, went inside the office, and took pictures of her knee because she "could feel everything blowing up." Tr.at 15. Petitioner testified that David responded to her text message, and told Petitioner to go inside, get the salt that was inside the lunchroom, and salt outside. Tr. at 16, 44, 55. Petitioner testified that the salt in the lunchroom was used for snow. Tr. at 44. Petitioner testified that "I had to open the bag to carry it outside, open it and pour it all over the front of the office[,]" on the sidewalk. Tr. at 55. Petitioner also poured salt on the parking space where she was going to walk to her car. Tr. at 55. Petitioner testified that she also notified David's boss, Darren Gentry, by email of her fall the following day. Tr. at 16-17. Abby and David were copied on the email Petitioner sent to David Gentry. Tr. at 17. Petitioner testified that Abby was "like the regional manager for the different offices, which is the offices that I was doing sales and everything for them. And Darren was taking over Abby's position because Abby got promoted to a higher position." Tr. at 17. Petitioner was shown Px8, which she identified as the emails that she sent to David Gentry, Abby, and David. Tr. at 17. Petitioner testified that she was sent to Physicians Immediate Care by David following the February 11, 2019 injury. Tr. at 18. Petitioner testified that the first time she ever had treatment to her right knee was after February 11, 2019. Tr. at 40.

Petitioner testified that while she was working at the Crest Hill office, she was told where to park. Tr. at 42. Petitioner testified that she was told "on that side of the parking lot for employees." Tr. at 42-43. Petitioner testified that people would come in and apply at Respondent and those people parked in the same area. Tr. at 43. Petitioner testified that she did not know if Respondent owned the building, if Respondent owned the parking lot, or if Respondent was responsible for maintaining the parking lot from ice and snow. Tr. at 43.

Petitioner testified that she had worked at the Crest Hill office the entire day on February 11, 2019, that she had worked at the Crest Hill office the day before, and that she was scheduled to work at the Crest Hill office the next day. Tr. at 44.

Medical records summary

Petitioner presented at Physician's Immediate Care on February 13, 2019. Px1 at 8. Petitioner presented with complaints of right elbow, lower back, and right knee pain since 6:15 p.m. on Monday, February 11, 2019. Px1 at 8. Petitioner reported that she slipped and fell in the parking lot. Px1 at 8. Petitioner reported that she fell forward on her right side and hit her right knee and right elbow. Px1 at 8. Petitioner also reported another work injury that occurred on December 10, 2018. Px1 at 8. Petitioner reported that she was going to a client's facility for a sales call, that her foot became stuck in a pothole, and that she twisted her right knee. Px1 at 8. Petitioner reported that since the December 10, 2018 injury, her right knee would swell if she walked for long and that it would stiffen if she stood up after prolonged sitting. Px1 at 8. Petitioner reported that she had been self-treating her right knee, but that her knee was

aggravated after falling on it. Px1 at 8. X-rays of Petitioner's right knee were obtained and demonstrated a possible old fibular head avulsion and mild degenerative joint disease. Px1 at 10. X-rays of Petitioner's lumbar spine were also obtained and were normal. Px1 at 10. Petitioner was diagnosed with a contusion of the right knee and a lower back strain. Px1 at 11. She was prescribed Ibuprofen 200mg and Acetaminophen 500mg. Px1 at 11. Petitioner was released to return to work without restrictions. Px1 at 11.

Petitioner returned to Physicians Immediate Care on February 20, 2019. Px1 at 25. Petitioner reported that her back and elbow were better and that her right knee pain had worsened. Px1 at 25. Petitioner reported feeling occasional instability in the right knee. Px1 at 25. Petitioner's diagnoses were unchanged. Px1 at 27. Petitioner was instructed to discontinue Ibuprofen and was prescribed Nabumetone 750mg and Acetaminophen. Px1 at 27. An MRI of Petitioner's right knee was ordered. Px1 at 27. Petitioner was placed on work restrictions, including avoiding prolonged standing and walking. Px1 at 27. Petitioner followed up at Physicians Immediate Care on February 27, 2019. Px1 at 40. Petitioner reported worsening right knee pain and that her knee had given out twice. Px1 at 40. Petitioner also reported feeling a knot behind her knee. Px1 at 40. Petitioner was fitted for a right knee brace. Px1 at 42. Petitioner's diagnoses were unchanged. Px1 at 42. Petitioner's work restrictions were maintained. Px1 at 42.

Petitioner underwent a right knee MRI at Saint Mary Open MRI on February 28, 2019, which demonstrated (1) Grade III tear within the anterior horn of the lateral meniscus with tiny associated parameniscal cyst along the anteroinferior margin of the anterior horn of the lateral meniscus, (2) mild-to-moderate osteoarthritic changes involving the patellofemoral and tibiofemoral articulations, (3) Grade I chondromalacia overlying the medial femoral condyle and medial tibial plateau, (4) Grade I chondromalacia patellae, (5) moderate patellofemoral joint effusion with moderate suprapatellar bursitis, (6) Grade I/II sprain of the lateral collateral ligament, (7) Grade I sprain of the medial collateral ligament, (8) mild edema within the soft tissues overlying the patella and patellar tendon, and (9) a Baker's cyst measuring approximately 4.2 x 2.9 x 2.8 cm at its typical location. Px1 at 54.

On March 5, 2019, Petitioner returned to Physicians Immediate Care and reported no improvement. Px1 at 56. Petitioner continued to feel pressure in the anterior and posterior parts of her right knee. Px1 at 56. Petitioner's diagnosis was internal derangement of her right knee. Px1 at 58. Petitioner was referred to orthopedic surgery at St. Anthony Hospital. Px1 at 58-59. Petitioner's restrictions were maintained. Px1 at 58.

Petitioner presented at St. Anthony Hospital on March 9, 2019 and was seen by Dr. Mitchell Goldflies. Px2 at 13. Petitioner reported a slip and fall on black ice on February 11, 2019. Px2 at 35. Petitioner reported shooting pain from her knee to her foot. Px2 at 35. X-rays of Petitioner's bilateral knees were obtained. Px2 at 13. The right knee x-rays showed mild degenerative changes within the medial and lateral compartments and joint space narrowing. Px2 at 13. The left knee x-rays showed mild degenerative changes within the lateral greater than medial compartment. Px2 at 13. X-rays of Petitioner's pelvis were also obtained and were normal. Px2 at 15. Dr. Goldflies noted Petitioner's pelvis was "off." Px2 at 36. Petitioner's diagnosis was primary osteoarthritis of the right knee. Pxx2 at 36. Physical therapy and

chiropractic treatment was ordered, and Petitioner was placed on work restrictions, including no bending, kneeling, prolonged standing, or walking and sitting work only. Px2 at 36.

Petitioner returned to St. Anthony Hospital for follow up on April 10, 2019. Px2 at 33. Petitioner's diagnosis was unchanged. Px2 at 33. Petitioner's work restrictions were maintained, with an added 20-pound lifting restriction. Px2 at 42. Petitioner next saw Dr. Goldflies on April 24, 2019. Px2 at 28-30. X-rays of Petitioner's right knee were obtained and showed moderate degenerative changes most pronounced medially. Px2 at 16. X-rays of Petitioner's pelvis were also obtained and were normal. Px2 at 17. Petitioner's diagnosis at that time was an MCL sprain. Px2 at 29. Petitioner was placed on sitting work only restrictions. Px2 at 29. Dr. Goldflies recommended that Petitioner discontinue physical therapy and chiropractic treatment for two weeks. Px2 at 29.

On May 8, 2019, Petitioner reported constant "pressure like" pain in her right knee. Px2 at 25. Petitioner's diagnoses on this date were right knee pain and arthritis of the right knee. Px2 at 26. Petitioner was instructed to continue physical therapy and chiropractic treatment. Px2 at 26. Petitioner's sitting work only restriction was maintained. Px2 at 38. Petitioner again saw Dr. Goldflies on June 19, 2019. Px2 at 20. Petitioner's diagnosis on this date was pain in the right knee. Px2 at 20. Dr. Goldflies recommended a right knee injection. Px2 at 20. Petitioner's sitting work only restriction was maintained. Px2 at 21.

On July 9, 2019, Petitioner presented to Dr. Thomas Poepping at Illinois Orthopedic Network ("ION"). Px3 at 3. A history of a right knee injury occurring on December 10, 2018, and a reinjury occurring on February 11, 2019 when Petitioner slipped on ice was reported by Petitioner. Px3 at 3. Dr. Poepping noted that Petitioner's right knee MRI showed a tear of the anterior horn of the lateral meniscus with associated parameniscal cyst, mild to moderate osteoarthritic changes involving the patellofemoral and tibiofemoral articulations, and Grade I sprains of the MCL and LCL. Px3 at 3. Petitioner's diagnoses were right knee chondromalacia and right knee anterior horn lateral meniscal tear. Px3 at 3. Dr. Poepping noted that he offered Petitioner an injection, which Petitioner declined as she preferred to start treatment with physical therapy. Px3 at 3. Petitioner was placed on a sedentary work only restriction. Px3 at 5.

Petitioner returned to Dr. Poepping on August 20, 2019. Px3 at 7. Petitioner's diagnoses were unchanged. Px3 at 7. Dr. Poepping administered an injection of 80mg Kenalog and 8mL of Lidocaine to the right knee. Px3 at 7. Petitioner's sedentary work only restriction was maintained. Px3 at 8. Petitioner next saw Dr. Poepping on September 17, 2019. Px3 at 9. Dr. Poepping noted that Petitioner had responded nicely to the injection and had completed therapy. Px3 at 9. Petitioner's diagnoses were unchanged. Px3 at 9. Dr. Poepping noted that visco-supplementation or a repeat cortisone injection were discussed. Px3 at 9. Petitioner's sedentary work only restrictions were continued. Px3 at 10. Petitioner returned to Dr. Poepping on October 29, 2019. Px3 at 11. Petitioner reported worsening and increased anterior and medial knee pain. Px3 at 11. Petitioner's diagnoses were unchanged. Px3 at 11. Dr. Poepping recommended a one-shot series of Synvisc-One. Px3 at 11. Petitioner's sedentary work only restriction was maintained. Px3 at 12.

Petitioner next saw Dr. Poepping on December 9, 2019. Px3 at 13. Petitioner's diagnoses were unchanged. Px3 at 13. Dr. Poepping administered a cortisone injection in Petitioner's right knee. Px3 at 13. Petitioner was prescribed Tramadol and her sedentary work only restriction was continued. Px3 at 13-14. On January 21, 2020, Dr. Poepping administered a Synvisc-1 injection into Petitioner's right knee. Px3 at 15. Petitioner's sedentary work only restriction continued. Px3 at 15. Petitioner followed up with Dr. Poepping on March 3, 2020. Px3 at 17. Petitioner reported that the Synvisc injection did not help a lot. Px3 at 17. Petitioner's diagnoses were unchanged. Px3 at 17. Surgical and nonsurgical treatment options were discussed. Px3 at 17. Dr. Poepping noted that at that time, surgery was not in Petitioner's best interest as he thought that Petitioner would still be left with some degree of pain. Px3 at 17. Dr. Poepping noted that the best thing for Petitioner to do was to continue to do activities of daily living as best as possible, take anti-inflammatory pain medications as needed, and to find work that she was able to tolerate. Px3 at 17. Dr. Poepping noted that Petitioner was at maximum medical improvement ("MMI"). Px3 at 17. Dr. Poepping noted that he considered Petitioner to be at MMI at that time because future surgery was not planned. Px3 at 17. Dr. Poepping also noted that it was possible that Petitioner would need surgery in the future. Px3 at 17. An FCE was ordered, and Petitioner's sedentary work only restriction was maintained. Px3 at 17, 18.

Petitioner underwent an FCE on March 13, 2020 at ION. Px3 at 20. It was noted that Petitioner demonstrated consistent effort throughout the evaluation. Px3 at 23. Petitioner demonstrated that she was capable of performing in the medium physical demand category. Px3 at 24. It was noted that squatting, kneeling, and squat lifting should be avoided, that it would be ideal if Petitioner worked in a situation where she could easily switch between sitting, standing, and walking, and that standing and walking should be limited to an occasional basis. Px3 at 24.

Petitioner returned to Dr. Poepping on March 31, 2020. Px3 at 25. Dr. Poepping noted that the FCE was valid. Px3 at 25. Dr. Poepping again noted that surgery was not indicated at that time, and that it was a possibility that Petitioner would need surgery in the future if her symptoms worsened to the point that she was unable to perform any useful work or if it started to impact her day-to-day activities more. Px3 at 25. Dr. Poepping placed Petitioner on permanent restrictions, which included (1) no carrying/lifting greater than 42 pounds, (2) no bending/squatting, (3) no kneeling/crawling, (4) no floor-to-waist lifting, (5) occasional stair climbing, and (6) occasional walking. Px3 at 26. Petitioner was discharged from Dr. Poepping's care. Px3 at 25.

On January 18, 2021, Petitioner returned to Dr. Poepping. Px3 at 27. Petitioner testified that she returned to Dr. Poepping on January 18, 2021 because her knee continued to swell and she wanted to continue her medication. Tr. at 33-34. Petitioner testified that between March 31, 2020 and January 18, 2021, her knee symptoms were the same and that she had to refill her medication. Tr. at 49-50. On January 18, 2021, Petitioner reported experiencing increased pain in the knee and that she was having significant feelings of giving way in the knee. Px3 at 27. Petitioner's diagnoses were right knee anterior horn lateral meniscal tear and right knee chondromalacia. Px3 at 27. Petitioner was interested in proceeding with surgical treatment. Px3 at 27. Dr. Poepping noted that surgery would involve a right knee arthroscopy, likely chondroplasty, evaluation of the tracking of the patella, and then partial lateral meniscectomy and synovectomy. Px3 at 27. Dr. Poepping also noted that he had reviewed Dr. Lieber's IME

report and that he disagreed with Dr. Lieber's finding that Petitioner had no work-related injury to her right knee. Px3 at 27. Dr. Poepping noted that Petitioner had two injuries to the right knee that involved twisting mechanisms of injury, and that either of those two injuries could be the source of her complaints that were present in the right knee, particularly as to the lateral tear. Px3 at 27. He further noted that there was certainly a causal reason for an exacerbation of the underlying chondromalacia. Px3 at 27. Dr. Poepping noted that he felt that the chondromalacia was preexisting to the injury, but that he did not have any documentation of an MRI done prior to injury that demonstrated that Petitioner had a meniscus tear. Px3 at 27. He further noted that regardless, the mechanism of injury that Petitioner documented would be a reasonable explanation for her ongoing knee pain and the reason for the requested right knee surgery. Px3 at 27. Petitioner's permanent restrictions were maintained. Px3 at 27.

Petitioner followed up with Dr. Poepping on February 18, 2021, April 15, 2021, May 27, 2021, June 29, 2021, September 29, 2021, February 28, 2022, and April 11, 2022. Px3 at 29, 31, 33-34, 35-36, 37-38, 65-66, 67-68. Dr. Poepping continued to recommend surgical treatment of Petitioner's right knee and Petitioner's permanent restrictions were maintained.

Petitioner participated in approximately 30 sessions of physical therapy at Soma Rehab, Inc. from March 3, 2019 through September 13, 2019. Px4. Petitioner presented at St. Anthony Hospital for chiropractic sessions for her pelvis on April 3, 2019, April 24, 2019, May 17, 2019, June 5, 2019, and June 12, 2019. Px2 at 34, 27, 24, 23, 22.

Earnings

Petitioner was compensated for mileage, in addition to her salary or hourly wage, when she would go out in the field. Tr. at 8. Petitioner testified that in terms of pay, she would "take home" between $900.00 and $1,200.00 every two weeks. Tr. at 9, 41. Petitioner testified that she worked overtime at Respondent and that there were some weeks she did not work 40 hours. Tr. at 48-49. Petitioner's mileage check was issued to her separately from her regular paycheck. Tr. at 52-54.

Petitioner testified that Respondent accommodated the light duty restrictions given to her by Physicians Immediate Care. Tr. at 20-21. Petitioner's light duty restrictions were accommodated by Respondent through June 2019. Tr. at 22-23. Petitioner testified that she was terminated from Respondent on June 28, 2019. Tr. at 23. Petitioner testified that she was told that Respondent did not need her anymore. Tr. at 45. Respondent did not accommodate Petitioner's work restrictions after June 28, 2019. Tr. at 24. Petitioner testified that she did not receive any lost time benefits from June 29, 2019 through January 30, 2020. Tr. at 28. Petitioner received a check in the amount of $10,080.00 for lost time benefits in December 2019. Tr. 29. Petitioner did not receive payments in June, July, August, September, or October 2019. Tr. at 29. Petitioner testified that she received 10 checks from Respondent or TrueBlue, each in the amount of $480.00, while she was not working. Tr. at 46-47. Respondent offered Respondent's Exhibit ("Rx") 5, a payment ledger, which reflects 10 payments to Petitioner each in the amount of $480.00 and one payment to Petitioner in the amount of $10,080. Rx5, however, does not reflect the dates of any of the payments listed. Rx5.Petitioner testified that after she was terminated by Respondent, she uploaded her resume online to Indeed and applied for jobs. Tr. at 45.

Petitioner testified that she was hired by Stafforward in July 2020. Tr. at 31. Petitioner did not receive any other job offers besides from Stafforward. Tr. at 45. Petitioner did not work from June 28, 2019 through July 20, 2020. Tr. at 31. Petitioner testified that she was hired by Stafforward at $13.50/hour and that she worked 37.5 hours/week. Petitioner testified that after working 90 days at Stafforward, her pay rate was increased to $14.00/hour. Tr. at 32. Petitioner testified that she was hired by the State of Indiana on December 14, 2020 and that she earns $1,157.00 bi-weekly. Tr. at 32-33. Petitioner testified that at the time of arbitration, she was still employed by the State of Indiana. Tr. at 40.

Current condition

Petitioner testified that if authorized, she would like to proceed with the surgery recommended by Dr. Poepping because she is hoping that it will better her quality of life. Tr. at 38. Petitioner testified that she cannot go to the grocery store without a list or walk around the mall because she can only stand for so long before her knee starts hurting. Tr. at 34-35, 38. Petitioner testified that prior to December 10, 2018, her right knee was fine and she could exercise, go shopping, and not have to think about a list or hold herself going down the stairs afraid that her knee was going to give out. Tr. at 39.

Testimony of Ridge Harrison

Respondent called Mr. Ridge Harrison to testify on its behalf. Tr. at 56. Mr. Harrison testified that at the time of arbitration he was employed by Respondent as the Regional Vice President. Tr. at 56-57. Mr. Harrison testified that his responsibilities are sales and operations for Respondent's branch locations and service centers in Wisconsin, Illinois, North Dakota, Minnesota, and Iowa. Tr. at 57. Mr. Harrison testified that Respondent's parent company is TrueBlue. Tr. at 57. Mr. Harrison has worked for Respondent for 12 years. Tr. at 57-58. Mr. Harrison testified that very little of his day-to-day activity was centered around the in-office actions at Respondent's Crest Hill office. Tr. at 63. Mr. Harrison testified that it was fair to say that the day-to-day operations were not very high on his "things to know." Tr. at 63-64.

Mr. Harrison testified that Respondent's Crest Hill office was part of his territory and that he had been to the Crest Hill office. Tr. at 58. The Crest Hill office is a smaller location in a strip mall. Tr. at 58. There were other businesses in the strip mall. Tr. at 58. Mr. Harrison testified that he did not know if the parking lot at the Crest Hill office was shared or if there was a specific parking lot for Respondent, but that he believed that it was a shared parking lot. Tr. at 58. Respondent did not own the Crest Hill office, and Respondent was a tenant. Tr. at 59. Mr. Harrison was shown Rx1 and Rx2, which he identified as lease agreements. Tr. at 59. Mr. Harrison testified that as part of the lease agreement, Respondent had a responsibility for the building, but not for the parking lot. Tr. at 59. Mr. Harrison testified that the lessor owned the parking lot, the sidewalks, and the building, and the lessor was responsible for maintaining the premises outside the building. Tr. at 60, 66. As part of the lease, the owner of the building was responsible for maintaining all of the common areas and for ice and snow removal. Tr. at 68, 69. Respondent did not have any duties regarding ice and snow removal at the Crest Hill office. Tr. at 60.

Mr. Harrison testified that he did not know if employees at the Crest Hill office were told to park in any specific areas of the parking lot. Tr. at 62. Mr. Harrison testified that he would not have expected the office manager or team at the Crest Hill office to keep the entryway clear for clients. Tr. at 64. Mr. Harrison testified that Respondent did not have a lot of client traffic that came into the office. Tr. at 64. Mr. Harrison was not at the Crest Hill office any time between November 2018 and June 2019. Tr. at 64-65. Mr. Harrison would not know whether Respondent's Crest Hill office had a bag of rock salt in the lunchroom. Tr. at 65. Mr. Harrison testified that there was not any kind of direction to the supervisors to put salt out on the sidewalks leading into an office location. Tr. at 65. Mr. Harrison testified that the expectation would be to have a reasonable and safe place for people to work when asked what obligations Respondent had to keep the inside of the Crest Hill office clean, tidy, and safe to use. Tr. at 66. When asked if the expectation to have a safe place for people to work included keeping the entry doorway free from ice, Mr. Harrison responded, "Potentially, yeah. I mean, that's –" Tr. at 66.

Mr. Harrison testified that Petitioner's job title in December 2018 was assistant branch manager. Tr. at 60-61. An assistant branch manager was responsible for recruiting, hiring new associates, placing new associates in jobs with Respondent's customers, and interacting with Respondent's customers to help grow the business. Tr. at 61. Mr. Harrison testified that Petitioner's job did not change in 2018 or 2019. Tr. at 61. Mr. Harrison testified that Petitioner received a promotion in August 2018, and that prior to her promotion her job title was senior staffing specialist. Tr. at 63. Mr. Harrison testified that it was his understanding that Petitioner spent time in four different locations in 2019, and that two of those locations were in Indiana and the other two were in Greater Chicago. Tr. at 61. Mr. Harrison testified that it was "probably a combination of both, where certain days [Petitioner] would spend the entire day in a specific location, and others she may be required to go back and forth[,]" when asked if Petitioner would be assigned to one location for the entire day or if she would have to travel from location to location. Tr. at 61-62. Mr. Harrison agreed that David Borgess was the manager of the Crest Hill office on February 11, 2019. Tr. at 69.

Evidence Deposition Testimony of Respondent's Section 12 Examiner, Dr. Lawrence Lieber

Dr. Lieber testified by way of evidence deposition on August 11, 2021. Rx3. Dr. Lieber testified as to his education and credentials as an orthopedic surgeon. Rx3 at 4-6.

Dr. Lieber first met with Petitioner on January 30, 2020. Rx3 at 9. Petitioner was referred to Dr. Lieber for an evaluation concerning Petitioner's December 10, 2018 and February 11, 2019 events. Rx3 at 9. Dr. Lieber took a history from Petitioner, noted her subjective complaints, and performed a physical examination of Petitioner. Rx3 at 9-11. Dr. Lieber testified that on exam, Petitioner had full range of motion of her right knee and she had good strength about the knee. Rx3 at 11. Petitioner had some tenderness about the medial joint line, had some instability of her medial collateral ligament with the valgus stress at 30 degrees, and had some tenderness about the patella femoral joint. Rx3 at 11. After conducting the physical exam, Dr. Lieber reviewed the x-ray of February 13, 2019, which confirmed minor degenerative changes about the knee. Rx3 at 11-12. Dr. Lieber also reviewed the MRI of February 27, 2019, which showed a tear about the lateral meniscus with a parameniscal cyst along with degenerative chondromalacia throughout the knee and a sprain of the medial and lateral collateral ligaments. Rx3 at 12. Dr.

Lieber reviewed records from Physicians Immediate Care Center, Dr. Goldflies, Dr. Poepping, and Soma Rehab as well. Rx3 at 12. Following his physical examination of Petitioner and review of medical records, Dr. Lieber authored an Independent Medical Examination ("IME") report on January 30, 2020 containing his findings. Rx3 at 13.

Dr. Lieber testified that Petitioner's diagnoses were right knee chondromalacia, degenerative joint disease, degenerative lateral meniscal tear, and MCL instability. Rx3 at 14. Dr. Lieber testified that Petitioner's two injuries were not competent causes of chondromalacia, and that chondromalacia is a chronic problem that was present prior to the two injuries. Rx3 at 15. Dr. Lieber testified that Petitioner's two injuries were not competent causes of degenerative joint disease, and that degenerative joint disease is a degenerative process. Rx3 at 16. Regarding the degenerative lateral meniscal tear and MCL instability, Dr. Lieber testified that the MRI indicated that Petitioner had a degenerative lateral meniscal tear with associated parameniscal cyst, which was consistent with a degenerative tear of the meniscal tissue. Rx3 at 16. Dr. Lieber explained that a parameniscal cyst is a collection of fluid from within the joint that occurs due to the defect within a meniscal tear that occurs over an extensive period of time, and that the MCL instability was associated with the overall degenerative condition of the knee causing some instability within the medial collateral ligament. Rx3 at 17.

Dr. Lieber testified that the difference between a degenerative meniscus tear and a traumatic meniscus tear is that a traumatic meniscal tear is an acute event that would not be associated with the parameniscal cyst and would show evidence of acute edema and acute findings on MRI. Rx3 at 17. Dr. Lieber testified that he felt that Petitioner's diagnoses were all degenerative conditions and had no relationship with either the December 2018 or February 2019 events. Rx3 at 17. Dr. Lieber explained that Petitioner had abnormal conditions within her knee that were degenerative in nature and had no relationship to the two alleged events, that her problems were preexisting, and that there was no evidence of any relation that any of her problems could have occurred or been affected by those two events. Rx3 at 18. Dr. Lieber testified that he felt that Petitioner had a symptomatic problem within her knee, which was related to the degenerative process, and that there was an extensive amount of treatment given that was related to the degenerative aspects of Petitioner's knee and not related to the two acute injuries. Rx3 at 18. Dr. Lieber testified that at the time of his January 30, 2020 IME, there was no evidence that Petitioner required any work restrictions in association with the two events and he did not feel that there was evidence of a significant acute injury that would require Petitioner to be limited in her work activities. Rx3 at 19.

Dr. Lieber reexamined Petitioner on April 1, 2021 and took a history from Petitioner. Rx3 at 19. Dr. Lieber also reviewed additional medical records. Rx3 at 20. Dr. Lieber testified that he was asked to author a second report, which he authored on April 1, 2021, and this report contains his findings from Petitioner's reexamination. Rx3 at 19, 20. Dr. Lieber testified that on exam, Petitioner had tenderness about the medial joint line, a positive McMurray's, and tenderness above the patellofemoral joint. Rx3 at 20. Dr. Lieber testified that his diagnoses of Petitioner on April 1, 2021 were right knee chondromalacia, degenerative joint disease, and degenerative lateral meniscal tear. Rx3 at 21. The medial collateral ligament instability had stabilized. Rx3 at 21-22. Dr. Lieber's opinion as to whether Petitioner's condition of ill-being was related to either date of accident was unchanged. Rx3 at 22. Dr. Lieber testified that he felt

that the need for surgery had no relationship to the alleged events of December 2018 or February 2019. Rx3 at 22. Dr. Lieber testified that he felt that Petitioner required no restrictions and could return to work without restrictions. Rx3 at 23.

On cross examination, Dr. Lieber testified that he takes a half hour to prepare for an IME and that he takes five to 10 minutes during the physical examination portion of an IME. Rx3 at 24. Dr. Lieber testified that he did not review any medical records that predated the February 13, 2019 Concentra report. Rx3 at 26. Dr. Lieber testified that he did not review a medical report that provided the same or similar diagnoses as his that predated February 10, 2019. Rx3 at 26. Dr. Lieber agreed that he did not see a medical report for Petitioner of a complaint of a symptomatic chondromalacia condition, a symptomatic degenerative joint disease condition, or a diagnosis or a confirmation of a symptomatic degenerative lateral meniscal tear prior to February 10, 2019. Rx3 at 26-27. Dr. Lieber testified that he did not see any medical reports for Petitioner of a symptomatic collateral ligament instability condition prior to February 13, 2019. Rx3 at 27. Dr. Lieber testified that he asked Petitioner if she ever experienced any symptoms prior to either date of accident, and that Petitioner reported no prior history. Rx3 at 27. Dr. Lieber testified that it was not common for a healthy person given Petitioner's age to have instability of Grade 2 nature of the MCL. Rx3 at 29. Dr. Lieber agreed that in his January 30, 2020 report he indicated that overall treatment through June 2019 was reasonable. Rx3 at 33-34, 44. Dr. Lieber was not aware that he was the only physician that diagnosed Petitioner's meniscal tear as degenerative in nature. Rx3 at 39. Dr. Lieber had no reason to believe that Petitioner had any other MRIs of her knee besides the February 17, 2019 MRI. Rx3 at 40. Dr. Lieber testified that a traumatic event can never cause a Baker's cyst. Rx3 at 41. Dr. Lieber testified that there was no evidence in the medical records that he reviewed that indicated that a Baker's cyst was present before December 10, 2018 or February 11, 2019. Rx3 at 41-42. Dr. Lieber agreed that the preexisting degenerative abnormalities could require additional future treatment, including injections and possibly surgery. Rx3 at 44-45. Dr. Lieber testified that he believed that he reviewed only his January 30, 2020 IME, the FCE report, and Dr. Poepping's record of January 18, 2020 for his April 1, 2020 IME. Rx3 at 46. Dr. Lieber testified that he may have had access to the records that he reviewed for his January 30, 2020 IME at the time of his April 1, 2020 IME. Rx3 at 46-47. Dr. Lieber testified that he did not review any medical records from Dr. Poepping from October 29, 2019 through January 18, 2021. Rx3 at 48. Dr. Lieber testified that he felt that a total of four months of treatment was adequate, and that he felt that treatment after that period was for the underlying preexisting degenerative conditions. Rx3 at 49. Dr. Lieber agreed that his opinion regarding the reasonableness of treatment was not based on a lack of subjective complaints from the Petitioner. Rx3 at 50.

Dr. Lieber testified that there was no evidence that the December 2018 or February 2019 events caused, accelerated, or aggravated any underlying abnormalities. Rx3 at 42-43. Dr. Lieber explained that he was not saying that the two events did not cause Petitioner to be symptomatic or did not cause the need for treatment, but from an objective standpoint, there was no evidence that either one of those two events did anything to Petitioner's knee. Rx3 at 43. Dr. Lieber testified that the two events could have created an asymptomatic condition to become symptomatic for a period of time that required treatment. Rx3 at 43-44.

On redirect examination, Dr. Lieber testified that he reviewed the actual MRI films of February 2019 and the report. Rx3 at 50-51. Dr. Lieber testified that a parameniscal cyst takes anywhere from six months to one year, or longer, to form. Rx3 at 52.

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The burden of proof is on a claimant to establish the elements of her right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission,* 44 Ill. 2d 214 (1969).

Credibility is the quality of a witness which renders her evidence worthy of belief. It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. *O'Dette v. Industrial Commission*, 79 Ill. 2d 249, 253 (1980); *Hosteny v. Workers' Compensation Commission*, 397 Ill. App. 3d 665, 674 (2009). Where a claimant's testimony is inconsistent with her actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972).

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds her to be a credible witness. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable.

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

Having considered all of the evidence, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that she sustained an accident that arose out of and in the course of her employment with Respondent on February 11, 2019. The Arbitrator notes that in regards to Petitioner's status as a traveling employee, the Arbitrator knows only that: (1) Petitioner regularly traveled for work prior to December 10, 2018, (2) Petitioner spent time for work in four different locations in 2019, two locations in Indiana and two locations in Greater Chicago, (3) there were certain days when Petitioner would spend the entire work day at one location, and there were days that Petitioner would be required to travel back and forth between locations, (4) Petitioner was assigned to the Crest Hill office at the time of the accident, and (5) the activity that Petitioner was performing at the time of the accident was reasonable and foreseeable. Regardless of Petitioner's status as a traveling employee, the Arbitrator still views the accident as compensable, where the evidence demonstrates that Petitioner was walking from Respondent's Crest Hill office to her car, that Petitioner's car was parked in a designated parking

location, and that Petitioner encountered a hazard in the parking lot or along a designated route to her parked car, causing Petitioner to slip and fall onto her right knee. The Arbitrator notes that Petitioner's testimony that she was told by Respondent where and in what area of the parking lot to park while working at the Crest Hill office was unrebutted.

Issue F, whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

Having considered all of the evidence, the Arbitrator finds that Petitioner's current right knee condition of ill-being is causally related to the February 11, 2019 injury. The Arbitrator relies on the following in support of her findings: (1) the medical records of Physicians Immediate Care, (2) the medical records of St. Anthony Hospital and Dr. Goldflies, (3) the medical records of ION and Dr. Poepping, (4) Petitioner's credible testimony that the first time she ever had treatment to her right knee was after February 11, 2019, and (5) the fact that none of the records in evidence reflect any right knee issues or treatment prior to February 11, 2019. The Arbitrator notes that the evidence demonstrates that Petitioner was able to work full duty and without restrictions immediately prior to the February 11, 2019 accident.

The Arbitrator has considered the opinions of Dr. Lieber and finds that the opinions of Dr. Lieber do not outweigh the opinions of Dr. Poepping. The Arbitrator notes that Dr. Poepping has provided Petitioner with continuous treatment since July 9, 2019, whereas Dr. Lieber examined Petitioner on only two occasions, with each of Dr. Lieber's physical examinations lasting no more than 10 minutes. The Arbitrator notes that while Dr. Lieber testified that Petitioner's right knee condition was caused by preexisting degenerative conditions, Dr. Lieber conceded that he did not review any medical records or diagnostic exams from prior to February 11, 2019. Dr. Lieber further conceded that either the December 10, 2018 injury or the February 11, 2019 injury could have created an asymptomatic condition to become symptomatic for a period of time.

Issue G, as to what were Petitioner's earnings, the Arbitrator finds as follows:

Petitioner claims that her earnings during the year preceding the injury were $37,440.00 and that her average weekly wage was $720.00. Arbitrator's Exhibit ("Ax") 1. Respondent disputes Petitioner's claims, and Respondent claims that Petitioner's average weekly wage was $711.93. Ax1.

Petitioner testified that she would "take home" between $900.00 and $1,200.00 every two weeks while working at Respondent. Petitioner also testified that she worked overtime at Respondent, but that there were also some weeks where she worked less than 40 hours. Petitioner offered Px7, Petitioner's payroll records from Respondent, which reflect Petitioner's earnings from December 16, 2017 to December 14, 2018. The Arbitrator has considered Px7 and calculated a different AWW than the AWW offered by Petitioner and Respondent. Respondent, however, is bound by its stipulation that Petitioner's AWW is $711.93 under *Walker v. Industrial Comm'n*, 345 Ill. App. 3d 1084, 1087-1088 (2004).

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:

Consistent with the Arbitrator's prior findings regarding the issues of accident and causal connection, the Arbitrator finds that Petitioner's medical treatment has been reasonable and necessary, and that Respondent has not yet paid all appropriate charges. At arbitration, Petitioner presented the following unpaid medical bills: (1) St. Anthony Hospital ($2,373.00), (2) Illinois Orthopedic Network ($2,488.17), (3) Midwest Specialty Pharmacy ($17,895.16), (4) St. Mary Open MRI ($2,600.00), (5) Integrated Pain Management ($2,775.64), and (6) Soma Rehab ($6,020.00). As the Arbitrator has found that Petitioner's treatment has been reasonable and necessary, the Arbitrator further finds that all bills, as provided in Px1 through Px4, are awarded and that Respondent is liable for payment of these bills, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act.

Respondent is entitled to a credit for any payments made towards the awarded outstanding expenses and shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit.

Issue K, whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows:

Consistent with the Arbitrator's prior findings, and having considered all of the evidence, the Arbitrator finds that Petitioner is entitled to prospective medical care as recommended by Dr. Poepping. As of January 18, 2021, Dr. Poepping has continuously recommended that Petitioner undergo a right knee arthroscopy, chondroplasty, evaluation of the tracking of the patella, partial lateral meniscectomy, and synovectomy. Accordingly, the Arbitrator finds that Petitioner is entitled to a right knee arthroscopy, chondroplasty, evaluation of the tracking of the patella, partial lateral meniscectomy, and synovectomy, which is contemplated as compensable treatment under Section 8(a) of the Act, and therefore, Respondent is responsible for authorizing and paying for same.

Issue L, whether Petitioner is entitled to temporary total disability and temporary partial disability, the Arbitrator finds as follows:

Consistent with the Arbitrator's prior findings, and having considered all of the evidence, the Arbitrator finds that Petitioner is entitled to TTD benefits and TPD benefits. Petitioner claims that she is entitled to TTD benefits from June 28, 2019 through July 19, 2020 and that she is entitled to TPD benefits from July 20, 2020 through August 24, 2022, the date of arbitration. Ax1. Respondent disputes Petitioner's claims for TTD and TPD benefits, and claims "subject to proof." Ax1.

Regarding Petitioner's entitlement to TTD benefits, Petitioner testified that she was terminated from her employment with Respondent on June 28, 2019. At the time of her termination, Petitioner was working with restrictions imposed by Dr. Goldflies on June 19, 2019. Petitioner's work restrictions were continued by Dr. Poepping on July 9, 2019. Dr. Poepping

subsequently placed Petitioner on permanent restrictions on March 31, 2020. Petitioner credibly testified that after her termination, she utilized the platform Indeed to look for employment, and that she did not find employment until she was hired by Stafforward on July 20, 202. Petitioner testified that she did not work between June 29, 2019 and July 19, 2020. No contrary evidence was offered by Respondent. Accordingly, the Arbitrator finds that Petitioner is entitled to TTD benefits from June 29, 2019 through July 19, 2020.

Regarding Petitioner's entitlement to TPD benefits, Petitioner testified that she began working at Stafforward on July 20, 2020. See Px11. At the time of her hire, Petitioner testified that she earned $13.50/hour and that she worked 37.5 hours/week, thus earning $506.25/week. See Px11, Px12. Petitioner testified that she received a raise on October 20, 2020, and began earning $14.00/hour, thus earning $525.00/week. See Px11. Petitioner testified that she began working at the State of Indiana on December 14, 2020. No contrary evidence was offered by Respondent. Accordingly, the Arbitrator finds that Petitioner is entitled to TPD benefits in the amount of $1,802.17 ($137.12 x 13 1/7 weeks) for the time period of July 20, 2020 through October 19, 2020 and $979.14 ($124.62 x 7 6/7 weeks) for the time period of October 20, 2020 through December 13, 2020. Petitioner further testified that she began work with the State of Indiana on December 14, 2020, earning $1,157.00 bi-weekly, or $578.50 weekly. See Px12. No contrary evidence was offered by Respondent. Accordingly, the Arbitrator finds that Petitioner is entitled to TPD benefits in the amount of $7,865.76 ($88.95 x 88 3/7 weeks) for the time period of December 14, 2020 through August 24, 2022, the date of arbitration.

Issue M, whether penalties/attorney's fees should be imposed upon Respondent, the Arbitrator finds as follows:

Petitioner filed a petition for penalties and fees on October 25, 2019. Px5 at 9-22. Petitioner filed a second petition for penalties and fees on November 22, 2019. Px5 at 23-37.

The award of Section 19(l) penalties is mandatory '[i]f the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay." *McMahan v. Industrial Commission*, 183 Ill.2d 499, 514-15 (1998). The employer bears the burden of justifying the delay and its justification is sufficient only if a reasonable person in the employer's position would have believed the delay was justified. *Board of Education of the City of Chicago v. Industrial Commission*, 93 Ill.2d 1, 9-10 (1982). Section 19(l) penalties are awardable at the rate of $30.00 per day "for each day that the benefits under Section 8(a) or Section 8(b)" were "withheld or refused," up to a maximum of $10,000.00. A delay in payment of 14 days or more creates a rebuttable presumption of unreasonable delay. In this case, the evidence demonstrates that Respondent delayed or withheld payment of TTD benefits to Petitioner from June 29, 2019 through November 22, 2019. See Px5 at 45, Rx5. The Arbitrator finds that Respondent did not offer an adequate justification for denial of payment. As such, the Arbitrator further finds Respondent liable for Section 19(l) penalties in the amount of $4,410.00 since benefits were denied for 147 days, from June 29, 2019 through November 22, 2019.

The Arbitrator further finds that Respondent's disputes in this case are not vexatious or in bad faith, such that Section 19(k) penalties and/or Section 16 attorney's fee are merited. As such,

the Arbitrator does not find it appropriate to award Section 19(k) penalties or Section 16 attorney fees.

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

Respondent claims that it is entitled to a credit in the amount of $14,880.00 in TTD benefits paid to Petitioner. Ax1. Petitioner disputes Respondent's claim, and Petitioner claims "subject to proof."

In support of Respondent's claim, Respondent offered Rx5, which reflects that Respondent paid $14,880.00 in TTD benefits to Petitioner. No contrary evidence was offered by Petitioner. Accordingly, the Arbitrator finds that Respondent is entitled to a credit in the amount of $14,880.00 for TTD benefits paid to Petitioner.

ANA VAZQUEZ, ARBITRATOR

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC012836
Case Name	Noe Zarate v. Anchor Brake Shoe Company
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0482
Number of Pages of Decision	12
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Michelle Porro
Respondent Attorney	Lauren Witkowski

DATE FILED: 11/15/2023

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS	)	
	) SS.	
COUNTY OF DU PAGE	)	

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

NOE ZARATE,

Petitioner,

vs. NO: 19 WC 12836

ANCHOR BRAKE SHOE COMPANY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, notice, temporary total disability, medical expenses, prospective medical, 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 27, 2022, is hereby affirmed and adopted.

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

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

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

November 15, 2023
o-10/17/23
KAD/jsf
42

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

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

/s/*Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC012836
Case Name	Noe Zarate v. Anchor Brake Shoe Company
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Stephen Friedman, Arbitrator

Petitioner Attorney	Michelle Porro
Respondent Attorney	Daniel Swanson

DATE FILED: 9/27/2022

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 27, 2022 3.85%

/s/*Stephen Friedman, Arbitrator*

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Noe Zarate
Employee/Petitioner
v.
Anchor Brake Shoe Company
Employer/Respondent

Case # **19** WC **012836**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Wheaton**, on **July 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 **February 28, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**56,600.96**; the average weekly wage was $**1,088.48**.

On the date of accident, Petitioner was **39** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

Because Petitioner failed to prove by a preponderance of the evidence that he sustained accidental injuries arising out of and in the course of his employment on February 28, 2019 and further failed to prove by a preponderance of the evidence that his condition of ill-being in the right hand was causally connected to his employment, Petitioner’s 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.

SEPTEMBER 27, 2022

/s/ Stephen J. Friedman
Signature of Arbitrator

Statement of Facts

Petitioner Noe Zarate testified in Spanish through an interpreter. Petitioner testified that he worked as a machine operator for Respondent Anchor Brake Shoe Company for nine years. On February 28, 2019, Petitioner began work approximately 3:00 AM. he was assigned a machine to work on, that was outside of his seniority, and made a complaint to the manager of his union because this machine was one of the heaviest machines. He testified the meeting took place around 4:15 AM with Brad Murrow, the union chief, and Jose Monjaraz. Petitioner later testified it was on his break at 4:45 AM. He became angry because the union president did not pay attention to him, and he punched a blue toolbox in the maintenance room, about 10 feet outside the office door around 4:30 AM. Petitioner testified that his hand was normal, and he felt nothing after he punched the toolbox. He used the bathroom in the locker room and took his break upstairs in the lunch room. He does not recall speaking with Jose Monjaraz after the meeting. He does not recall talking to Hector Diaz or Dan Caranza in the lunchroom.

He testified that after his break, he went back to work on his machine, which was Machine No. 7. He denied going directly from the lunchroom to Bob Costanzo. He testified that while pushing a pallet weighing 480 to 500 pounds when a piece of back stock fell in front of the pallet and got stuck in the rollers causing his hand to bend backwards. He started to feel a tingling sensation in his hand, after bending it backwards. RX 10 was identified as a piece of back stock. PX 6 was identified as a photo of a brake and back stock. He testified that things get stuck and fall off the pallet frequently, when pushing product down the conveyor band with the rollers. Petitioner was shown RX 7 which is a reenactment of pushing a skid of briquettes and having a brake on the rollers in front. Petitioner testified that the part on the video was horizontal but the one that fell on the date of the accident fell vertically.

Petitioner testified that immediately after the accident, that he went and spoke with his Supervisor, Bob Costanzo, at approximately 5:00 AM. He denied going directly from the breakroom to Bob Constanza's office. He told him he hurt his hand. He asked if he could tell a co-worker to watch his machine. He does not recall who he asked. He then went back to Bob Costanzo to file a report. RX 1 is the Incident Reporting. Petitioner described the event as "Push skid of H4 from back of line to the front of line." He testified he then called Work Care. He later testified he did not call them himself. The contact was at 5:13 AM (PX 7). He reported pushing a skid of briquettes closer to his work station injuring his right hand (PX 8).

Petitioner testified he went to Tyler Medical as soon as they opened on February 28, 2019 (PX 1). He provided a history that "he was pushing heavy material into a roller, but it got stuck and 'smashed' his right hand and it hyperextended at the wrist." X-rays noted an acute comminuted 5th metacarpal base fracture involves the CMC articular surface. He was referred to Dr. Suchy in orthopedics (PX 1, p 7-9). Dr. Suchy recommended closed reduction and percutaneous pinning (PX 1, p 10).

Petitioner testified that he returned to the plant after seeing Tyler Medical but was sent home. He testified that he spoke with Julie Jones in Human Resources and reported the same mechanism of injury. He does not remember a conversation with Danielle Johnson the next day or anyone from Respondent asking for more specific information about the mechanism of injury. He does not recall exactly his conversation with Danielle Johnson on March 4, 2019. He recalls having a conference call on March 19, 2019. That was the first time he admitted he punched the toolbox. He does not remember a second call with his sister present to interpret.

The surgery was performed on March 5. 2019 (PX 2, p 6-7). The pins were removed on April 4, 2019. Petitioner was released to return to work with no lifting over 5 pounds (PX 1, p 15). He was discharged from care and released to regular work without restrictions on April 23, 2019 (PX 1, p 16). Petitioner testified he was off work under treatment to April 23, 2019. He did not go back to work for Respondent. They did not take him back. Petitioner testified he received RX 8, a certified letter suspending him for 5 days and being subject to termination at the end of that period. He has a different job now. Petitioner testified that now his right hand is fine. He has pain only when it is cold.

Brad Murrow testified that he has been employed for 44 years at Anchor Brake Shoe Company. He is the General Maintenance Machinist and Tooling Coordinator and up until last year, he was the United Steelworkers Union President. He has known Petitioner for the eight or nine years that he worked there. If a worker was under investigation for violation of company rules and requested union representation during his disciplinary company hearing, he would attend the meeting between the employee and the supervisor, to support the employee with their collective bargaining agreement.

Mr. Murrow testified that he started work on February 28, 2019, at 4:30 a.m. and recalled having a meeting that day with Petitioner in the maintenance office. Jose Monjaraz was in the maintenance room with him and present during his discussions with Petitioner at approximately 4:35 on February 28, 2019. He testified Petitioner was upset with his supervisor, Bob Costanzo, who would assign him a machine to work while he was working overtime, and that he was not very happy working on. Petitioner told Mr. Murrow that the supervisor needed to be corrected and that he needed to go talk to him. Mr. Murrow told Petitioner that he would look into it, but that today he needed to just do the job. Petitioner left the office pretty upset. Mr. Murrow testified that, after Petitioner left, he and Jose both heard a loud noise like a thud against the wall or thud against something metal. He heard a noise, but he did not actually see anyone punch a toolbox.

Mr. Murrow further testified that he did participate in meetings and discussions regarding Petitioner in his role as the union president, including a phone call on March 19, 2019. He testified that union members had a right to file a grievance with the union if they are terminated for a work injury in violation of the union contract. He was not aware if Petitioner filed a grievance. Brad Murrow testified that he had a conversation with Danielle Johnson, the safety manager, at some point before the March 19th meeting, and she told him that the x-rays indicated that Petitioner sustained a boxer's fracture, a break to the pinky finger on the right hand. Brad Murrow had no other conversations and has not seen Petitioner since he left Respondent. He testified that he does not remember any other accidents on Machine Press No. 7.

Santiago Matta testified that he worked for Respondent for 24 years as a machine operator and he was working as a machine operator on February 28, 2019. He was working 20-30 feet away from Petitioner on the other side of the main aisle on February 28, 2019. There is material in between. You can see each other from where he was. Mr. Matta marked RX 2 with the locations. At around 4:45 AM, he observed Petitioner walked away from the machine he was working on and walked down the main aisle. He did not see anything unusual. He testified that he saw Petitioner coming back to his Machine Press No. 7, 15 or 20 minutes later, holding his right hand against the stomach with the left hand over his right hand. It could have been after 5:00 AM. Petitioner came back. He is not sure if he left again. He thinks somebody else came to run his press. He did not speak with Petitioner. Mr. Matta testified that he later spoke with Danielle Johnson.

Mr. Matta testified that even the skid is pretty heavy, it is on rollers. You don't need a lot of force. It takes some effort to push it. Sometimes parts fall off the skids, but the skid is so heavy that it will probably go over it. He

has never had a skid stop because of materials getting stuck in the rollers or seen anyone else have that issue.,

Jose Monjaraz testified that on February 28, 2019, he worked for Respondent, but he currently works for Smithfields. On February 28, 2019, he worked in maintenance. He is bilingual. On February 28, 2019, he was present at a meeting in the maintenance office with Petitioner and Brad Murrow, He testified that Petitioner came in the maintenance office and was discussing his dissatisfaction with his supervisor, Bob Costanzo, assigning him to a heavy machine that he did not like while he was working overtime. Petitioner got mad because Brad Murrow told him there was nothing that he could do for him at that time, and he stormed out of the door of the maintenance office. Mr Monjaraz testified that he heard a bang. Mr. Monjaraz testified that he signed a statement, in which he said he actually saw Noe Zarate strike a toolbox but clarified that he actually did not see him make contact with the toolbox. It was an assumption because, “you put two and two together.” He saw a hand go up and he heard a noise at the time that the door closed the maintenance office, but he really could not see the toolbox. The following day he saw a dent in a red toolbox belonging to Carl Phillips. He stated that Carl Phillips was upset that there was a dent in his toolbox on the side. He testified that there are no blue toolboxes in the maintenance area, they are all red, silver or gray. Mr. Monjaraz testified that he talked to Petitioner going into the breakroom just before 5:00 a.m. He testified that he told Petitioner that there is no reason for him to get all upset over something like that because that happens all the time at work, so there was really no reason for him to get upset over that. Mr. Monjaraz identified RX 9 as his statement.

Danielle Johnson testified that on February 28, 2019, she worked for Respondent, as the manager of Quality, Health, Safety and Environment. She has worked there for 10 years. She is responsible for any type of incident reporting and investigations, as well as OSHA required training for the employees. She testified that she was first notified that Petitioner sustained an injury to his hand, when she received e-mail notification from WorkCare, a third-party company that employs a series of doctors and nurses who handle workers’ injuries. She was not at work on February 28, 2019. When she returned on March 1, 2019, she started to conduct an investigation of the incident, so that they could take corrective action and preventative action in the future. She interviewed Santiago Matta. She spoke to Petitioner on March 4 to try to get more information concerning the mechanism of the injury than what was contained on PX 1. She identified RX 10 as the backing stock that the Petitioner said fell onto the rollers. He told her that it would stick up in the rollers at a 90-degree going lengthwise as opposed to horizontally across the rollers.

Ms. Johnson testified that she watched several hours of videotape across several days to see if she can get an angle Petitioner working at the press to determine what happened. She testified that she followed the cameras as Petitioner walked from his workstation to the maintenance area to see Brad Murrow. She was trying to trace his movement through the plant on both the top floor and bottom floor on February 28, 2019, after he alleged the incident. She observed Petitioner working as normal. Then he left his work station, proceeded up the main aisle, came around the corner and turned to go into the maintenance area. The video clips were admitted as part of RX 7.

Ms. Johnson testified that the videos in the facility had the wrong timestamps on them. They were typically 15 to 20 minutes slower than the real time. Respondent does not maintain the camera system. The last place that Petitioner was located before he went to report the incident to Bob Costanzo at 5:00 AM was in the breakroom upstairs. The next camera after he left the breakroom, which had a timestamp of 4:40:38, picks him up walking into Bob Costanzo’s office. The clock on the wall showed the time was approximately 5:00 AM. The Incident Root Cause & Corrective Action Analysis, which includes the summary of the camera video analysis was

admitted as RX 4. A camera progression was admitted at RX 12. The plant floor plans were admitted as RX 2 and RX 3. Ms. Johnson testified that Petitioner went from the breakroom straight to Bob Costanzo's office to report the accident. She testified that Bob Costanzo allowed Noe Zarate to go back to the floor to tell the operator to watch his press, while he came back to make out his WorkCare report, after initially reporting the incident at 5:00 a.m. on February 28, 2019.

Ms. Johnson testified she tried to reenact or replicate the mechanism of injury with Mike Tatera, the Production Supervisor. She testified that they went down to the press where there was a stack of briquettes on the skid and they placed the backing stock on the railing the way he had described, but the backing stock kept falling through the railing, when they tried to stand it up. They also laid it on the railing and Mike Tatera went behind the briquette, just as Petitioner had explained, and pushed the skid and held his hand the way he had indicated it was when it stopped suddenly. Mike Tatera did the same thing and pushed the skid forward, but the backing stack moved on the railing forward in front of the skid. She testified that their efforts to try to reenact the mechanism of injury were not successful, because the backing stock kept falling through the rollers. She identified RX 6 as a photograph of Mike Tatera during the reenactment attempt, holding his hand the way Petitioner indicated he was pushing the pallet toward the main aisle.

Ms. Johnson also testified that she was present for a conference call on March 19, 2019 with Noe Zarate, via telephone, Brad Murrow, the Union President, Mike Tatera, the Production Manager and Julie Jones, the Human Resources Director. The purpose of the meeting was to review the findings of her Root Cause investigation of the February 28, 2019 incident. Her investigation ended at that time, and she concluded in her report that the injury did not occur as described in the Incident Reporting and Investigation Form or in the March 4, 2019 follow up incident investigation conversation with the employee, because the nature of the occurrence cannot be determined and therefore "Root cause or corrective action cannot be identified or implemented" (RX 4). A documentation of the March 19, 2019 phone conference was admitted as RX 5.

Mike Tatera testified that he has worked for Respondent for 45 years and is currently the Operations Manager. On February 28, 2019, he was the Production Manager. He testified that when he arrived at work at 6:30 in the morning, Bob Costanzo, the shift supervisor, told him that Petitioner had broken his hand or had hurt his right hand. He testified that he took part in the investigation of the incident and helped Danielle Johnson attempt to reenact it. He also looked at video to track where Petitioner went in the facility, after the alleged injury on the video. He was aware of the video system being approximately 9 to 20 minutes behind the real recording time. His understanding from watching the videos was that the last place Petitioner was before he went to Bob Costanzo's office to report the incident was the lunchroom.

It was his understanding that it was the backing stock that fell onto the roller. He tried to replicate the skid stop, as reported, but he could not. He testified that they put the backing stock long ways in front of the pallet, but the skid would just push it along and when they tried to put it upright, it would fall through the rollers. He is not aware that they have ever had an incident where the pallet stopped suddenly because something like backing stack was blocking it.

Mr. Tatera also testified that he was on the conference call with Petitioner on March 19, 2019, when he admitted that he punched a toolbox. Bob Costanzo was currently retired and lives in Kentucky, which is the reason that he did not come to the trial today. Mike Tatera testified that he worked on Press No. 7 at one point in his career and was the first one to run that press.

Conclusions of Law

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

To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that he suffered a disabling injury that arose out of and in the course of the claimant's employment. An injury is accidental within the meaning of the Act when it is traceable to a definite time, place and cause and occurs in the course of employment unexpectedly and without affirmative act or design of the employee*. International Harvester Co. v. Industrial Comm*., 56 Ill. 2d 84, 89 (Ill. 1973). An injury occurs "in the course of' employment when it occurs during employment and at a place where the claimant may reasonably perform employment duties, and while a claimant fulfills those duties or engages in some incidental employment duties. An injury "arises out of" one's employment if it originates from a risk connected with, or incidental to, the employment and involves a causal connection between the employment and the accidental injury. For an injury to 'arise out' of the employment its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. 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)*. Included within that burden is proof that his current condition of ill-being is causally connected to a work-related injury. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003).

Petitioner has testified to a work incident at while pushing a pallet weighing 480 to 500 pounds when a piece of back stock fell in front of the pallet and got stuck in the rollers causing his hand to bend backwards. He started to feel a tingling sensation in his hand, after bending it backwards. He testified that this incident occurred after he left his meeting with Brad Murrow at about 4:30 AM, took his break and went back to his machine. Petitioner's testimony as to the mechanism of injury was not corroborated by any other evidence except his own history presented to Tyler medical. Respondent presented testimony of Mr. Murrow, Mr. Mata, Mr. Monjaraz, Ms. Johnson, and Mr. Tatera, and plant video to dispute Petitioner's testimony.

It is the Commission's province to assess the credibility of witnesses, the reasonable inferences from the evidence, determine the weight to give testimony and resolve conflicts in the evidence. *Berry v. Industrial Commission*, 99 Ill. 2d 401, 406-07, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984). *Hosteny v. Illinois Workers' Compensation Commission*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Commission*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999). The Arbitrator finds the Petitioner's testimony is not credible in that it is contradicted by virtually all of the other credible testimony and evidence submitted.

It is undisputed that Petitioner punched a toolbox after leaving his meeting with Mr. Murrow. This would be a competent cause of an injury to his right hand. His testimony that he met at 4:15 AM does not track with Mr. Murrow's testimony that he did not arrive at work until 4:30 AM and that the meeting took place at 4:35 AM. This tracks with the video showing Petitioner leave his work station as well as the testimony of Mr. Mata, who saw him leave the production area. Petitioner then testified that he went to the locker room and then the break room. The video confirms he arrived at the breakroom around 4:55 consistent with going directly there rather that returning to his machine. He is seen rubbing his right hand. Then, contrary to his testimony, he goes directly to Mr. Constanza's office to report the accident at 5:00 AM.

The Arbitrator has observed the witnesses' testimony and viewed the video. He finds the video summaries presented are accurate. He notes that Petitioner's testimony on cross examination was contradictory, vague and evasive. His claim of striking a blue toolbox, is contradicted by the testimony that all the toolboxes are either red or grey. He denied speaking with Mr. Monjaraz after the incident. He could not remember who he spoke with to take over his machine after reporting his injury. He claimed to not remember his conversations with Ms. Jones and Ms. Johnson following the date of accident. The Arbitrator notes that Mr. Tatera was unable to reproduce the event claimed by Petitioner. Further Mr. Tatera and Mr. Mata, despite years of working on the machines, testified that the claimed event had never occurred.

Petitioner's version of the accident is contradicted by every credible piece of evidence including the testimony of every other witness and the video.

Based upon the record as a whole, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he sustained accidental injuries arising out of and in the course of his employment on February 28, 2019 and further failed to prove by a preponderance of the evidence that his condition of ill-being in the right hand was causally connected to his employment.

In support of the Arbitrator's decision with respect to (J) Medical, (K) Temporary Compensation, and (L) Nature & Extent, the Arbitrator finds as follows:

Based upon the Arbitrator's finding with respect to Accident and Causal Connection, the remaining issues of Medical, Temporary Compensation, and Nature & Extent are moot.

Petitioner's claim for compensation is hereby denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC033489
Case Name	INSURANCE COMPLIANCE v. COLES' COMPLETE TREE SERVICE
Consolidated Cases	
Proceeding Type	Petition for Penalties
Decision Type	Commission Decision
Commission Decision Number	23IWCC0483
Number of Pages of Decision	3
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Bradley Defreitas
Respondent Attorney	

DATE FILED: 11/16/2023

/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

Illinois Department of Insurance,

Petitioner,

vs. No. 22 WC 33489
20 INC 00176

Donald E. Cole, III, Individually and as Owner of
Cole's Complete Tree Service,

Respondent.

DECISION AND OPINION REGARDING INSURANCE COMPLIANCE

Petitioner, Illinois Department of Insurance, brought this action against Respondent by and through the office of the Illinois Attorney General alleging violations of section 4(a) of the Illinois Workers' Compensation Act (the Act). Proper and timely notice was given to all parties. An insurance compliance hearing was held before Commissioner Stephen Mathis on May 8, 2023, in Peoria, Illinois. Respondent appeared *pro se* and agreed to obtain workers' compensation insurance. Respondent further agreed to settle the noncompliance periods for a lump sum of money. The parties therefore asked for a stay of penalties pending settlement. Commissioner Mathis allowed the stay. However, the parties failed to reach a final settlement. Commissioner Mathis then continued the matter to allow the parties to submit their respective proposed decisions or briefs. After carefully considering the entire record, the Commission finds that Respondent knowingly and willfully violated section 4(a) of the Act and shall pay a total penalty of $150,000 for failing to have workers' compensation insurance.

The record shows that Respondent, who is subject to section 3 of the Act requiring workers' compensations insurance, knowingly and willfully lacked workers' compensation insurance coverage for multiple periods of time. Michael Cummins, an insurance compliance investigator, testified that he became aware of Respondent's noncompliance when an employee of Respondent filed a workers' compensation claim with the Illinois Workers' Compensation Commission and named the Illinois Injured Workers' Benefit Fund (IWBF) as co-Respondent due to Respondent not having insurance coverage at the time of the injury. Investigator Cummins determined that Respondent was

automatically subject to the provisions of sections 3 and 4 of the Act because it operated a business that involved a high risk of injury due to the heights where work was performed and the use of sharp tools, as well as vehicles. Investigator Cummins found multiple periods of noncompliance. Certified records from the National Council on Compensation Insurance (NCCI) (Petitioner's Exhibit 2) revealed that Respondent had no workers' compensation insurance for certain periods of time and did have workers' compensation insurance for other periods of time. Petitioner's Exhibit 6 also details the periods of noncompliance. Investigator Cummins continued his investigation to determine whether Respondent was self-insured under the Act and received a certification from Maria Sarli-Dehlin of the Commission's Office of Self-Insurance Administration indicating there was no certificate of approval to self-insure issued by the Commission. (Petitioner's Exhibit 5).

The Commission concludes that Respondent knowingly and willfully violated the insurance requirements of section 4(a) of the Act. Respondent appeared at the hearing and agreed to: (1) obtain workers' compensation insurance; and (2) settle the noncompliance periods for a lump sum of money. Respondent then failed to follow through on those promises, despite a generous continuance.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to the Illinois Workers' Compensation Commission the sum of $150,000 pursuant to section 4(d) of the Act and section 9100.90 of the Commission Rules. Pursuant to Commission Rule 9100.90(f), payment shall be made by certified check or money order made payable to the Illinois Workers' Compensation Commission. Payment shall be mailed or presented within 30 days after the final order of the Commission or the order of the court on review after final adjudication to:

Illinois Workers' Compensation Commission
Fiscal Department
69 W. Washington Street, Suite 900
Chicago, Illinois 60602

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000. 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.

November 16, 2023
SM/sk
44

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC034988
Case Name	Hilda Chamorro Mendoza v. Aerotek Staffing, Inc.
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0484
Number of Pages of Decision	16
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Estefania Perez
Respondent Attorney	Peter Havighorst

DATE FILED: 11/16/2023

/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 McHENRY)	[X] Reverse Causation	[ ] Second Injury Fund (§8(e)18)
		[ ] PTD/Fatal denied
	[ ] Modify	[X] None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Hilda Chamorro Mendoza,

Petitioner,

vs. No. 21 WC 34988

Aerotek Staffing, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical care, temporary disability, permanent disability, penalties and attorney fees, and being advised of the facts and law, reverses the Decision of the Arbitrator and awards workers' compensation benefits for the reasons stated below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation, medical benefits or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327 (1980).

Petitioner's application for adjustment of claim alleges that on December 2, 2021, a "[h]ard plastic container fell on left hand/wrist" causing injuries. The matter proceeded to a section 19(b) hearing on October 6, 2022. After the close of proofs, the parties stipulated to accident. On December 6, 2022, the Arbitrator filed a Decision denying workers' compensation benefits after December 23, 2021, for failure to prove causation.

On direct examination, Petitioner testified through an interpreter that as of December 2, 2021, she worked for Respondent staffing company for about month and a half. Petitioner was assigned to work at Abbott, and her job was to pack Covid tests. Petitioner described the

accident on December 2, 2021, as follows: "I was working and a container fell on my [left] hand." Petitioner felt pain in the left hand.

Petitioner received initial treatment for her injury at Advocate Condell Medical Center and follow-up care at La Clinica. The La Clinica staff referred Petitioner to a hand surgeon, Dr. Wiesman at the Illinois Orthopedic Network. Petitioner underwent diagnostic studies and conservative treatment. Petitioner testified the treatment helped "[a] little." During Petitioner's last visit before the arbitration hearing, Dr. Wiesman recommended a functional capacity evaluation (FCE) and kept Petitioner off work. Petitioner was to follow up with Dr. Wiesman after the FCE. Petitioner described her current condition as follows: "[T]he pain is always persistent and it always hurts."

In the meantime, Respondent scheduled Petitioner for a section 12 examination with Dr. Schmidt on May 19, 2022. Petitioner testified she received notice of the examination, but not the mileage check. Petitioner stated she did not attend the examination because she had neither the transportation nor the money.

On cross-examination, Petitioner testified that she is right hand dominant. Petitioner has not worked since December of 2021 and has not looked for work. Petitioner's attorney gave Petitioner a ride to the arbitration hearing. At the time of the arbitration hearing, Petitioner was not taking any medications. On redirect examination, Petitioner testified her doctors at La Clinica and the Illinois Orthopedic Network have kept her off work.

The medical records from Advocate Condell Immediate Care show that on December 3, 2021, the attending physician noted the following history: "Her boss pushed a box into her left thumb yesterday at work. *** Today the thumb feels swollen and was asleep when she woke-up today. Tingling is gone but thumb hurts to bend." X-rays showed a "[n]onspecific 2 mm calcification noted within the soft tissues of the 1st digit at the level of the proximal phalanx." Physical examination described no abnormalities. The attending physician prescribed a splint and "[r]ight handed work only and recheck in 7 days."

On December 10, 2021, Petitioner returned. This time, the attending physician noted the following history: "Had a crate fall on hand/wrist." Petitioner complained of persistent pain and tingling, no improvement. Repeat x-rays showed no acute fracture or dislocation. Physical examination was notable for "L wrist: flexion and extension limited by pain, but full with assistance. Lateral motion intact." "+mild swelling noted to L wrist and thenar eminence. TTP over L scaphoid." The attending physician kept Petitioner on light duty and instructed her to follow up in a week.

The medical records from La Clinica show that on December 16, 2021, Petitioner saw Chiropractor Perez, who noted complaints of "left wrist pain, left hand pain, left forearm pain, left elbow pain, and left arm pain." "The patient reports that her present pain began on 12/02/2021 after sustaining an injury while at work. *** [S]he was seated in her work station

handling items when suddenly a hard plastic box fell and struck her left wrist, left hand, and left distal forearm. The patient states that the box fell because it was accidentally pushed off by another box that had been thrown by a supervisor." "She returned back to work on 12/06/21 but was only able to work for half a day due to her pain worsening. The patient then had the next two days off. She returned back to work on Thursday, 12/09/21. She is supposed to be doing one handed work with her right hand only. She reports experiencing more pain especially while at work. She feels her condition is getting worse." On physical examination, Petitioner added that the pain extended all the way to the left shoulder. Petitioner stated she was unable to use her left upper extremity due to the pain. "[H]er left upper extremity is held stationary, fixed against her body with her left elbow bent. With attempted movements with her left upper extremity, the patient appears in obvious acute distress." Petitioner voiced severe tenderness to palpation and demonstrated severely decreased range of motion. Some systems could not be adequately assessed due to the severity of the pain. The carpal compression test and Finkelstein's test were positive on the left. Chiropractor Perez assessed: left wrist/hand pain; left forearm/elbow pain; and left arm pain—all causally connected to the work accident. He ordered an MRI, prescribed physical therapy, and took Petitioner off work. Thereafter, Petitioner underwent physical therapy several times a week through April 27, 2022. She was kept off work.

An MRI of the left *forearm* performed December 23, 2021, was unremarkable.

An MRI of the left *wrist* also performed December 23, 2021, was interpreted by the radiologist as showing: "1. Extensive fluid signal/cystic change about the triangular fibrocartilage complex as detailed above. Partial tearing of the intrasubstance of the dorsal band of the distal radial ulnar ligament difficult to exclude. MR arthrogram can be considered for further evaluation. 2. Possible stress response of the distal subarticular lunate from chronic impaction. *** 3. Multifocal subcortical cystic change likely reactive in the carpal bones of the proximal and distal carpal row. There is a osteophyte-like structure arising from the dorsal ulnar base of the second metacarpal bone which may represent an element of coalition between the second metacarpal bone and distal hamate or secondary to posttraumatic changes. There is reactive chondromalacia related bone change across the articulation with the base of the third metacarpal bone."

The medical records from the Illinois Orthopedic Network show that Petitioner began treating with Dr. Wiesman on January 5, 2022. Dr. Wiesman noted the following history: "Patient states that she works for Abbott as a packager. She was making the COVID tests. She has to put them in bags and she went to ask for more products. An empty box was left over and it ended up falling onto the patient's left hand." Petitioner denied prior injury to the wrist or a diagnosis of carpal tunnel syndrome. Physical examination findings were as follows: "Mild tenderness to palpation at the DRUJ, as well as in the proximal row of the carpals. Denies anatomic snuffbox tenderness, radial styloid tenderness or any other tenderness along the radial aspect of the wrist. Denies tenderness to palpation of digits three and four. Limited range of motion with flexion and extension of the wrist, as well as with all five digits secondary to pain. Able to make a loose composite fist, however, with passive range of motion, able to fully flex

and extend wrist and all digits, however, patient endorses this causes pain. No deformities noted. No edema, erythema or ecchymosis noted. Patient does have limited supination as well secondary to pain, however, actively able to fully supinate the hand. The patient endorses decreased sensation at digits three and four. Negative Tinel's of the carpal tunnel, however, patient endorses that her fingers are already numb. Denies worsening of numbness or tingling with Phalen's or compression of the carpal tunnel. Full range of motion of the elbow. Negative for tenderness of the elbow. Distally neurovascularly intact. Grip strength reduced on the left when compared to right." Dr. Wiesman requested the imaging records and kept Petitioner off work.

On January 25, 2022, Dr. Wiesman reviewed the MRI findings and asked Petitioner to follow up in person to correlate with physical examination. He kept Petitioner off work. On March 15, 2022, Dr. Wiesman performed a steroid injection into the left wrist and kept Petitioner off work. On March 29, 2022, Petitioner called to report no improvement, and Dr. Wiesman ordered an MRI arthrogram. On April 15, 2022, an MRI arthrogram had not been approved. Petitioner continued to complain of significant pain and disability. Dr. Wiesman's recommendations remained unchanged. He kept Petitioner off work.

On April 18, 2022, Petitioner underwent the MRI arthrogram. The radiologist described the findings of "[p]olyarticular degenerative joint disease (primary osteoarthritis)," with unremarkable intercarpal, radiocarpal, ulnocarpal and carpometacarpal compartments.

On April 27, 2022, Dr. Wiesman, noted: "Updated MRA is mostly unremarkable except for osteoarthritic changes." Dr. Wiesman prescribed a Medrol Dosepak and kept Petitioner off work.

On May 18, 2022, Petitioner continued to report she was unable to use her wrist and hand without pain. Dr. Wiesman could not reconcile the differences between the original MRI and the MRI arthrogram, and recommended obtaining a repeat MRI arthrogram at the same place that performed the original MRI. Further, Dr. Wiesman recommended "an FCE for permanent restrictions" and kept Petitioner off work in the interim.

On June 23, 2022, Petitioner reported "not using the left hand at all for any activities" and being unable to work "full duty or any full duty." She had not obtained a repeat MRI arthrogram or an FCE. Dr. Wiesman was contemplating a partial versus total wrist fusion. He kept Petitioner off work.

Petitioner returned on October 3, 2022, reporting she had an FCE scheduled the following week. She continued to report being unable to use her left hand or work. X-rays taken under fluoroscopy showed "normal left wrist findings. Mild degeneration along the base of the second metacarpal and hamate. Proximal row intact. Distal carpal row intact without any signs of narrowing. Patient's joint spaces are well maintained on x-ray. Images were sent to Dr. Irvin Wiesman, who agreed no signs of OA noted on imaging." Dr. Wiesman no longer recommended

a fusion surgery. Rather, he suggested a possible diagnostic arthroscopy. He kept Petitioner off work and instructed her to follow up after the FCE.

The Arbitrator found Petitioner not credible. The Arbitrator further found the record did not support an award of benefits after December 23, 2021.

In reversing the Arbitrator's Decision, the Commission relies on objective findings of injury noted by the Advocate Condell staff on December 10, 2021, and the MRI findings suggestive of some possibly posttraumatic pathology[1] noted on December 23, 2021. The Arbitrator failed to consider the abnormal MRI findings relative to the left wrist. On the other hand, the Arbitrator is correct that a subsequent MRI arthrogram was interpreted by the radiologist as showing only primary osteoarthritis. Dr. Wiesman could not reconcile the differences between the original MRI and the MRI arthrogram. On October 3, 2022, Dr. Wiesman obtained x-rays taken under fluoroscopy, which showed no osteoarthritis, only some mild degeneration.

Regarding Petitioner's credibility, the Commission disagrees with the Arbitrator's amplification of Petitioner not wearing a splint during the trial when there was no medical recommendation for continuing splint use. Furthermore, there is no support for the Arbitrator's finding that Petitioner failed to attend Respondent's IME with Dr. Schmidt after receiving notice *and payment*. On the other hand, the Commission notes inconsistent descriptions of the accident, evidence of symptom magnification, and lack of candor regarding Petitioner's continued work for Respondent (see Respondent's Exhibit 3).

The Commission finds that Petitioner sufficiently met her burden of proof regarding causation, temporary disability, related medical bills in evidence, and the need for an FCE. Regarding the period of temporary disability, the Commission notes that although Petitioner testified she has not worked since December 9, 2021, the wage records in evidence (Respondent's Exhibit 3) show Petitioner continued to work through January 24, 2022. Deferring to Dr. Wiesman's expertise, the Commission awards temporary total disability benefits from January 25, 2022 through the date of the arbitration hearing on October 6, 2022. The parties stipulated to an average weekly wage of $691.20, corresponding to a temporary total disability rate of $460.80.

Lastly, the Commission finds that penalties and attorney fees are not warranted, as there was a *bona fide* dispute regarding multiple issues.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 6, 2022, is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $460.80 per week for a period of 36 3/7 weeks, from January 25, 2022

[1] Possible partial tear or aggravation of preexisting degenerative condition.

through October 6, 2022, 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, medical benefits or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay related medical bills in evidence pursuant to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide prospective medical care in the form of the FCE recommended by Dr. Wiesman, pursuant to §§8(a) and 8.2 of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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.

November 16, 2023
SJM/sk
o-10/11/2023
44

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC034988
Case Name	Hilda Chamorro Mendoza v. Aerotek Staffing, Inc.
Consolidated Cases	
Proceeding Type	19(b)/8(a) & Penalties Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Paul Seal, Arbitrator

Petitioner Attorney	Estefania Perez
Respondent Attorney	Peter Havighorst

DATE FILED: 12/6/2022

THE INTEREST RATE FOR THE WEEK OF DECEMBER 6, 2022 4.57%

/s/ *Paul Seal, 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
19(B)/8(A) & PENALTIES

Hilda Chamorro Mendoza
Employee/Petitioner
v.
Aerotek Staffing, Inc.
Employer/Respondent

Case # **21 WC 34988**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Paul Seal, Arbitrator of the Commission, in the city of **Woodstock, Illinois**, on **October 6, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 2, 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 **$4,800.00**; the average weekly wage was **$691.20**.

On the date of accident, Petitioner was **49** years of age, **single** with **2** 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 parties stipulated at hearing and the Arbitrator finds that Petitioner proved that she was involved in an accident that arose out of and in the course of her employment with Respondent.

The Arbitrator finds that Petitioner did not prove her current condition of ill-being to her left hand is causally related to the events of December 2, 2021. As such, prospective medical is hereby denied.

The Arbitrator further finds that any medical invoices incurred for services related to the 12/2/21 date are hereby denied after the date of 12/23/21.

The Arbitrator finds that Petitioner has not proven that she is entitled to any TTD and therefore any claim for same is denied.

The Arbitrator further concludes that Petitioner did not substantiate or prove the determination of Penalties under Section 19(k) and 19(l) or Fees under Section 16, and all are hereby denied.

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

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

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

Signature of arbitrator

DECEMBER 6, 2022

ARBITRATOR'S FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The parties agree that on the alleged injury date of 12/2/21 they were operating under the Illinois Workers' Compensation Act, and that their relationship was one of employee and employer. On that date, Petitioner was single, with 2 dependent children. Furthermore, the parties agree that timely notice of an alleged accident occurred.

At issue in this hearing is a as follows: whether Petitioner's current condition of claimed ill-being is related to any work accident; whether Petitioner is entitled to any additional medical treatment; whether Petitioner is entitled to any prior TTD and future TTD; whether Petitioner is entitled to payment on medical bills; and whether Petitioner has proven she is entitled to Penalties and Fees.

FINDINGS OF FACT

This matter was tried on 10/6/22 on Petitioner's 19(b) and 8(a) motions concerning her alleged left-hand injury.

Petitioner testified that she began working for Aerotek ("Respondent"), a staffing company, in October of 2021 (Tr. 11). She was assigned to work at Abbot Labs, as a Packer in the Covid Test manufacturing facility (Tr. 11). Her job duties included picking and counting pieces and then putting them in boxes (Tr. 11). Previous to working for Respondent, the Petitioner had several factory jobs that all included working with her hands (Tr. 21).

On Friday, 12/2/21, Petitioner testified that while she was working a container fell on her left hand (Tr. 11-12), her non-dominant hand, as she is right-handed (Tr. 24). She told her supervisor what occurred, and stated she had pain in her hand. Claimed to not have had any previous accidents with her left hand (Tr. 13).

On Saturday, 12/3/21, Petitioner was sent to the Condell Medical Center by Respondent for x-rays and an evaluation (Tr. 13). The images of her left hand detailed: no fractures or dislocations, no bony lesions, and no fractures of the thumb and no nail damage. There was a nonspecific 2mm calcification within the soft tissues of the 1st digit at the level of the proximal phalanx. She was diagnosed with a contusion to her left thumb without nail damage and provided a splint for her thumb.

Petitioner testified that she was given light-duty restrictions and was able to return to work (Tr. 14). Petitioner testified that she continued to work until Thursday, 12/9/21 (Tr. 14).

On 12/10/21, Petitioner met with Dr. Dalka at Advocate who had her scheduled for another week of light duty work.

On 12/16/21, Petitioner testified she was directed to a different physician and facility by her attorneys (Tr. 32). Petitioner confirmed that she had secured counsel from an earlier

workers' compensation claim and that her attorneys made arrangement for her to see a physician at La Clinica (Tr. 32). Petitioner testified the doctor at La Clinica recommended an MRI of her left hand, and recommended that Petitioner should be off work (Tr. 14-15).

On 12/23/21 Petitioner underwent an MRI of her left hand and left wrist. The MRI detailed unremarkable findings, that included:

- No soft tissue masses or space-occupying lesions.
- Intact flexor and extensor tendons.
- Intact scapholunate and lunotriquetral intervals.
- No abnormalities within the carpal tunnel or Guyan's canal.
- Partial tearing of the intrasubstance of the dorsal band of the distal radial ulnar ligament (an MR arthrogram should be considered).

Petitioner was eventually seen by Dr. Wiesman, a referred physician from La Clinica. Under Dr. Wiesman, Petitioner received a pain injection, and also was referred to Dr. Irvin.

On 4/18/22 Petitioner underwent an MR Arthrogram which detailed:

- Degenerative changes are seen at the radiocarpal, intercarpal and carpometacarpal articulations. Normal MRI appearance of the carpal tunnel and its content.
- No fractures or dislocations.
- No soft-tissue abnormalities.
- Unremarkable intercarpal, radiocarpal and ulnocarpal compartments.
- Unremarkable carpometacarpal compartment.
- Polyarticular degenerative joint disease (primary osteoarthritis).

On 4/27/22 Dr. Weisman met Petitioner to review the MR Arthrogram. He found confirmed unremarkable findings for an injury, but the wrist had developed osteoarthrisis
Petitioner testified that she knew about her IME scheduled with Dr. Schmidt on 5/19/22 but that she did not attend the exam (Tr. 33-34).

Petitioner testified that she knew the job at Aerotek was a short-term position, and that the job may only last 3-4 months (Tr. 37). That said, she testified that in her job at Aerotek she often worked overtime, every week staying at least six more hours (Tr. 36).

Since December 2021, Petitioner has not put together a resume and has not looked for a job. She has not made an effort to look for a job using only one hand (Tr. 37). Petitioner has remained off work.

CONCLUSIONS OF LAW

With regard to the Arbitrator's Decision concerning (C) accident, and (F) whether Petitioner's current condition of ill-being is causally related to the injury, the

Arbitrator finds the following:

Herein the parties agreed after trial testimony at the conclusion of hearing that an incident took place on 12/2/21. At that point accident was no longer in issue. Based upon Petitioner's testimony and submitted evidence the arbitrator finds that an accident occurred which arose out of and in the course of Petitioner's employment. That said, the arbitrator concludes that Petitioner suffered only a minor hand strain, which resolved and any claim Petitioner presently makes is unrelated to that work incident.

It is established that Petitioner bears the burden of proving every aspect of her claim by a preponderance of the evidence. Hutson v. Indus. Comm'n, 223 Ill App. 3d 706 (1992). Preponderance of the evidence means greater weight of the evidence in merit and worth that which has more evidence for it than against it. *Spankroy v. Alesky*, 45 Ill. App.3d 432 (1st Dis. 1977). Therefore, "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).

Among the factors to be considered in determining whether a claimant has sufficiently carried her burden is credibility. *Parro v. Industrial Comm'n*, 630 N.E.2d 860 (1st Dist. 1993). Credibility is the quality of a witness, which renders his evidence worthy of belief, and it is the province of the arbitrator to evaluate the witness' demeanor and any external inconsistencies with testimony.

The mere existence of testimony, of course, does not require the acceptance of a Petitioner's claim. *Smith v. Industrial Comm'n*, 98 Ill.2d 20, 27 (1983). To argue to the contrary would require that an award be entered whenever a claimant testified to an injury no matter how much his testimony might be contradicted by the evidence, or how much evident it might be that his story is a fabricated afterthought. *U.S. Steel v. Industrial Comm'n*, 8 Ill.2d 407, 411 (1956).
Herein, Petitioner testified that she was injured when a box fell into her hand. No testimony was elicited at trial about the size, weight, shape or makeup of the box. The only record details it was plastic. There is also no testimony or evidence of how hard the box fell into her hand or from what height. The arbitrator will not use imagination, conjecture and surmise to determine any of these factors, but does note that Petitioner failed to address them.

On the other hand, the medical records do not support that a forceful incident occurred. The initial medical diagnosis a contusion, with no fractures, no lacerations, and a completely intact thumbnail. There isn't even discoloration noted in the thumb or nail and there is no known brusing described. Her treatment was to use a soft splint with light duty work for a week. Twenty-one days later an MRI was ordered which was unremarkable. It detailed no soft tissue injury, and no abnormalities. Finally, *4 months later* an MR Arthrogram described no contusion issues but did show degenerative osteoarthritis.

The arbitrator does not find Petitioner credible concerning her pain complaints 10 months after the work incident. Petitioner had multiple issues at trial concerning her veracity, including:

- Petitioner testified that she never saw or signed her Application submitted on her behalf for the injury (Tr. 30).
- Petitioner completed the entire trial without wearing any protective medical splint device on her left hand, yet she testified she had too much pain to go to work.
- Petitioner testified that she worked numerous overtime hours for Respondent even though the wage records detail she did not work any overtime (Tr. 36).
- Petitioner failed to attend Respondent's IME with Dr. Schmidt, after receiving notice and payment.

The Arbitrator does not doubt that Petitioner experienced a left-hand contusion, and then endured some pain. Petitioner has a physically demanding job, and it is reasonable to anticipate a person in this line of work to experience physical discomfort while using her hands the entire time on a shift and if hit by a box. That said, there is a distinction between experiencing pain from a simple contusion and supporting a finding of sustained hand pain for close to a year. In this case, the evidence simply does not support what the Petitioner testified to at arbitration.

Therefore, after considering 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 12/2/21.

With regard to the Arbitrator's Decision concerning Issue L, whether Petitioner is entitled to Temporary Total Disability (TTD), the Arbitrator concludes as follows:

The arbitrator notes that to be entitled to TTD benefits it is a claimant's burden to prove not only that she did not work, but also that she was unable to work. *Interstate Scaffolding Inc. v. IWCC, 236 Ill.2d 132, 148 (2010); Pietrzak v. Industrial Comm'n, 329 Ill.App.3d 828, 832 (2002).* The dispositive question is whether the claimant's condition has stabilized, i.e., whether she has reached MMI. *Interstate Scaffolding, 329 Ill.App.3d at 833.* The factors to consider in assessing whether a claimant has reached MMI include a release to return to work, medical evidence and testimony concerning the injury, and the extent of the injury. *Id.*

TTD is not awarded when a Petitioner voluntarily removes herself from the workforce, for reason unrelated to the injury. *Interstate Scaffolding, 329 Ill.App.3d at 833.* The determination whether a claimant was unable to work and the period for which a claimant is temporarily and totally disabled are questions of fact to be determined by Commission. *Archer Daniels Midland v. IWCC*, 138 Ill.2d 107, 118 (1990).

The Arbitrator has rendered a decision about Petitioner's accident claim. The trial encompassed specific testimony about the accident and events thereafter, with Petitioner the only witness. The day after the work incident, Petitioner was released to return to work using her right hand only – her dominant hand. At no time did Petitioner testify that she could not work in the light duty right hand only position that was provided to her by Respondent. In fact, she confirmed that she worked in the position for several days. Then, she simply did not return to the job. There is no testimony from Petitioner that she could not do the job because of pain, or stress, or some other debilitating medical issue.

Petitioner's physicians are not persuasive on their off-work designations since at no time did they offer an opinion on whether Petitioner could work using only one hand, her dominant right hand.

As she testified, Petitioner worked after a minor incident, and then removed herself from the job. Then, even after the medical records (MRI and MR Arthrogram) showed no discernable injury, Petitioner remained off work – and refused to look for work – removing herself from the workplace entirely.

Based upon the trial testimony, medical records and evidence, Petitioner has not proved by a preponderance of the evidence that she is entitled to any prior, or current TTD related to the incident on 12/2/21. The award of any TTD is therefore denied.

With regard to (J), whether medical services that were provided to Petitioner were reasonable and necessary, and whether or not Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator concludes as follows:

The Arbitrator finds that Petitioner failed to prove her current condition of ill-being is related to the accident of 12/2/21 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 12/2/21 accident based on the evidence presented and, therefore, denies any of these bills after the MRI was taken on 12/23/21.

With regard to (K), whether Petitioner is entitled to any prospective medical care, the Arbitrator finds the following:

The Arbitrator adopts his findings above concerning accident, causation, and benefits. At trial, Petitioner did not prove through either testimony or documentary evidence what treatment she was precisely seeking. Moreover, Petitioner's medical evaluation completed with Dr. Weisman just prior to trial details an issue with degenerative arthritis – this was not the medical from the original incident.

Just as an award cannot be based upon conjecture and surmise, a claimant must establish the reason for the award of more medical treatment otherwise none will be awarded. *Poore v. IWCC*, 298 Ill.App.3d 719, 724 (1998). Based upon a totality of the evidence presented at trial, the Arbitrator denies Petitioner's request for prospective medical.

With regard to the Arbitrator's Decision concerning Issue M, concerning Petitioner's Petition for Penalties and Fees under Section 19(K), 19(L), and 16, the Arbitrator concludes as follows:

Based on the entirety of the evidence and the Arbitrator's findings above, penalties and fees are denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC008477
Case Name	Rachel Draper v. Watseka Rehabilitation & Healthcare Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0485
Number of Pages of Decision	27
Decision Issued By	Stephen Mathis, Commissioner, Amylee Simonovich, Commissioner

Petitioner Attorney	Jennifer Eldridge, Muriel Collison
Respondent Attorney	Michael Brandow

DATE FILED: 11/16/2023

/s/Stephen Mathis, Commissioner
Signature

DISSENT: /s/Amylee Simonovich, 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 Accident	☐	Second Injury Fund (§8(e)18)
		☐	PTD/Fatal denied
☐	Modify	☒	None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rachael Draper,

Petitioner,

vs. No. 19 WC 08477

Watseka Rehabilitation and Healthcare Center,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical care, wage calculations/benefit rates, temporary disability and permanent disability, and being advised of the facts and law, reverses the Decision of the Arbitrator and denies Petitioner's claim for the reasons stated below.

Petitioner, who was 34 years old at the time of the arbitration hearing, testified on direct examination that she worked for Respondent as "helping hands." Petitioner was hired "at the beginning of February, end of January of 2019." She was responsible for two residents that required 24-hour care. One of the two residents, Carol, was a fall risk. Petitioner transported Carol in a wheelchair, as Carol "wasn't allowed to stand."

Petitioner further testified that on February 20, 2019, she was assigned the shift from 3 p.m. to 11 p.m. When Petitioner clocked in at 2:45 p.m., she saw that she was to take care of Carol. While on her way to Carol, Petitioner encountered John, an administrator, and another worker, Asia, who "were walking with Carol one was on each side of her. ¶ John mentioned to me it had been a very rough day. That she was extremely agitated and it didn't matter what they had done or tried to do for her that day, they could not get her to calm down. She was highly agitated and being very irrational from what he told me and that in fact, quote unquote, to be prepared for a hell of a shift." It was unusual for Petitioner to encounter John, as he worked the day shift and usually left between 2:30 and 3 p.m. Petitioner relieved Asia, and John went back to his office. Petitioner alone was left to take care of Carol, who was "very aggressive." As the day went on, Carol grew more agitated. At some point in the evening,

Petitioner had to go to the nurses' station and ask a nurse named Tracey for help. Around 9 or 9:30 p.m., Tracey administered medication to Carol "to try to calm her down." After that, Petitioner sat in Carol's room for approximately 15 minutes. Then Carol woke up. Petitioner put Carol in a wheelchair and started pushing her down the hallway to the nurses' station.

Petitioner described the alleged accident as follows:

> "Tracey was supposed to administer her night medication for her which was not a good thing. She was always very agitated and very irritated about what happened in the day shift.
>
> When Tracey tried to stop us in transit by the nurse's station Carol wasn't having it. She started throwing a fit. She was name calling. I'm not doing this, you can't make me. Just the typical I-don't-want-to-take-my-medication-and-I-don't-have-to-type thing.
>
> I was standing behind her. When Tracey attempted the last time, Carol stood up. When she stood up, my job was to go in front of her and my job was to make sure she didn't fall. When I placed myself in front of her, that's when she came around with her left arm and put me in a choke hold and started rapid fire on my shoulders and in the back of my neck with her right arm."

Carol struck Petitioner at least 11 times, while Petitioner was calling for help. "There were 3 nurses around me, CNAs. She's attacking me, she's hurting me, somebody help me and get her off me." "Tracey was standing behind the nurse's station filling out charts from what she had just done from the people she had given the medications to. A woman named Noel was sitting as close to me as this chair was. And then there was another helping hands that had just came out of the laundry area and was standing to the left of us. Probably about 2 or 3 feet down the hallway. Definitely within earshot to be able to hear what I was saying." However, "nobody helped." Petitioner was eventually able to extricate herself. Then, Petitioner "sat [Carol] back down in her chair and I walked to the administration office."

Petitioner continued:

> "I told John that Carol just attacked me, that she had put me in a half choke hold and punched me several times in the back and neck and shoulders and my head.
>
> John then looked at me and told me he was dealing with call offs and scheduling and that I needed to go back to work because we were extremely short staffed and he didn't have time to deal with whatever I was trying to say to him. Go back to work. And I repetitively tried to tell him I was hurt, my arm was completely numb to my finger tips to might [*sic*] left side, something is wrong. He said you go back to your job and be where you are suppose to be or quit. I don't have time to deal with this right now."

John did not ask Petitioner to complete an accident report. The alleged attack took place between 9:45 and 10 p.m.

Petitioner continued:

> "I went back out to where my locker was. I grabbed my cell phone and I called my grandma because I didn't know what to do. I didn't know what my next plan of motion was other than the fact my arm was numb to the fingertips on the left side and I had just been attacked.
>
> I called my grandma. She said you need to find the lead nurse like you normally do. My boss wasn't there. She was gone for family problems.
>
> I walked up to the first RN, I told her I was quitting because I was attacked by Carol and I didn't feel anybody was helping me to make sure I was okay. She told me I couldn't quit, that we were very short staffed and they could not have me leave that they didn't have everybody to stay with Carol.
>
> I said, grandma, she's not letting me quit. She said Rachael, I don't care what you do, you walk out and quit. I told her again I was attacked, your are not helping me. Clocked out and left."

Petitioner did not recall the name of that nurse, who "was a daytime nurse she was filling in for a night shift because we were so short staffed." Petitioner took her belongings out of her locker and left.

Petitioner further testified that she did not go to the emergency room because she "just had spinal fusion surgery previously and I had a spinal team that had already done the surgery on me, and I felt more comfortable going to my surgeon than going to the emergency room where they could potentially cause me more harm." The fusion surgery had been performed in June of 2018. The following morning, Petitioner called her spinal surgeon, Dr. Butler, and asked for the first available appointment. According to Petitioner, the first available appointment was two weeks later.

On cross-examination, Petitioner testified that at the time of the accident she lived with a domestic partner, and the domestic partner unsuccessfully tried to get an order of protection against her. On redirect examination, Petitioner explained that, because Petitioner was unemployed, they "started fighting and having lots of problems." Petitioner stated the restraining order attempt took place in June of 2020, over a year after the alleged accident. Asked to clarify the timeline, Petitioner stated: "I actually had to move up to family. I moved back to my grandma's house when I was injured because I couldn't afford the gas to make it back and forth to the doctor's appointment. I went with my grandma, he maintained our home while I was getting the training I needed to get from physical therapy, Dr. Fletcher's office, Dr. Butler's office, which was in between Bourbonnais, Gibson City and Champaign." There was never a restraining order by Petitioner or against her.

Petitioner further testified on cross-examination that when she called Dr. Butler the day after the accident, the staff did not tell her to go to the emergency room or seek treatment immediately, even though her arm was numb and she was in pain. Asked about any other injuries the work accident caused, Petitioner responded: "Pretty sure I had a dislocated finger and broken toe from being stepped on and body banged by her." Petitioner did not receive any treatment for those conditions.

Petitioner further testified on cross-examination that on February 24, 2019, she applied for unemployment benefits. Petitioner stated the application was for seasonal worker unemployment benefits

in connection with another job, not her job with Respondent. Petitioner repeatedly denied seeking unemployment benefits in connection with her job for Respondent. At that point, the Arbitrator granted Respondent's motion to admit into evidence for impeachment purposes a document to the contrary from the Illinois Department of Employment Security.

John Shaw testified on direct examination that in February of 2019 he was the administrator of Respondent's facility. If there was a work accident, Mr. Shaw conducted an investigation and completed paperwork. Mr. Shaw did not remember any conversations with Petitioner regarding the alleged work accident on February 20, 2019. Mr. Shaw never investigated the alleged accident or completed paperwork. Mr. Shaw did not remember whether he worked on February 20, 2019. Had Petitioner reported a work accident to him, Mr. Shaw would have done the paperwork immediately.

On cross-examination, Mr. Shaw testified that he usually worked on weekdays from 8 a.m. until 4:30 p.m. Mr. Shaw did not remember anything about February 20, 2019. Regarding Carol, Mr. Shaw testified she was usually in a wheelchair. Carol was a fall risk and had cognitive problems. Carol was also "aggressive and did require some redirection." Mr. Shaw denied that Petitioner ever came into his office and reported being attacked by Carol. Mr. Shaw would not have told Petitioner to return to her job duties or quit.

Annette Nixon testified on direct examination that she was a charge nurse at Respondent's facility in February of 2019. Ms. Nixon recalled that February 20, 2019 fell on a weekend.[1] Ms. Nixon believed she worked that day. Ms. Nixon did not recall discussing any work injury with Petitioner. Rather, Ms. Nixon stated: "She came to me saying she couldn't deal with Carol anymore. I said well that's what we hired you for. Go talk to your com padre, your coworker, see if you can trade off. Each of you do a little bit, trade places, I don't care who, which one watches her, one of you will." "She continued to cry about how she couldn't deal with it. I said that's what you were hired for. This is your job. Well she had to leave. I'm like well that's job abandonment, because you can't just—it's not like Walmart you can't just walk out. She said I guess I have to quit and then expletives came out and she walked out the door. ¶ I think I went and called the [director of nurses] and said she left." Petitioner never mentioned an injury, did not seem to be injured, and did not request an accident report.

On cross-examination, Ms. Nixon testified that in February of 2019 she typically worked from 6 a.m. until 6 p.m. Before the arbitration hearing, Ms. Nixon checked her old schedule and confirmed she worked on February 20, 2019. It was her "regular weekend" shift. Ms. Nixon might have stayed after 6 p.m. Ms. Nixon did not remember how late she stayed. The conversation with Petitioner took place in the dining room during supper.

Incomplete pre-accident medical records from Dr. Butler show Petitioner followed up on September 12, 2018, after a cervical spine fusion surgery. Dr. Butler noted a good result from the surgery and released Petitioner to return to work full duty. Dr Butler instructed Petitioner to follow up in six months, *i.e.*, in March of 2019.

On March 7, 2019, Dr. Butler noted: "The patient returns in followup 8 months after a cervical fusion. She recently sustained an injury at work when she was attacked as a home health aide. She was taking care of a patient under the supervision of [Respondent]. She was attacked by a patient and

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[1] According to timeanddate.com, February 20, 2019 fell on a Wednesday.

placed in a headlock and punched multiple times in the back of the head. She dislocated a finger and, I believe, broke her toe as well. She has been denied an incident report from her employer and was told if she did not like her job, she could just quit, so the patient presents today with severe neck pain and radiating pain down the left upper extremity. She reports numbness and tingling that extend down into the elbow. She has not had any of this since her previous surgery that was performed on 06/14/2018." Petitioner also reported multiple episodes of vomiting. Physical examination was notable for a markedly limited range of motion and tenderness. "The x-rays of her cervical spine show movement of the C7 screw in her plate. It is now prominent, whereas her x-rays from this past fall showed normal healing and no protrusion of the C7 screw." Dr. Butler diagnosed "[a]cute cervical spine injury/strain with possible concussion" and referred Petitioner to Dr. Fletcher for an evaluation of her head trauma, as well as cervical spine.

The medical records from Dr. Fletcher show a visit the same day, March 7, 2019. Petitioner complained of pain in her head, neck and arm, reporting an injury on February 27, 2019.[2] "Patient states a resident attack her on 02/27/2019, the resident choked and punched her in the neck and back." Physical examination showed no abrasions, wounds, bruising or swelling from the alleged attack. Dr. Fletcher assessed "signs of recurrent left cervical radiculopathy." "She was assaulted by a patient. She has developed recurrent left cervical radiculopathy. Screw broke according to her surgeon." "She has signs of a serious head injury." On March 15, 2019, Dr. Fletcher was "less concerned about her closed head injury."

Petitioner's Exhibit E documents significant mental health problems.

The Commission finds that Petitioner failed to prove the alleged work accident took place. The Commission is not obligated to accept Petitioner's testimony at face value. The Commission also notes impeachment evidence, inconsistent and confusing testimony, as well as evidence of domestic violence. The Commission further notes that Petitioner did not seek emergency post-accident medical care. Two weeks after the alleged accident, Petitioner followed up with her treating surgeon, Dr. Butler. During the previous visit, Dr. Butler had instructed Petitioner to follow up in March of 2019. Petitioner's visit on March 7, 2019, was part of her follow-up care for a prior cervical spine fusion surgery. Petitioner reported the alleged work accident to Dr. Butler, and Dr. Butler referred her to Dr. Fletcher for the alleged work injuries. Petitioner initially reported to Dr. Fletcher a work accident that occurred on February 27, 2019, not February 20, 2019. Physical examination showed no abrasions, wounds, bruising or swelling from the alleged attack. The Commission lastly notes Petitioner's Exhibit E, which documents significant mental health problems. Having carefully considered the entire record, the Commission finds Petitioner failed to meet her burden of proof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 22, 2022, is hereby reversed and Petitioner's claim is denied.

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[2] On March 15, 2019, the accident date was changed to February 20, 2019.

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.

November 16, 2023

SJM/sk

o-09/20/2023

44

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

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

DISSENT

I disagree with the Majority's decision. In my view, Petitioner established by the preponderance of the credible evidence that she sustained an accidental injury arising out of and occurring in the course of her employment on February 20, 2019.

Initially, I note Petitioner provided a detailed account of the events of that day and her testimony was unrebutted. When Petitioner entered the secured dementia area to begin her shift, she encountered John Shaw, the facility's administrator, and Asia, another helping hand, walking down the hall with Carol, one on each side of Carol's wheelchair. T. 15. Petitioner testified that when Shaw saw her, he stated it had been "a very rough day" and warned Carol "was extremely agitated" and "being very irrational." T. 15. Once Petitioner arrived, Asia left, Shaw went to his office, and Petitioner assumed wheeling Carol through the hallways. T. 16-18.

Around 5:30 or 6:00 in the evening, Petitioner led Carol to the kitchen for dinner. T. 16-18. Petitioner testified Carol's agitation and distress continued through dinner and ultimately a CNA needed to assist Petitioner with feeding Carol. T. 17. After dinner, Petitioner resumed Carol's routine of going up and down the hallways, but Carol repeatedly attempted to stand up. T. 18. Eventually, after 9:00, Petitioner went to the nurse's station and asked the nurse, Tracey, for assistance; Petitioner testified they brought Carol to her room, got her into bed, and Tracey medicated Carol "to try to calm her." T. 18-20. Petitioner monitored Carol while she slept and when she woke approximately 15 minutes later, Petitioner transferred Carol to her wheelchair and they went down the hall toward the nurse's station. T. 21.

At that point, it was 9:45 or 10:00; when they reached the nurse's station, Tracey directed Petitioner to stop so she could administer Carol's night medication. T. 27, 21-22. Petitioner explained Carol routinely reacts badly to getting her nighttime medications but her reaction that night was worse than normal; Petitioner testified Carol "started throwing a fit" and again attempted to get out of her wheelchair. T. 22. Petitioner's responsibility in that situation is to move in front of Carol and prevent a fall. T. 22. Petitioner walked around Carol's left side to stand in front of the wheelchair (T. 23) and when

Petitioner got within reach, Carol grabbed her: "When I placed myself in front of her, that's when she came around with her left arm and put me in a choke hold and started rapid fire on my shoulders and in the back of my neck with her right arm." T. 22. Petitioner testified three individuals were near the nurse's station at the time (Tracey, a CNA named Noel, and another helping hands aide (T. 24-25)), and that area is also covered by Respondent's surveillance cameras. Petitioner explained there are multiple cameras in the facility, and she had direct knowledge that the video system was in working order as a week prior to her injury there had been an incident where Carol's roommate had suffered a significant ankle injury; Petitioner testified that during the investigation of the incident, her boss showed her footage from the room that demonstrated Petitioner was not at fault. T. 42. Petitioner stated cameras cover nearly the entire facility, except for the private bathrooms and shower areas, and there are three or four cameras around the nurse's station where the attack occurred. T. 43.

Once Petitioner extricated herself from Carol's grasp, she sat Carol back in the wheelchair then went to the administrator's office to report the attack. T. 25-26. Petitioner testified Shaw responded he was too busy dealing with call-offs to deal with her so she needed to get back to work or quit. T. 26. Petitioner walked to the locker area, retrieved her cellphone, and called her grandmother, who advised her to speak with the lead nurse. T. 27. Petitioner explained her normal supervisor was off on extended leave, so she approached the charge nurse and informed her she was quitting because she had been attacked. T. 27, 29. Petitioner could not recall the nurse's name but identified her as a daytime nurse who had been called in to cover a shift that was short-staffed. T. 28. The nurse told Petitioner she could not leave because she was the only one available to stay with Carol; Petitioner reiterated that it was Carol who attacked her, no one had offered her any help or seemed concerned about her so she was quitting, and she left. T. 27-28.

While Respondent offered testimony from John Shaw and Annette Nixon, I find neither effectively challenged Petitioner's description of the events of Wednesday, February 20, 2019. For instance, Shaw confirmed some background facts, *i.e.*, Carol "needed a lot of direction," "was aggressive," and was frequently assigned a helping hands (T. 76-77), but Shaw was a poor historian and offered nothing concrete with respect to February 20, 2019. To be clear, Shaw could not recall if he was working that day, had no recollection of ever conversing with Petitioner, and did not even recognize Petitioner when he saw her at the hearing. T. 74, 75, 78-80. As to Nixon, her testimony was more detailed, but the specifics she provided were inaccurate. Nixon testified she was the charge nurse on A hall on February 20, 2019, which she knew because she had reviewed her "old schedules"; Nixon explained she works 6:00 a.m. to 6:00 p.m. on weekdays and alternating weekends, and February 20, 2019 was her "regular weekend." T. 88-89. Nixon further testified Petitioner did not report an injury to her that day, however Petitioner did come to her whining about how difficult Carol was being. T. 85. Nixon testified Petitioner "continued to cry about how she couldn't deal with it"; when Nixon responded Petitioner needed to get back to work, Petitioner "said I guess I have to quit and then expletives came out and she walked out the door." T. 87. Nixon detailed that her conversation with Petitioner on February 20, 2019 took place during the "supper pass because I was in the dining room." T. 92. There are two significant factual problems with Nixon's testimony. First, February 20, 2019 was a Wednesday, not a weekend, an error the Majority acknowledges in a footnote. Second, Petitioner specifically explained the nurse she spoke with on February 20, 2019 was not working her "regular" shift but instead was a day nurse who had been called in to cover short staffing for the night shift. As such, by her own testimony, Nixon established her presence on the wrong day (weekend Wednesday) in the wrong area (dining room) at the wrong time (supper time). In other words, Nixon was not present on the day of the occurrence. I find Nixon's testimony is unreliable and has no probative value.

Additionally, I find the medical records corroborate Petitioner's testimony. Petitioner explained she did not go to the emergency room as she felt "more comfortable" going directly to her spine surgeon, so the morning after the assault, she phoned Dr. Jesse Butler's office and was given the first available appointment, which was March 7, 2019. T. 30. Dr. Butler's evaluation note reflects Petitioner provided a detailed history of the attack:

> The patient returns in followup 8 months after a cervical fusion. She recently sustained an injury at work when she was attacked as a home health aide. She was taking care of a patient under the supervision of Petersen Health Care in Watseka. She was attacked by a patient and placed in a headlock and punched multiple times in the back of the head. She dislocated a finger and, I believe, broke her toe as well. She has been denied an incident report from her employer and was told if she did not like her job, she could just quit, so the patient presents today with severe neck pain and radiating pain down the left upper extremity. She reports numbness and tingling that extend down into the elbow. She has not had any of this since her previous surgery that was performed on 06/14/2018. PXB.

On examination, Dr. Butler observed a significant deterioration from Petitioner's previous objective findings, including "markedly limited range of motion of the cervical spine in all planes" as well as severe tenderness throughout the trapezial muscles; radiographs taken that day revealed the fusion hardware had partially dislodged: "The X-rays of her cervical spine show movement of the C7 screw in her plate. It is now prominent, whereas her X-rays from this past fall showed normal healing and no protrusion of the C7 screw." PXB. Diagnosing an "[a]cute cervical spine injury/strain with possible concussion," Dr. Butler referred Petitioner to Dr. Fletcher, who evaluated Petitioner later that same day; Dr. Fletcher's records reflect an accident history of "a resident attack [*sic*] her on 02/27/2019 [*sic*], the resident choked and punched her in the neck and back." PXB; PXA. The treatment records thereafter consistently document the assault at work followed by an immediate onset of cervical spine symptoms:

- March 19, 2019 ATI physical therapy initial evaluation: "[Patient] reports that she had a cervical fusion in June of 2018. She notes that while she was working on 2/20/19 at Watseka rehab she was put in a choke hold by a patient and was then punched in the back of the head." (PXD);

- March 28, 2019, N.P. Rebecca Koerner: "Patient presents to follow up on her chronic neck pain [status post] fusion. [Patient] had been doing well, and reportedly got a job in a nursing home where acutely combative patient tried to strangle her and reinjured her neck." (PXE); and

- September 15, 2020, Dr. Victoria Johnson: "Ms. Draper states her neck pain began about three years ago. She had a cervical fusion. Her symptoms improved. About three or four months later, she was at work and a patient put her in a headlock. She went back to the surgeon and was told that her plate moved." PXF.

The same history was also documented by Respondent's §12 physician, Dr. Alexander Ghanayem, whose report reflects Petitioner's prior history of right-sided cervical symptoms which resolved after surgery and a subsequent onset of left-sided symptoms after a resident became aggressive:

> Ms. Draper is a 31-year-old medical aide who was injured on February 21st [*sic*] of this year. She apparently was with a resident who had put her in a headlock and punched her

> in the neck and head region. She had a prior cervical problem in the way of a fusion at C6-C7 back in June of 2018. Prior to the surgery, she had neck and right arm pain. The right arm pain has resolved, and as a result of the injury in February of this year, she has developed neck and left-sided arm pain…
> My impression is that Rachael has neck and left-sided arm pain after what appears to be an injury to her neck. Based on the radiographic findings and her physical exam findings, she does have a C6 radiculopathy that are consistent with one another. The mechanism of injury would be consistent with such an injury occurring. She did have a prior cervical problem which has gone on to heal with pain on the opposite side. I believe this problem at C5-C6 is more likely than not a new problem. PXG.

Finally, I find it significant Respondent's in-house surveillance video was not offered into evidence. Petitioner testified there are cameras covering all public areas in Respondent's facility; this assertion was unchallenged by Respondent. Notably, Petitioner observed there are a minimum of three cameras aimed at the nurse's station where Carol attacked her. T. 43. As such, Respondent possessed multiple angles of video showing the area where Petitioner alleged the incident occurred. If, as Respondent claims and the Majority concludes, Petitioner fabricated the assault by Carol (in an area Petitioner knew to be covered by Respondent's cameras) and instead simply abandoned her job in the middle of her shift, video of the events, or non-events, at the nurse's station would indisputably refute Petitioner's claim. Respondent, however, did not produce this presumably dispositive evidence, nor did Respondent offer any excuse for its failure to do so. In my view, under the missing evidence rule, the only reasonable inference from Respondent's failure to produce the footage is that it corroborates Petitioner's claim. *See Reo Movers, Inc. v. Industrial Commission*, 226 Ill. App. 3d 216, 223 (1st Dist. 1992) (The missing evidence rule holds where a party fails to produce evidence in its control, a presumption arises that evidence would be adverse to that party. The presumption is not applicable, however, where evidence shows a reasonable excuse for failure to produce evidence and that missing evidence was equally available to other side).

In concluding Petitioner "failed to prove the alleged work accident took place," the Majority emphasizes "impeachment evidence," Petitioner's choice to forego emergency room evaluation and treat directly with her spine surgeon, the absence of evidence of acute trauma at her initial medical evaluation, as well as "significant mental health problems." In my view, these factors are not dispositive. With respect to the impeachment evidence, although not specifically identified by the Majority, this seems to refer to a document from the Illinois Department of Employment Security offered into evidence as Respondent's Exhibit 4 (and which contains Petitioner's unredacted protected identity information in violation of Supreme Court Rule 138). During cross-examination, Petitioner agreed she filed for and was granted unemployment benefits but clarified she did not pursue benefits against Respondent, as she had not worked there long enough to qualify, and instead the unemployment benefits were chargeable to her prior seasonal employment at a grain elevator. T. 53-54. Respondent's Counsel then attempted to impeach Petitioner's testimony with Respondent's Exhibit 4, which he described as "a notice of claim to acknowledge chargeable employment and it lists Peterson Health Care" T. 56. A cursory look at Respondent's Exhibit 4, however, reveals the document is titled "Notice of Claim to **Non-Chargeable** Employer" and specifically states "You are currently not charged for this claim." RX4 (Bold added, underline in original). Petitioner explained applicants are required to provide specific information, including listing previous employers. T. 63-64. I note Petitioner's testimony is corroborated by the IDES Rules, which require a claimant to provide the name, address, dates of service, and reason for separation for "each employing unit for whom the claimant worked during the past 2 years." 56 Ill. Admin. Code

§2720.100(b)(3). Petitioner's testimony cannot be considered impeached by her compliance with the codified Rules. Turning to her choice to avoid the emergency room and instead seek the first available appointment with her spine surgeon, I, like the Arbitrator, find this a reasonable course of action for an individual eight months out from cervical spine fusion surgery. Moreover, I do not share the Majority's belief that the absence of bruising or abrasions from the "alleged" attack when Petitioner was ultimately evaluated on March 7, 2019 is significant. To be clear, two weeks had elapsed since the injury so it is to be expected that any bruises and/or scrapes would have healed in the interim. Rather than relying on the absence of bruising, I find Dr. Butler's examination findings evidencing new cervical spine pathology much more significant. Finally, as to Petitioner's "significant mental health problems," my review of Petitioner's Exhibit E reveals Petitioner's mental health issues are attributed to the assault:

> Patient presents to follow up on her chronic neck pain [status post] fusion. [Patient] had been doing well, and reportedly got a job in a nursing home where acutely combative patient tried to strangle her and reinjured her neck. Apparently during this incident one of the screws in her fusion backed out slightly. She may require another surgery, was told to stop PT, and is schedule[d] at GAH for MRI. With all of this going on she is having a lot of anxiety and depression, daily panic attacks. She is requesting to see psychiatrist and counselor. PXE (Emphasis added).

I agree the Commission is not obligated to accept Petitioner's testimony at face value. Instead, we consider that testimony in light of the totality of the evidence which, in this case, consists of medical records and Dr. Ghanayem's §12 report uniformly documenting a consistent history of being choked and punched in the head and neck by a resident, an immediate onset of neck pain and radiating left arm pain, and diagnostic imaging revealing Petitioner's previously-aligned fusion hardware was dislodged, which the physicians all agree is consistent with the described mechanism of injury; testimony from Shaw, who could not identify Petitioner and had no recollection of the events of February 20, 2019; testimony from Nixon, who placed herself in the wrong area of the facility on the wrong day and at the wrong time; a Notice of Claim to Non-Chargeable Employer, which establishes only that Petitioner provided the information specifically required by the Illinois Department of Employment Security's rules; and, most significantly, unrebutted evidence that the nurse's station where Petitioner alleges the incident occurred is covered by multiple cameras yet Respondent failed to produce the associated footage.

For all of the above reasons, I cannot join the Majority's determination that Petitioner fabricated an altercation with a resident in an area she knew to be covered by surveillance cameras, and I respectfully dissent.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC008477
Case Name	Rachel Draper v. Watseka Rehabilitation & Healthcare Center
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Roma Dalal, Arbitrator

Petitioner Attorney	Muriel Collison
Respondent Attorney	Michael Brandow

DATE FILED: 7/22/2022

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

/s/ *Roma Dalal, Arbitrator*
Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Rachael Draper
Employee/Petitioner

Case # **19** WC **08477**

v.

Consolidated cases: ______

Watseka Rehabilitation & Healthcare Center
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Roma Dalal**, Arbitrator of the Commission, in the city of **Joliet**, on **5/18/2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **2/20/2019**, 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 $**12,887.16**; the average weekly wage was $**247.83**.

On the date of accident, Petitioner was **31** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

The Arbitrator finds Petitioner sustained an accident arising out of and in the course of her employment on February 20, 2019, underwent a period of treatment and reached MMI as of July 10, 2019.

Respondent shall pay Petitioner temporary total disability benefits of $**220.00**/week for 20 weeks, commencing **2/20/2019** through **07/10/2019**, as provided in Section 8(b) of the Act. Respondent shall receive credit for amounts paid.

The Arbitrator orders Respondent to pay Petitioner all reasonable and necessary medical services, pursuant to the medical fee schedule, incurred in connection with the care and treatment of her causally related condition through July 10, 2019, MMI, pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid.

Respondent shall pay Petitioner permanent partial disability benefits of $**220.00**/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.

Petitioner's request for penalties and fees is denied.

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

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

JULY 22, 2022

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Rachael Draper,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 19WC00847
Watseka Rehabilitation & Healthcare Center	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on May 18, 2022, in Joliet, Illinois before Arbitrator Roma Dalal. Issues in dispute include accident, causal connection, wages, disputed medical bills, TTD benefits, nature and extent and penalties. (Arb. Ex. 1).

Racheal Draper (hereinafter referred to as the "Petitioner") was a 31-year-old single female in February 2019. She testified she worked at Watseka Rehab (hereinafter referred to as the "Respondent") as a helping hand.

Petitioner testified her job duties consisted of assisting two people at the facility that required 24-hour care. This meant they were either a fall risk or a risk to themselves or to other residents in the nursing home. (T.10). Petitioner worked the night shift from 3 pm to 11 pm, full time. (T.11). It was a set schedule with the only thing rotating was the two people she worked with on a daily basis. (T.11). The two residents she worked with were named Tom and Carol. Tom was agitated by other residents while Carol was a fall risk and not allowed to stand. (T.12-13).

On February 20, 2019, Petitioner arrived to work at 2:45 PM (T.14). Petitioner clocked in and saw John and Asia walking with Carol. (T.15). John mentioned it had been a rough day with Carol (T.15). Petitioner testified it was not normal for John to be in the building when she got there as he normally left between 2:30 pm and 3:00 pm. (T.15).

Petitioner testified Carol was agitated. (T.16). At dinner, Carol tried to stand five to six times. (T.17). After dinner, Carol began more agitated and irritated and kept trying to get up. It was a repetitive cycle of Petitioner trying to get Carol to stay in the chair so she would not fall. Petitioner eventually had to go to the nursing station and ask for help. (T.18). Petitioner testified she spoke with Tracey at the nursing staff and explained Carol was agitated. (T.19). Tracey ended up taking Carol to her room and administering medication to calm her down around 9:00 or 9:30 pm. (T.19).

Carol fell asleep and Petitioner sat in her room. (T.21). Carol woke up and Petitioner put her in wheelchair and headed down the hallway to the nurses' station so Tracey could administer her night medication. (T.21). When Tracey tried to administer Carol's medications, she started throwing a fit. Petitioner was standing behind Carol when Tracey attempted to give the medication, Carol stood up. Petitioner then came around the left side of Carol and went in front of her to make sure she did not fall. When Petitioner placed herself in front of Carrol, that is when Carol put her left arm around Petitioner's neck and placed Petitioner in a chokehold and started rapid fire on Petitioner's shoulder and in the back of Petitioner's neck with her right arm. (T.22). Petitioner testified that Carol hit her at least 11 times. (T.24).

Petitioner testified she was screaming, and no one helped. (T.25). Petitioner testified she told John that Carol had attacked her and put her in a half choke hold and punched her back, neck, shoulders, and head. (T.26). Petitioner testified John told her to go back to her job or to quit. She was in his office for less than 5 minutes. (T.26). Petitioner testified the attack took place around 9:45 to 10:00 PM. (T.27).

Petitioner testified after leaving John's office she walked up to the first nurse and told her she was quitting because she was attacked by Carol. (T.28). Petitioner testified the nurse told her she could not quit because they were short staffed. Petitioner then clocked out and left. (T.28). Petitioner did not recall the name of the nurse. (T.28). She further testified John did not ask Petitioner fill out an accident report. She also did not go back and tell him she was quitting. (T.28). Petitioner testified she would have ordinarily notified Mindy Mathis, her supervisor, but she was off. (T.29). Petitioner subsequently went to her locker, took everything out and left the facility. (T.29).

Petitioner testified after the incident she felt numbness on the left side of her neck down to her shoulder. (T.29-30). Petitioner noted she did not go to the emergency room because she had a previous spinal fusion and felt more comfortable going to her surgeon. (T.20). She testified after the initial surgery she had no neck pain. (T.31). Petitioner advised she contacted Dr. Butler the next morning and saw him at his first available visit, which was 2 weeks later. (T.32). Dr. Butler performed an X-ray and MRI which revealed that her screw had been moved 4mm out of her fusion. (T.32). Dr. Butler referred her to Dr. Fletcher who was a physical therapist specialist. (T.33).

Petitioner testified she underwent physical therapy and a neck injection. (T.33). She last saw Dr. Fletcher in July of 2019 and he placed her at light duty, no lifting over 10 pounds. (T.35).

Petitioner was able to find a job as a scale operator at a grain elevator in October of 2019. (T.36). Petitioner further noted that after her first surgery she was released to regular work full duty with no restrictions. (T.37).

Currently Petitioner testified she has shooting pain from her ear to her shoulder, into her elbow on the left side. (T.40).

Petitioner further testified there were cameras in the facility as she had to watch a previous tape to verify injuries of another resident. (T.42). To her knowledge, there were three or four cameras around the nurses' station and were working. (T.42-43).

On Cross-examination, Petitioner testified that she was unable to see Dr. Butler due to unpaid medical bills. (T.44). Petitioner testified the State of Illinois paid for her initial surgery, but Dr. Butler would not accept the same after the alleged injury because it was a worker's compensation case. (T.45).

Petitioner admitted when she applied for work at Watseka Rehabilitation Center, she listed she had a 25-pound restriction. (T.47). She further indicated the 25-pound weight was going to be for the rest of her life. (T.47-48).

Petitioner testified she hired an attorney after her surgeon told her the screw was backed out of her neck. (T.49).

Petitioner testified when she went to talk to John at 9:45 that night, and he did not ask her to fill out an accident report. She testified he was working in the office to schedule all the call offs. (T.50). Petitioner testified she did not ask him about an accident report but did ask him what to do. She further testified the charge nurse told her since they were extremely short staffed, she could not quit because there would be nobody to stay with Carol who needed 24-hour care. (T.51).

Petitioner testified she called Dr. Butler's office the next day about the pain in her neck and they provided her with the March 7 visit. (T.52).

Petitioner further testified that she applied for unemployment four days later on February 25, 2019. (T.52). Petitioner testified she received unemployment for her previous job she had at the elevator not for Respondent. (T.53). She noted she had been getting seasonal unemployment for the past 10 years as she was a seasonal worker. (T.53). She noted the unemployment was through the grain elevator as she did not work long enough at Respondent's to collect unemployment. (T.54).

Petitioner testified she never talked with Peterson after February 20, 2019. She did not remember filing for unemployment against Peterson after presented with a Notice of Claim filed by her against them. (T.55-56). With respect to filing for unemployment, Petitioner would fill out the application which asked her what her last date of work was, when did she work there, how long did she work there, what did she make. She testified unemployment determines based on the time and dates who is responsible for the unemployment if approved. In this form she listed her last employer. (T.63-64). She previously had filed unemployment against the grain elevator. (T.65).

She indicated she also suffered a dislocated finger and a broken toe in the incident. She once again denied going to the emergency room for her toes or fingers nor did she go to her primary care doctor. (T.55). Petitioner testified the reasoning was that she was an athlete and had broken her fingers prior. (T.66).

TESTIMONY OF JOHN SHAW

John Shaw testified he is currently employed by Respondent and had been employed with Respondent for the last 9 years. (T.72). In February 2019 he was the administrator. (T.72). He testified his duties and responsibilities was running the day-to-day operations of a nursing home. With respect to a work-related accident, he would be notified and then there would be paperwork and investigation. (T.73). He testified he does not remember having any conversations with Petitioner on the date of injury. (T.73). If she reported a work injury, he would have notified his supervisor, completed packet of paperwork, and

conducted investigation. (T.73). He further noted he does not remember if he was working on February 20, 2019. (T.74).

On Cross-Examination, he reiterated he does not recall if he was working on February 20, 2019. (T.75). He confirmed that Carol was unable to walk on her own, was in a wheelchair and was a fall risk. (T.76). Carol frequently had helping hands with her. (T.77). He noted nursing homes are short staffed for a very long time. (T.77). He further noted he does not recall if he was with Carol on February 20, 2019. (T.78). He further noted he does not recall anything about that day in question and did not recognize Petitioner. (T.78). He testified he does not remember anybody ever telling him that Carol attacked them. (T.79). He further noted he would not tell anyone to go do your job or quit. (T.81).

DIRECT TESTIMONY OF ANNETTE NIXON

Annette Nixon testified she is employed for Respondent and worked as a charge nurse. (T.84-85). Ms. Nixon testified she does not recall having any conversation about an injury Petitioner sustained. (T.85).

Ms. Dixon testified she does recall Petitioner came to her saying she could not deal with Carol anymore. Ms. Dixon testified she told Petitioner that is what we hired you for. She further told her to go talk to her coworker to see if they could trade off. She testified Petitioner continued to cry about how she cannot deal with it. She testified Petitioner told her she had to leave. Ms. Dixon told her that was job abandonment because you just can't walk out like Walmart. (T.86-87). Ms. Nixon testified Petitioner did not advise her of any injuries. (T.87).

On Cross examination, Ms. Nixon testified she did work on February 20, 2019. (T.88). She further testified she did not recall if she worked past 6:00 PM. (T.90). Ms. Nixon noted she would agree that Petitioner spoke with her on that day. (T.91). Ms. Nixon further testified she spoke with Petitioner during the supper pass because she was in the dining room. (T.92).

MEDICAL SUMMARY

The records show preexisting medical care to Petitioner's cervical spine. On June 7, 2018 Petitioner presented to Dr. Jesse Butler with complaints of cervical spine pain. Petitioner had severe neck pain and had multiple injuries to her neck and upper extremities. Petitioner was recommended an anterior diskectomy and fusion at C6-7 (PX A, 84-86). On June 14, 2018 Petitioner underwent an anterior diskectomy and fusion at C6-7. *Id*. at 110.

Petitioner followed up on June 28, 2018 for her first post operative visit. Petitioner was doing well but still had left trapezius and left neck pain. (PX A, 92). Petitioner followed up on July 25, 2018 with a pain of 6 out of 10. Petitioner was doing well and was advised to return to work with a 20-pound lifting restriction. *Id*. at 95-97. Petitioner followed up on September 12 2018. Petitioner complained of pain of a 5 out of 10 and was improving. Petitioner was to return in six months. *Id*. at 102.

On March 7, 2019 Petitioner presented to Dr. Butler. Petitioner recently sustained an injury at work when she was attacked as a home health aide. Petitioner reported that she was told if she did not like her job she could just quit. She dislocated a finger and broke her toe. She reports numbness and tingling down into her elbow. Petitioner was to see an occupational health physician. Dr. Butler noted this would be a

disputed Workers' Compensation issue so directed her to Dr. Fletcher for management. (PX A, 107-108). Petitioner underwent an X-Ray of the cervical spine which revealed a stable fusion but one of the inferiorly located fixation screws may be partly dislodged. *Id*. at 109.

On March 7, 2019, Petitioner presented on March 7, 2019 to Dr. David Fletcher. Petitioner presented with head, neck, and arm pain. He noted a resident attacked her on February 27, 2019. Petitioner was diagnosed with radiculopathy of the cervical region and a contusion of the head. Petitioner was provided medication and advised to undergo a CT scan of the brain and cervical spine as well as an MRI of the cervical spine. Petitioner was off work. (PX A, 16).

Petitioner followed up with Dr. Fletcher on March 15, 2019. Petitioner still complained of left cervical radiculopathy. Petitioner was provided medication and was recommended therapy. Petitioner remained off work. (PX A, 28). Petitioner returned on March 26, 2019. Petitioner had no changes in her symptoms. The recommendations were the same. Petitioner remained off work. *Id*. at 43. Petitioner returned on April 10, 2019 and felt like she was not improving. Petitioner was to continue medication, therapy and remained off work. (PX A, 52). Petitioner followed up on April 29, 2019 with Dr. Fletcher. Petitioner still had a pain of 7 out of 10. The Doctor stopped therapy and increased her Lyrica. Petitioner remained off work. *Id*. at 58.

On April 29, 2019 Petitioner was discharged from therapy with minimal improvement. Petitioner underwent therapy from March 19, 2019 through April 24, 2019, attending 11 visits. (PX D, p.11).

On May 1, 2019 Petitioner underwent an MRI of the cervical spine which revealed a stable ACDF at C6-7 and small posterior central disc protrusion at C5-6 without evidence of foraminal compromise or nerve root impingement. (PX B, 26).

Petitioner followed up with Dr. Butler on May 9, 2019. The Doctor reviewed the CT scan and cervical MRI. Petitioner was a good candidate for an injection. Petitioner was to resume therapy after completion of the injection. Petitioner was off work. (PX B, 29).

Petitioner followed up on May 13, 2019. Petitioner was not improving. Dr. Fletcher recommended continued medication and a cervical epidural steroid injection. Petitioner remained off work. (PX A, 67, 70).

On June 3, 2019 Petitioner was seen by Dr. Anas Alzoobi at Gibson Area Hospital & Health Services. Petitioner was still complaining of numbness and tingling involving the left upper extremity. Petitioner was provided an epidural injection. (PX B, 32, 39).

On June 6, 2019 Petitioner presented to Dr. Alexander Ghanayem for a Section 12 examination. Petitioner was a 31-year-old medical aide who was injured on February 21, 2019 when a resident put her in a headlock and punched her in neck and head region. Petitioner noted she had developed neck and left-sided arm pain. Petitioner had neck and left-sided arm pain after what appeared to be an injury to her neck. The mechanism of injury would be consistent with injury. The Doctor noted Petitioner's C5-6 problem was more likely than not a new problem. Petitioner was to finish her injections and continue with physical therapy. Petitioner may need surgery later. At this time, Petitioner could return to work in a sedentary capacity. (PX G).

Petitioner followed up on June 11, 2019 with Dr. Fletcher. Petitioner underwent a CESI with no benefit. Petitioner's pain was no longer anatomical. Petitioner was given medication and remained off work. (PX A, 73).

Petitioner was last seen by Dr. Fletcher on July 10, 2019. Petitioner noted her pain as a 6 out of 10 and severe. The Doctor was concerned about Petitioner over-reporting her subjective complaints. Petitioner was recommended to follow up with Dr. Butler, undergo a FCE and return back to work. She could also under a second opinion with Dr. Epinoza. Petitioner could return to work regular duty. (PX A, 80-82).

On August 19, 2019 Petitioner presented to SIU Medicine and was seen by Dr. Jeffrey Cozzens. Petitioner noted pain the left arm. The Doctor diagnosed Petitioner with cervical radiculitis vs. myofascial pain syndrome. Petitioner was to undergo an EMG. (PX C, 10).

On August 29, 2019 Petitioner returned to Dr. Butler. Petitioner still complained of severe symptoms. Physical examination showed excellent range of motion. In addition, her X-rays revealed no acute changes. Petitioner was being evaluated by a neurologist at SIU for possible fibromyalgia. Petitioner was to continue with her current work restrictions. (PX B, 44). Dr. Butler also placed Petitioner off work until October 4, 2019. (PX B, 46).

On September 5, 2019 Petitioner underwent an EMG which was normal. (PX C, 12).

On November 4, 2019 Petitioner was seen at Iroquois Memorial Hospital because she fell at her mother's house and hit neck/shoulder on counter on Friday (11/1/19) hitting her left shoulder blade and left side of her neck. Medication was prescribed. She indicated she had worsening of her left arm and neck pain. Assessment was neck pain, pain of left shoulder and scapulalgia. (PX E, 24).

On January 14, 2020 Petitioner was seen at Iroquois Memorial Hospital for a preemployment physical as she had applied for a position at IMH in housekeeping. Petitioner does have preexisting neck disc bulges, 1 of which had fusion stemming from July 13, 2018. Petitioner was cleared to work without restriction but has limitation of left arm which is preexisting. (PX E, 20).

On September 22, 2020 Petitioner was seen by Nurse Practitioner Koerner for her bipolar disorder and degeneration of the cervical intervertebral disc. Petitioner was provide medication. (PX E, 10).

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:

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

After a careful review of the record, including Petitioner's testimony and the medical evidence available in this case, the Arbitrator finds Petitioner did sustain an "accident" as defined by the Act. The Arbitrator finds on February 20, 2019, Petitioner was working in the course and scope of her employment as an employee when she was attacked by a resident.

The testimony is clear at the time of the alleged accident, Petitioner was employed, working her normal shift, at her normal place of employment. Petitioner's testimony is supported by the medical records submitted into evidence.

Petitioner described in great detail what transpired on February 20, 2019. Petitioner verbally advised that she reported the injury to John Shaw. Mr. Shaw testified he had no recollection of the events on February 20, 2019 and did not recognize Petitioner. He further testified the nursing home was short staffed. While Mr. Shaw did remember who Carol was, it was not certain whether he recalled whether an accident occurred or not.

Respondent also called Ms. Nixon, the charge nurse to testify. Ms. Nixon testified February 20, 2019, was a weekend and she was working her usual 6 am – 6 pm shift. Judicial notice will show that February 20, 2019, was a Wednesday. Ms. Nixon also testified her conversation with Petitioner was around dinner time which based on Petitioner testimony would be between 5:30-6:00 pm. Petitioner testified the incident did not take place until 9:45-10:00 PM. Based on the same, the Arbitrator does not rely on Ms. Nixon's testimony to disprove Petitioner's account of her accident.

Petitioner testified that she verbally reported her injuries to John Shaw and a nurse that was working. Notice can be either verbal or written. It is not required to be both. The fact that an accident report was not filled out that night does not mean an accident did not occur. Respondent has put forth no medical evidence to show she was injured in any other way. In addition, Dr. Butler, Dr. Fletcher and even Respondent's IME indicated that if the accident occurred as Petitioner testified, then it would cause the injuries that Petitioner had been treated for.

On Cross-examination, Respondent's counsel inquired why Petitioner did not seek treatment immediately due to her pain. Petitioner testified she wanted to see her surgeon as she previously underwent a fusion surgery 8 months prior. The Arbitrator finds this reasonable.

Based on the foregoing, the Arbitrator finds Petitioner sustained an accident that arose out of and in the course of her employment, when she was attacked at work.

With regard to issue "F", whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

The Findings of Fact and Conclusions of Law, as stated above, are adopted herein.

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in her ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." International Harvester v. Industrial Com., 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982). Prior good health followed by a change immediately following an accident allows an inference that a subsequent condition of ill-being is the result of the accident. Navistar International Transportation Co. v. Industrial Commission, 315 Ill. App. 3d 1197, 1205, 248 Ill. Dec. 609, 734 N.E.2d 900 (2000).

When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." St. Elizabeth's Hospital v. Workers' Compensation Commission, 864 N.E.2d 266, 272-273 (5th Dist. 2007). Even when a preexisting condition exists, recovery may be had if a claimant's employment is a causative factor in his or her current condition of ill-being. Sisbro, Inc. v. Industrial Commission, 797 N.E.2d 665 (2003). Allowing a claimant to recover under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. Land & Lakes Co. v. Industrial Commission, 834 N.E.2d 583 (2d Dist. 2005).

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 (1st Dist. 2000).

In the instant case, the Arbitrator finds Petitioner's current condition of ill-being is causally related to her work accident. Petitioner testified she previously underwent a cervical fusion 8 months prior but was doing well until the accident date. In regards to causation, Respondent has produced no evidence to refute the cause of injury.

In furtherance each and every doctor who has seen Petitioner has causally related her condition to the work accident described on February 20, 2019, including Respondent's own IME doctor. Respondent has not provided testimony or any evidence from any medical professional to dispute Petitioner's condition of ill-being is causally related to her work accident.

Based on the evidence as presented, the Arbitrator finds Petitioner had a previous stable health, an accident, and a subsequent injury resulting in disability which proves a causal nexus between the accident and Petitioner's injury.

For the reasons discussed above, the Arbitrator finds Petitioner's condition of ill-being as it relates to her cervical spine causally related to her work accident suffered on February 20, 2019. The Arbitrator notes Petitioner was last seen by Dr. Fletcher on July 10, 2019. At this visit the Doctor was concerned about Petitioner over-reporting her subjective complaints. He opined Petitioner could return to work regular duty. (PXA, 80-82). This is contrast to Petitioner's testimony. (T.35). Petitioner later saw Dr. Cozzens on August 19, 2019 who ordered an EMG that was later found to be normal. No restrictions were noted. On August 29, 2019 Petitioner saw Dr. Butler who continued her on her current work restrictions. It was unclear if Petitioner was treating for her fibromyalgia at this time. The Arbitrator finds Petitioner did not have restrictions as of this date. At a later note, he placed her off work. The Arbitrator, however, does not deem that off work date to her current condition. The Arbitrator finds Petitioner's condition was the same and plateaued as of July 10, 2019, as such reaching MMI as of this date. In addition, the January 14, 2020 medical note further supports Petitioner was clear to work without restrictions. (PX E, 20). Based on the same, the Arbitrator finds Petitioner reached MMI as of July 10, 2019.

With regard to issue "G", what were Petitioner's earnings, the Arbitrator finds as follows:

Petitioner's wage statement reflects a total wages of $1,118.54 for a 4-week period. (RX1). Based on the same, the average weekly wage is $279.64 with a corresponding PPD and TTD minimum rate of $220.00.

With regard to issue "J", whether the medical services provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for reasonable and necessary medical services, the Arbitrator finds as follows:

The Arbitrator incorporates by reference the above Findings of Fact and refers to them by reference herein. 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 <u>Gallentine v. Industrial Comm'n</u>, 201 Ill.App.3d 880, 888 (2nd Dist. 1990).

The Arbitrator finds Petitioner's treatment to be reasonable and necessary and finds Respondent has not paid for said treatment.

Respondent has not paid for the medical treatment Petitioner has received. The live testimony of Petitioner at trial, the opinions of Petitioner's treating physicians, Dr. Fletcher, Dr. Butler, and Dr. Ghanayem and the treatment history is consistent with this finding. Respondent shall pay reasonable and necessary medical services as billed by Petitioner's treating physicians for their dates of service through MMI of July 10, 2019 pursuant to the workers' compensation fee schedule.

As such, the Arbitrator orders Respondent to pay Petitioner the reasonable and necessary medical expenses incurred through July 10, 2019 in connection with the care and treatment of her causally related condition pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid.

With regard to issue "K", what temporary benefits are in dispute, the Arbitrator finds as follows:

The Arbitrator incorporates by reference the above Findings of Fact and refers to them by reference herein.

In order to prove entitlement to TTD benefits, a claimant must establish not only that he did not work, but that he was unable to work. Sharwarko v. Illinois Workers' Compensation Comm'n, 2015 IL App (1st) 131733WC. An employee is temporarily totally disabled from the time that an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. Archer Daniels Midland Co. v. Industrial Comm'n, 138 Ill. 2d 107, 118 (1990). Once an injured employee's physical condition stabilizes or he has reached MMI, he is no longer eligible for temporary total disability benefits. Archer Daniels Midland Co., 138 Ill. 2d at 118. A claimant reaches MMI when he is as far recovered or restored as the permanent character of his injury will permit. Nascote Industries v. Industrial Comm'n, 353 Ill. App. 3d 1067, 1072 (2004). Factors to be considered in determining whether a claimant has reached MMI include whether he has been released to return to work, medical evidence, testimony concerning the claimant's injury, the extent of his injury, and whether the injury has stabilized. Nascote Industries, 353 Ill. App. 3d at 1072. The period of time during which a claimant is temporarily and totally disabled is a question of fact to be determined by the Commission, and its resolution of the issue will not be disturbed on appeal unless it is against the manifest weight of the evidence. Archer Daniels Midland, 138 Ill. 2d at 119-20.

Petitioner is claiming a period of Temporary Total Disability from February 20, 2019 through October 4, 2019. (Arb. Ex. 1). The Arbitrator notes Petitioner was released to return to regular duty work as of July 10, 2019. (PXA, 80-82). As indicated above, Petitioner saw Dr. Cozzens on August 19, 2019 who ordered an EMG that was later found to be normal. No restrictions were noted. The Arbitrator does note Dr. Butler, on August 29, 2019, continued her on her current work restrictions. There were no active restrictions as of this date. At a later note, he placed her off work. The Arbitrator finds that Petitioner's condition was the same and plateaued as of July 10, 2019, as such reaching MMI as of this date.

Based on the foregoing, the Arbitrator finds Petitioner has proved, by a preponderance of the evidence, that she was temporarily totally disabled from February 20, 2019 through July 10, 2019 at a rate of $220.00/week. Respondent shall receive credit for amounts paid.

With regard to issue "L", what is the nature and extent of the injury, the Arbitrator finds as follows:

The Findings of Fact and Conclusions of Law, as stated above, are adopted herein.

Consistent with the Illinois Workers' Compensation Act, the Arbitrator is to base the permanency determination on the following factors:

i. The reported level of impairment pursuant to subsection (a) (e.g., the AMA rating)
ii. The occupation of the injured employee
iii. The age of the employee at the time of the injury
iv. The employee's future earning capacity
v. Evidence of disability corroborated by the treating medical records.

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 no party introduced an impairment rating at trial and as such, no weight is given to this factor.

With regard to subsection (ii) of § 8.1b(b), the Arbitrator notes Petitioner testified she was employed as a helping hand. She noted she was assigned to two patients and had a least 25-pound restriction. Petitioner is now working a seasonal sedentary job which does not require her to lift and carry with her left side. The Arbitrator notes, however, that as of January 14, 2020, Petitioner was cleared to work without restriction but had the limitation of the left arm which stemmed from the July 13, 2018 fusion. (PX E, 20). Based on the same, the Arbitrator gives this factor moderate weight.

With regard to subsection (iii) of § 8.1b(b), the Arbitrator notes Petitioner was 31 years of age at the time of injury. She will have to continue to work with the effect of this injury for the remainder of her working life as well as the remainder of her natural life. As such, the Arbitrator assigns moderate weight to this factor.

With regard to subsection (iv) of § 8.1b(b), the Arbitrator notes there was no evidence that the injury had an effect on Petitioner's future earning capacity. The Arbitrator gives this factor moderate weight.

With regard to subsection (v) of § 8.1b(b), the Arbitrator notes Petitioner's medical records indicate Petitioner sustained an aggravation of her cervical injury, undergoing physical therapy, injections, and medication. Petitioner testified that she still has issues with her left arm. She has pain that shoots from her ear all the way down her shoulder into her elbow in her pinkie, ring, and middle finger on her left hand. Petitioner's complaints are consistent with the injury she sustained. The Arbitrator gives this factor moderate weight.

Based on the above factors, and the record taken as a whole, the Arbitrator finds Petitioner sustained permanent partial disability to the extent of 7.5% loss of use of person as a whole pursuant to §8(d)2 of the Act for the injuries to her cervical spine. Respondent shall pay Petitioner permanent partial disability benefits of $220.00/week for 37.5 weeks or $8,250.00.

With respect to Issue (M) whether penalties and fees be imposed upon Respondent, the Arbitrator finds the following:

"It is not enough for workers' compensation claimant to show that the employer simply failed, neglected, or refused to make payment or unreasonably delayed payment without good and just cause in order to obtain additional compensation and attorney fees under workers' compensation statute, providing that, in case where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, then Workers' Compensation Commission may award additional compensation, and under statute providing for an award of attorney fees when an award of additional compensation is appropriate; instead, penalties and attorney fees under these statutes 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." Jacobo v. Illinois Workers' Compensation Com'n, 355 Ill.Dec. 358, 959 N.E.2d 772 (2011).

Respondent denied this matter based on the fact Petitioner did not report the injury and the testimony of Respondent's witnesses. While the Arbitrator does not agree with Respondent's argument, it is the Arbitrator's view that Respondent's position is not objectively unreasonable or vexatious. The denial of TTD benefits does not rise to the level of being vexatious and unreasonable. As such, taking the totality of the evidence in the record and based on the fact Respondent was denying accident, the Arbitrator finds that the Respondent's failure to pay benefits for this period at issue was not objectively unreasonable or vexatious under the circumstances. Petitioner's request for penalties and fees is, therefore, denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC021666
Case Name	Alex Lewis v. City of Pekin
Consolidated Cases	21WC021667;
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	23IWCC0486
Number of Pages of Decision	13
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Stephen Kelly
Respondent Attorney	John Fassola

DATE FILED: 11/17/2023

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Alex Lewis,

Petitioner,

vs. NO. 21WC 21666

City of Pekin,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, causal connection, prospective medical care, notice, 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 9, 2022, is hereby affirmed and adopted.

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

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

November 17, 2023

SJM/sj
o-9/6/2023
44

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

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

/s/*Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC021666
Case Name	Alex Lewis v. City of Pekin
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Bradley Gillespie, Arbitrator

Petitioner Attorney	Stephen Kelly
Respondent Attorney	John Fassola

DATE FILED: 9/9/2022

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 7, 2022 3.32%

/s/*Bradley Gillespie, Arbitrator*

Signature

STATE OF ILLINOIS)
)
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)

Alex Lewis
Employee/Petitioner

Case # **21 WC 21666**

v.

Consolidated cases:

City of Pekin
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 **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. ☒ 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, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, the Petitioner earned $**72,000.00**; the average weekly wage was $**1,384.62**.

On the date of accident, Petitioner was **30** years of age, ***single*** with **0** children under 18.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services. This issue is moot due to the Arbitrator's decision on issues of Accident, Causal Connection and Notice

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 would be entitled to a credit of $**4,072.17** under Section 8(j) of the Act, but this issue is moot due to the Arbitrator's decision on issues of Accident, Causal Connection and Notice.

ORDER

The Arbitrator finds that Petitioner failed to meet his burden of proving a compensable accident or that his current condition of ill-being is causally related to a workplace accident. Please see 19(b) Decision of Arbitrator.

The Arbitrator further finds that Petitioner failed to prove that Notice was provided to the Respondent as required by Section 6(c) of the Act. Please see 19(b) Decision of Arbitrator.

As a result of the foregoing, no benefits are awarded ,and all remaining issues are moot.

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 9, 2022

Bradley D. Gillespie

Signature of arbitrator

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ALEX LEWIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No.: 21WC021666**
	)	**21WC021667**
CITY OF PEKIN,	)	
	)	
Respondent.	)	

19(b) DECISION OF ARBITRATOR

These matters were consolidated for the purpose of trial and proceeded to hearing on April 28, 2022, in Peoria, Illinois. (Arb. Ex. 1 & Arb. Ex. 2). Case number 21 WC 021666 states a date of loss August 9, 2018, and case number 21 WC 021667 states a date of loss July 27, 2021. The following issues were in dispute at arbitration:

- Accident
- Notice
- Causal Connection
- Medical Bills
- Prospective Medical Care

FINDINGS OF FACT

Alex Lewis [hereinafter "Petitioner"] testified that he has been employed as a firefighter for the City of Pekin [hereinafter "Respondent"] for approximately seven years. (T.11) Prior to obtaining his position as a firefighter, Petitioner took and passed a pre-employment physical. (T.11)

Petitioner testified to a right elbow condition which he attributes to his work activities. (T.12) He testified at length to the requirements of his employment. He described lifting patients on a stretcher as a paramedic. (T.13-14) He stated that he is required to lift medical bags and heart monitors at the scene. (T.15) He testified about climbing ladders and opening hydrants. On a fire scene, there are many tools, including saws, axes, hydraulic tools, fire hooks and forceable entry tools. He also testified to using heavy tools at scenes of car accidents, and to dragging hoses at fire scenes. (T.16-24)

On cross-examination, Petitioner admitted that he would not be performing any of these specific activities for an extended period. For example, carrying a stretcher would be for a limited period of time. (T.44) Opening a hydrant would take only a minute or two. (T.46) He admitted that he responded to fully involved fires only a couple of times per month. (T.45) He would not use any tools

repetitively throughout the course of a shift. Instead, his job duties would require him to use a variety of tools at a variety of times for a limited period of time. (T.61)

Petitioner testified that he sought treatment from his family doctor due to right elbow pain. (T.26) He informed the doctor's office that he was doing workout circuits in preparation for a 5K run. He described the workout equipment at the firehouse which he used for circuit training. (T.25-26) Petitioner's family doctor referred him to a Sports Medicine doctor, Dr. Bockewitz.

When Petitioner saw Dr. Bockewitz on August 9, 2018, he was complaining of right elbow pain and left hip pain. (T.27) He reported to Dr. Bockewitz that he had been training for a 5K and admitted he was trying to get into better shape for that event. (T.27) On cross-examination, he agreed that he did not tell Dr. Bockewitz he had been injured at work, or that he had been using tools at work which caused problems with his right arm. (T.40) He admitted that he told Dr. Bockewitz that he started noticing problems developing while he was working out for the 5K. (T.41)

He testified that he was diagnosed with lateral epicondylitis by Dr. Bockewitz on August 9, 2018. (T.41) He never advised Dr. Bockewitz that his problems were related to the use of tools or specific activities at work. (T.42) Petitioner agreed that his medical bills were never sent to workers' compensation for payment, and that the bills were submitted to his group insurance. (T.43)

He testified that he had difficulties performing some of his job duties due to his elbow pain. (T.29) He admitted that he did not tell a supervisor about his injury or that he was having difficulty performing his job duties. (T.41) He tried to limit the use of his right arm as much as possible. Fire Chief, Trent Reeise, testified that he would have anticipated a firefighter who had a medical issue to the extent that he could not fully perform his job duties would have reported it through the chain of command. (T.62)

In July 2021, Petitioner underwent an MRI of his right arm. He was referred to Dr. James Williams, whom he saw on one occasion in August 2021. (T.33) Petitioner testified that he had a long conversation with Dr. Williams about what work activities he performed. (T.56) However, the office notes from Dr. Williams do not reference a discussion about Petitioner's specific job duties, nor the tools he used. However, Dr. Williams expressed an opinion that his condition was related to use of the upper extremities in his job. (PX2, pp.14-15)

Petitioner admitted that he first reported his medical condition as being work related in July 2021. He admitted that he did not report the injury until he was aware that he would need to undergo surgery and would have lost time in association with the surgery. (T.43)

Petitioner admitted that he plays hockey. He testified that he plays recreationally, once a week on a Sunday night, approximately 8-10 games per season. (T.36) He admitted that he used his right arm and hand to grip his hockey stick. (T.51) Petitioner admitted fishing, which would involve using his right arm. (T.51) His other recreational activities include hunting and playing pickleball, which is a racquet sport in which he would hold his racquet in his right hand. (T.52) Since Petitioner is right hand dominant, he admitted that most of his activities, including off duty activities, would be performed with the right arm. (T.52)

Petitioner admitted he has lost no time in association with his alleged injury. No work restrictions regarding the use of his right arm or right hand have been imposed. At the time of arbitration, Petitioner was working full duty and was able to perform all his work tasks. (T.53-54) Petitioner testified that he wants to undergo the surgery recommended by Dr. Williams if authorized through Workers' Compensation. (T.38)

Dr. James Williams opined that the Petitioner's condition was causally related to his work activities. Dr. Williams noted that Petitioner performs activities with his upper extremities in his job as a firefighter. (PX2, p.14) He did not identify any specific types of activities that would cause lateral epicondylitis and did not comment on how the activities he performed would be sufficiently repetitive in nature to result in lateral epicondylitis.

Petitioner saw Dr. Sam Biafora for an Independent Medical Evaluation at the behest of Respondent on October 12, 2021. Dr. Biafora testified that he is familiar with the job requirements of a firefighter. (RX1, p.12) He testified that Petitioner's lateral epicondylitis condition was not related to his work activities as a firefighter. (RX1, p.14) He testified that for lateral epicondylitis to be work related, the job would have to require repetitive grasping activities throughout the course of the entire day. (RX1, p.15, 31-32) While he agreed that the certain firefighting activities involved forceful gripping at times, the job does not involve repetitive activities consistently throughout the entire day as would be required to establish causal connection. (RX1, p.15)

On cross-examination, he was asked by Petitioner's attorney about his knowledge of various tools that a firefighter might use in his job. Dr. Biafora noted that the Petitioner would not be fighting fires every day and would not be using the referenced tools all day every day. Dr. Biafora opined that, unless Petitioner was performing forceful gripping activities throughout the course of an entire day, it would not be sufficient to establish causal connection. (RX1, p.32)

CONCLUSIONS OF LAW

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATED TO (C) DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT, AND (F) IS PETITONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS THE FOLLOWING:

Petitioner was diagnosed with lateral epicondylitis of the right arm. He filed Applications for Adjustment of Claim alleging two separate dates of accident, August 9, 2018, and July 27, 2021. No evidence was introduced that Petitioner sustained a specific traumatic accident occurring on either date. The first date appears to coincide with Petitioner's initial visit with sports medicine doctor, Dr. Bockewitz. The second alleged date corresponds to the date of Petitioner's right arm MRI. The central inquiry is whether Petitioner has established that his right elbow condition of ill-being is causally related to his workplace activities for Respondent.

Petitioner asserts that his condition arose from repetitive use of the right arm in his duties as a firefighter. Petitioner testified about numerous job duties requiring the use of his right arm. Petitioner testified to the use of various hand tools, pry tools, dragging hoses, lifting patients on medical calls, and general maintenance and firehouse cleaning responsibilities.

However, when Petitioner initially saw his primary care provider on August 2, 2018, he did not associate any activities he performed as a firefighter to the onset of his right arm complaints. (PX5 p. p. 4) He associated his complaints to circuit training in conjunction with an upcoming 5K event. *Id.* When he saw Dr. Bockewitz on August 9, 2018, Petitioner did not describe any of his workplace activities, the use of tools or other equipment as instigating his right arm pain complaints. (PX3 p. 1) Instead, he provided a history of onset in May 2018 due to overuse, specifically referring to his training for a 5K and noticing right arm pain in association with his increased workouts. *Id.* Therefore, at the onset of Petitioner's complaints, there is no indication that his condition was associated with his firefighting activities.

Dr. Bockewitz's medical records do not reference Petitioner's alleged repetitive use of tools or other equipment in association with his job duties. (*See* PX3) Moreover, Petitioner admitted he never told Dr. Bockewitz he associated his complaints with his duties as a firefighter. (T.42) Dr. Bockewitz did not provide any opinion addressing causal connection in his notes nor did he provide a deposition.

Aside from his own testimony, the only evidence presented by Petitioner to support his contention of a work-related condition is the office note from Dr. James Williams on August 2, 2021. (PX2 p.14) Petitioner testified that he had a lengthy conversation with Dr. Williams regarding the requirements of his job. (T.56) However, the office note from Dr. Williams does not relate a specific

discussion with Petitioner nor does it specify particular activities performed by Petitioner. Instead, Dr. Williams' includes a conclusory statement that "repetitively lifting, pinching, and gripping at work" has aggravated if not caused his right elbow problem. (PX2 p.14) Nothing in Dr. Williams note describes the specific activities involved, or how repetitive those activities might have been.

On the other hand, Respondent introduced the evidence deposition testimony from Dr. Sam Biafora. Dr. Biafora opined that Petitioner's condition of ill-being was not causally related to his workplace activities, since the activities in question were not sufficiently repetitive to result in the development of lateral epicondylitis. (RX1, p.15) Dr. Biafora was cross-examined at length by Petitioner's attorney regarding his knowledge of the specific job duties and types of tools used by Petitioner in the course of his employment. However, Dr. Biafora continued to opine, despite the cross-examination, that using a variety of tools as part of one's job duties does not constitute the type of forceful repetitive activity required to result in the development of lateral epicondylitis.

Petitioner attempted to minimize the extent of his discussion with Dr. Biafora regarding the requirements of his job. He claimed that Dr. Biafora's history consisted of "one question". (T.48) However, the report of Dr. Biafora references a more thorough history from Petitioner, including a history of the developments of his complaints. (RX1) His report does reference Petitioner's occupation and what Petitioner apparently described regarding his job requirements. *Id.* There is no indication in Dr. Biafora's report that Petitioner described repetitive use of tools or other repetitive activities in association with his job requirements. *Id.* Nonetheless, Dr. Biafora's testimony was clear that without an indication of repetitive activities throughout the course of the day, he would not find the condition to be related to employment. *Id.*

Overall, Petitioner's testimony established that he performs activities with his upper extremities as part of his work activities. However, his testimony did not demonstrate that any of the activities are repetitive in nature. On cross-examination, he essentially admitted that any of the activities performed would be periodic in nature and would not last for a significant duration. Some of the described activities would take "a minute of two". None were performed every day. Live fire responses were relatively infrequent per Petitioner's testimony. The activities described by Petitioner were consistent with the use of a variety of tools at a variety of times for a limited period of time, a description endorsed by Fire Chief Reeise.

Overall, the work duties described by Petitioner would not rise to the level of repetitive activity necessary to establish a causal relationship with his condition of ill-being. In the same way, Petitioner

identified personal activities, such as ice hockey, fishing, hunting, and pickleball, all of which would require grasping with the right arm. Indeed, Petitioner's initial complaint to his sports medicine physician was that the complaints developed as a result of increased workouts in preparation for a 5K.

Overall, the Arbitrator finds the opinion of Dr. Biafora regarding the lack of relationship between Petitioner's work activities and his development of lateral epicondylitis to be more persuasive. Wherefore, the Arbitrator finds and concludes that Petitioner has failed to meet his burden of proving that his condition of ill being arose out of and in the course of his employment with the Respondent or that it was causally connected to his employment. Accordingly, the Arbitrator finds that the Petitioner has failed to prove that he sustained accidental injuries arising out of an in the course of his employment with Respondent on August 9, 2018 or July 27, 2021, or that his current condition of ill-being is causally related to his work as a firefighter.

WITH RESPECT TO THE ARBITRATOR'S DECISION RELATED TO (E) WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO THE RESPONDENT, THE ARBITRATOR FINDS THE FOLLOWING:

The conclusions set forth in the paragraphs above are incorporated herein by reference. Therefore, remaining issues would be moot. Nonetheless, the Arbitrator likewise finds that Petitioner failed to prove that he provided notice of an alleged accident on August 9, 2018, to his employer within the statutorily required time period. Under Section 6(c) of the Act, a Petitioner is required to provide evidence of a workplace injury as soon as practicable, but not less than 45 days after the accident. There is no question that Petitioner did not provide notice until July 2021 at the earliest. Despite his testimony that the condition of his arm had been interfering with his ability to perform his job, he admitted he did not advise a supervisor about his condition. Petitioner further admitted that he ultimately decided to provide notice of an accident because he understood that he would be undergoing surgery and would be losing time from work. Therefore, per his own testimony, Petitioner had a motivation to report an alleged workplace injury at that point in time. Based on the totality of the evidence, the Arbitrator finds and concludes that Petitioner failed to provide timely notice of an accident occurring on August 9, 2018.

WITH RESPECT TO THE ARBITRATOR'S DECISION RELATED TO (K) WERE THE MEDICAL SERVICES PROVIDED TO PETITIONER REASONABLE AND NECESSARY, AND (K) IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL

CARE, THE ARBITRATOR FINDS THE FOLLOWING:

The conclusions set forth above are incorporated herein by reference. As a result of the failure of proof regarding accident, causal connection and notice, no medical benefits are awarded, and prospective medical is likewise denied, as all remaining issues are moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC021667
Case Name	Alex Lewis v. City of Pekin
Consolidated Cases	21WC021666;
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	23IWCC0487
Number of Pages of Decision	13
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Stephen Kelly
Respondent Attorney	John Fassola

DATE FILED: 11/17/2023

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Alex Lewis,

Petitioner,

vs. NO. 21WC 21667

City of Pekin,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, causal connection, prospective medical care, notice, 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 shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

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

November 17, 2023
SJM/sj
o-9/6/2023
44

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

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

/s/*Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

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Petitioner Attorney	Stephen Kelly
Respondent Attorney	John Fassola

DATE FILED: 9/9/2022

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 7, 2022 3.32%

/s/*Bradley Gillespie, Arbitrator*
Signature

STATE OF ILLINOIS)
)
COUNTY OF PEORIA)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Alex Lewis
Employee/Petitioner

Case # **21 WC 21667**

v.

Consolidated cases:

City of Pekin
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 **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. [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. [ ] What were Petitioner's earnings?

H. [ ] What was Petitioner's age at the time of the accident?

I. [ ] What was Petitioner's marital status at the time of the accident?

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

K. [x] Is Petitioner entitled to any prospective medical care?

L. [ ] 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, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, the 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, the Petitioner earned $**72,000.00**; the average weekly wage was $**1,384.62**.

On the date of accident, Petitioner was **33** years of age, ***single*** with **0** children under 18.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services. This issue is moot due to the Arbitrator's decision on issues of Accident and Causal Connection.

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 would be entitled to a credit of $**4,072.17** under Section 8(j) of the Act, but this issue is moot due to the Arbitrator's decision on issues of Accident and Causal Connection.

ORDER

The Arbitrator finds that Petitioner failed to meet his burden of proving a compensable accident or that his current condition of ill-being is causally related to a workplace accident. Please see 19(b) Decision of Arbitrator.

As a result of the foregoing, no benefits are awarded and all remaining issues are moot.

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 9, 2022

Bradley D. Gillespie

Signature of arbitrator

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ALEX LEWIS,	)		
	)		
Petitioner,	)		
	)		
v.	)	**Case No.:**	**21WC021666**
	)		**21WC021667**
CITY OF PEKIN,	)		
	)		
Respondent.	)		

19(b) DECISION OF ARBITRATOR

These matters were consolidated for the purpose of trial and proceeded to hearing on April 28, 2022, in Peoria, Illinois. (Arb. Ex. 1 & Arb. Ex. 2). Case number 21 WC 021666 states a date of loss August 9, 2018, and case number 21 WC 021667 states a date of loss July 27, 2021. The following issues were in dispute at arbitration:

- Accident
- Notice
- Causal Connection
- Medical Bills
- Prospective Medical Care

FINDINGS OF FACT

Alex Lewis [hereinafter "Petitioner"] testified that he has been employed as a firefighter for the City of Pekin [hereinafter "Respondent"] for approximately seven years. (T.11) Prior to obtaining his position as a firefighter, Petitioner took and passed a pre-employment physical. (T.11)

Petitioner testified to a right elbow condition which he attributes to his work activities. (T.12) He testified at length to the requirements of his employment. He described lifting patients on a stretcher as a paramedic. (T.13-14) He stated that he is required to lift medical bags and heart monitors at the scene. (T.15) He testified about climbing ladders and opening hydrants. On a fire scene, there are many tools, including saws, axes, hydraulic tools, fire hooks and forceable entry tools. He also testified to using heavy tools at scenes of car accidents, and to dragging hoses at fire scenes. (T.16-24)

On cross-examination, Petitioner admitted that he would not be performing any of these specific activities for an extended period. For example, carrying a stretcher would be for a limited period of time. (T.44) Opening a hydrant would take only a minute or two. (T.46) He admitted that he responded to fully involved fires only a couple of times per month. (T.45) He would not use any tools

repetitively throughout the course of a shift. Instead, his job duties would require him to use a variety of tools at a variety of times for a limited period of time. (T.61)

Petitioner testified that he sought treatment from his family doctor due to right elbow pain. (T.26) He informed the doctor's office that he was doing workout circuits in preparation for a 5K run. He described the workout equipment at the firehouse which he used for circuit training. (T.25-26) Petitioner's family doctor referred him to a Sports Medicine doctor, Dr. Bockewitz.

When Petitioner saw Dr. Bockewitz on August 9, 2018, he was complaining of right elbow pain and left hip pain. (T.27) He reported to Dr. Bockewitz that he had been training for a 5K and admitted he was trying to get into better shape for that event. (T.27) On cross-examination, he agreed that he did not tell Dr. Bockewitz he had been injured at work, or that he had been using tools at work which caused problems with his right arm. (T.40) He admitted that he told Dr. Bockewitz that he started noticing problems developing while he was working out for the 5K. (T.41)

He testified that he was diagnosed with lateral epicondylitis by Dr. Bockewitz on August 9, 2018. (T.41) He never advised Dr. Bockewitz that his problems were related to the use of tools or specific activities at work. (T.42) Petitioner agreed that his medical bills were never sent to workers' compensation for payment, and that the bills were submitted to his group insurance. (T.43)

He testified that he had difficulties performing some of his job duties due to his elbow pain. (T.29) He admitted that he did not tell a supervisor about his injury or that he was having difficulty performing his job duties. (T.41) He tried to limit the use of his right arm as much as possible. Fire Chief, Trent Reeise, testified that he would have anticipated a firefighter who had a medical issue to the extent that he could not fully perform his job duties would have reported it through the chain of command. (T.62)

In July 2021, Petitioner underwent an MRI of his right arm. He was referred to Dr. James Williams, whom he saw on one occasion in August 2021. (T.33) Petitioner testified that he had a long conversation with Dr. Williams about what work activities he performed. (T.56) However, the office notes from Dr. Williams do not reference a discussion about Petitioner's specific job duties, nor the tools he used. However, Dr. Williams expressed an opinion that his condition was related to use of the upper extremities in his job. (PX2, pp.14-15)

Petitioner admitted that he first reported his medical condition as being work related in July 2021. He admitted that he did not report the injury until he was aware that he would need to undergo surgery and would have lost time in association with the surgery. (T.43)

Petitioner admitted that he plays hockey. He testified that he plays recreationally, once a week on a Sunday night, approximately 8-10 games per season. (T.36) He admitted that he used his right arm and hand to grip his hockey stick. (T.51) Petitioner admitted fishing, which would involve using his right arm. (T.51) His other recreational activities include hunting and playing pickleball, which is a racquet sport in which he would hold his racquet in his right hand. (T.52) Since Petitioner is right hand dominant, he admitted that most of his activities, including off duty activities, would be performed with the right arm. (T.52)

Petitioner admitted he has lost no time in association with his alleged injury. No work restrictions regarding the use of his right arm or right hand have been imposed. At the time of arbitration, Petitioner was working full duty and was able to perform all his work tasks. (T.53-54) Petitioner testified that he wants to undergo the surgery recommended by Dr. Williams if authorized through Workers' Compensation. (T.38)

Dr. James Williams opined that the Petitioner's condition was causally related to his work activities. Dr. Williams noted that Petitioner performs activities with his upper extremities in his job as a firefighter. (PX2, p.14) He did not identify any specific types of activities that would cause lateral epicondylitis and did not comment on how the activities he performed would be sufficiently repetitive in nature to result in lateral epicondylitis.

Petitioner saw Dr. Sam Biafora for an Independent Medical Evaluation at the behest of Respondent on October 12, 2021. Dr. Biafora testified that he is familiar with the job requirements of a firefighter. (RX1, p.12) He testified that Petitioner's lateral epicondylitis condition was not related to his work activities as a firefighter. (RX1, p.14) He testified that for lateral epicondylitis to be work related, the job would have to require repetitive grasping activities throughout the course of the entire day. (RX1, p.15, 31-32) While he agreed that the certain firefighting activities involved forceful gripping at times, the job does not involve repetitive activities consistently throughout the entire day as would be required to establish causal connection. (RX1, p.15)

On cross-examination, he was asked by Petitioner's attorney about his knowledge of various tools that a firefighter might use in his job. Dr. Biafora noted that the Petitioner would not be fighting fires every day and would not be using the referenced tools all day every day. Dr. Biafora opined that, unless Petitioner was performing forceful gripping activities throughout the course of an entire day, it would not be sufficient to establish causal connection. (RX1, p.32)

CONCLUSIONS OF LAW

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATED TO (C) DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT, AND (F) IS PETITONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS THE FOLLOWING:

Petitioner was diagnosed with lateral epicondylitis of the right arm. He filed Applications for Adjustment of Claim alleging two separate dates of accident, August 9, 2018, and July 27, 2021. No evidence was introduced that Petitioner sustained a specific traumatic accident occurring on either date. The first date appears to coincide with Petitioner's initial visit with sports medicine doctor, Dr. Bockewitz. The second alleged date corresponds to the date of Petitioner's right arm MRI. The central inquiry is whether Petitioner has established that his right elbow condition of ill-being is causally related to his workplace activities for Respondent.

Petitioner asserts that his condition arose from repetitive use of the right arm in his duties as a firefighter. Petitioner testified about numerous job duties requiring the use of his right arm. Petitioner testified to the use of various hand tools, pry tools, dragging hoses, lifting patients on medical calls, and general maintenance and firehouse cleaning responsibilities.

However, when Petitioner initially saw his primary care provider on August 2, 2018, he did not associate any activities he performed as a firefighter to the onset of his right arm complaints. (PX5 p. p. 4) He associated his complaints to circuit training in conjunction with an upcoming 5K event. *Id.* When he saw Dr. Bockewitz on August 9, 2018, Petitioner did not describe any of his workplace activities, the use of tools or other equipment as instigating his right arm pain complaints. (PX3 p. 1) Instead, he provided a history of onset in May 2018 due to overuse, specifically referring to his training for a 5K and noticing right arm pain in association with his increased workouts. *Id.* Therefore, at the onset of Petitioner's complaints, there is no indication that his condition was associated with his firefighting activities.

Dr. Bockewitz's medical records do not reference Petitioner's alleged repetitive use of tools or other equipment in association with his job duties. (*See* PX3) Moreover, Petitioner admitted he never told Dr. Bockewitz he associated his complaints with his duties as a firefighter. (T.42) Dr. Bockewitz did not provide any opinion addressing causal connection in his notes nor did he provide a deposition.

Aside from his own testimony, the only evidence presented by Petitioner to support his contention of a work-related condition is the office note from Dr. James Williams on August 2, 2021. (PX2 p.14) Petitioner testified that he had a lengthy conversation with Dr. Williams regarding the requirements of his job. (T.56) However, the office note from Dr. Williams does not relate a specific

discussion with Petitioner nor does it specify particular activities performed by Petitioner. Instead, Dr. Williams' includes a conclusory statement that "repetitively lifting, pinching, and gripping at work" has aggravated if not caused his right elbow problem. (PX2 p.14) Nothing in Dr. Williams note describes the specific activities involved, or how repetitive those activities might have been.

On the other hand, Respondent introduced the evidence deposition testimony from Dr. Sam Biafora. Dr. Biafora opined that Petitioner's condition of ill-being was not causally related to his workplace activities, since the activities in question were not sufficiently repetitive to result in the development of lateral epicondylitis. (RX1, p.15) Dr. Biafora was cross-examined at length by Petitioner's attorney regarding his knowledge of the specific job duties and types of tools used by Petitioner in the course of his employment. However, Dr. Biafora continued to opine, despite the cross-examination, that using a variety of tools as part of one's job duties does not constitute the type of forceful repetitive activity required to result in the development of lateral epicondylitis.

Petitioner attempted to minimize the extent of his discussion with Dr. Biafora regarding the requirements of his job. He claimed that Dr. Biafora's history consisted of "one question". (T.48) However, the report of Dr. Biafora references a more thorough history from Petitioner, including a history of the developments of his complaints. (RX1) His report does reference Petitioner's occupation and what Petitioner apparently described regarding his job requirements. *Id.* There is no indication in Dr. Biafora's report that Petitioner described repetitive use of tools or other repetitive activities in association with his job requirements. *Id.* Nonetheless, Dr. Biafora's testimony was clear that without an indication of repetitive activities throughout the course of the day, he would not find the condition to be related to employment. *Id.*

Overall, Petitioner's testimony established that he performs activities with his upper extremities as part of his work activities. However, his testimony did not demonstrate that any of the activities are repetitive in nature. On cross-examination, he essentially admitted that any of the activities performed would be periodic in nature and would not last for a significant duration. Some of the described activities would take "a minute of two". None were performed every day. Live fire responses were relatively infrequent per Petitioner's testimony. The activities described by Petitioner were consistent with the use of a variety of tools at a variety of times for a limited period of time, a description endorsed by Fire Chief Reeise.

Overall, the work duties described by Petitioner would not rise to the level of repetitive activity necessary to establish a causal relationship with his condition of ill-being. In the same way, Petitioner

identified personal activities, such as ice hockey, fishing, hunting, and pickleball, all of which would require grasping with the right arm. Indeed, Petitioner's initial complaint to his sports medicine physician was that the complaints developed as a result of increased workouts in preparation for a 5K.

Overall, the Arbitrator finds the opinion of Dr. Biafora regarding the lack of relationship between Petitioner's work activities and his development of lateral epicondylitis to be more persuasive. Wherefore, the Arbitrator finds and concludes that Petitioner has failed to meet his burden of proving that his condition of ill being arose out of and in the course of his employment with the Respondent or that it was causally connected to his employment. Accordingly, the Arbitrator finds that the Petitioner has failed to prove that he sustained accidental injuries arising out of an in the course of his employment with Respondent on August 9, 2018 or July 27, 2021, or that his current condition of ill-being is causally related to his work as a firefighter.

WITH RESPECT TO THE ARBITRATOR'S DECISION RELATED TO (E) WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO THE RESPONDENT, THE ARBITRATOR FINDS THE FOLLOWING:

The conclusions set forth in the paragraphs above are incorporated herein by reference. Therefore, remaining issues would be moot. Nonetheless, the Arbitrator likewise finds that Petitioner failed to prove that he provided notice of an alleged accident on August 9, 2018, to his employer within the statutorily required time period. Under Section 6(c) of the Act, a Petitioner is required to provide evidence of a workplace injury as soon as practicable, but not less than 45 days after the accident. There is no question that Petitioner did not provide notice until July 2021 at the earliest. Despite his testimony that the condition of his arm had been interfering with his ability to perform his job, he admitted he did not advise a supervisor about his condition. Petitioner further admitted that he ultimately decided to provide notice of an accident because he understood that he would be undergoing surgery and would be losing time from work. Therefore, per his own testimony, Petitioner had a motivation to report an alleged workplace injury at that point in time. Based on the totality of the evidence, the Arbitrator finds and concludes that Petitioner failed to provide timely notice of an accident occurring on August 9, 2018.

WITH RESPECT TO THE ARBITRATOR'S DECISION RELATED TO (K) WERE THE MEDICAL SERVICES PROVIDED TO PETITIONER REASONABLE AND NECESSARY, AND (K) IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL

CARE, THE ARBITRATOR FINDS THE FOLLOWING:

The conclusions set forth above are incorporated herein by reference. As a result of the failure of proof regarding accident, causal connection and notice, no medical benefits are awarded, and prospective medical is likewise denied, as all remaining issues are moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC014772
Case Name	Kayla Wesley v. State of Illinois - Murray Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0488
Number of Pages of Decision	13
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Kenton Owens

DATE FILED: 11/20/2023

/s/Amylee Simonovich, Commissioner

Signature

STATE OF ILLINOIS	)		
	) SS.	☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
COUNTY OF JEFFERSON	)	☒ 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

Kayla Wesley,

Petitioner,

vs. NO: 21 WC 14772

State of Illinois / Murray Center,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by Respondent and Petitioner herein and notice given to all parties, the Commission, after considering nature and extent, 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 makes the following modifications to the Decision of the Arbitrator. In the Order section of the Arbitration Decision Form and on page four (4) of the Decision, the Commission strikes the following language:

> Respondent offered no evidence that Petitioner's medical treatment or expenses were unreasonable or unnecessary.

On page one (1) of the Decision, the Arbitrator wrote that the patient Petitioner was assisting at the time of her work injury was "…having a behavior." The Commission modifies the above-referenced sentence to read as follows:

> It is undisputed that on 5/11/21 Petitioner was injured while assisting a patient.

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 April 24, 2023, is modified as stated herein.

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 Respondent pay to Petitioner interest pursuant to §19(n) of the Act, if any.

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review.

November 20, 2023
d: 11/7/23
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	21WC014772
Case Name	Kayla Wesley v. State of Illinois/Murray Center
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Kenton Owens

DATE FILED: 4/24/2023

THE INTEREST RATE FOR THE WEEK OF APRIL 18, 2023 4.87%

/s/ Linda Cantrell, Arbitrator

Signature

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

April 24, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Kayla Wesley
Employee/Petitioner
v.
State of Illinois/Murray Center
Employer/Respondent

Case # **21** WC **14772**

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, Illinois**, on **2/16/23**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **5/11/21**, 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 the accident ***was*** given to Respondent.

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

In the year preceding the injury, Petitioner earned $**38,525.76**; the average weekly wage was $**740.88**.

On the date of accident, Petitioner was **29** years of age, ***married*** with **5** 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 $**23,356.29 in TTD benefits paid, plus five service-connected days and two regular days off, resulting in an overpayment of temporary benefits in the amount of $7,917.31 for which Respondent is entitled to a credit**, as stipulated by the parties, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**23,356.29**. The parties stipulated that Petitioner is entitled to temporary total disability benefits from 5/29/21 through 11/11/21 and 6/24/22 through 8/8/22.

Respondent is entitled to a credit of $**TBD and any and all paid** under Section 8(j) of the Act, pursuant to the stipulation of the parties.

ORDER

The parties stipulated that Respondent shall pay all reasonable and related medical expenses directly to the medical providers. Respondent offered no evidence that Petitioner's medical treatment or expenses were unreasonable or unnecessary. Therefore, Respondent shall pay the medical expenses contained in Petitioner's Group Exhibit 1, pursuant to the Illinois medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. Pursuant to the stipulation of the parties, Respondent shall pay the medical expenses directly to the medical providers and receive a credit for any and all medical expenses paid through its group medical plan under Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**444.53**/week for **64.5** weeks, less a credit of **$7,917.31** for the stipulated overpayment of temporary total disability benefits, because the injuries sustained caused **30%** loss of use of Petitioner's right leg, as provided in Section 8(e)12 of the Act.

Respondent shall pay Petitioner compensation that has accrued from 10/24/22 through 2/16/23, 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.

APRIL 24, 2023

Arbitrator Linda J. Cantrell

STATE OF ILLINOIS)
) SS
COUNTY OF JEFFERSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

KAYLA WESLEY,)
)
Employee/Petitioner,)
)
v.) Case No.: 21-WC-014772
)
STATE OF ILLINOIS/)
MURRAY CENTER,)
)
Employer/Respondent.)

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Mt. Vernon on February 16, 2023 on all issues. The parties stipulated that Petitioner sustained accidental injuries that arose out of and in the course of her employment with Respondent on 5/11/21. The parties stipulated on the record that Respondent shall pay all reasonable and related medical expenses directly to the medical providers. The parties stipulated that Respondent is entitled to a credit for any and all medical bills paid through its group medical plan, under Section 8(j) of the Act. The parties stipulated that Petitioner is entitled to temporary total disability benefits from 5/29/21 through 11/11/21 and 6/24/22 through 8/8/22. The parties stipulated that Respondent is entitled to a credit of $23,356.29 in TTD benefits paid, plus five service-connected days and two regular days off, resulting in an overpayment of temporary benefits in the amount of $7,917.31.

The issues in dispute are causal connection, medical expenses, and the nature and extent of Petitioner's injuries.

TESTIMONY

Petitioner was 29 years old, married, with five dependent children at the time of accident. Petitioner was hired by Prime Communications, AT&T, as a sales representative on 4/26/22. Petitioner was employed by Respondent as a Mental Health Technician II. It is undisputed that on 5/11/21 Petitioner was injured while assisting a patient that was having a behavior. The patient threw herself on the floor and Petitioner attempted to get a pillow under the patient's head when she slammed her right knee into the concrete. The incident required a five-person physical hold on the patient until the behavior had deescalated. Petitioner testified she felt excruciating pain in her right knee after the incident. Petitioner testified that prior to the accident she had no diagnoses, treatment, MRIs, or surgeries with regard to her right knee.

Petitioner treated with Dr. Bradley who performed surgery on 9/15/21. Petitioner testified that her condition increasingly worsened following surgery and she had a one-fourth mile walking restriction. She underwent a second surgery in June 2022 that dramatically improved her condition. She stated she was walking five miles a day within two weeks of her second surgery. She stated that by October 2022 she was walking 5 to 6 miles per day and continues to do so today. She returned to work at AT&T when she was released by Dr. Bradley in November 2022.

Petitioner testified she currently has numbness in the third toe of her right foot, which has been present since her injury, and worsens with cold weather. Her third toe drags making it difficult to wear flip-flops. Her knee aches with weather changes and prolonged activities. She controls her symptoms with Tylenol or Ibuprofen. She walks five miles per day.

On cross-examination, Petitioner testified she returned to work for Respondent after her first knee surgery. She resigned in April 2022 because it hurt to walk, and she could not get around Respondent's large facility. She was still under a one-fourth mile walking restriction at the time and did not have any personal days to take off work.

MEDICAL HISTORY

On 5/12/21, Petitioner presented to SSM St. Mary's Good Samaritan Express Care in Mount Vernon, Illinois with symptoms of right knee bruising, swelling, and pain. (PX3) Physical examination revealed decreased range of motion, tenderness over the lateral joint line, and effusion to the right knee. X-rays showed no fracture or dislocation. Petitioner was instructed to take Naproxen and return in two weeks. The following day, Petitioner returned to the Express Clinic and reported her condition was worsening, and she was unable to put any weight on her leg. She was referred to orthopedics.

On 5/27/21, Petitioner was examined by Dr. Matthew Bradley and provided a consistent history of injury. (PX4) Petitioner had symptoms of anterior right knee pain that worsened with walking and going up and down steps. Physical exam of the right knee showed mild effusion, positive McMurray's testing without catching or locking, and severe pain or crepitus with patellar compression testing. An MRI showed a large, almost full-thickness chondral defect to the right lateral patella, a corresponding loose body within the knee joint proper, and a moderately sized Baker's cyst. (PX5) Given the size of the chondral defect and the corresponding loose body, Dr. Bradley recommended surgery.

On 6/30/21, Petitioner underwent preoperative testing at SSM Health Good Samaritan Hospital with NP Tracy Arnold. (PX6, 7) Petitioner reported her surgery was scheduled for 7/14/21. NP Arnold instructed Petitioner to postpone her surgery for two months due to abnormal labs.

On 9/15/21, Dr. Bradley performed a patelloplasty and lateral release of Petitioner's right knee. (PX8) Intraoperatively, Dr. Bradley noted an acute-appearing small, isolated injury to the lateral facet of the patella without any full thickness of the subchondral bone visible.

On 10/14/21, Petitioner returned to Dr. Bradley and reported a small lump on her leg that presented after prolonged standing and use. (PX4) Dr. Bradley diagnosed a small area of effusion and instructed her to continue to wear her compression sleeve, participate in physical therapy. and take anti-inflammatory medication. She was continued off work.

Petitioner underwent physical therapy at the Orthopedic Center of Southern Illinois (OCSI). (PX9)

On 11/8/21, Petitioner returned to Dr. Bradley with intermittent pain in her right knee, particularly with weight bearing in a flexed position. (PX4) Dr. Bradley was unable to reproduce her pain with physical examination and recommended an MRI arthrogram. He placed Petitioner on work restrictions of desk work only.

On 1/3/22, Dr. Bradley noted Petitioner underwent a cortisone injection in her knee that did not provide relief. (PX4) He reviewed the MRI dated 12/8/21 that revealed medial femoral condyle grade ¾ chondrosis with small chondral fissuring that was increased from her previous study, as well as a 10 x 7 grade ¾ chondral defect in the lateral patellar articulation, which had also increased in size from the previous study. (PX4, 5) Dr. Bradley continued Petitioner on light duty restrictions, recommended she continue taking Tylenol and Ibuprofen, and ordered physical therapy with the utilization of graston and myofascial techniques.

Petitioner underwent physical therapy at the OCSI. She returned to Dr. Bradley on 3/17/22 and reported pain with walking any significant distance and she was unable to continue therapy due to pain. Dr. Bradley recommended an MRI and placed her on light duty restrictions. Dr. Bradley, work, and instructed her to continue her home exercise program and use of Tylenol and Ibuprofen.

On 4/11/22, Dr. Bradley reviewed the MRI performed on 3/23/22 and found it revealed lateral patellar chondrosis, chondral fissuring, and medial tibiofemoral chondrosis. He suspected Petitioner’s symptoms were coming from her lateral quadriceps tendon, and could be nerve related, as her knee appeared to be functioning well. Dr. Bradley referred Petitioner to pain management to determine whether her pain was emanating from a nerve or her lateral quadriceps tendon. She was continued on light duty restrictions and encouraged to continue a home exercise program.

On 4/11/22, Petitioner was examined by Dr. Ravi Yadava. (PX10) Physical examination revealed decreased knee flexion, fullness of the infrapatellar and suprapatellar pouch, tenderness to palpation over the peroneal nerve at the fibular head with a positive Tinel’s sign, palpable tension of the lateral hamstring that extended to the popliteal fossa, palpable trigger points in the biceps femoris in the proximal 1/3 of the lateral hamstring, and deficient mass in the quadriceps, adductor, and gastric. Dr. Yadava noted Petitioner had musculoligamentous restriction of her hamstrings and IT band that were contributing to irritation at her lateral knee and poor tracking of her patella, as well as a peroneal nerve neuropathy at the fibular head. He recommended an EMG/NCS and therapeutic exercises.

Dr. Yadava reviewed the EMG/NCS performed on 4/26/22 and found it revealed mild to moderate peroneal nerve neuropathy at the right fibular head, and an incidental finding of entrapment neuropathy at the tibial nerve at the medial ankle. (PX10) Dr. Yadava recommended physical therapy and administered an injection to the peroneal nerve. Petitioner underwent physical therapy at Hands On Therapeutics. (PX11)

On 5/23/22, Petitioner returned to Dr. Bradley and reported her pain significantly improved after the injection, but her pain was returning, and she had no change in swelling. Dr. Bradley recommended surgery. He opined that Petitioner's condition in her right knee was causally connected to her work accident.

On 6/24/22, Dr. Bradley performed a right peroneal nerve decompression at the fibular head and a biologic allograft utilization. (PX12, 13; PX8) Intraoperatively, Dr. Bradley appreciated tightness and significant inflammatory changes near the intermuscular septum of the peroneal nerve, which he debrided and widened to give the nerve more room.

On 7/25/22, Petitioner reported that most of her lateral knee pain and burning resolved. She continued to have third toe numbness which she felt was slightly worse since surgery, as well as significant spasms in her calf that occurred with prolonged standing and walking. Dr. Bradley continued Petitioner off work for two more weeks, recommended physical therapy, and instructed her to continue taking Tylenol and Ibuprofen.

Petitioner underwent physical therapy at OCSI from 8/3/22 through 9/14/22. (PX9) On 10/24/22, Petitioner returned to Dr. Bradley and reported she was doing well and was able to walk five to six miles per day, although she continued to have numbness on the dorsal aspect of her third toe. Dr. Bradley instructed Petitioner to continue her home exercise program and placed her at MMI.

CONCLUSIONS OF LAW

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

Respondent stipulated on the record it does not dispute medical causation, but rather, causation of Petitioner's current condition in the event her testimony was not consistent with medical evidence. (T10) The Arbitrator finds that Petitioner's testimony regarding her current symptoms was consistent with the medical evidence. Respondent offered no contrary opinion or evidence at trial. Therefore, the Arbitrator finds that Petitioner's current condition is causally related to her work injury that occurred on 5/11/21.

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

The parties stipulated that Respondent shall pay all reasonable and related medical expenses directly to the medical providers. Respondent offered no evidence that Petitioner's medical treatment or expenses were unreasonable or unnecessary. Therefore, Respondent shall

pay the medical expenses contained in Petitioner's Group Exhibit 1, pursuant to the Illinois medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. Pursuant to the stipulation of the parties, Respondent shall pay the medical expenses directly to the medical providers and receive a credit for any and all medical expenses paid through its group medical plan under Section 8(j) of the Act.

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

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

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

(ii) **Occupation**: Petitioner voluntarily resigned from employment with Respondent and began working as a sales representative for AT&T on 4/26/22. She testified she was walking five miles a day within two weeks of her second surgery on 6/24/22. She testified that by October 2022 she was walking 5 to 6 miles per day and continues to do so today. She returned to work at AT&T when she was released by Dr. Bradley. There is no evidence that Petitioner's current condition of ill-being interferes with the performance of her current job duties. The Arbitrator places some weight on this factor.

(iii) **Age**: Petitioner was 29 years old at the time of injury. She is a younger individual and must live and work with her disability for an extended period of time. Pursuant to *Jones v. Southwest Airlines*, 16 I.W.C.C. 0137 (2016) (wherein the Commission concluded that greater weight should have been given to the fact that Petitioner was younger [46 years of age] and would have to work with his disability for an extended period of time). The Arbitrator places greater weight on this factor.

(iv) **Earning Capacity**: There was no evidence of impairment of earning capacity. Petitioner continues to work without restrictions for another employer. The Arbitrator places some weight on this factor.

(v) **Disability**: As a result of the undisputed work accident, Petitioner sustained injuries to her right knee that resulted in two surgeries. She underwent a right knee patelloplasty and lateral release in September 2021, and a right peroneal nerve decompression at the fibular head and a biologic allograft utilization in June 2022. Petitioner testified that the pain and swelling in her knee significantly improved following her second surgery, but she continues to experience numbness in the third toe of her right foot. She testified that her third toe drags, and she cannot wear flip-

flops or unsupportive shoes. The symptoms in her toe worsen with cold weather. Petitioner has an aching pain in her knee with weather changes and activity. She takes over-the-counter Tylenol and Ibuprofen to alleviate her symptoms. Petitioner was released to full duty work without restrictions on 10/24/22. The Arbitrator places significant 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 her right leg, pursuant to Section 8(e) of the Act.

Respondent shall pay Petitioner compensation that has accrued from 10/24/22 through 2/16/23, and shall pay the remainder of the award, if any, in weekly payments.

Arbitrator Linda J. Cantrell DATED:

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC005274
Case Name	Kelly Wells v. Securitas, Incdeb.
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0489
Number of Pages of Decision	19
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Thomas Stiberth
Respondent Attorney	Patrick D. Duffy

DATE FILED: 11/20/2023

/s/Deborah Simpson, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KELLY WELLS,

Petitioner,

vs. NO: 20 WC 5274

SECURITAS, INC.,

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 made to page 13 of the memorandum of the Decision of the Arbitrator as stated by the Commission herein.

On page 13 of the Decision of the Arbitrator, the Arbitrator provided the following sentence when making her award of permanent partial disability: "Upon consideration of the foregoing evidence and factors, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 30% loss of the *left* foot and 5% loss of the *left* leg, pursuant to Section 8(e) of the Act." (Dec. p. 13, *emphasis added*). This award of permanency to the left lower extremity is inconsistent with the award made in the Order section of the Decision and the evidence presented at the hearing, both of which show that Petitioner had sustained the injury to her *right* foot and *right* leg. Thus, the Commission corrects the typographical errors on page 13 of the Decision that incorrectly reference the Petitioner's left lower extremity to instead reflect the proper extremity as follows: "Upon consideration of the foregoing evidence and factors, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 30% loss of the right foot and 5% loss of the right leg, pursuant to Section 8(e) of the Act." In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the herein identified sentence on page 13 of the Decision of the Arbitrator that references the left lower extremity is corrected to read: "Upon consideration of the foregoing evidence and factors, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 30% loss of the right foot and 5% loss of the right leg, pursuant to Section 8(e) of the Act." In all other respects, the Commission affirms and adopts the Decision of the Arbitrator filed on March 3, 2023.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest pursuant to Section 19(n) of the Illinois Workers' Compensation Act, if any.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $42,200.00. 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.

November 20, 2023

DLS/met
O-10/11/23
46

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC005274
Case Name	Kelly Wells v. Securitas, Inc.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Ana Vazquez, Arbitrator

Petitioner Attorney	Thomas Stiberth
Respondent Attorney	Patrick D. Duffy

DATE FILED: 3/3/2023

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 28, 2023 4.98%

/s/Ana Vazquez, Arbitrator
Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Kelly Wells
Employee/Petitioner

v.

Securitas, Inc.
Employer/Respondent

Case # **20** WC **005274**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Ana Vazquez**, Arbitrator of the Commission, in the city of **Chicago**, on **September 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 **whether there was an underpayment of TTD and whether there was an overpayment TTD from August 5, 2020 to September 11, 2020.**

FINDINGS

On **November 1, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**33,382.44**; the average weekly wage was $**641.97**.

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 $**20,831.52** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**20,831.52**.

ORDER

Respondent shall pay the reasonable and necessary medical services provided by Community Physical Therapy, as provided in Petitioner's Exhibit 10, pursuant to Sections 8(a) and 8.2 of the Act. Respondent is entitled to a credit for any payments made towards the awarded outstanding expenses and shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit.

Respondent shall pay Petitioner permanent partial disability benefits of **$385.18/week** for **60.85 weeks**, because the injuries sustained caused **30% loss of use of the right foot** and **5% loss of use of the right leg**, as provided in Section 8(e) of the Act.

Per the Parties stipulation, Respondent shall pay to Petitioner temporary total disability benefits in the amount of **$427.98/week** for **43 3/7 weeks**, commencing on **November 2, 2019 through August 4, 2020** and from **March 24, 2021 through April 14, 2021**. Per the Parties' stipulation, Respondent is entitled to a credit of **$20,831.52** for temporary total disability benefits paid to Petitioner.

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 3, 2023

PROCEDURAL HISTORY

This matter proceeded to arbitration by agreement on September 26, 2022, before Arbitrator Ana Vazquez in Chicago, Illinois. The Parties jointly submitted a Request for Hearing form. Arbitrator's Exhibit ("Ax") 1. The issues in dispute are (1) causal connection, (2) earnings, (3) unpaid medical bills, (4) the nature and extent of the injury, and (5) whether there was an underpayment of temporary total disability ("TTD") benefits and whether there was an overpayment of TTD benefits from August 5, 2020 through September 11, 2020. Ax1; Transcript of Proceedings at Arbitration ("Tr.") at 9. All other issues have been stipulated. The Parties stipulated that Respondent is entitled to a credit in the amount of $20,831.52 for TTD paid to Petitioner by Respondent. Ax1.

FINDINGS OF FACT

Petitioner testified that at the time of arbitration she was 57 years of age. Tr. at 14. She completed high school and some college. Tr. at 14. Petitioner was employed at Respondent and at the U.S. Postal Service ("USPS") on November 1, 2019. Tr. at 14, 17. Petitioner began her employment at Respondent on October 1, 2018. Tr. at 18.

Petitioner testified that Respondent is a security company. Tr. at 17. Petitioner's position at Respondent on November 1, 2019 was site supervisor on the third shift. Tr. at 17. Petitioner's duties as a site supervisor included making sure that employees were at their post, making sure employees got their breaks, and making sure that employees were performing their duties. Tr. at 17-18. Petitioner testified that on November 1, 2019, she was working for Respondent at FedEx at O'Hare, and that she was overseeing other security officers on that site. Tr. at 18.

Prior to working at Respondent, Petitioner had worked in a security position at Andy Frain Security ("Andy Frain"). Tr. at 18. Her position at Andy Frain was a site supervisor at FedEx at O'Hare. Tr. at 18-19. Petitioner began her employment at Andy Frain in October 2006. Tr. at 19. Petitioner testified that she applied and interviewed for employment at Andy Frain. Tr. at 19. Petitioner was shown Petitioner's Exhibit ("Px") 2, which she identified as her application for employment at Andy Frain. Tr. at 19-20. Petitioner testified that her signature was at the bottom of the last page of Px2 and that she personally completed the application. Tr. at 20. Petitioner agreed that the application asked her to provide notice of her past and present employers, and she testified that she advised Andy Frain that she was working at USPS from 8 a.m. to 5 p.m. Tr. at 21. Petitioner agreed that at the bottom of the first page of Px2, there was a question that asked whether there were any hours or days of the week that she would be unable to work. Tr. at 21. Petitioner testified that her response to the question was "yes" because she was also working at USPS from 8 a.m. to 5 p.m. Tr. at 21. Petitioner testified that she interviewed with Nathan Thomas for the position at Andy Frain. Tr. at 21. Petitioner testified that when she interviewed with Mr. Thomas for the position at Andy Frain, she told Mr. Thomas that she was only able to work the night shift because she was also working at USPS in the daytime. Tr. at 21-22. Petitioner's supervisor at Andy Frain was Mr. Thomas. Tr. at 22.

Petitioner testified that she continued to work at Andy Frain as a site supervisor at the FedEx O'Hare site until her employment began at Respondent. Tr. at 33. Petitioner did not leave her employment at Andy Frain. Tr. at 22. Andy Frain lost its contract in August 2018 to Respondent. Tr. at 22. Petitioner testified that a letter was sent to all Andy Frain employees informing them that Andy Frain was going to lose the contract. Tr. at 23. Petitioner also received correspondence from Respondent. Tr. at 23. Petitioner was shown Px3, which she identified as "one of the notifications that came out to all the

employees about [Respondent.]" Tr. at 23. Petitioner agreed that Px3 was Respondent's correspondence informing her of a transition plan and inviting her to apply for employment at Respondent. Tr. at 23-24. Petitioner talked to Mr. Thomas regarding applying for work at Respondent after receiving Px3. Tr. at 24. Petitioner also talked to Mr. Thomas about her concern that Respondent would not allow her to work on the third shift as a site supervisor. Tr. at 24. Petitioner testified that Mr. Thomas "informed me that this was just a formality, that we were just being transitioned over, and that as long as we pass the drug test, that I would continue to keep my security position on the third shift." Tr. at 24-25. Petitioner testified that she applied for employment at Respondent pursuant to the transition plan. Tr. at 25. Petitioner was shown Px4, which she identified as her employment application with Respondent. Tr. at 25. Petitioner agreed that the application asked her to provide information about her past employment, and she testified that she put down that she worked for Andy Frain. Tr. at 25. Petitioner agreed that the application also asked who her supervisor was, and she testified that she put down that her supervisor was Mr. Thomas. Tr. at 26. Petitioner testified that she did not put down anything regarding her position at USPS in the application for employment at Respondent. Tr. at 26, 47. On redirect examination, Petitioner testified that she did not list USPS on her application for employment at Respondent because Mr. Thomas was aware of her job at USPS and she was concerned that Respondent would not allow her to work the same hours and the same position she had worked at Andy Frain. Tr. at 48. Petitioner agreed that Mr. Thomas was the person that she disclosed her position at USPS to in writing when she applied at Andy Frain, and that Mr. Thomas continued to be her supervisor when she was working at Respondent. Tr. at 48.

Petitioner was hired by Respondent as a site supervisor after completing Px4. Tr. at 26. Petitioner agreed that she was doing the same job at Respondent that she did when working at Andy Frain. Tr. at 26-27. Mr. Thomas was Petitioner's supervisor from the time she began her employment at Respondent on October 1, 2018 until November 1, 2019. Tr. at 27. Petitioner testified that after she began her employment at Respondent, Mr. Thomas asked her to work in the daytime to cover another employee, and that she reminded him that she could not because she worked at USPS. Tr. at 39. On cross examination, Petitioner agreed that Mr. Thomas was dead and on recross examination, Petitioner testified that Mr. Thomas passed away on February 1, 2020. Tr. at 40, 49.

Accident & Notice

Petitioner testified that on November 1, 2019, while working at Respondent, she slipped on black ice on the driveway while on her way to the guard shack to give an employee a break. Tr. at 27-28. Petitioner testified that when she slipped and fell, she fell on her right ankle and her knee, and she was in pain. Tr. at 28. Petitioner testified that she reported her accident to Mr. Thomas. Tr. at 28.

On cross examination, Petitioner testified that she recalled that Rita Fowler, a claims adjuster, contacted her on November 5, 2019. Tr. at 43. Petitioner recalled Ms. Fowler asking her questions about her background and her treating doctor. Tr. at 44. Petitioner did not remember Ms. Fowler asking her if she had other employment. Tr. at 44. Petitioner did not recall calling Ms. Fowler on November 13, 2019. Tr. at 44. Petitioner testified that she did not remember talking to Ms. Fowler "like that" when asked if she recalled telling Ms. Fowler that she had a job at USPS in a phone conversation within two weeks of the accident. Tr. at 45-46. Petitioner testified that she did not recall Ms. Fowler saying to Petitioner that she needed to investigate whether Respondent knew about Petitioner's job at USPS. Tr. at 45. Petitioner did not recall calling Ms. Fowler on November 18, 2019. Tr. at 45. Petitioner did not recall telling Ms. Fowler that no one at Respondent knew about her job at USPS and that it was nobody's business. Tr. at 45. Petitioner testified that she did not remember telling Ms. Fowler that Leonardo Jimenez knew about

her job at USPS on December 10, 2020 because she did not put that on the application. Tr. at 46. Petitioner testified that she did not put on the application that Mr. Jimenez knew about her position at USPS. Tr. at 46. Petitioner testified that she did not remember telling Ms. Fowler about USPS at all. Tr. at 46. Petitioner testified that she did not remember talking about the accident with Ms. Fowler. Tr. at 46-47.

Medical records summary

Petitioner presented at Elmhurst Hospital Emergency Department on November 1, 2019 for evaluation of right ankle and knee pain following a fall on ice earlier that morning. Px 5 at 17-18. Petitioner reported a consistent accident history. Px5 at 24. Petitioner complained of pain to the right knee down to her ankle. Px5 at 25. X-rays of Petitioner's right ankle were obtained and demonstrated (1) an undisplaced fracture of the distal fibula, (2) soft tissue swelling, (3) calcaneal enthesophytes, and (4) osteoarthritis. Px5 at 20. X-rays of Petitioner's right knee were obtained and demonstrated (1) little change from December 29, 2017, (2) no fracture, (3) osteoarthritis, and (4) joint effusion. Px5 at 30. A right short leg splint was applied. Px5 at 20. Petitioner's clinical impression was (1) accidental fall, (2) injury of the right ankle, and (3) right knee injury. Px5 at 21. Petitioner was prescribed Meloxicam and Tramadol. Px5 at 22. Petitioner was referred to Dr. William Hadesman for an orthopedic evaluation. Px5 at 21.

Petitioner presented to Dr. William Hadesman on November 12, 2019. Px6 at 61. Petitioner reported a consistent accident history. Px6 at 61. Petitioner reported that she noticed pain about the ankle, laterally and medially, as well as right knee pain, that improved prior to her visit, but that was exacerbated by weightbearing activities. Px6 at 61. X-rays were obtained and demonstrated a spiral oblique fracture of the distal fibula shaft with some mild posterior displacement. Px6 at 62. Petitioner's diagnoses were closed fracture of distal end of right fibula with unspecified fracture morphology and tear of the deltoid ligament of the right ankle. Px6 at 63. Treatment options were discussed with Petitioner, her splint was reapplied and continued non-weightbearing was recommended, and Dr. Hadesman recommended that Petitioner be admitted for observation 24 to 48 hours prior to surgery. Px6 at 63.

On November 15, 2019, Petitioner underwent a right ankle open reduction and internal fixation with application of a posterior mold splint. Px5 at 98; Px6 at 74-75. Petitioner's postoperative diagnosis was right ankle supination and external rotation, type 4, displaced fracture. Px5 at 98; Px6 at 74. Petitioner testified that following surgery, she was in a short cast that ran up to her knee, she was non-weight bearing, and she required crutches to ambulate. Tr. at 29-30. Petitioner testified that she continued to complain of right knee pain after surgery. Tr. at 31. Petitioner returned to Dr. Hadesman on November 21, 2019 for postoperative follow up. Px6 at 56-60. Petitioner again saw Dr. Hadesman on December 2, 2019, and reported that her right ankle was doing well, but that she had been experiencing persistent pain and swelling about her right knee since falling on November 1, 2019. Px6 at 52. Petitioner's diagnoses were closed displaced fracture of lateral malleolus of right fibula with routine healing and internal derangement of right knee. Px6 at 54. The staples/sutures were removed from Petitioner's ankle and a short leg cast was applied. Px6 at 55. Non-weightbearing was recommended. Px6 at 55. An MRI of Petitioner's right knee was recommended. Px6 at 55.

On December 11, 2019, Petitioner underwent an MRI of her right knee at High Definition MRI. Px6 at 110. The MRI revealed (1) tear of the anterior horn of the lateral meniscus, (2) sprain or mucinous degeneration of the anterior cruciate ligament, sprain of the medial collateral ligament, more

prominent proximally, infrapatellar tendinopathy and tendinitis, and possible findings of chronic early Osgood-Schlatter's disease, (3) tricompartmental degenerative changes more prominent laterally with grade 3-4 chondromalacia overlying the lateral joint compartment adjacent to the intercondylar notch and grade 4 chondromalacia overlying the lateral patellofemoral joint, and (4) joint effusion, loose body along the posterior intercondylar notch, and minimal nonspecific soft tissue edema. Px6 at 110. Petitioner returned to Dr. Hadesman on December 12, 2019. Px6 at 49. Petitioner reported that she was still experiencing pain about the medial aspect of her knee, and that her ankle pain was well-controlled in the cast. Px6 at 49. Petitioner's diagnoses were (1) closed displaced fracture of lateral malleolus of right fibula with routine healing, (2) internal derangement of right knee, (3) sprain of medial collateral ligament of right knee, (4) complex tear of lateral meniscus of right knee as current injury, and (5) primary osteoarthritis of right knee. Px6 at 50. Dr. Hadesman recommended conservative treatment for Petitioner's MCL sprain, including physical therapy. Px6 at 50. Petitioner was placed in a double upright brace. Px6 at 50.

Petitioner next saw Dr. Hadesman on January 7, 2020. Px6 at 46. Dr. Hadesman noted that Petitioner had tolerated her cast well and that she was doing much better with regards to her right knee. Px6 at 46. Petitioner was undergoing physical therapy. Px6 at 46. Petitioner's diagnoses were (1) closed displaced fracture of malleolus of right fibula with routine healing, (2) internal derangement of right knee, (3) sprain of medial collateral ligament of right knee, (4) complex tear of lateral meniscus of right knee, and (5) primary osteoarthritis of right knee. Px6 at 47. Dr. Hadesman recommended outpatient physical therapy for Petitioner's right knee, ankle, and foot. Px6 at 47. He noted that Petitioner would be advanced to full weightbearing, as tolerated, with use of a cam walker outside of her home. Px6 at 47. On January 28, 2020, Petitioner returned to Dr. Hadesman and reported that she was still experiencing activity-related pain about her right knee and ankle. Px6 at 43. Dr. Hadesman noted that Petitioner was still using the cam walker and two crutches, and that she had only been able to make it to physical therapy twice a week. Petitioner's diagnoses were (1) displaced fracture of malleolus of right fibula with routine healing, (2) internal derangement of right knee, (3) sprain of medial collateral ligament of right knee, (4) tear of deltoid ligament of right ankle, and (5) primary osteoarthritis. Px6 at 44. Dr. Hadesman recommended that Petitioner discontinue use of the cam walker, attend physical therapy more frequently, and be more aggressive in performing a home exercise program. Px6 at 44. Dr. Hadesman also recommended Petitioner discontinue use of the crutches. Px6 at 44. Dr. Hadesman noted that he discussed various treatment options for Petitioner's right knee, including surgical treatment options. Px6 at 44-45. Dr. Hadesman administered an intraarticular corticosteroid injection into Petitioner's right knee. Px6 at 45. On cross examination, Petitioner testified that her right knee pain improved after Dr. Hadesman gave her the cortisone injection and the knee brace. Tr. at 41. Petitioner did not recall telling Dr. Hadesman that her knee pain had improved on November 12, 2019. Tr. at 41.

On March 3, 2020, Petitioner reported that the range of motion of her right ankle was improving and that she was not experiencing any increased pain. Px6 at 40. Dr. Hadesman noted that Petitioner continued to not experience any knee pain. Px6 at 40. Petitioner's diagnoses were (1) closed displaced fracture of malleolus of right fibula with routine healing, (2) tear of deltoid ligament of right ankle, (3) internal derangement of right knee, (4) sprain of medial collateral ligament of right knee, (5) complex tear of lateral meniscus of right knee as current injury, (6) primary osteoarthritis of right knee, and (7) pes planus of both feet. Px6 at 41. Dr. Hadesman recommended Petitioner continue with physical therapy and use of heel pronators, and noted that if improvement was observed, new custom orthotics would be considered. Px6 at 41. Petitioner returned to Dr. Hadesman on April 4, 2020.[1] Px6 at 37. Dr.

[1] Petitioner sought treatment with Dr. Hadesman for unrelated low back and right shoulder conditions on April 16, 20, and 28, 2020, and underwent an unrelated MRI of her lumbar spine on April 21, 2020. Px6 at 26-36, 109, 117.

Hadesman noted that Petitioner's knee pain continued to improve after the intraarticular corticosteroid injection. Px6 at 37. Petitioner's diagnoses were closed displaced fracture of malleolus of right fibula with routine healing and right calf pain. Px6 at 38. Dr. Hadesman noted that he was pleased with Petitioner's clinical progress and recommended that she continue with physical therapy. Px6 at 38. Petitioner followed up with Dr. Hadesman on June 1, 2020. Px6 at 23. Petitioner's diagnosis was closed displaced fracture of malleolus of right fibula with routine healing. Px6 at 24. Dr. Hadesman noted that Petitioner's physical therapist recommended a functional capacity evaluation ("FCE"), and one was ordered. Px6 at 24. Petitioner testified that at the time that Dr. Hadesman recommended an FCE, she was still complaining of pain and swelling in the ankle with activity. Tr. at 32.

On June 9, 2020, Petitioner underwent an FCE at Community Physical Therapy & Associates. Px6 at 87-95; Px9 at 6-14. Petitioner's maximum voluntary effort was invalid. Px6 at 87; Px9 at 6. It was noted that Petitioner demonstrated no signs of inappropriate illness behavior. Px6 at 87; Px9 at 6. It was also noted that Petitioner demonstrated frequent and both verbal and physical pain behaviors, and that low back and right knee pain limited many of Petitioner's functional activities. Px6 at 87; Px9 at 6. An inconsistency was noted between Petitioner's subjective maximum standing/walking tolerance of 20 minutes compared to her demonstrated standing/walking tolerance of 37 minutes. Px6 at 87; Px9 at 6. Another inconsistency was also noted where Petitioner demonstrated the ability to repetitively push/pull with the same resistance that was supposed to be her maximum resistance. Px6 at 87; Px9 at 6. Petitioner demonstrated a work tolerance in the sedentary physical demand level. Px6 at 87; Px9 at 6. A full duty return to work was not recommended. Px6 at 88; Px9 at 7. Petitioner testified that she had difficulty with the treadmill during the FCE, and that the doctor asked her to get on the treadmill while it was running and that she could not walk on it fast enough. Tr. at 33. Petitioner followed up with Dr. Hadesman on July 2, 2020. Px6 at 20. Petitioner's diagnosis was closed displaced fracture of malleolus of right fibula with routine healing. Px6 at 21. Dr. Hadesman recommended work hardening. Px6 at 22.

Petitioner returned to Dr. Hadesman on August 10, 2020. Px6 at 17. Petitioner reported that her right ankle was doing much better, as well as her knee. Px6 at 17. Dr. Hadesman noted that a work hardening program had been recommended, but was denied by Petitioner's insurance company. Px6 at 17. Petitioner's diagnoses were (1) closed displaced fracture of lateral malleolus of the right fibula with routine healing, (2) internal derangement of right knee, (3) sprain of medial collateral ligament of right knee, (4) complex tear of lateral meniscus of right knee, (5) primary osteoarthritis of right knee, and (6) pes planus of both feet. Px6 at 18. Dr. Hadesman released Petitioner to return to work per the FCE recommendations of no kneeling and limited hyperflexion activity, limited prolonged walking and standing, and limited squatting, pushing, and pulling. Px6 at 18. Petitioner's return to work was allowed on an as tolerated basis. Px6 at 18.

On September 24, 2020, Petitioner reported that her ankle was doing very well. Px5 at 14. She described intermittent episodes of swelling and soreness in the lateral aspect of the ankle, particularly after prolonged standing. Px5 at 14. She also described intermittent knee pain, with no history of any locking or giving way symptoms. Px5 at 14. Petitioner's diagnoses were (1) closed displaced fracture of lateral malleolus of the right fibula with routine healing, (2) internal derangement of right knee, (3) sprain of medial collateral ligament of right knee, (4) complex tear of lateral meniscus of right knee, and (5) primary osteoarthritis of right knee. Px6 at 15. Dr. Hadesman noted that he was pleased with Petitioner's clinical progress, recommended that Petitioner continue with her home exercises, and allowed Petitioner to return to work on an as tolerated basis. Px6 at 15. Petitioner was shown Px11, which she identified as a picture of both of her ankles that was taken on December 21, 2020. Tr. at 34-

35. On December 24, 2020, Petitioner returned to Dr. Hadesman. Px5 at 11. Petitioner reported that she had been experiencing persistent swelling of the bilateral lower extremities, right greater than left, with right ankle soreness and prominence over the hardware site, which worsened towards the end of the day. Px5 at 11. A right lower extremity venous Doppler was recommended, and hardware removal was discussed. Px5 at 13. Petitioner underwent an ultrasound of her right lower extremity on December 24, 2020. Px5 at 255; Px6 at 114. The findings were negative for right lower extremity DVT. Px5 at 255, Px6 at 114.

On March 31, 2021, Petitioner underwent a right ankle hardware removal with BNP bone grafting. Px6 at 85-86. Petitioner's postoperative diagnosis was right ankle fracture, status post open reduction and internal fixation with retained hardware. Px6 at 85. Petitioner returned to Dr. Hadesman for postoperative follow up on April 8, 2021 and April 15, 2021. Px5 at 8; Px6 at 5; Px7 at 16-21. On April 15, 2021, Petitioner's suture/staples were removed, and steri-strips were applied. Px5 at 7; Px7 at 18. Dr. Hadesman recommended that Petitioner continue with full weightbearing activities as tolerated. Px5 at 7; Px7 at 18. Petitioner returned to Dr. Hadesman on July 19, 2021. Px7 at 10-16. Petitioner reported that she was no longer experiencing pain about her ankle, but that she had noticed a pins-and-needles sensation predominantly over the lateral foot without numbness or weakness since the hardware removal. Px6 at 10. Petitioner also reported that she had been experiencing increased mobility in her ankle and that she returned to all of her normal activities of daily living, including work at the post office. Px6 at 10. Petitioner's diagnosis was closed displaced fracture of lateral malleolus of right fibula with routine healing. Px7 at 12. Dr. Hadesman recommended that Petitioner continue with her home exercises and activities as tolerated. Px7 at 12. He noted that Petitioner appeared to have some dysesthesias in her lateral foot which could be related to sural nerve irritation, adhesions, with or without contributing radicular symptoms. Px7 at 12. Treatment options were discussed, and Dr. Hadesman noted that Petitioner felt that her symptoms were not severe enough to consider any medications or physical or occupational therapy. Px7 at 12.

Petitioner participated in 50 sessions of physical therapy at JonComPTPC from December 17, 2019 through May 29, 2020. Px8.

Concurrent employment

Petitioner testified that she began her employment with USPS in October 1984. Tr. at 15. Her position at USPS on November 1, 2019 was a clerk, and her duties as a clerk consisted of sorting mail. Tr. at 15. Petitioner testified that as of November 1, 2019, she worked at USPS Monday through Friday from 8 a.m. to 5 p.m. Tr. at 15-16. Petitioner's USPS job was located at 433 W. Harrison, Chicago, Illinois. Tr. at 16.

Petitioner was shown Px1, which she identified as her pay earnings from USPS. Tr. at 16. Petitioner testified that Px1 accurately reflected all of the earnings that she received as a clerk from USPS from November 1, 2018 through November 1, 2019. Tr. at 16-17.

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Petitioner agreed that she was off work from November 1, 2019 through September 2020. Tr. at 42. Petitioner testified that she did not work at USPS during that time. Tr. at 42. Petitioner recalled that she was off work following the hardware removal surgery from March 24, 2021 to April 15, 2021. Tr. at 42. Petitioner testified that she did not work at USPS during that time. Tr. at 42.

Current condition

Petitioner testified that sometimes when she walks down steps, she leads with her left ankle and not her right ankle because she does not want to fall. Tr. at 36. Petitioner testified that she enjoyed roller skating prior to November 1, 2019, which she no longer does. Tr. at 36-37. Petitioner testified that she does not want to fall, and it hurts a little bit when asked what it is about her foot condition that makes roller skating difficult. Tr. at 37. Petitioner testified that when standing up to wash dishes or while cooking, she props her right ankle on top of her left foot for support when asked if there are any activities that she does not do as well as she used to do before the incident. Tr. at 37. Petitioner testified that she is able to stand for a couple of minutes before having to prop her right ankle on top of her left foot. Tr. at 37-38. Petitioner testified that she continues to experience some swelling, and that she experiences swelling when walking. Tr. at 38. Petitioner does not wear high heels anymore. Tr. at 38.

Petitioner testified that immediately prior to the incident of November 1, 2019, there was nothing wrong with her ankle, she did not have any right ankle condition, and she did not have any problems with her right knee. Tr. at 38. On cross examination, Petitioner testified that she did not recall having an x-ray of her right knee taken on December 17, 2017. Tr. at 40. Petitioner testified that she did not recall having any conditions to her right knee before November 1, 2019. Tr. at 40. Petitioner testified that she did not remember seeing a doctor complaining of right knee pain before November 1, 2019. Tr. at 40.

Testimony of Rita Fowler

Respondent called Ms. Rita Fowler at arbitration to testify on its behalf. Tr. at 49-50. Ms. Fowler testified that she works at Sedgwick as a claims adjuster for workers' compensation claims. Tr. at 51. She is assigned to certain employers, including Respondent, and she handles nine states, including Illinois. Tr. at 51.

Ms. Fowler testified that she has a routine that she follows to investigate a claim when an employee from Respondent submits an Illinois Workers' Compensation claim. Tr. at 52. Her routine includes contacting her client, which is the HR representative that is assigned to the case, and after she obtains the facts from the HR representative, she contacts the claimant. Tr. at 52. Ms. Fowler makes notes when she makes these contacts, and she saves the notes. Tr. at 52.

Ms. Fowler testified that Petitioner's claim was assigned to her and that during the course of her investigation, she spoke with Petitioner. Tr. at 53. Ms. Fowler testified that she spoke with Petitioner at most, four times, she made notes of her discussions with Petitioner, and she maintained those notes. Tr. at 53. Ms. Fowler testified that she made the notes contemporaneously with her discussions with Petitioner. Tr. at 53. Ms. Fowler was shown Respondent's Exhibit ("Rx") 2, and she agreed that they were the notes she made. Tr. at 53-54. Ms. Fowler testified that she first spoke with Petitioner on November 7, 2019, and that there was a series of basic questions that she had to ask. Tr. at 54. Ms. Fowler testified that she asked Petitioner if she had a job other than the one with Respondent and that Petitioner said "no." Tr. at 55. Ms. Fowler testified that Petitioner called her on November 13, 2019. Petitioner wanted to tell Ms. Fowler that she did have another job and that she had been employed somewhere else for 20 years. Tr. at 55. Ms. Fowler testified that she asked Petitioner for the contact information for the HR representative at her other job, and then said to Petitioner that she was going to contact Respondent to see if Respondent knew that she was employed at another job. Tr. at 56. Ms. Fowler testified that Petitioner called her again on November 18, 2019. Tr. at 56. Petitioner confirmed

again that she had another job at USPS and stated that neither one of her employers knew about her having another job and that she did not want them to know. Tr. at 56. Ms. Fowler spoke with Petitioner again on December 10, 2019. Tr. at 56. Ms. Fowler testified that Petitioner wanted to tell her that she had listed USPS on Respondent's application and that Ms. Fowler would need to get a copy of that application, and also relayed her concerns about additional TTD because she had bills to pay. Tr. at 57. Ms. Fowler testified that Petitioner told her that Leo Jimenez knew about her other job. Tr. at 57. Petitioner did not identify anyone else at Respondent as knowing about her other job. Tr. at 57. Ms. Fowler testified that she received Petitioner's employment application, that she reviewed it, and that it did not identify Petitioner's job at USPS. Tr. at 57-58. Ms. Fowler testified that Petitioner did not mention that Mr. Thomas had knowledge of her job at USPS during any of the conversations that she had with Petitioner. Tr. at 58.

On cross examination, Ms. Fowler testified that during her conversations with Respondent, she was told that Respondent took over security at O'Hare for FedEx from Andy Frain. Tr. at 60. Ms. Fowler testified that Petitioner told her that she was employed at Andy Frain as a site supervisor providing security at O'Hare. Tr. at 60. Ms. Fowler was not aware that Mr. Thomas was Petitioner's supervisor at Andy Frain. Tr. at 60. Ms. Fowler testified that she reached out to Savannah, her contact person for claims, and that Savannah told her that Petitioner's site supervisor was Leo. Tr. at 61. Ms. Fowler testified that she is not familiar with Mr. Thomas. Tr. at 61. Ms. Fowler testified that she did not have any idea as to what Mr. Thomas's position was at Respondent or at Andry Frain. Tr. at 61. Ms. Fowler testified that the only application she had seen was Petitioner's application for employment at Respondent. Tr. at 62. Ms. Fowler agreed that denying concurrent employment would be favorable to the insurance carrier in terms of the amount of funds that the insurer would have to pay. Tr. at 62-64. Ms. Fowler testified that the application that she read did not have Mr. Thomas's name on it. Tr. at 66. Ms. Fowler was shown Rx1, and she agreed that it was the application that she had reviewed. Tr. at 66. Ms. Fowler was directed to page 3 of Rx1, she was asked who Petitioner identified as her supervisor, and she responded "Nathan Thomas." Tr. at 67. Ms. Fowler testified that she does not know who Mr. Thomas is, that she never talked to Mr. Thomas, and that she was not directed to speak to Mr. Thomas. Tr. at 66-67.

Testimony of Leonardo Jimenez

Respondent called Mr. Leonardo Jimenez at arbitration to testify on its behalf. Tr. at 68. Mr. Jimenez is employed at Respondent as the district manager. Tr. at 69. Mr. Jimenez was a district manager for Respondent on November 1, 2019. Tr. at 69-70. Mr. Jimenez testified that he knows Petitioner and that he was her district manager. Tr. at 70. Mr. Jimenez became Petitioner's district manager when Respondent obtained FedEx O'Hare in October 2018. Tr. at 70. Mr. Jimenez did not work for Andy Frain. Tr. at 70. Mr. Jimenez testified that he did not know that Petitioner had another job with USPS on November 1, 2019. Tr. at 70. Mr. Jimenez testified that he found out Petitioner had another job with USPS from an employee in 2020. Tr. at 71. Mr. Jimenez testified that Petitioner was not a site supervisor at O'Hare, and that her title was shift supervisor. Tr. at 71. Mr. Jimenez testified that Petitioner was not required to work overtime, that Petitioner worked overtime, and that the overtime was voluntary. Tr. at 71-72.

On cross examination, Mr. Jimenez testified that as a district manager he manages more than one site for Respondent. Tr. at 72. Mr. Jimenez agreed that Ms. Fowler did not correctly state his position. Tr. at 72. Mr. Jimenez testified that Mr. Thomas was the account manager at FedEx O'Hare on November 1, 2019. Tr. at 72-73. Mr. Jimenez testified that Mr. Thomas's position was a non-working

supervisor that managed the account and that he would have been a supervisor for Petitioner. Tr. at 73. Mr. Jimenez testified that it was correct that Mr. Thomas was the appropriate person for Petitioner to report her injury to. Tr. at 73. Mr. Jimenez testified that Mr. Thomas was authorized or designated as a person at Respondent who employees could report injuries to. Tr. at 74. Mr. Jimenez did not recall who he learned about Petitioner's employment at USPS from. Tr. at 74-75. Mr. Thomas did not tell him about Petitioner's employment at USPS. Tr. at 75. Mr. Jimenez agreed that in 2018, Respondent took over the contract from security for FedEx at O'Hare, that Respondent entered into a transition plan with respect to Andy Frain employees that were employed there, and that Respondent offered employment to all of the existing employees at Andy Frain to transition to Respondent. Tr. at 75. Mr. Jimenez agreed that the employees were asked to complete an application and a drug test. Tr. at 76. Mr. Jimenez testified that the employees that completed an application and passed the drug test were not necessarily kept in the same positions. Tr. at 76. Petitioner and Mr. Thomas maintained the same positions. Tr. at 76. On redirect examination, Mr. Jimenez testified that Mr. Thomas worked at Respondent until he died in February 2020. Tr. at 77.

IME by Respondent's Section 12 Examiner, Dr. Brian C. Toolan

Dr. Brian Toolan performed an independent medical evaluation of Petitioner's right ankle fracture and right knee pain on August 11, 2020 and authored a report of his findings and conclusions on the same date. Rx5.

Dr. Toolan opined that Petitioner's diagnosis was right ankle pain after operative management of a deltoid equivalent bimalleolar ankle fracture and a pes planovalgus foot deformity, and right knee osteoarthritis involving three compartments. Rx5 at 6. Dr. Toolan opined that the only diagnosis causally related to the injury was the right ankle fracture. Rx5 at 6. Dr. Toolan believed Petitioner's prognosis was excellent. Rx5 at 6. He noted that Petitioner's right ankle fracture had healed in anatomic alignment for the fracture, joint, and syndesmosis and that there was minimal to no evidence of posttraumatic arthritis. Rx5 at 6. He further noted that range of motion and strength in the right ankle was excellent. Rx5 at 6. Dr. Toolan also noted that based on his review, Petitioner's right ankle had been restored to full function. Rx5 at 6. Regarding Petitioner's right knee, Dr. Toolan noted that Petitioner may experience crepitation, swelling, and pain in her knee from time to time due to her severe tricompartmental osteoarthritis. Rx5 at 6. He noted that there was no evidence of ligamentous laxity of the anterior cruciate ligament or the medial or lateral collateral ligament. Rx5 at 6. Dr. Toolan noted that he believed that Petitioner's treatment to date had been reasonable and customary regarding her right ankle, right knee, and her lumbar complaints. Rx5 at 6.

Dr. Toolan noted that he believed that Petitioner's right knee tricompartmental arthritis was preexisting, based on his review of the medical records and x-rays obtained during the evaluation. Rx5 at 6-7. Dr. Toolan believed that the diagnosis of tricompartmental knee arthritis predated the work injury of November 1, 2019, and that the manifestations of joint space narrowing, subchondral sclerosis, and cyst formation in the lateral compartment and the patellofemoral compartment were present prior to the injury. Rx5 at 7. He also believed that the findings on MRI of medial collateral ligament laxity and infrapatellar tendon degenerative change were also preexisting. Rx5 at 7. Dr. Toolan noted that he also believed that medial collateral ligament changes were associated with the valgus alignment of Petitioner's knee due to the lateral joint space compartment. Rx5 at 7. Dr. Toolan noted that he did not believe that Petitioner sustained a medial collateral knee ligament injury as a result of a fall. Rx5 at 7. Dr. Toolan did not believe that Petitioner needed any further formal physical therapy for her right ankle. Rx5 at 7. He noted that Petitioner should continue to perform a home exercise program and that

Petitioner's right knee would benefit also from a home exercise program. Rx5 at 7. Dr. Toolan opined that based on his review of the medical records and evaluation, Petitioner could return to work full duty, full time without restrictions. Rx5 at 7. He noted that he believed that Petitioner's functional capacity was higher than what she demonstrated during the functional capacity evaluation of June 9, 2020. Rx5 at 7-8. Dr. Toolan opined that Petitioner had reached maximum medical improvement ("MMI") as it related to her right ankle and her right knee as of the date of his evaluation, August 11, 2020, and that there was no permanent impairment of Petitioner's work-related injury to the right ankle. Rx5 at 8.

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The burden of proof is on a claimant to establish the elements of her right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission,* 44 Ill. 2d 214 (1969).

Credibility is the quality of a witness which renders her evidence worthy of belief. It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. *O'Dette v. Industrial Commission*, 79 Ill. 2d 249, 253 (1980); *Hosteny v. Workers' Compensation Commission*, 397 Ill. App. 3d 665, 674 (2009). Where a claimant's testimony is inconsistent with her actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972).

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds her to be a credible witness. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable.

Issue F, whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

To obtain compensation under the Act, a claimant must prove that some act or phase of her employment was a causative factor in her ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Industrial Com.*, 93 Ill. 2d 59 (1982).

The Arbitrator finds that Petitioner's current right ankle and right knee conditions of ill-being are causally related to the November 1, 2019 injury. In so finding, the Arbitrator relies on the following: (1) treatment records of Elmhurst Memorial Hospital, (2) treatment records of Dr. William Hadesman, (3) physical therapy records of JonComPTPC, (4) Petitioner's credible denial of any pre-accident problems with or treatment of her right ankle and right knee, and (5) the fact that none of the records in evidence reflect any pre-accident treatment or problems with Petitioner's right ankle or right knee. The Arbitrator

notes that the evidence demonstrates that Petitioner was in condition of good health and was able to work full duty and without restrictions immediately prior to the work accident.

The Arbitrator has considered the opinions of Dr. Toolan and is not persuaded by his opinions, which are inconsistent with Petitioner's treatment records. Petitioner reported consistent and continuous right knee symptoms following the November 1, 2019 injury. Petitioner underwent an intraarticular corticosteroid injection on January 28, 2020, which provided relief of her right knee symptoms. While Dr. Toolan opined that Petitioner's right knee conditions were preexisting, Dr. Toolan did not review any pre-accident right knee treatment records and did not address or provide an explanation regarding Petitioner's right knee symptoms following the November 1, 2019 injury. Overall, the evidence demonstrates that Petitioner's right knee was asymptomatic immediately prior to the November 1, 2019 injury. Regarding Petitioner's right ankle, while Dr. Toolan opined that Petitioner was at MMI on August 11, 2020, the evidence demonstrates that Petitioner continued to experience right ankle pain and swelling, which ultimately required that Petitioner undergo hardware removal with BNP bone grafting on March 31, 2021.

In resolving the issue of causation, the Arbitrator also finds that Petitioner reached MMI as to her right knee on September 24, 2020, the last date that Dr. Hadesman recorded right knee related complaints, and that Petitioner reached MMI as to her right ankle on July 19, 2021, the last date that Petitioner sought treatment for her right ankle with Dr. Hadesman.

<u>Issue G, as to what were Petitioner's earnings, the Arbitrator finds as follows:</u>

The Arbitrator initially notes that the Parties do not dispute that Petitioner had concurrent employment at USPS on November 1, 2019. The dispute lies in whether Respondent had knowledge of Petitioner's concurrent employment with USPS prior to November 1, 2019.

During direct examination, Petitioner conceded that she did not list her position at USPS on Respondent's employment application. Petitioner credibly explained that she did not list her position at USPS on Respondent's employment application (1) because Mr. Thomas was aware of her employment at USPS and (2) because she was concerned that Respondent would not allow her to work the same hours and the same position that she had worked while at Andy Frain. In offering this explanation, Petitioner admitted motive to not disclose her concurrent employment to Respondent. The Arbitrator has considered Petitioner's testimony regarding the information she provided to Mr. Thomas about her concurrent employment with USPS and notes that Respondent did not object to this testimony. Regardless of anything Petitioner said, however, the Arbitrator will never know how Mr. Thomas would have testified about the subject since he died in February 2020. Even if the Arbitrator assumed that Mr. Thomas had knowledge of Petitioner's concurrent employment prior to November 1, 2019, there is insufficient evidence to conclude that Respondent, as an entity, had knowledge of Petitioner's concurrent employment prior to November 1, 2019. The Arbitrator notes that while Petitioner and Mr. Jimenez agree that Mr. Thomas was Petitioner's supervisor on November 1, 2019, Mr. Jimenez testified that on November 1, 2019, Mr. Thomas was an account manager and that his position was that of a "non-working" supervisor that managed the account. Mr. Jimenez testified that he was Petitioner's district manager on November 1, 2019, and that as a district manager, he managed more than one site for Respondent. Mr. Jimenez also testified that he did not know about Petitioner's concurrent employment prior to November 1, 2019. The Arbitrator further notes that Ms. Fowler testified that she did not know who Mr. Thomas was and that she was directed to speak to Mr. Jimenez regarding Petitioner's claim. Ms. Fowler was not directed to speak to Mr. Thomas regarding Petitioner's claim.

Having considered all of the evidence, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that Respondent had knowledge of Petitioner's concurrent employment with USPS prior to the November 1, 2019 injury and that Petitioner's AWW is $641.97.

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:

Consistent with the Arbitrator's prior findings regarding the issues of accident and causal connection, the Arbitrator finds that Petitioner's medical treatment has been reasonable and necessary, and that Respondent has not yet paid all appropriate charges. At arbitration, Petitioner presented the following unpaid medical bill: (1) Community Physical Therapy ($154.98). As the Arbitrator has found that Petitioner's treatment has been reasonable and necessary, the Arbitrator further finds that the bill for Community Physical Therapy, as provided in Px10, is awarded and that Respondent is liable for payment of this bill, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act.

Respondent is entitled to a credit for any payments made towards the awarded outstanding expenses and shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit.

Issue L, with respect to the nature and extent of the injury, the Arbitrator finds as follows:

The Arbitrator notes that pursuant to Section 8.1(b) of the Act, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability. Per 820 ILCS 305/8.1b(b), the criteria to be considered includes: (i) the reported level of impairment pursuant to AMA; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records.

With regard to criterion (i), the Arbitrator notes that an AMA Impairment Rating was not offered, and therefore the Arbitrator gives no weight to this factor.

With regard to criterion (ii) and criterion (iii), the Arbitrator notes that at the time of the accident, Petitioner was 54 years of age and was employed at Respondent as a shift supervisor. The Arbitrator notes that Petitioner returned to her position as a shift supervisor for Respondent and has continued to perform the job duties required of that position in the same manner as prior to her work injury. The Arbitrator gives these factors some weight.

With regard to criterion (iv), Petitioner has not demonstrated that her future earning capacity has been affected by the accident and there is no evidence of reduced earning capacity in the record. The Arbitrator gives less weight to this factor.

With regard to criterion (v), the Arbitrator notes that following the November 1, 2019 work injury, Petitioner suffered a closed fracture of the distal end of the right fibula and tear of the deltoid ligament of the right ankle, as well as an MCL sprain. Treatment for Petitioner's right ankle condition consisted of a right ankle open reduction and internal fixation with application of a posterior mold splint on November 15, 2019, a right ankle hardware removal with BNP bone grafting on March 31, 2021, and

physical therapy. Treatment for Petitioner's right knee was conservative and consisted of bracing, physical therapy, and one intraarticular corticosteroid injection administered on January 28, 2020. The Arbitrator notes that right knee related complaints are last documented by Dr. Hadesman on September 24, 2020, and that Petitioner last sought treatment for her right ankle with Dr. Hadesman on July 19, 2021. The record of July 19, 2021 documents that Petitioner complained of a pins-and-needle sensation over the lateral right foot without numbness or weakness since the hardware removal. Dr. Hadesman noted that Petitioner appeared to have some dysesthesias in her lateral foot, which could be related to sural nerve irritation, adhesions, with or without contributing radicular symptoms. Dr. Hadesman further noted that treatment options were discussed, and that Petitioner felt that her symptoms were not severe enough to consider any medications or physical or occupational therapies. At arbitration, Petitioner testified that she continues to experience swelling when walking, that she props her right ankle on top of her left foot while standing when washing dishes or cooking, that she no longer wears high heels, and that she no longer roller skates, which is a hobby that she enjoyed prior to November 1, 2019. The Arbitrator assigns more weight to this factor.

Upon consideration of the foregoing evidence and factors, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 30% loss of the left foot and 5% loss of the left leg, pursuant to Section 8(e) of the Act.

Issue O, whether there was an underpayment of TTD based on the AWW dispute and whether there was overpayment of TTD from August 5, 2020 to September 11, 2020, the Arbitrator finds as follows:

The Arbitrator notes that the Parties stipulated that Petitioner is entitled to TTD benefits from November 2, 2019 to August 4, 2020 and from March 24, 2021 to April 14, 2021, representing 43 3/7 weeks. Ax1. Respondent offered a printout of its TTD benefits payments to Petitioner, Rx4, without objection. As the Parties are bound by its stipulation under *Walker v. Industrial Comm'n*, 345 Ill. App. 3d 1084, 1087-1088 (2004), and consistent with the Arbitrator's finding regarding earnings, the Arbitrator finds that Petitioner is entitled to TTD benefits in the amount of $427.98/weeks, representing 43 3/7 weeks, from November 2, 2019 to August 4, 2020 and from March 24, 2021 to April 14, 2021.

ANA VAZQUEZ, ARBITRATOR

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC018119
Case Name	Serretta Rogers v. Tootsie Roll
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	23IWCC0490
Number of Pages of Decision	14
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Alan Bruggeman
Respondent Attorney	Amy Bilton

DATE FILED: 11/20/2023

/s/Deborah Simpson, 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: Accident	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SERRETTA ROGERS,

Petitioner,

vs. NO: 21 WC 18119

TOOTSIE ROLL,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability benefits, permanent partial disability, evidentiary issues, and medical expenses both current and prospective and being advised of the facts and law, reverses the Decision of the Arbitrator, finds that Petitioner did not sustain her burden of proving a compensable accident, and denies compensation.

Findings of Fact - Testimony

Petitioner testified she worked for Respondent and had for about four years. She was involved in production (packing candy) and sanitation (cleaning the equipment that makes the candy). She works with various machines. She takes wrapped candy from a conveyor belt, puts them in boxes, and places them on another conveyor belt. There are three assembly lines. Each has the conveyor belts. They also used balers which take used empty boxes and crushes them for disposal. That machine was in a different area than the assembly lines. Respondent's building is old.

Petitioner did not have to clean the balers but did have to clean the line. She went back and forth between cleaning and packing. She is 5'3". Her shift was eight hours with bathroom and lunch breaks. When in production she would stand, but she did not have to stand during her entire shift and was able to sit during breaks or when working with machines which were low enough for her to sit at.

Petitioner testified that the boxes consisted of 42 medium sized bags which could have weighed a pound each. She did not have to lift the boxes but rather pushed them on the line to the chute. She stands at a stationary position at the assembly line and stands to clean the machines. Petitioner had a previous accident about a year prior to the instant accident. In that accident a pallet on a forklift bumped into her into her machine and her knees. She was off work from the accident and received temporary total disability benefits. Although her leg was broken in that accident, she did not believe that injury contributed to her instant accident.

On May 6, 2021, she worked as packer in the morning and after lunch she was shifted to working the baler. She was walking to the baler from the break room when she tripped and fell. Initially, she did not know what she tripped on. She now knew that she tripped on concrete. The floor was made of concrete as well. She identified the 1st photo in Petitioner's Exhibit 5 as "something like" what she fell over. It showed "some concrete sticking up from the floor." It was about 1&1/2 inches high. She was laying on the floor for a long time and she noticed the piece of concrete on the floor, which was similar to the one depicted in photo 3 of the exhibit. Photo 7 of the exhibit shows the area where she fell, "but it's smoothed down now."

Petitioner testified she has not returned to work with Respondent since the instant accident. When she fell her right leg hurt "real bad." She couldn't move and laid on the floor for about ½ hour. Eventually coworkers arrived, paramedics were called, and she was taken by ambulance to Christ Hospital. She was treated at the hospital by Dr. Lieder, who performed surgery on Petitioner on May 12th. In all she was in hospital from May 6th until May 16th. She was confined to bed even after her discharge, for a total of about a month. It probably took four or five months before she was able to get into/out of bed without assistance. Thereafter, she used crutches, a walker, and a wheelchair for ambulation. Her daughter helped her get into and out of her wheelchair. Dr. Lieder put hardware in her leg which he told her would be permanent. She last saw Dr. Lieder in March of 2022. At that time, Dr. Lieder changed her restrictions to light duty. She still uses crutches "now and then." She was scheduled to see him again on October 19, 2022.

On cross examination, Petitioner agreed that she had home physical therapy through Aspire, and then Dr. Lieder prescribed outside physical therapy on July 23. She had physical therapy at both Horizon and OSF and her last visit was in April of 2022. It was weeks between the time Dr. Lieder prescribed outside physical therapy and when she began the therapy. On September 3, 2021, Dr. Lieder made it very clear to her that she needed to work hard to wean herself off crutches and her knee brace and the importance of therapy. She agreed Dr. Lieder told her the leg had completely healed, but was unsure whether that was on September 3, 2021.

Petitioner also agreed that on October 24, 2021, she broke a toe on her left foot and was put in a surgical shoe. During treatment of her fractured toe, she could not also do physical therapy for her knee and stopped physical therapy for her leg for “some weeks.” Thereafter, Dr. Lieder continued to stress the importance of physical therapy/strengthening/home exercise program, despite her toe injury. She agreed that she last saw Dr. Lieder on March 11, 2022 and advised her to return in three months. She did not believe she had seen him since that visit. She denied that Dr. Lieder told her that on that date that he planned on releasing her to full duty at the next visit which would have been in June. She then acknowledged that he told her she could “probably go back to full duty if [she was] able to.” She did not return to Dr. Lieder in June of 2022 because her “medical expired” and she ended up “getting on another medical.”

Petitioner agreed that she was injured working on the “pop wrap” section of the plant. There are walls around the pop wrap section. She clocked back to work after her break and she had to turn around an office to get to the baler. The baler was “straight forward” from the time-stamp clock. She had already passed the office and was near the baler. Initially, Petitioner claimed to know nothing about a train in the area, but then agreed that she could see the tarp over the train from the baler but not the pop wrap section.

Petitioner did not know who took the photos in Petitioner’s exbibit 5, or when they were taken. She reiterated that the piece of concrete in photo 3 was similar to the one she fell over, but was not certain it was the same one. She was walking on the “walkway to get to” her area. She seemed unsure of whether any of the pictures depicted the area on which she fell. Petitioner was shown Respondent’s exhibit 1, which she identified as the area going to the baler, which was just to the right of the depiction. There was something wrapped in cellophane which was product on a pallet. She fell and was lying near a pallet with boxes on it, but she did not believe that was the same pallet. She was then shown Respondent’s exhibit 2, another photo, which she testified looked like the area in which she fell, but was not sure whether that was where she fell. She agreed that the condition of the concrete in Respondent’s exhibit 2 looked “somewhat” like the one she fell on.

On questioning from the Arbitrator, Petitioner answered that she fell forward on her chest and then moved to try to get up/roll over. On resumption of cross examination, Petitioner testified the pallet was on her left. She moved from the location where she fell by rolling/crawling seeking help. She was walking her normal slow pace. She did not extend her arms to stop her fall and “went straight down on [her] face.” She reiterated she did not know what she fell over initially but figured it out “probably when the paramedics arrived” and she was moved. She fell while she was on the walkway.

Petitioner testified that if the emergency room records indicate that she reported falling on something, or that she reported she hit her leg on something, she fell, and hit the ground with her right leg, those records would be not entirely correct because she told them she tripped over concrete.

Petitioner also disagreed with a doctor report that she slipped on something on the floor, her leg went away from her body, and she collapsed. She also disagreed with another report that she bumped her leg, rolled her foot, and then she fell. She also disagreed with Dr. Lieder's note on the day of her surgery that Petitioner tripped over something, fell, twisted, and landed on her right knee.

Petitioner identified Respondent's exhibit 6 as a statement she gave dated July 14, 2021. She testified all that was in the statement was still true. It indicates that on the day of the accident she was working break relief in the morning, relieving workers on breaks, and was then assigned to the baler. Petitioner clocked out on break at 10:00 or 10:30. Normally, if she were working break relief, she would stay within a single department and be assigned to relieve the same set of machines throughout the day. The day of the accident was different in that she was told to leave pop wrap and go to the baler department. She was told of the reassignment while she was on break. She was reassigned by her training supervisor Ms. Howse. She was told to work at the baler until 11:30 and then to go home, if she wanted. Petitioner agreed that work assignments are based on seniority. She had the most seniority in the pop wrap department.

On redirect examination, Petitioner testified that her insurance was interrupted when she moved from the Blue Cross Medicaid plan to a Meridian Medicaid plan. Respondent never paid for her health insurance.

Nancy Trejo was called to testify by Petitioner. She worked for Respondent as an occupational health nurse and handles all FMLA. She worked on May 6, 2021 and was aware that Petitioner fell in Respondent's building. She was notified by the supervisor and was on the scene of the accident in four to six minutes. Petitioner was still lying on the floor face down. It was not apparent that Petitioner had broken her leg. She did not examine or treat Petitioner. She tried to turn her over for EMS, but Petitioner refused. Paramedics arrived about four or five minutes after she was already on the scene. She was aware that Petitioner complained of leg pain and her injury prevented her from getting up. Workers punch in around 7:00 and would work until 3:30. She learned that Petitioner was going to leave early on May 6, 2021 from the supervisor, Ms. Howse, who was also at the scene of the accident. She was on the scene when Ms. Trejo arrived. She only learned days later that Petitioner was leaving early on May 6th.

Ms. Trejo was shown Petitioner's exhibit 9, which is a letter she sent to Petitioner dated the day of the accident informing her that if she qualified for FMLA, that would be counted "concurrent with [her] work-related absence," and it was her responsibility to continue paying insurance premiums if she was "enrolled in a [Respondent's] medical plan." The letter was signed by Ms. Trejo. Ms. Trejo testified that the FMLA Act allows employers to place person on leave even without their application. It turned out that Petitioner was not eligible for FMLA leave because she had not worked for Respondent the 1,250 hours required under the Act.

Ms. Trejo knew Diane Ward and that she worked for Respondent's workers' compensation third party administrator. She was unaware that Ms. Ward was sent correspondence from Petitioner, or someone on her behalf, dated May 17th with a CC to Respondent. She would not know who at Respondent would have received that letter, but she did not receive it. She was shown photos in Petitioner's exhibit 5, which she could have been taken in Respondent's facility. She agreed that there was a picture that looked like an elevated concrete block in photos four & five. She did not recognize the area. There are yellow borders all over the facility. She did recognize that photo 7 was in Respondent's facility near the train tracks, used to deliver material. When asked whether she saw "raised concrete elements" where Petitioner was laying, Ms. Trejo answered "no."

Ms. Trejo read a Section 12 medical report from Dr. Yanke which was done for Respondent. Respondent's WC insurance carrier determines whether an injury is work-related. Ms. Trejo's responsibility was to evaluate an injured worker, whether they need medical attention, and if 911 needed to be called. She would talk to the supervisor about accident investigation and prepare a First Report of Injury for the insurer. She did not make any determination whether Petitioner's injury was work-related; "that's not [her] job."

Ms. Trejo was aware that Petitioner tripped and fell on her knee. She knew nothing about a raised piece of concrete. She was aware that Petitioner broke her leg, was unable to work for some time, and at some time she was released to work light duty. She did not recall seeing Dr. Lieder's operative report.

On cross examination, Ms. Trejo reiterated that she did not know where the Petitioner's exhibit photos were taken. She was present when the photo in Respondent's exhibit 1 was taken. It accurately depicts the area around the place of injury. That was the area where Petitioner fell. However, the pallet seen was not present at the time of the accident, and Petitioner was laying where the pallet was. When she arrived, Petitioner was three or four feet from the pallet. The concrete looked identical in the photo as the concrete on the day of the accident; there were no protruding concrete pieces. The floor was clean and absent of any debris. She has never seen a walkway in Respondent's facility with protruding concrete and part of her job is looking for safety issues. If she had seen any protruding concrete she would have reported it. When she talked to Petitioner at the scene of the accident, she never mentioned any protruding concrete.

Ms. Trejo identified Respondent's exhibit 3 as time clock records of Petitioner from May 6, 2021. The records are kept contemporaneously with the time clock entries. Petitioner clocked out at 10:07 and clocked back in at 10:20. When Ms. Trejo sent Petitioner the letter on May 6, 2021, she had concluded all of her investigation. She made no determination whether or not the injury was compensable. The insurer makes any such determination. When she referred to a work-related claim, she was not referring to a determination that the claim was compensable. It is the witness' responsibility to prepare Form 45 reports. She did not prepare the Form 45 in Petitioner's exhibit 7 nor ask her to fill it out. That was not the From 45 she sent to the State of Illinois.

On redirect examination, Ms. Trejo testified an investigator took the photos in Respondent's exhibits 1 & 2. There are raised concrete stubs in the storage area, but not in the walkways. The walls in the photo separate the train tracks from the rest of the facility. She identified a half-wall in the photo which was in front of pop wrap machinery. The pop wrap location was not fully walled in. The photo does show what could be called concrete footings for pillars, which she saw when the photo was taken. However, it may have been tile or brick; "we have a lot of brick in our plant." She did not know where the stubs were located in relation to the area Petitioner fell. The yellow area is not a walkway but where pallets are stored.

On re-cross examination, Ms. Trejo testified the area depicted in Respondent's exhibit 2 was not the area in, or even near, the place where Petitioner fell. She looked around the area of the fall and did not see anything that looked like Respondent's exhibit 2. Respondent's exhibit 1 shows the area where Petitioner fell. The concrete depicted in that photo looks like the concrete on the day of the accident. To her knowledge nothing has been changed since the fall. Ms. Howse told the witness that Petitioner was assigned as relief person for three machines and because of quality issues they were closing the line down at 11:00. She never told Petitioner that she was being reassigned.

On re-redirect examination, Ms. Trejo agreed that Petitioner was off break at 10:20 and was still working until 11:00. On re-re-cross, Ms. Trejo testified Petitioner was not where she was supposed to be when she fell. On re-re-redirect, Ms. Trejo explained she was not where she was supposed to be because she was assigned to the pop wrap machines. She agreed that the line was stopped and people were being sent home at 11:00.

Pete Lebron was called by Respondent for which he was HR manager, a position he has held since he began working for Respondent almost 17 years earlier. He arrived at the accident scene within five minutes, 10 at the most. Petitioner was lying of the floor face down between the engineering office and the palletizing area. He was very familiar with the area where she fell. He could have been in that location more than 1,000 times. In that period he had never seen any broken concrete in that area. He identified photo B of Petitioner's exhibit 6 to be an area which is at least 50 to 60 feet from the area she fell. It does not depict a walkway. "There's no reason for anybody to be back there;" "it's just an area to keep the pallets from going up against the wall." It does not lead to the baler or any machinery.

Mr. Lebron was shown the photos in Petitioner's exhibit 5. He did not recognize where any of them were taken, except for photo 8, which was the end of the curtain wall. He thought he found Petitioner six to eight feet from the area depicted in the photo; she was just off the walkway. None of the other pictures were similar to the area in which he found Petitioner. The baler would have been 100 feet or farther from the area where she fell. The office to which Petitioner referred was about 100 feet south of where she was found and the baler was farther north than she was found.

In his investigation, Mr. Lebron located a potential witness and video. The video was taken on May 6, 2021 and accurately depicts the area of the fall. The video was shown at the hearing. He identified a blow up or a video image including the office Petitioner referred to. It was where “that little window” was. The time clock was a little to the right of the area depicted.

Mr. Lebron testified that if she were walking directly from the time clock to where she fell, she would be seen in the video. She would have been coming from the north, which was not the direction she was walking in the video. There was no way she could have walked directly from the time clock past this office on the right side over to the baler. He noted that was seen on the left side of the photo.

Mr. Lebron testified Respondent took measures to avoid future injuries after the instant accident, but nothing was changed regarding the concrete floor. He inspected the area immediately after the fall and the concrete was fine with no potholes or protrusions. Mr. Lebron was shown Respondent’s exhibit 1, which depicts the walkway depicted on the video. She was walking on a pathway that does not go by the office or time clock. He found her towards the bottom of the photo, but past the pallet. The concrete looked the same as it did not May 6, 2021.

On cross examination, Mr. Lebron testified that the work after the accident was putting up a railing in the area of the fall. He agreed that Petitioner’s exhibit 1 showed yellow curbs on which employees were allowed to walk. In the photo, north is on the right side. The tracks were north of the area depicted. In the video, Petitioner was walking from west to east. She was going straight. Initially, Mr. Lebron believed Petitioner tripped on “the angle iron at the bottom.” He did not recall whether lines were shut down on May 6, 2021, but it was possible that if that happened workers possibly would have been sent home or reassigned.

Mr. Lebron agreed that a photo that appeared to show things resembling old footings was “not too far” from where Petitioner fell. The video was reshown and stopped at the 25 second mark. He indicated that something that extends from floor to ceiling is part of a wall toward the railroad tracks. There was also an aisleway going toward the north. It goes to pop storage and not pop production, which was south of the photo. The pop wrap wall is not shown in the photo. People and forklifts are allowed in the aisleway.

On redirect examination, Mr. Lebron testified that initially he thought Petitioner tripped on the angle iron, but looking at the video, it appeared she was beyond the angle iron “and it looks like she tripped on her own two feet.” He was 100% certain Petitioner did not trip on protruding concrete. From her location, there was no way she could have fallen on the footings depicted in 6-B. He thought there was zero chance that Petitioner tripped on a footing based on the video.

Greg Cheaure was called by Respondent, for which he worked as security director for four years. He reviewed the video, downloaded relevant portions, and relayed it to Mr. Lebron. He was shown the video and it was the same as it was when he sent it to Mr. Lebron.

On cross examination, Mr. Cheaure testified the 5 minute 28 second video was edited to show the time from before Petitioner entered the scene until medical attention was being rendered. He did not know off hand the time of day the video was taken. He could review the time the time logged down on the video, but he did not review it prior to the hearing. Petitioner would have been coming from somewhere in the pop wrap area. He never spoke to Petitioner. It would have taken Petitioner less than a minute to walk from the pop wrap area to the area she is seen on the video. If she were coming from the break room, she would have come in from a different direction.

On redirect examination, Mr. Cheaure reiterated that Petitioner was nowhere near the area depicted in Petitioner's exhibit 6-B, which showed the concrete protrusions, when she fell. He saw no such protrusions in the area in which she fell. Her testimony that she walked from the time clock, past the office, to the area where she ultimately fell, was inconsistent with what he saw in the video. On re-cross, Mr. Cheaure reiterated that he did not know where in the plant Petitioner's exhibit 6-B depicted; but it was not the area of the fall.

Onieka Howse was called by Respondent for which she worked for almost four years, the last year and a half as production supervisor. She was not training supervisor, which is pretty much for your first six weeks of inter-department training. They were shutting the plant early on May 6, 2021 because of potential contamination. She was informed of that at about 10:00. Petitioner was working as relief operator on three machines. She was shown Respondent's exhibit 5 which was the daily schedule. Employees swipe in and are given their work assignments for the day. If someone was assigned to pop wrap they would not be relocated unless there was a need. Petitioner's statement that she had been reassigned by her on May 6, 2021 was untrue. She knew that was the case because they were shutting down production and there was no need for reassignment. She has never reassigned Petitioner to the baler position; because it is a "really hard job" and she typically has a man doing it.

Ms. Howse was shown Respondent exhibit 6, Respondent's work rules. Rule 20 prohibits leaving one's department of work assignment during working hours without permission. A first offense is punishable by suspension and the second by termination. These rules were approved by the union. On May 6, 2021 Petitioner should have been in the pop wrap area. Petitioner's explanation that she was coming from the time clock to the baler was not possible because she was coming from the wrong direction. In Ms. Howse's opinion Petitioner had no business being at the place she fell. She knew where Petitioner fell because she saw her on the floor within a minute or so of the accident. The video actually shows her appearing on the scene. Ms. Howse was familiar with the area and walked through it often when in pop wrap. After the fall she inspected the floor and saw no concrete footings, protrusions, or debris on which she could have tripped. The area is not a walkway but an access point to the railroad tracks. She did not give Petitioner any assignment that would have put her in the area of the fall. No workers should have been in that area.

On cross examination, Ms. Howse testified that there was no company rule for only men to be assigned to the baler. No one was assigned to work the baler on May 6, 2021 before production was shut down. The baler is to the west of the department and Petitioner was seen coming from the north. The hallway area does not have a name and employees are allowed to walk in the area. On the day of the accident, Petitioner was assigned to fill in for employees who were on breaks. She would inform coworkers when it was time for them to take a break and fill in. Petitioner had a card with all the information about coworkers' breaks.

Ms. House testified that Fernando Arreoloa was assigned to the baler on the day of the accident. The assignment would have been given him between 10:00 and 11:00. 10:00 was the approximate time they were informed about the shutdown at 11:00. They did not plan on baling during the production time and only after the production was stopped. There was no need for a relief worked for the baler because his shift would end at 3:30. She explained that baling is not done on a continuous run, so the baler can take breaks when necessary.

Ms. Howse testified she did not inform Petitioner that the line was shutting down and she would be going home early; they had not gotten "around to tell everyone" before Petitioner fell. She would not have asked her to stay after the line was closed. She did not know when Petitioner took her break or whether she succeeded in relieving everybody she was supposed to. Nobody complained to her about not being relieved or about where Petitioner was walking. She did not write Petition up. She did not investigate after the accident.

On redirect examination, Ms. Howse testified she supervised employees other than only pop wrap employees. When she was going back and forth in the video she was speaking to other employees. Petitioner was not in her department when she fell. Nobody was supposed to be in that area and she had no idea why Petitioner was there.

On re-cross examination, Ms. Howse testified at the time of the accident Petitioner was not on break; she had already taken her break from 10:03 to 10:20. Petitioner did not report to her everybody she was relieving and when on that day. She reiterated that nobody complained that they had not been relieved.

On re-redirect examination, Ms. Howse was asked whether Petitioner was doing her job when she fell. After objection the Arbitrator noted: "Let's be clear. She's already said that there were no complaints. She was working. She was coming off her break when the fall happened, and she was not in the area she was supposed to be. This is well established by multiple witnesses. Let us all move on." Thereafter, there was no more re-direct examination.

Findings of Fact – Medical Records

On May 6, 2021, Petitioner presented to the Christ Hospital emergency room with knee pain. She reported tripping on something at work and had a mechanical fall. She twisted her knee while falling. She had swelling and pain radiating down to the right calf. She had not been able to bear weight since the accident. X-rays showed oblique transverse fracture through the medial tibial plateau into the tibial eminence, mild impaction/displacement anteriorly, and nondisplaced oblique transverse fracture of the proximal fibular head. She was given Norco, orthopedics was consulted, and she was admitted.

Dr. Tyler examined Petitioner who reported she slipped on "something" on the floor at work, her right knee went lateral to her body, and she collapsed. Petitioner was transferred from the emergency room to the hospital as an inpatient. She now reported that while at work, her right leg "hit something and she stepped with her foot externally rotated and she fell from ground-level, hitting the ground with her right leg." She denied any prior falls or fractures. She was examined by orthopedics and they planned on taking her to surgery the next morning. Dr. Lieder was called by Dr. Pannu for "definitive management" and he accepted. He was not available until May 12th. Petitioner agreed to surgery, which would be performed that day. When he saw Petitioner on May 12th, she reported being at work on May 6th, she tripped over something, fell, twisted, and landed on her right knee.

On May, 12, 2021, Dr. Lieder performed ORIF of right bicondylar tibial plateau fracture and closed treatment of right proximal fibula fracture for fractures. Petitioner was discharged from hospital on May 16, 2021.

On June 4, 2021, Petitioner returned to Dr. Lieder for postop follow up after she fell at work. She was wearing a knee brace. He removed staples and replaced them with steri-strips. "According to her work, she stands for eight hours a day and this is challenging for her." X-rays showed anatomic reduction of the fracture with no signs of fracture/hardware displacement and the examination was good. He continued the use of the brace at all times and continued non weightbearing for three weeks. Dr. Lieder noted that the injury occurred at work so this was a workers' compensation injury. He expected her to return to work at light duty in six months, possibly full duty 9-12 months, and maximum medical improvement in one year.

On September 3, 2021, Petitioner presented for follow up. Her pain was well controlled. "At the last appointment [they] made her weightbearing as tolerated." She was using a knee brace and crutches. X-rays showed she was "completely healed." Petitioner reported no instability but felt "very weak." Dr. Lieder continued her weightbearing as tolerated. He "was very clear with" Petitioner that she really needed to work hard to get off the crutches and discontinue the brace completely. He had not seen any WC coordinator. However, she would need physical therapy for about a year and he believed she could work sedentary duty now, light duty in six to nine months, and full duty in 9-12 months.

On December 10, 2021, Petitioner reported she had not been in physical therapy since October 25, 2021 when she suffered an injury to her left big toe, for which she was treating with Dr. Gillespie, a podiatrist. She was told to stop physical therapy for her knee, which was against his "knowledge or recommendations." She reported a feeling of instability/giving out and weakness. Dr. Lieder made clear to Petitioner that he wanted to continue physical therapy for her leg and to continue to bear weight.

On March 11, 2022, Petitioner reported she had not returned to work yet and was in physical therapy. Dr. Lieder wanted her to continue to bear weight as tolerated. He gave her a handicapped sticker for six months. Physical therapy would work on weightbearing, strength, training to stand, and gait training. She could work desk duty and he would make her go back to full duty at the next appointment.

At the request of Respondent's workers' compensation insurer, on January 24, 2022, Dr. Yanke examined Petitioner, reviewed her medical records and issued a report. Petitioner reported that on May 6, 2021, she was ambulating to her work place when she tripped on a piece of raised concrete, fell face first, and landed directly on her knee. She had ORIF surgery and was still in physical therapy thrice a week. She reported continued pain, for which she took Tylenol and denied "any improvement in her pain since the injury" which was 7/10. She used crutches and a walker at home to assist ambulation. She was currently in physical therapy for a fractured toe.

Petitioner reported prior injury to her knees bilateral in February 2022, when she was struck by a forklift from behind. She had physical therapy at the time and could have had injections for ongoing pain, but she could not recall specifically. She acknowledged that she had continued pain after her return to work after the forklift accident and that she still had pain when she sustained the instant accident. She affirmed that her current pain was different from the pain she had after the forklift accident.

On examination, Dr. Yanke noted that initially Petitioner reported pain with soft touch over the anterior tibia, however, while he performed other tests applying even more pressure on the tibia, she showed no signs of pain or expressed any concerns. He did note very slight "crepitation that is normal in nature with no significant audible pop or shifting." Her ligaments were stable. After summarizing medical records to date, Dr. Yanke answered queries.

Dr. Yanke noted that Petitioner alleged she tripped over a piece of concrete. She also reported that she sought physical therapy after May 2021 and talked to Dr. Lieder about it. When asked whether Petitioner's behavior prolonged her recovery, Dr. Yanke did not see any particular issues on examination except for the different level of pain/discomfort with distraction. He also noted that she had pain prior to the instant accident. Nevertheless, she objectively recovered very well from the severity of the injury. She could benefit from an MRI to determine any remaining pathology and possible from intra-articular injections. The MRI may suggest arthroscopic surgery. Petitioner could work sedentary duty.

Findings of Fact - Miscellaneous

The Commission notes that in the video Petitioner is seen walking from the left of the screen and falls. The mechanism of the fall is not clear and nothing is seen on the floor. However, the immediate area of the floor on which she fell is not completely visible. It seems that Petitioner's left leg spayed out and her legs split apart immediately before she appears to fall on her right knee. A person in a forklift appears to have seen the incident, got off his forklift, and went to her within about 20 seconds. Another coworker came to her after about another 20 seconds. After about five minutes a person arrives on a mechanized cart and comes to Petitioner's aid. In addition, Respondent submitted the staffing list for May 6, 2021, which indicates that Petitioner was assigned to Bagger #1 stacker, Bagger #2 stacker, and Bagger #3 bagger.

Conclusions of Law

In finding Petitioner sustained her burden of proving accident, the Arbitrator found that Petitioner's testimony that she tripped over concrete was "more credible and persuasive" than that of the witnesses who testified they did not observe any raised concrete in the area in which Petitioner fell. The Arbitrator conceded that Petitioner was not where she was supposed to be when she fell. Nevertheless, she appeared to discount that fact by noting that there was no evidence that Petitioner was reprimanded for any offense.

Respondent argues the Arbitrator erred in finding Petitioner sustained her burden of proving a compensable accident. It stresses that the Arbitrator relied exclusively on the testimony of Petitioner and simply argued she "was not credible on what she tripped on, nor about where she was going at the time of the fall, nor why she was near the baler when she fell." It also argues that Petitioner was not with a risk associated with her employment, that the video contradicts Petitioner's testimony about her movements, she did not explain why was in the location, and the photos of area of the fall, as well as the testimony of all the other witnesses, contradict Petitioner's assertion that she tripped over concrete.

After examining the entire records before us, the Commission concludes that Petitioner did not sustain her burden of proving she suffered a compensable accident. We disagree with the Arbitrator's conclusion that she was "more credible and persuasive" than all the other witnesses, in her testimony that she tripped over a piece of raised concrete. The Commission also agrees with Respondent that the lack of any disciplinary action against Petitioner is irrelevant and should not have been considered a factor in the Arbitrator's decision.

In addition, the Arbitrator's finding about Petitioner's credibility appears to be somewhat in contradiction with the Arbitrator's statement that it had been confirmed by various witnesses that Petitioner was not where she should have been when she was injured. That would be contrary to her finding that Petitioner was credible in testifying that she was in process of moving to another assignment when she was injured.

Finally, in assessing the record before us, including reviewing the testimony and perusing the video of the accident, it seems clear to the Commission that Petitioner was not where she should have been at the time of the alleged accident, there were no concrete stumps in the area of the alleged accident, and she did not trip over any defect in the floor. In this situation, a fall like this, without any apparent cause, is considered idiopathic and non-compensable. Therefore, the Commission finds that Petitioner's accident did not arise in the course of her employment and denies compensation. Based on the Commission finding that Petitioner did not sustain her burden of proving accident, all other issues are moot and the Commission declines to address them.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator issued February 2, 2023 is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's claim for compensation is denied.

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

November 20, 2023
O-9/20/23
DLS/dw
046

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC005721
Case Name	Gordon Ritter v. U.S. Fire Protection, Inc.
Consolidated Cases	22WC013504;
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0491
Number of Pages of Decision	28
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Kevin Veugeler
Respondent Attorney	JASON ALLAIN, Robert Smith

DATE FILED: 11/20/2023

/s/ *Deborah Simpson, 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: Down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GORDON RITTER,

Petitioner,

vs. NO: 22 WC 5721

US FIRE PROTECTION, 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 accident, causal connection, notice, temporary total disability benefits, medical expenses, and the imposition of penalties and attorney fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as specified 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).

Initially, we note this claim was consolidated, and arbitrated with, 22 WC 13504. The instant claim was for alleged injury to Petitioner's left shoulder while 22 WC 13504 alleged injury to his right shoulder. In the instant claim the Arbitrator awarded Petitioner 24&1/7 weeks of temporary total disability benefits from January 14, 2022 through July 1, 2022, $108,845.50 in medical expenses, $71,966.52 in 19(k) penalties, $10,000.00 in Section 19(l) penalties, and $28,786.61 in Section 16 fees. In 22 WC 13504, the Arbitrator awarded Petitioner 16&6/7 weeks of temporary total disability benefits from July 1, 2022 through October 26, 2022, as well $12,249.50 in 19(k) penalties, and $4,889.80 in Section 16 fees. The Arbitrator did not award medical in 22 WC 13504.

Findings of Fact - Testimony

Petitioner testified he worked as a sprinkler fitter for 35 years and installs fire protection. He worked for Respondent for the past five years. He was a working foreman for Respondent, which means he both installed sprinklers and was in charge of the men and materials on the jobsite. He installs overhead systems and works mostly in commercial buildings. He worked a lot on ladders and used various tools. Material/equipment can weigh anywhere from 25 pounds up to 200 to 300 pounds. He had to take pipe from the ground and either put it on a lift or put it on his shoulder and walk up a ladder.

Petitioner was shown Petitioner's exhibit 8, an outline of job duties of "sprinkler fitter elements" with Respondent. He was also shown a photo identified as Petitioner's exhibit 1, which he explained was a fire pump. One that size would weigh "maybe 300, 400 pounds." He would bring it to the site on a jack of some sort, but then have to physically install it. Pipes were installed between fire pumps on different floors. There could be hundreds of feet of pipe installed in a ceiling. He would have to install them overhead. Sometimes he worked alone and sometimes with a partner. Often he has to use both hands to lift two pipe wrenches over head to tighten bolts, "so it's repetitive. Everything is overhead." The wrenches can weigh eight-12 pounds. However, he used mostly aluminum wrenches which are lighter. He worked overtime when necessary to meet deadlines.

Petitioner testified that in the end of December, early January, he noticed that his left arm/shoulder was giving him problems. He noticed it while installing pipe overhead. He never had any such problems with his shoulder. He sought medical treatment on January 11, 2021 from Dr. Izquierdo, who recommended an MRI. He discussed his visit with the doctor with Dave Curren, the safety director and that he recommended the MRI. Mr. Curren asked for the results of the test. It was taken on April 29, 2021 and it showed "a near complete tear of" the rotator cuff. "Dave knew" about the MRI results. Dr. Izquierdo recommended rotator cuff repair surgery.

After a May 10, 2021 visit, Petitioner began having issues with his right shoulder, because he was doing a lot more work with his right arm to compensate for the left. He returned to Dr. Izquierdo who ordered an MRI of the right shoulder rotator cuff. Petitioner had an IME with Dr. Levin on August 5, 2021, at which time he reported issues with both his shoulders. He then had the MRI on August 17, 2021, which showed rotator cuff/tendon tears. Dr. Izquierdo again recommended rotator cuff repair surgery.

Petitioner informed Respondent about the recommendation for his right shoulder surgery. He was off work in September through December, and Respondent paid him his normal salary. He had the surgery on January 14, 2022. Petitioner agreed that in physical therapy on March 25, 2022, he reported his right shoulder was getting better but he had pain/weakness in the left shoulder. Dr. Izquierdo continued physical therapy for the right shoulder and again recommended rotator cuff repair surgery for the left shoulder.

On July 1, 2022, Dr. Izquierdo performed left subacromial decompression and rotator cuff repair. He last saw Dr. Izquierdo on September 21, 2022 at which time he continued physical therapy. He had his last physical therapy visit on the day before the hearing and continued physical therapy was recommended.

Petitioner testified that currently his right shoulder was "not too bad." He watches what he does and Dr. Izquierdo told him to stop activities he cannot do. The left shoulder still had pain. His limitations "as far as movement was getting better, but it's not there. That's why he wants [him] to continue with" physical therapy. Dr. Izquierdo had kept him off work. Petitioner has not received any TTD or salary since his January surgery. The medical bills were sent through his group insurance.

On cross examination, Petitioner agreed he worked for multiple companies besides Respondent. He had a workers' compensation injury to his right shoulder in 2017. He also treated with Dr. Izquierdo for that injury and had surgery after that accident as well. That case was settled in 2019. He had other workers' compensation claims from as far back as the 1980s. He agreed that Dr. Albright was his primary care physician before his retirement. Petitioner was prescribed medicine for arthritis, which he took for years. Petitioner acknowledged that he had osteoarthritis for at least 20 years. Dr. Albright noted his prior right shoulder surgery and Petitioner acknowledged that he had hip replacement surgery and was seeing Dr. Daniels for his right knee.

Petitioner agreed that he was aware of the workers' compensation reporting requirements. As foreman, coworkers tell him about injuries/accidents. He was not aware of a company called CareOnSite. Petitioner's responsibility was to report his injury to Dave Curren. He agreed that he told Dave that he was getting physical therapy at Athletico, that he reported to physical therapy that he felt severe pain in his anterior left shoulder lifting pipe overhead, that he was asked to continue working if possible, that he injured his right shoulder within a month of continuing work, and that he could no longer work. He continued working from January to September because the superintendent asked him to continue. He agreed that the medical records indicate he started having right shoulder pain in or around July of 2021.

Petitioner agreed that he saw Dr. Levin twice. The MRI of the right shoulder was taken on August 17, 2021, about two weeks after the first IME. On the first exam, Dr. Levin only examined his left shoulder, but he also performed some maneuvers on his right shoulder at both examinations. As far as he knew group insurance paid all the medical bills associated with the right shoulder condition. He still worked for Respondent.

Petitioner testified that if a supervisee reports an injury to him, he would either call Dave Curren or the employee would. If one could not get a hold of Mr. Curren there is an API number to call. As far as he knew, "it's always been Dave Curren."

Petitioner acknowledged that he never put 300-pound equipment "fully up to the shoulder." He usually had assistance when moving 300-pound equipment. Sometimes he also had assistance

lifting 21-foot pipes. He would not carry the 21-foot pipes up ladders; it would be brought up with a jack. Jacks were also used to move fire pumps. The drill used to cut through concrete, etc. could weigh between 25 and 30 pounds. He might have told Dave that he had to carry pipe weighing between 125 and 250 pounds up ladders, "but he should know that."

Petitioner reiterated that his right shoulder was feeling pretty good for the most part and he was still in physical therapy for the left shoulder. Dr. Izquierdo told him normally physical therapy took anywhere between six to eight months, not four months.

On redirect examination, Petitioner testified he returned to work in 2017. Dr. Izquierdo performed the surgery and released him to work at full duty. After his return to work after that injury, he did not have any additional follow up or physical therapy. He had no problems with his right shoulder until around July of 2021. API is a parent company of Respondent "and a whole bunch of other companies." He had more than one conversation with Dave Curren about his shoulders. He did not initially inform Dave about the surgery because it was not yet scheduled. He told him about the surgery after it was scheduled in May.

Petitioner agreed that he saw Dr. Izquierdo on August 9th, four days after he saw Dr. Levin, and told him his right shoulder had been bothering him at work since July. He shoulder was bothering him in August of 2021. If Dr. Levin asked him about his right shoulder pain, he would have reported it.

On re-cross examination, Petitioner reiterated that when he saw Dr. Levin in August of 2021 it was for his left shoulder and in October of 2021 it was for his right shoulder.

Findings of Fact – Medical Records

An MRA of the left shoulder taken on December 22, 2006 for arm injury/decreased ROM was normal.

On January 5, 2009, Petitioner presented to Dr. Albright, his primary care physician, and reported that the 200 mg of Celebrex did not seem to do the job and asked for it to be increased to 400 mg. Dr. Albright obliged. In January of 2015, Petitioner reported his osteoarthritis was well controlled with the Celebrex. His back has been stable for which he used Soma occasionally. Dr. Albright's diagnoses were osteoarthritis and chronic back pain. Almost seven years later, Petitioner reported to Dr. Albright that his joint/body aches were getting worse and worse. His arthritis was getting to the point where he was having difficulty doing his job as pipe fitter. Dr. Albright started Medrol Dosepak. On April 17, 2017, Dr. Albright cleared Petitioner for right shoulder arthroscopic surgery scheduled for May 5, 2017.

In late August of 2019, Petitioner presented to Dr. Daniels for pain in the medial aspect of the right knee for two months. He had surgery on the right knee in the 70s. X-rays showed severe medial compartment osteoarthritis in the right knee. An MRI was ordered. An MRI taken two

weeks later confirmed severe medical compartment osteoarthritis, "with essentially nonexistent markedly macerated meniscus and bone-on-bone appearance." Dr. Daniels would schedule knee arthroplasty surgery.

On May 5, 2020, Dr. Albright noted that Petitioner was still taking Celebrex and Effexor which helped his chronic pain. He was seeing Dr. Daniels for his right knee and Dr. Izquierdo for his left shoulder. Dr. Albright noted he had prior surgery on his right shoulder. Osteoarthritis and obesity were Dr. Albright's only diagnoses.

On July 2, 2020, Petitioner returned to Dr. Daniels for bilateral hip pain for a month, left worse than right, with gradual onset, and no known injury. X-rays showed moderate-to-severe bilateral hip osteoarthritis with joint space narrowing and spur formation. On August 10, 2020, Dr. Daniels performed total left hip replacement.

On January 11, 2021, Petitioner presented to Ms. Frakes, PA-C, for left shoulder pain since December of 2020, with gradual onset and no known injury. The pain ranged between 3-6/10. X-rays of the left shoulder showed type II acromion and changes consistent with AC joint arthritis and mild glenohumeral arthritis. Ms. Frakes diagnosed left shoulder bursitis and ordered an MRI.

On May 10, 2021, Petitioner presented to Dr. Izquierdo reporting that his left shoulder was "doing the same." The pain ranged between 3-10/10 with associated popping/clicking. He was working full duty and taking Norco *prn*. Dr. Izquierdo noted the MRI showed a near complete full-thickness, partial width focal tear at the anterior edge of the supraspinatus tendon, severe tendinosis of the supraspinatus tendon, and various other pathology. Dr. Izquierdo recommended left-shoulder arthroscopic rotator cuff repair, subacromial decompression with anterior acromioplasty, and biceps tenodesis.

On August 9, 2021, Petitioner presented to Ms. Rivers, PA-C, for intermittent right shoulder pain (4-8/10) which started a few weeks previously, without trauma. He had a cortisone injection in 2017 without improvement, but had improvement with right-shoulder arthroscopic surgery to repair small-to-medium, one-tendon tear of the supraspinatus tendon, biceps tenodesis, subacromial decompression with anterior acromioplasty performed in May 2017 by Dr. Izquierdo. Petitioner was working full time. Dr. Izquierdo diagnosed bursitis on the right shoulder, prescribed Medrol Dosepak, and ordered an MRI.

About three weeks later, Petitioner presented to Dr. Izquierdo reporting that his right shoulder was doing the same with 3-6/10 pain. He was working full-time without restrictions. He worked as a foreman and alleged that he had an unwitnessed workers' compensation injury. He was able to work the rest of the day and reported the injury 30 days after it had occurred. Dr. Izquierdo noted the MRI showed pathology which appears to have been similar to that found in the left shoulder. He believed the acute rotator cuff injury was caused by the reported accident. Dr. Izquierdo diagnosed rotator cuff tear and recommended arthroscopic rotator cuff repair, debridement, possible patch augmentation, and possible revision rotator cuff repair.

On January 14, 2022, Dr. Izquierdo performed right shoulder arthroscopic rotator cuff repair and extensive debridement for small-to-medium subscapularis tear, acromial bursitis, adhesions in the subacromial space, labral tearing, synovitis of the glenohumeral joint, and Grade 2 changes of humeral head/glenoid.

On April 7, 2022, Petitioner returned to Dr. Izquierdo, 12 weeks after right shoulder surgery, reporting that his right shoulder was improving but his left shoulder felt about the same. An MRI taken on March 15th redemonstrated severe tendinosis of the supraspinatus tendon/bicipital tenosynovitis/mild joint thinning of the articular cartilage, a new punctate interstitial split tear within the infraspinatus tendon, interval increase in the subscapularis tendon tear, and stable moderate-to-severe AC joint arthropathy. Dr. Izquierdo reviewed the MRI and indicated the subscapularis/supraspinatus tears had not retracted. Dr. Izquierdo continued physical therapy and noted that Petitioner may consider surgical intervention for the left shoulder rotator cuff tear.

On July 1, 2022, Dr. Izquierdo performed left shoulder arthroscopic biceps tenodesis, extensive debridement of the glenohumeral joint, and subacromial decompression for tear of the subscapularis/supraspinatus, biceps tendinosis/partial thickness tearing, synovitis of the glenohumeral joint, labral tearing, Grade 1 changes of humeral head/glenoid, and subacromial impingement.

Findings of Fact – Doctor Depositions

Dr. Izquierdo testified by deposition on August 11, 2022, that he was board-certified in orthopedic surgery and sports medicine. 90% of his practice involves treatment of shoulders. He previously treated Petitioner and performed right rotator cuff repair in May of 2017. Thereafter, he was released to work full duty as a sprinkler fitter in January of 2018. He returned to Dr. Izquierdo on January 11, 2021 regarding his left shoulder. Petitioner then returned to him on August 9, 2021 complaining again about his right shoulder, which he reported began in December of 2020, was of gradual onset, and for which there was no specific injury. He had not been treated previously for his left shoulder. Petitioner attributed it to overuse.

Dr. Izquierdo testified that x-rays showed arthritis, but the arthritis was not causing his impingement or issues he was having. An MRI of the left shoulder was taken on April 29, 2021. Initially, the MRI showed no retraction of what seemed to be an acute rotator cuff tear. The pathology seen on the MRI was consistent with Petitioner's symptoms. No significant arthritis was seen in the left AC joint. Petitioner still had right shoulder pain/symptoms.

An MRI of the right shoulder was taken on August 31, 2021, which showed that the previous repairs at the superior aspect of the rotator cuff (supraspinatus) appeared to be intact and there was a subscapularis tear. Dr. Izquierdo planned on repairing the subscapularis. Right rotator cuff tear surgery was performed on January 14, 2022. On May 19, 2022, Petitioner reported his

left shoulder was worsening, and he was still complaining about his right shoulder. On July 1, 2022, he performed left shoulder repair surgery. He had some fraying but no full-thickness tear of the left rotator cuff.

Dr. Izquierdo opined that Petitioner's job duties as sprinkler fitter caused or contributed to the pathology he noted in the MRIs and which required surgeries. That would relate to both the rotator cuff and biceps pathology. Even if he had a pre-existing rotator cuff tear, his overhead activities would have certainly exacerbated it. Because there was no substantial atrophy or retraction, it was unlikely to be a chronic tear. He did not report left shoulder symptoms until December of 2020. He had not released Petitioner to full duty and he believed it unlikely that Petitioner could return to work as a sprinkler fitter.

On cross examination, Dr. Izquierdo agreed that the last time he examined Petitioner's right shoulder was probably in May of 2022. He agreed that essentially, Petitioner's condition of ill-being of his left shoulder was bursitis. He estimated that 12 to 15% of his practice involved workers compensation patients. He performed about 600 shoulder surgeries annually. Dr. Izquierdo agreed that his treatment notes do not indicate that the left shoulder injury was work-related. He did not recall Petitioner reporting any mechanism of injury for his right shoulder condition. He saw no reason why Petitioner could not go back to work.

Dr. Mark Levin testified by deposition that he was a general board-certified orthopedic surgeon with additional training in sports medicine. Currently, most of his work involved shoulders/knees. He estimated he performed 200 to 300 surgeries a year. He restricts his IMEs to no more than 20% of his practice.

Dr. Levin examined Petitioner on two occasions, the first time on August 5, 2021, and he reviewed his medical records. Petitioner reported he worked as a sprinkler fitter. In February of 2021 he began having left-shoulder pain that he attributed to repetitive, heavy, overhead work. He did not report any precipitating event. He had not had any treatment for his left shoulder, but he did have a work-related right shoulder surgery five years previously. After a few weeks he went to see Dr. Izquierdo in May of 2021. After an MRI, Dr. Izquierdo recommended left-shoulder arthroscopic surgery.

Petitioner reported pain in the biceps area of the left shoulder. The pain ranged between 3-10/10. His history was significant for taking Celebrex for multiple joint arthritis, and he had left hip replacement in 2020, due to arthritis. On examination, Petitioner exhibited changes in the biceps tendon consistent with tendinitis.

Dr. Levin reviewed the MRI from April 29, 2021 which showed the tendinitis and marked AC joint arthritis, or "chronic hypertrophy enlargement which would cause subacromial impingement." Dr. Levin diagnosed chronic left-shoulder degenerative disc disease over the AC joint with chronic subacromial impingement. He was symptomatic prior to February 1, 2021, noting the MRI was ordered on January 11, 2021. He noted that the condition was chronic and

not acute because the shape of the AC joint was not an acute change, there was no acute bony edema, and the change in the rotator cuff was consistent with an ongoing impingement from this bony process. Dr. Levin testified that Petitioner's subjective reports were inconsistent with the medical records/findings. There were references to shoulder pain, injections, and of no precipitating event.

Petitioner's condition was very common. Treatment would normally include cortisone injections and possibly physical therapy. If the patient failed conservative treatment, then one can do surgery. However, he could not "testify for any surgical intervention for this gentleman from an alleged injury of" February 1, 2021. He was able to work full duty in the past and there was reason why he could not continue to work in that capacity.

Dr. Levin saw Petitioner again on October 11, 2021 in which he examined Petitioner's right shoulder. Petitioner reported that since the first IME he developed a new problem in his right shoulder that developed on August 10, 2021, after he carried a pipe up a ladder. Petitioner indicated he "ordered an MRI by himself" and starting treating again with Dr. Izquierdo. After seeing the MRI, Dr. Izquierdo recommended right shoulder surgery.

Petitioner acknowledged prior rotator cuff repair surgery to his right shoulder four or five years previously but he was fully functional with the shoulder prior to the specific event on August 10, 2021. The MRI showed postop changes from previous rotator cuff surgery, some long-standing degenerative changes which were chronic based on the "fatty infiltration, the atrophy of the muscle." The condition was not from any acute injury. His report of an acute onset after a work injury on August 10, 2021 was inconsistent with his medical records and MRI findings.

On cross examination, Dr. Levin agreed that on August 5, 2021 he examined Petitioner's right shoulder and found no pain/tenderness. At that time he reviewed the MRI of the left shoulder, not the right shoulder. It showed signal changes consistent with tendinitis, but no full-thickness rotator cuff tear. He reviewed all the material that had been provided him, and did not and probably could not, have sought additional information. He was not provided a description of the job duties of sprinkler fitter, but he was familiar with the job and treated a lot of such patients. He understands that it requires a lot of overhead work. He has not seen any records past October 11, 2021. Dr. Levin noted that the majority of sprinkler fitters do not develop symptomatic degenerative arthritis. He acknowledged that he performed IMEs for Respondent previously.

Petitioner submitted into evidence a description of the job duties of sprinkler fitter. A sprinkler fitter spends about 30% of his time walking/standing and 70% working on ladders and scaffolds. "A Sprinkler Fitter must be able to lift tools and materials that weigh in excess of 100 pounds. That amount of weight is frequently picked up from the ground and lifted and held above their head. When installing pipe, they bend over, pick up one piece (average length 12 feet), hold it overhead, align the thread with the fitting firmly grasping and rotating until hand tight." The exhibit included photos of equipment.

Conclusions of Law

The Arbitrator found that Petitioner sustained his burden of proving a causal connection between his repetitive overhead work activities and his condition of ill-being of his right shoulder and left shoulder bilaterally. She found Petitioner's testimony credible, consistent with the medical records, and consistent with the description of the job duties of sprinkler fitter. She also found the opinion testimony of Dr. Izquierdo more persuasive than that of Dr. Levin. Specifically, she noted that Dr. Levin offered a causation opinion without benefit of the description of Petitioner's job activities and she found that Dr. Levin used "circular logic" in specifying that not all sprinkler fitters suffer rotator cuff tears.

Respondent argues the Arbitrator erred in finding Petitioner sustained his burden of proving a compensable accident and causation to the conditions of ill-being of his shoulders bilaterally. It questions the Arbitrator's determination of the credibility of Petitioner's testimony, disputing that it was consistent with the medical records. Respondent also argues that the Arbitrator erred in finding Dr. Izquierdo more persuasive than Dr. Levin because the MRI of the right shoulder, taken less than two weeks after the alleged manifestation date showed Stage II fatty infiltration, suggesting the condition of ill-being was long-standing.

The Commission affirms the Decision of the Arbitrator on the issue of causal connection. It's clear that Petitioner had multi-joint arthritis that affected his shoulders. Nevertheless, the Commission agrees with the analysis of the Arbitrator that Petitioner's work as a sprinkler fitter constituted repetitive, heavy, overhead activity which at least contributed to, and/or aggravated, the condition of ill-being of his shoulders bilaterally. In addition, Petitioner was able to work at his heavy, largely overhead job before his condition worsened so that he was no longer able to perform his job, which helps establish causal connection under the chain of event analysis.

On the issue of temporary total disability benefits, the Arbitrator awarded Petitioner 24&1/7 weeks of temporary total disability benefits from January 14, 2022 through July 1, 2022, while in the companion claim, the Arbitrator awarded Petitioner 16&6/7 weeks of temporary total disability benefits from July 1, 2022 through October 26, 2022. The Commission notes that the Arbitrator erroneously applied the incorrect TTD award for the injury in each claim. Therefore, the Commission modifies the Arbitrator's award of 24&1/7 weeks of temporary total disability benefits to be 16&6/7 weeks.

On the issue of notice, the Arbitrator found that Petitioner proved proper notice because he reported the injuries within the statutory 45 day period. Respondent preserved the issue but does not argue it in its brief. The Commission affirms the Decision of the Arbitrator on the issue of notice.

On the issue of medical expenses, the Arbitrator awarded medical submitted into evidence in the amount of $108,845.50 "pursuant to the medical fee schedule as provided in Section 8(a) and 8.2 of the Act." However, in the award, the Arbitrator did not award a bill from Ortho IL in

the amount of $1,723.55, because the bill reflected a zero balance. However, upon careful review the Commission notes that there was an outstanding balance which was sent to collections. Therefore, the Commission concludes that the Respondent is liable for the additional $1,723.55 in medical expenses and adds that amount to the medical award accordingly.

Respondent argues the Commission erred in awarding $108,845.50 because the evidence reflects payments made by Petitioner's group health insurance, thus reducing the outstanding balances. The Commission notes that such an award for medical expenses pursuant to Sections 8(a) and 8.2 of the Act contemplates that the Respondent shall get the benefit of the negotiated rate, if applicable. See *Perez v. Ill. Workers' Comp. Comm'n*, 2018 IL App (2d) 170086WC (2nd Dist, 2018). However, the Commission also notes that to the extent any balances remain regarding the awarded bills which stem from Petitioner's deductible, co-payments, and/or co-insurance after the group health insurance payments were made, the Respondent shall reimburse Petitioner accordingly pursuant to Section 8(a) of the Act. See *Bobby Sims v. South Berwyn School Dist. #100*, 20 IWCC 0412.

On the issue of penalties/fees, the Arbitrator awarded Petitioner $71,966.52 in §19(k) penalties, $10,000.00 in §19(l) penalties, and $28,786.61 in §16 fees for a total of $110,753.13. She based that award on her finding that Petitioner did not have a good faith defense to the claim, again specifying that it asked Dr. Levin to opine about causation without the benefit of a description of Petitioner's job activities.

The Commission vacates the award of penalties and fees. While the Commission concludes that Petitioner's heavy, repetitive, overhead work activities aggravated/accelerated Petitioner's underlying advanced osteoarthritis in his shoulders bilaterally, we are not convinced that Respondent acted in bad faith in defending the claim. It is clear that Petitioner had advanced arthritis in multiple joints throughout his body. In addition, while the Arbitrator was within her prerogative to find Dr. Levin's opinions unpersuasive because he did not see a description of Petitioner's job activities, that does not necessarily mean that his opinions are totally unreasonable. It would have been advantageous for him to see the job description and that may have made his opinion more persuasive. However, he based his opinion, at least regarding the right shoulder, on Petitioner's report that he injured the shoulder in an acute accident carrying a pipe up a ladder on a certain date. He made a fairly reasonable conclusion that the fatty infiltration/atrophy proved to him that the injury was long-standing and not of recent origin. While that is a valid defense to a claim of acute trauma, it may have less relevance regarding repetitive trauma. Therefore, the Commission finds that Petitioner did not act in an unreasonable and vexatious manner in defending the claim and vacates the award of penalties and fees.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 23, 2023, is hereby modified as specified above and otherwise is affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner total disability benefits of $1,453.33 per week for 16&6/7 weeks, from July 1, 2022 through October 26, 2022, as provided by §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the necessary and reasonable medical expenses of $110,569.05, pursuant to §8(a) and subject to the applicable medical fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION, that 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.

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 $70,000.00. 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.

November 20, 2023
O-9/20/23
DLS/dw
046

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC005721
Case Name	Gordon Ritter v. U.S. Fire Protection, Inc.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Raychel Wesley, Arbitrator

Petitioner Attorney	Kevin Veugeler
Respondent Attorney	Jason Allain, Robert Smith

DATE FILED: 1/23/2023

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

/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)
X None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Gordon Ritter
Employee/Petitioner
v.
U.S. Fire Protection, Inc.
Employer/Respondent

Case # **22 WC 005721**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Raychel Wesley**, Arbitrator of the Commission, in the city of **Chicago**, on October 26, 2022. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **January 11, 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 $**113,360.00**; the average weekly wage was $**2,180.00**.

On the date of accident, Petitioner was **62** years of age, single, with no 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**.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $**1,453.33**/week for **24 1/7** weeks, commencing **1/14/2022 through 7/1/2022** as provided in Section 8(b) of the Act.

Medical benefits

Respondent shall pay reasonable and necessary medical services of **$108,845.50**, pursuant to the medical fee schedule as provided in Section 8(a) and 8.2 of the Act.

Penalties

Respondent shall pay to Petitioner penalties of $**28,786.61**, as provided in Section 16 of the Act; $**71,966.52**, as provided in Section 19(k) of the Act; and $**10,000.00**, 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/ *Raychel A. Wesley*

Signature of Arbitrator

JANUARY 23, 2023

Ritter v U S Fire Protection, Inc.

<u>MEMORANDUM OF DECISION OF ARBITRATOR</u>

<u>Findings of Fact</u>

The Petitioner testified that he worked as a sprinkler fitter for 35 years. (Tr. P. 14). Sprinkler Fitters install overhead fire protections systems, using wrenches and drills to install pipes, valves, and fire pumps. (Tr. P. 15-17). Photographs received into evidence depict the size and type of materials used by a sprinkler fitter. (Tr. P. 18-20, 26, 28-33, PX8).

Petitioner explained the process of installing sprinkler systems. (Tr. P. 16-18). Pipe weighing from 30 to 200 lbs. is brought up to the ceiling using man lifts or put on the shoulder and walked up a ladder. (Tr. P. 17, 23). The pipe is then lifted up to hangers attached to the ceiling using an overhead Hilti drill. (Tr. P. 24-25). Two pipe wrenches are used to tighten the pipe overhead. (Tr. P. 31-32). This process is repeated 80 to 100 times a day. (Tr. P. 25-26). A job description confirmed Petitioner's testimony concerning his work duties. (Tr. P. 18, PX8).

According to *Sprinkler Fitter Job Elements*, when installing pipe, sprinkler fitters will bend over and pick up a piece of pipe, average length of twelve feet, and hold it overhead while attaching it to a fitting. (PX8). A hanger is attached to the ceiling using a Hilti drill and a pipe wrench is used to tighten the pipe. (PX8). This process is repeated 80-125 times in an average workday. (PX8).

Petitioner had been employed as a sprinkler fitter foreman with U.S. Fire Protection for the last five years of his 35 year career. (Tr. P. 18). Petitioner has additional supervisory duties as a foreman in addition to his installation duties. (Tr. P. 14, 35).

Petitioner testified that in December of 2020 and early January 2021, he began to experience pain in his left shoulder while working installing pipe overhead. (Tr. P. 35-36).

Petitioner testified that prior to December of 2020, he did not have any issues or problems with his left shoulder while working for Respondent. (Tr. P. 37).

Petitioner initially sought care with Ortho Illinois on January 11, 2021. (Tr. P. 37, PX1, PX7, P. 8-9). It was noted Petitioner complained of ongoing pain in the left shoulder since December 2020 with gradual onset and no known injury. (PX1, PX7, P. 36-37). An examination was positive for impingement. (PX1). The diagnosis was left shoulder bursitis, and Petitioner was prescribed an MRI and instructed to return. (Tr. P. 38, PX1).

Petitioner testified that he informed U.S. Fire Protection's Safety Director, Dave Curran, that he was experiencing pain in his left shoulder the following day, on January 12, 2021. (Tr. P. 38).

An April 29, 2021 MRI of the left shoulder revealed a near complete full thickness tear of the supraspinatus tendon, partial tear of the sub scapularis tendon and a split tear of the biceps tendon. (Tr. P. 39, PX1, PX7, P. 11). Petitioner notified his employer of the results of the MRI. (Tr. P. 39).

Petitioner returned to Dr. Rolando Izquierdo of Ortho Illinois as instructed on May 10, 2021. (Tr. P. 39, PX3, PX7, P. 12). At that time, Dr. Izquierdo noted the results of the MRI and diagnosed a left rotator cuff tear and recommended surgery. (Tr. P. 39, PX1, PX7, P. 12).

Petitioner testified that he continued to work full duty for Respondent. (Tr. P. 40). After May 10, 2021 he began to notice problems with his right arm while working due to compensating for the left arm. (Tr. P. 40). As a result, Petitioner returned to Dr. Izquierdo on August 9, 2021. (Tr. P. 40, PX1, PX7, P. 13). The office notes indicate the Petitioner reported right shoulder pain overhead that started a few weeks ago without trauma that Petitioner attributed to overcompensating for the left arm. (PX1, PX7, P. 13-14). Dr. Izquierdo diagnosed

right shoulder bursitis, and prescribed a Medrol Dose Pak, an MRI and instructed Petitioner to return to the clinic. (Tr. P. 40, PX1, PX7, P. 14).

Petitioner underwent a right shoulder MRI on August 17, 2021 that demonstrated a rotator cuff tear and bicep tendon tear. (Tr. P. 41, PX1, PX7, P. 15). On August 31, 2021, Dr. Izquierdo noted Petitioner's right shoulder pain started a few weeks earlier at work. (PX1, PX7, P. 15). Dr. Izquierdo reviewed the results of the MRI and diagnosed an acute right rotator cuff tear and recommended surgical repair and light duty, no lifting greater than 5 lbs. and no overhead work until surgery. (Tr. P. 41, PX1, PX7, P. 16).

Petitioner testified he was off work beginning September 2021 and was paid his full salary by his employer in September, October, November, and December. (Tr. P. 42). On December 20, 2021, Petitioner was cleared for surgery by his family physician. (Tr. P. 42, PX2).

On January 14, 2022, Petitioner underwent surgical repair of his right shoulder. (Tr. P. 42, PX1, PX7, P. 16). Petitioner returned for post-surgical follow up on January 17, 2022 complaining of right leg pain. (PX1). Petitioner was prescribed a doppler exam to rule out a DVT, medication, and instructed to begin physical therapy and remain off work. (Tr. P. 43, PX1). On February 28, 2022, Petitioner returned to Dr. Izquierdo and was instructed to continue therapy. (PX1).

A March 25, 2022 physical therapy note indicates Petitioner was complaining of increased left shoulder issues. (Tr. P. 43-44, PX5).

On July 1, 2022, Dr. Izquierdo performed a left subacromial decompression and debridement of the rotator cuff. (Tr. P. 44, PX1, PX7, P. 18). Petitioner returned for post-surgical follow up on July 5, 2022 and was prescribed medication, instructed to continue wearing

a sling, begin physical therapy, remain off work and to return to the clinic. (Tr. P. 44-45, PX1, PX7, P. 20).

Petitioner testified that since the surgery, he has remained in prescribed physical therapy and has remained off work pursuant to Dr. Izquierdo's recommendation. (Tr. P. 45, PX1). At the time of trial, Petitioner reported his right shoulder is not too bad and he performs activities as tolerated. (Tr. P. 45-46). Petitioner is still in physical therapy for the left shoulder and is limited with pain and movement. (Tr. P. 46). Petitioner remains off work pursuant to Dr. Izquierdo's orders, however, Respondent has not paid temporary total disability since January, 2022. (Tr. P. 46).

Petitioner presented the testimony of Dr. Izquierdo, a Board Certified Orthopedic Surgeon. (PX7, P. 4). 90% of his practice is treating patients with shoulder issues. (PX7, P. 5). He performs 600 shoulder surgeries a year. (PX7, P. 35). Dr. Izquierdo reviewed the "Sprinkler Fitter Job Element" submitted as PX8 and stated that the document accurately reflected his understanding of the work activities of Petitioner. (PX7, P. 7). Dr. Izquierdo opined that Petitioner's work activities as a sprinkler fitter caused or contributed to cause the right rotator cuff tear and need for surgery. (PX7, P. 21). Similarly, Dr. Izquierdo testified Petitioner's work activities as a sprinkler fitter caused or contributed to cause the left rotator cuff tear and need for surgery. (PX7, P. 21-22). Dr. Izquierdo testified that the tears seen at the time of surgery in the right shoulder were recent tears, and not chronic in nature. (PX7, P. 15, 22-23). Regarding the left shoulder, Dr. Izquierdo confirmed that the left shoulder issues were not related to arthritic changes, but acute in nature. (PX7, P. 10-11, 21-23). In addition, Dr. Izquierdo testified that Petitioner did not have any issues with his left shoulder prior to December 2020. (PX7, P. 23). Petitioner did have a previous rotator cuff tear in the right shoulder that was successfully

repaired by Dr. Izquierdo in May 2017 and Petitioner was able to return to work as a sprinkler fitter full duty in January of 2018. (PX7, P. 5-6).

Dr. Izquierdo also testified that Petitioner was unable to return to work in a full duty capacity after the January 14, 2022 right shoulder surgery. (PX6, P. 16-17, 18, 24-25). Dr. Izquierdo stated Petitioner's subjective complaints of pain were consistent with the objective diagnostic studies and at no time did Petitioner exhibit signs of malingering or secondary gain. (PX7, P. 12, 20-21, 23-24).

Respondent presented the evidence testimony of Dr. Mark Levin. (RX1). Dr. Levin acknowledged that if there were relevant materials that weren't provided to him, that his opinion could change. (RX1, P. 39-40). In that regard, Respondent failed to provide a job description outlining the work activities of Petitioner, the deposition of Dr. Izquierdo, or medical records past October 11, 2021. (RX1, P. 54-56). As a result, Dr. Levin was not aware of the number of times Petitioner's work activities require him to repetitively work overhead, nor could he comment on whether Petitioner's work activities could have caused his shoulder injuries. (RX1, P. 58-61). Instead, Dr. Levin testified he was not provided enough information to determine if the overhead work of a sprinkler fitter could cause degenerative changes. (RX1 P. 59-60). He did testify that not all sprinkler fitters get degenerative changes [in their shoulder]. (RX1 P. 59-60).

Dr. Levin was unaware Dr. Izquiedo ordered an MRI of the right shoulder, believing instead, that Petitioner prescribed his own MRI. (RX1, P. 28-319). Additionally, Dr. Levin was also not given the operative reports that demonstrated acute tears. (RX1 P. 66). Dr. Levin testified that at no time were there any issues of malingering or secondary gain. (RX1, P. 48-49).

Dr. Levin did not testify concerning the number of shoulder surgeries he does, but he did acknowledge that he did approximately 280 §12 exams a year. (RX1, P. 62-63).

Conclusions of Law

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

(F) Is Petitioner's present condition of ill-being causally related to the injury?

It is well-settled that an employee need only show that some act of employment was a causative factor, not the sole, nor principal cause, of his injury. Alderson v. Select Beverage, Inc., 06 I.W.C.C. 0095, 01 W.C. 33435 (2006). The fact that the employee had a preexisting condition, even though the same result may not have occurred had the employee been in normal health, does not preclude a finding that the employment was a causative factor. Id. The question is whether the evidence supports an inference that the work activities aggravated or accelerated the process which led to the employee's current condition of ill-being. Id. An injury arises out of a claimant's employment where it "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, 203 (2003).

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. Hopkins v. WSNS Telemundo, 02 IIC 0946, 99 W.C. 42128 (2002). In determining that an employee was entitled to compensation for aggravation of a preexisting injury in Hopkins, the Commission noted that petitioner was in good health prior to the fall, he had no restrictions prior to his fall, and following his fall he suffered a marked decrease in his health and ability to function at work.

The Arbitrator finds that Petitioner's right shoulder injury is causally connected to his repetitive overhead work activities with Respondent. Specifically, the Arbitrator finds that Petitioner suffered a rotator cuff tear as a result of his work activities that necessitated surgical repair. In addition, the Arbitrator finds that Petitioner's left shoulder injury is causally connected to his repetitive overhead work activities with Respondent. Specifically, the Arbitrator finds that Petitioner suffered a partial rotator cuff tear as a result of his work activities that necessitated surgical repair.

Petitioner testified that he began to experience left shoulder pain in December of 2020 while working for U.S. Fire Protection installing pipe overhead. This was confirmed by the medical records submitted into evidence. Dr. Izquierdo confirmed that Petitioner's work activities as a sprinkler fitter contributed to cause his bilateral shoulder conditions. Respondent's §12 examiner, Dr. Levin was not provided relevant materials and could not comment on Petitioner's work activities nor whether overhead lifting was a factor that contributed to the Petitioner's shoulder pain. The Arbitrator finds the opinions of Dr. Izquierdo more credible than the opinions of Dr. Levin. Dr. Levin acknowledged offering an opinion on causal connection without reviewing a job description outlining the repetitive nature of Petitioner's work. In addition, Dr. Levin engaged in circular logic to suggest that because all sprinkler fitters do not develop repetitive injuries, that somehow Petitioner could not have developed a rotator cuff tear due to his heavy repetitive work activities. The Arbitrator does not adopt this line of reasoning, and believes that the documents and information not provided to the Respondent's doctor did in fact impair his ability to assess the Petitioner accurately.

The Arbitrator further finds Petitioner's testimony to be credible. Petitioner's testimony is consistent with the medical records submitted into evidence. There are contradictions, but these are based on Dr. Levin's testimony and the Arbitrator is not relying on this testimony.

In this case, the *Sprinkler Fitter Job Elements* confirmed the repetitive, heavy duty, overhead nature of the work activities described by Petitioner. The Arbitrator notes that Respondent declined to offer testimony from Petitioner's co-workers or supervisors to refute Petitioner's testimony of his job activities or physical condition in December, 2020. It is well settled that the failure of a party to produce testimony or evidence within its control creates a presumption that the evidence, if produced, would be adverse or unfavorable. Reo Movers v. Industrial Commission, 226 Ill.App.3d 216, 589 N.E.2d 704, 168 Ill.Dec. 304, (1st Dist.), Stypula v. City of Chicago, 03 IIC 833.

With regard to repetitive overhead work activities causing shoulder injuries, the Arbitrator notes the Commission has found causal connection between various repetitive overhead work activities and shoulder injuries.

In Stout v. Gerresheimer Glass, 20 IWCC 0056, petitioner was a millwright who developed shoulder problems due to heavy overhead work. In finding causal connection between Petitioner's repetitive overhead activities and his shoulder injury, the Commission noted "[s]imply because an employee's work related injury is gradual, rather than sudden and completely disabling, should not preclude protection and benefits" under the Act. (citing Peoria County v. Industrial Commission, 115 Ill.2d 524 (1987).

In Parker v. Illinois Department of Transportation, 15 IWCC 0302, the Commission affirmed the Arbitrator's decision that petitioner's rotator cuff injury was a result of petitioner's repetitive, heavy duty, overhead work as a mechanic.

(E) Was timely notice of the accident given to Respondent?

In cases involving repetitive trauma, an employee must point to a date within the limitations period on which both the injury and its causal link to the employee's work became plainly apparent. This so-called manifestation date must come within the statute of limitations. Durand v. Industrial Com'n. 224 Ill.2d 53 (2006). There is no dispute that Petitioner filed both claims within the three year statute of limitations against Respondent.

In *Durand*, the Illinois Supreme Court indicated that the manifestation date for a repetitive trauma case can occur when the Petitioner's condition necessitated medical treatment. Id. at 74. The Court rejected the argument that Petitioner's own conclusions concerning the relationship between the symptoms and work activities determined the manifestation date, as that would result in a layperson giving expert medical testimony.

In this case the Arbitrator finds the manifestation date for Petitioner's left shoulder claim to be Petitioner's January 11, 2021 visit to Ortho Illinois. It was at that time that Petitioner was diagnosed with a left shoulder injury. It was this injury which ultimately necessitated surgical repair.

The Arbitrator finds that Petitioner gave proper notice of the claim of injury to Respondent. The day after his January 11, 2021 doctor's visit, Petitioner notified his employer's safety director in charge of worker's compensation claims of his injury and visit.

Concerning the right shoulder, the Arbitrator finds the manifestation date was the August 9, 2021 office visit with Dr. Izquierdo. Petitioner testified he notified his employer of Dr. Izquierdo's surgical recommendation of August 31, 2021 and was off work and receiving benefits September 1, 2021. Dr. Levin's §12 report reflects Petitioner notified Respondent of his right shoulder injury on August 10, 2021. (RX1, Ex. 3, P. 2).

Illinois statute requires that a claimant must provide notice of an accident "to the employer as soon as practicable, but not later than 45 days after the accident." 820 ILCS 305/6(c). Section 6(c) further holds that "[n]o defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings on arbitration or otherwise by the employee unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy." *Id*. Illinois courts have liberally construed Section 6(c), stating that "a claim is only barred if no notice whatsoever has been given," and "[i]f some notice has been given, but the notice is defective or inaccurate, then the employer must show that he has been unduly prejudiced." *Tolbert v. Ill. Workers' Compensation Commission*, 2014 IL App (4th) 130523WC (2014).

In this case, the unrebutted evidence demonstrates Petitioner notified Respondent of his left and right shoulder injuries within 45 days of manifestation.

(J) Were the medical services that were provided to Petitioner reasonable and necessary?

Petitioner submitted the following medical expenses without objection concerning reasonableness and necessity:

Exhibit 4 – Ortho Illinois - $41,926.50
Exhibit 6 – Algonquin Road Surgery Center - $44,985.00
Exhibit 9 – Athletico Physical Therapy - $21,934.00

Based on the above, the Arbitrator finds Respondent responsible for medical expenses by the above providers pursuant to the fee schedule.

(L) What amount of compensation is due for Temporary Total Disability?

The Arbitrator finds that Respondent is responsible for temporary total disability benefits from the date of Petitioner's first shoulder surgery on January 14, 2022 to the date of hearing, October 26, 2022, in the amount of $1,453.33 per week for a total of 41 weeks.

(M) Should penalties or fees be imposed upon Respondent?

Medical Expenses

Section 19(k) of the Illinois Workers' Compensation Act states that "(i)n cases where there has been any unreasonable or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award."

Section 19(l) of the Act state that "(i)f the employee has made written demand for payment of benefits under §8(a) or §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 §8(a) or §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 §8(a) or §8(b) have seen so withheld or refused, not to exceed $10,000.00. A delay in payment of 14 days or more shall create a rebuttable resumption of unreasonable delay."

Section 16 of the Act states that "(w)henever the Commission shall find that the employer, his or her agent, service company or insurance carrier has been guilty of delay or unfairness towards an employee in the adjustment, settlement or payment of benefits due such

employee within the purview of paragraph (c) of §4 of this Act; or has been guilty or unreasonable or vexatious delay, intentional under-payment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of §19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his or her insurance carrier."

Respondent purports to rely on the opinions of Dr. Levin to deny causal connection, however, conflicting medical opinions does not present an absolute defense to the imposition of penalties. "The test is not whether there is some conflict in medical opinions; rather, it is whether the employer's conduct in relying on the medical opinion to contest liability, is reasonable under all circumstances presented." Continental Distributing v. Industrial Commission, 98 Ill.2d 407 (1983).

It is well-settled that an employer's good faith basis for disputing a claim will not subject it to an award of penalties and fees. The reliance on the opinions of a qualified §12 examiner may demonstrate a good faith denial of benefits. However, in order to rely on a §12 examiner, Respondent may not fail to provide relevant materials and simply accept a demonstratively flawed opinion. Here, Dr. Levin was asked to opine on causal connection, and was not provided with a description of the repetitive work activities of Petitioner nor a complete set of medical records. Furthermore, he was asked to opine concerning specific dates of accidents when Petitioner was not claiming a specific date of injury. Respondent never requested Dr. Levin provide an opinion concerning repetitive claims despite the fact Petitioner stated he did not have a specific date of injury.

In light of this, it cannot be said that Respondent had a good faith basis for denying

Petitioner's claims based on the opinions of Dr. Levin. Regarding the assessment of penalties and fees, the respondent bears the burden to show that it had a reasonable belief that the denial of benefits was justifiable. Gallegos v. Rollex Corp., 03 IIC 0173. The employer must show that the facts in its possession would lead a reasonable person to believe the employee is not entitled to prevail under the Act. Cook County v. Indus. Comm'n, 160 Ill.App.3d 820 (1st Dist. 1987).

Therefore, the Arbitrator finds the failure to provide medical benefits under the Act to be vexatious and unreasonable and orders penalties pursuant to §19(k) of the Act in the amount of $54,422.75 (50% of outstanding medical of $108,845.50).

In addition, a delay in payment of 14 days or more creates a presumption of unreasonable delay. 820 ILCS 305/19(l). In this case, Respondent has not met its burden to show that the delay in paying the outstanding charges was reasonable. Pursuant to §19(l), the Arbitrator further awards penalties in the amount of $10,000.00. Finally, the Arbitrator awards attorneys' fees pursuant to §16 of the Act in the amount of $21,769.10.

Temporary Total Disability

Respondent did not dispute the period of temporary total disability, only liability. Therefore, the Arbitrator finds the failure to provide temporary total disability benefits under the Act to be vexatious and unreasonable and orders penalties pursuant to §19(k) of the Act in the amount of $29,793.27 (50% of outstanding benefits of $59,586.53). Finally, the Arbitrator awards attorneys' fees pursuant to §16 of the Act in the amount of $11,917.31.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC013504
Case Name	Gordon Ritter v. U.S. Fire Protection, Inc.
Consolidated Cases	22WC005721;
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0492
Number of Pages of Decision	28
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Kevin Veugeler
Respondent Attorney	Jason Allain, Robert Smith

DATE FILED: 11/20/2023

/s/ Deborah Simpson, 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: Down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GORDON RITTER,

Petitioner,

vs. NO: 22 WC 13504

US FIRE PROTECTION, 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 accident, causal connection, notice, temporary total disability benefits, medical expenses, and the imposition of penalties and attorney fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as specified 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).

Initially, we note this claim was consolidated and arbitrated with 22 WC 5721. The instant claim was for alleged injury to Petitioner's right shoulder while 22 WC 13504 alleged injury to his left shoulder. In the instant claim the Arbitrator awarded Petitioner 16&6/7 weeks of temporary total disability benefits from July 1, 2022 through October 26, 2022, as well $12,249.50 in 19(k) penalties, and $4,889.80 in Section 16 fees. The Arbitrator did not award medical in 22 WC 13504. In 22 WC 5721, the Arbitrator awarded Petitioner 24&1/7 weeks of temporary total disability benefits from January 14, 2022 through July 1, 2022, $108,845.50 in medical expenses, $71,966.52 in 19(k) penalties, $10,000.00 in Section 19(l) penalties, and $28,786.61 in Section 16 fees.

Findings of Fact - Testimony

Petitioner testified he worked as a sprinkler fitter for 35 years and installs fire protection. He worked for Respondent for the past five years. He was a working foreman for Respondent, which means he both installed sprinklers and was in charge of the men and materials on the jobsite. He installs overhead systems and works mostly in commercial buildings. He worked a lot on ladders and used various tools. Material/equipment can weigh anywhere from 25 pounds up to 200 to 300 pounds. He had to take pipe from the ground and either put it on a lift or put it on his shoulder and walk up a ladder.

Petitioner was shown Petitioner's exhibit 8, an outline of job duties of "sprinkler fitter elements" with Respondent. He was also shown a photo identified as Petitioner's exhibit 1, which he explained was a fire pump. One that size would weigh "maybe 300, 400 pounds." He would bring it to the site on a jack of some sort, but then have to physically install it. Pipes were installed between fire pumps on different floors. There could be hundreds of feet of pipe installed in a ceiling. He would have to install them overhead. Sometimes he worked alone and sometimes with a partner. Often he has to use both hands to lift two pipe wrenches over head to tighten bolts, "so it's repetitive. Everything is overhead." The wrenches can weigh eight-12 pounds. However, he used mostly aluminum wrenches which are lighter. He worked overtime when necessary to meet deadlines.

Petitioner testified that in the end of December, early January, he noticed that his left arm/shoulder were giving him problems. He noticed it while installing pipe overhead. He never had any such problems with his shoulder. He sought medical treatment on January 11, 2021 from Dr. Izquierdo, who recommended an MRI. He discussed his visit with the doctor with Dave Curren, the safety director and that he recommended the MRI. Mr. Curren asked for the results of the test. It was taken on April 29, 2021 and it showed "a near complete tear of" the rotator cuff. "Dave knew" about the MRI results. Dr. Izquierdo recommended rotator cuff repair surgery.

After a May 10, 2021 visit, Petitioner began having issues with his right shoulder, because he was doing a lot more work with right arm to compensate for the left. He returned to Dr. Izquierdo who ordered an MRI of the right shoulder rotator cuff. Petitioner had an IME with Dr. Levin on August 5, 2021, at which time he reported issues with both his shoulders. He then had the MRI on August 17, 2021, which showed rotator cuff/tendon tears. Dr. Izquierdo again recommended rotator cuff repair surgery.

Petitioner informed Respondent about the recommendation for his right shoulder surgery. He was off work in September through December, and Respondent paid him his normal salary. He had the surgery on January 14, 2022. Petitioner agreed that in physical therapy on March 25, 2022, he reported his right shoulder was getting better but he had pain/weakness in the left shoulder. Dr. Izquierdo continued physical therapy for the right shoulder and again recommended rotator cuff repair surgery for the left shoulder.

On July 1, 2021, Dr. Izquierdo performed left subacromial decompression and rotator cuff repair. He last saw Dr. Izquierdo on September 21, 2022 at which time he continued physical therapy. He had his last physical therapy visit on the day before the hearing and continued physical therapy was recommended.

Petitioner testified that currently his right shoulder was "not too bad." He watches what he does and Dr. Izquierdo told him to stop activities he cannot do. The left shoulder still had pain. His limitations "as far as movement was getting better, but it's not there. That's why he wants [him] to continue with" physical therapy. Dr. Izquierdo had kept him off work. Petitioner has not received any TTD or salary since his January surgery. The medical bills were sent through his group insurance.

On cross examination, Petitioner agreed he worked for multiple companies besides Respondent. He had a workers' compensation injury to his right shoulder in 2017. He also treated with Dr. Izquierdo for that injury and had surgery after that accident as well. That case was settled in 2019. He had other workers' compensation claims from as far back as the 1980s. He agreed that Dr. Albright was his primary care physician before his retirement. Petitioner was prescribed medicine for arthritis, which he took for years. At one point, he was taking Vioxx, which was discontinued for about 25 years, which Petitioner described as "a shame." Petitioner acknowledged that he had osteoarthritis for at least 20 years. Dr. Albright noted his prior right shoulder surgery and Petitioner acknowledged that he had hip replacement surgery and was seeing Dr. Daniels for his right knee.

Petitioner agreed that he was aware of the workers' compensation reporting requirements. As foreman, coworkers tell him about injuries/accidents. He was not aware of a company called CareOnSite. Petitioner's responsibility was to report his injury to Dave Curren. He agreed that he told Dave that he was getting physical therapy at Athletico, that he reported to physical therapy that he felt severe pain in his anterior left shoulder lifting pipe overhead, that he was asked to continue working if possible, that he injured his right shoulder within a month of continuing work, and that he could no longer work. He continued working from January to September because the superintendent asked him to continue. He agreed that the medical records indicate he started having right shoulder pain in around July of 2021.

Petitioner agreed that he saw Dr. Levin twice. The MRI of the right shoulder was taken on August 17, 2021, about two weeks after the first IME. On the first exam, Dr. Levin only examined his left shoulder, but he also performed some maneuvers on his right shoulder at both examinations. As far as he knew group insurance paid all the medical bills associated with the right shoulder condition. He still worked for Respondent.

Petitioner testified that if a supervisee reports an injury to him, he would either call Dave Curren or the employee would. If one could not get a hold of Mr. Curren there is an API number to call. As far as he knew, "it's always been Dave Curren."

Petitioner acknowledged that he never put 300-pound equipment "fully up to the shoulder." He usually had assistance when moving 300-pound equipment. Sometimes he also had assistance lifting 21-foot pipes. He would not carry the 21-foot pipes up ladders; it would be brought up with a jack. Jacks were also used to move fire pumps. The drill used to cut through concrete, *etc*. could weigh between 25 and 30 pounds. He might have told Dave that he had to carry pipe weighing between 125 and 250 pounds up ladders, "but he should know that."

Petitioner reiterated that his right shoulder was feeling pretty good for the most part and he was still in physical therapy for the left shoulder. Dr. Izquierdo told him normally physical therapy took anywhere between six to eight months, not four months.

On redirect examination, Petitioner testified he returned to work in 2017. Dr. Izquierdo performed the surgery and released him to work at full duty. After his return to work after that injury, he did not have any additional follow up or physical therapy. He had no problems with his right shoulder until around July of 2021. API is a parent company of Respondent "and a whole bunch of other companies." He had more than one conversation with Dave Curren about his shoulders. He did not initially inform Dave about the surgery because it was not yet scheduled. He told him about the surgery after it was scheduled in May.

Petitioner agreed that he saw Dr. Izquierdo on August 9th, four days after he saw Dr. Levin, and told him his right shoulder had been bothering him at work since July. His shoulder was bothering him in August of 2021. If Dr. Levin asked him about his right shoulder pain, he would have reported it.

On re-cross examination, Petitioner reiterated that when he saw Dr. Levin in August of 2021 it was for his left shoulder and in October of 20/21 it was for his right shoulder.

Findings of Fact – Medical Records

An MRA of the left shoulder taken on December 22, 2006 for arm injury/decreased ROM was normal.

On January 5, 2009, Petitioner presented to Dr. Albright, his primary care physician, and reported that the 200 mg of Celebrex did not seem to do the job and asked for it to be increased to 400 mg. Dr. Albright obliged. In January of 2015, Petitioner reported his osteoarthritis was well controlled with the Celebrex. His back has been stable for which he used Soma occasionally. Dr. Albright's diagnoses were osteoarthritis and chronic back pain. Almost seven years later, Petitioner reported to Dr. Albright that his joint/body aches were getting worse and worse. His arthritis was getting to the point where he was having difficulty doing his job as pipe fitter. Dr. Albright started Medrol Dosepak. On April 17, 2017, Dr. Albright cleared Petitioner for right shoulder arthroscopic surgery scheduled for May 5, 2017.

In late August of 2019, Petitioner presented to Dr. Daniels for pain in the medial aspect of the right knee for two months. He had surgery on the right knee in the 70s. X-rays showed severe medial compartment osteoarthritis in the right knee. An MRI was ordered. An MRI taken two weeks later confirmed severe medical compartment osteoarthritis, "with essentially nonexistent markedly macerated meniscus and bone-on-bone appearance." Dr. Daniels would schedule knee arthroplasty surgery.

On May 5, 2020, Dr. Albright noted that Petitioner was still taking Celebrex and Effexor which helped his chronic pain. He was seeing Dr. Daniels for his right knee and Dr. Izquierdo for his left shoulder. Dr. Albright noted he had prior surgery on his right shoulder. Osteoarthritis and obesity were Dr. Albright's only diagnoses.

On July 2, 2020, Petitioner returned to Dr. Daniels for bilateral hip pain for a month, left worse than right, with gradual onset, and no known injury. X-rays showed moderate-to-severe bilateral hip osteoarthritis with joint space narrowing and spur formation. On August 10, 2020, Dr. Daniels performed total left hip replacement.

On January 11, 2021, Petitioner presented to Ms. Frakes, PA-C, for left shoulder pain since December of 2020, with gradual onset and no known injury. The pain ranged between 3-6/10. X-rays of the left shoulder showed type II acromion and changes consistent with AC joint arthritis and mild glenohumeral arthritis. Ms. Frakes diagnosed left shoulder bursitis and ordered an MRI.

On May 10, 2021, Petitioner presented to Dr. Izquierdo reporting that his left shoulder was "doing the same." The pain ranged between 3-10/10 with associated popping/clicking. He was working full duty and taking Norco *prn*. Dr. Izquierdo noted the MRI showed a near complete full-thickness, partial width focal tear at the anterior edge of the supraspinatus tendon, severe tendinosis of the supraspinatus tendon, and various other pathology. Dr. Izquierdo recommended left-shoulder arthroscopic rotator cuff repair, subacromial decompression with anterior acromioplasty, and biceps tenodesis.

On August 9, 2021, Petitioner presented to Ms. Rivers, PA-C, for intermittent right shoulder pain (4-8/10) which started a few weeks previously, without trauma. He had a cortisone injection in 2017 without improvement, but had improvement with right-shoulder arthroscopic surgery to repair small-to-medium, one-tendon tear of the supraspinatus tendon, biceps tenodesis, subacromial decompression with anterior acromioplasty performed in May 2017 by Dr. Izquierdo. Petitioner was working full time. Dr. Izquierdo diagnosed bursitis on the right shoulder, prescribed Medrol Dosepak, and ordered an MRI.

About three weeks later, Petitioner presented to Dr. Izquierdo reporting that his right shoulder was doing the same with 3-6/10 pain. He was working full-time without restrictions. He worked as a foreman and alleged that he had an unwitnessed workers' compensation injury. He was able to work the rest of the day and reported the injury 30 days after it had occurred. Dr. Izquierdo noted the MRI showed pathology which appears to have been similar to that found in

the left shoulder. He believed the acute rotator cuff injury was caused by the reported accident. Dr. Izquierdo diagnosed rotator cuff tear and recommended arthroscopic rotator cuff repair, debridement, possible patch augmentation, and possible revision rotator cuff repair.

On January 14, 2022, Dr. Izquierdo performed right shoulder arthroscopic rotator cuff repair and extensive debridement for small-to-medium subscapularis tear, acromial bursitis, adhesions in the subacromial space, labral tearing, synovitis of the glenohumeral joint, and Grade 2 changes of humeral head/glenoid.

On April 7, 2022, Petitioner returned to Dr. Izquierdo, 12 weeks after right shoulder surgery, reporting that his right shoulder was improving but his left shoulder felt about the same. An MRI taken on March 15th redemonstrated severe tendinosis of the supraspinatus tendon/bicipital tenosynovitis/mild joint thinning of the articular cartilage, a new punctate interstitial split tear within the infraspinatus tendon, interval increase in the subscapularis tendon tear, and stable moderate-to-severe AC joint arthropathy. Dr. Izquierdo reviewed the MRI and indicated the subscapularis/supraspinatus tears had not retracted. Dr. Izquierdo continued physical therapy and noted that Petitioner may consider surgical intervention for the left shoulder rotator cuff tear.

On July 1, 2022, Dr. Izquierdo performed left shoulder arthroscopic biceps tenodesis, extensive debridement of the glenohumeral joint, and subacromial decompression for tear of the subscapularis/supraspinatus, biceps tendinosis/partial thickness tearing, synovitis of the glenohumeral joint, labral tearing, Grade 1 changes of humeral head/glenoid, and subacromial impingement.

Findings of Fact – Doctor Depositions

Dr. Izquierdo testified by deposition on August 11, 2022, that he was board-certified in orthopedic surgery and sports medicine. 90% of his practice involves treatment of shoulders. He previously treated Petitioner and performed right rotator cuff repair in May of 2017. Thereafter, he was released to work full duty as a sprinkler fitter in January of 2018. He returned to Dr. Izquierdo on January 11, 2021 regarding his left shoulder. Petitioner then returned to him on August 9, 2021 complaining again about his right shoulder, which he reported began in December of 2020, was of gradual onset, and for which there was no specific injury. He had not been treated previously for his left shoulder. Petitioner attributed it to overuse.

Dr. Izquierdo testified that x-rays showed arthritis, but the arthritis was not causing his impingement or issues he was having. An MRI of the left shoulder was taken on April 29, 2021. Initially, the MRI showed no retraction of what seemed to be an acute rotator cuff tear. The pathology seen on the MRI was consistent with Petitioner's symptoms. No significant arthritis was seen in the left AC joint. Petitioner still had right shoulder pain/symptoms.

An MRI of the right shoulder was taken on August 31, 2021, which showed that the previous repairs at the superior aspect of the rotator cuff (supraspinatus) appeared to be intact and there was a subscapularis tear. Dr. Izquierdo planned on repairing the subscapularis. Right rotator cuff tear surgery was performed on January 14, 2022. On May 19, 2022, Petitioner reported his left shoulder was worsening, and he was still complaining about his right shoulder. On July 1, 2022, he performed left shoulder repair surgery. He had some fraying but no full-thickness tear of the left rotator cuff.

Dr. Izquierdo opined that Petitioner's job duties as sprinkler fitter caused or contributed to the pathology he noted in the MRIs and which required surgeries. That would relate to both the rotator cuff and biceps pathology. Even if he had a pre-existing rotator cuff tear, his overhead activities would have certainly exacerbated it. Because there was no substantial atrophy or retraction, it was unlikely to be a chronic tear. He did not report left shoulder symptoms until December of 2020. He had not released Petitioner to full duty and he believed it unlikely that Petitioner could return to work as a sprinkler fitter.

On cross examination, Dr. Izquierdo agreed that the last time he examined Petitioner's right shoulder was probably in May of 2022. He agreed that essentially, Petitioner's condition of ill-being of his left shoulder was bursitis. He estimated that 12 to 15% of his practice involved workers compensation patients. He performed about 600 shoulder surgeries annually. Dr. Izquierdo agreed that his treatment notes do not indicate that the left shoulder injury was work-related. He did not recall Petitioner reporting any mechanism of injury for his right shoulder condition. He saw no reason why Petitioner could not go back to work.

Dr. Mark Levin testified by deposition that he was a general board-certified orthopedic surgeon with additional training in sports medicine. Currently, most of his work involved shoulders/knees. He estimated he performed 200 to 300 surgeries a year. He restricts his IMEs to no more than 20% of his practice.

Dr. Levin examined Petitioner on two occasions, the first time on August 5, 2021, and he reviewed his medical records. Petitioner reported he worked as a sprinkler fitter. In February of 2021 he began having left-shoulder pain that he attributed to repetitive, heavy, overhead work. He did not report any precipitating event. He had not had any treatment for his left shoulder, but he did have a work-related right shoulder surgery five years previously. After a few weeks he went to see Dr. Izquierdo in May of 2021. After an MRI, Dr. Izquierdo recommended left-shoulder arthroscopic surgery.

Petitioner reported pain in the biceps area of the left shoulder. The pain ranged between 3-10/10. His history was significant for taking Celebrex for multiple joint arthritis, and he had left hip replacement in 2020, due to arthritis. On examination, Petitioner exhibited changes in the biceps tendon consistent with tendinitis.

Dr. Levin reviewed the MRI from April 29, 2021 which showed the tendinitis and marked AC joint arthritis, or "chronic hypertrophy enlargement which would cause subacromial impingement." Dr. Levin diagnosed chronic left-shoulder degenerative disc disease over the AC joint with chronic subacromial impingement. He was symptomatic prior to February 1, 2021, noting the MRI was ordered on January 11, 2021. He noted that the condition was chronic and not acute because the shape of the AC joint was not an acute change, there was no acute bony edema, and the change in the rotator cuff was consistent with an ongoing impingement from this bony process. Dr. Levin testified that Petitioner's subjective reports were inconsistent with the medical records/findings. There were references to shoulder pain, injections, and of no precipitating event.

Petitioner's condition was very common. Treatment would normally include cortisone injections and possibly physical therapy. If the patient failed conservative treatment, then one can do surgery. However, he could not "testify for any surgical intervention for this gentleman from an alleged injury of" February 1, 2021. He was able to work full duty in the past and there was reason why he could not continue to work in that capacity.

Dr. Levin saw Petitioner again on October 11, 2021 in which he examined Petitioner's right shoulder. Petitioner reported that since the first IME he developed a new problem in his right shoulder that developed on August 10, 2021, after he carried a pipe up a ladder. Petitioner indicated he "ordered an MRI by himself" and starting treating again with Dr. Izquierdo. After seeing the MRI, Dr. Izquierdo recommended right shoulder surgery.

Petitioner acknowledged prior rotator cuff repair surgery to his right shoulder four or five years previously but he was fully functional with the shoulder prior to the specific event on August 10, 2021. The MRI showed postop changes from previous rotator cuff surgery, some long-standing degenerative changes which were chronic based on the "fatty infiltration, the atrophy of the muscle." The condition was not from any acute injury. His report of an acute onset after a work injury on August 10, 2021 was inconsistent with his medical records and MRI findings.

On cross examination, Dr. Levin agreed that on August 5, 2021 he examined Petitioner's right shoulder and found no pain/tenderness. At that time, he reviewed the MRI of the left shoulder, not the right shoulder. It showed signal changes consistent with tendinitis, but no full-thickness rotator cuff tear. He reviewed all the material that had been provided him, and did not and probably could not, have sought additional information. He was not provided a description of the job duties of sprinkler fitter, but he was familiar with the job and treated a lot of such patients. He understands that it requires a lot of overhead work. He has not seen any records past October 11, 2021. Dr. Levin noted that the majority of sprinkler fitters do not develop symptomatic degenerative arthritis. He acknowledged that he performed IMEs for Respondent previously.

Petitioner submitted into evidence a description of the job duties of sprinkler fitter. A sprinkler fitter spends about 30% of his time walking/standing and 70% working on ladders and scaffolds. "A Sprinkler Fitter must be able to lift tools and materials that weigh in excess of 100

pounds. That amount of weight is frequently picked up from the ground and lifted and held above their head. When installing pipe, they bend over, pick up one piece (average length 12 feet), hold it overhead, align the thread with the fitting firmly grasping and rotating until hand tight." The exhibit included photos of equipment.

Conclusions of Law

The Arbitrator found that Petitioner sustained his burden of proving a causal connection between his repetitive overhead work activities and his condition of ill-being of his right shoulder and left shoulder bilaterally. She found Petitioner's testimony credible, consistent with the medical records, and consistent with the description of the job duties of sprinkler fitter. She also found the opinion testimony of Dr. Izquierdo more persuasive than that of Dr. Levin. Specifically, she noted that Dr. Levin offered a causation opinion without benefit of the description of Petitioner's job activities and she found that Dr. Levin used "circular logic" in specifying that not all sprinkler fitters suffer rotator cuff tears.

Respondent argues the Arbitrator erred in finding Petitioner sustained his burden of proving a compensable accident and causation to the conditions of ill-being of his shoulders bilaterally. It questions the Arbitrator's determination of the credibility of Petitioner's testimony, disputing that it was consistent with the medical records. Respondent also argues that the Arbitrator erred in finding Dr. Izquierdo more persuasive than Dr. Levin because the MRI of the right shoulder, taken less than two weeks after the alleged manifestation date showed Stage II fatty infiltration, suggesting the condition of ill-being was long-standing.

The Commission affirms the Decision of the Arbitrator on the issue of causal connection. It's clear that Petitioner had multi-joint arthritis that affected his shoulders. Nevertheless, the Commission agrees with the analysis of the Arbitrator that Petitioner's work as a sprinkler fitter constituted repetitive, heavy, overhead activity which at least contributed to, and/or aggravated, the condition of ill-being of his shoulders bilaterally. In addition, Petitioner was able to work at his heavy, largely overhead job before his condition worsened so that he was no longer able to perform his job, which helps establish causal connection under the chain of event analysis.

On the issue of temporary total disability benefits, the Arbitrator awarded Petitioner 16&6/7 weeks of temporary total disability benefits from July 1, 2022 through October 26, 2022 while in the companion claim, the Arbitrator awarded Petitioner 16&6/7 weeks of temporary total disability benefits from January 14, 2022 through July 1, 2022. The Commission notes that the Arbitrator erroneously applied the incorrect TTD award for the injury in each claim, and compensated the same date, July 1, 2022, twice. Therefore, the Commission modifies the Arbitrator's award of temporary total disability benefits to be 24 weeks for the period of January 14, 2022 through June 30, 2022.

On the issue of notice, the Arbitrator found that Petitioner proved proper notice because he reported the injuries within the statutory 45 day period. Respondent preserved the issue but does

not argue it in its brief. The Commission affirms the Decision of the Arbitrator on the issue of notice.

On the issue of penalties/fees, the Arbitrator awarded Petitioner $12,249.50 in 19(k) penalties, and $4,889.80 in Section 16 fees. She based that award on her finding that Respondent did not have a good faith defense to the claim, again specifying that it asked Dr. Levin to opine about causation without the benefit of a description of Petitioner's job activities.

The Commission vacates the award of penalties and fees. While the Commission concludes that Petitioner's heavy, repetitive, overhead work activities aggravated/accelerated Petitioner's underlying advanced osteoarthritis in his shoulders bilaterally, we are not convinced that Respondent acted in bad faith in defending the claim. It is clear that Petitioner had advanced arthritis in multiple joints throughout his body. In addition, while the Arbitrator was within her prerogative to find Dr. Levin's opinions unpersuasive because he did not see a description of Petitioner's job activities, that does not necessarily mean that his opinions are totally unreasonable. It would have been advantageous for him to see the job description and that may have made his opinion more persuasive. However, he based his opinion, at least regarding the right shoulder, on Petitioner's report that he injured the shoulder in an acute accident carrying a pipe up a ladder on a certain date. He made a fairly reasonable conclusion that the fatty infiltration/atrophy proved to him that the injury was long-standing and not of recent origin. While that is a valid defense to a claim of acute trauma, it may have less relevance regarding repetitive trauma. Therefore, the Commission finds that Respondent did not act in an unreasonable and vexatious manner in defending the claim and vacates the award of penalties and fees.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 23, 2023, is hereby modified as specified above and otherwise is affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner total disability benefits of $1,453.33 per week for 24 weeks, from January 14, 2022 through June 30, 2022, as provided by §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION, that 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.

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 $35,000.00. 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.

November 20, 2023

O-9/20/23

DLS/dw

046

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC013504
Case Name	Gordon Ritter v. U.S. Fire Protection, Inc.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Raychel Wesley, Arbitrator

Petitioner Attorney	Kevin Veugeler
Respondent Attorney	Robert Smith, Jason Allain

DATE FILED: 1/23/2023

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

/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)
x None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Gordon Ritter
Employee/Petitioner
v.
U.S. Fire Protection, Inc.
Employer/Respondent

Case # **22** WC **13504**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Raychel Wesley**, Arbitrator of the Commission, in the city of **Chicago**, on October 26, 2022. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **August 9, 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 $**113,360.00**; the average weekly wage was $**2,180.00**.

On the date of accident, Petitioner was **62** years of age, single, with no 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**.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of **$1,453.33**/week for **16 6/7** weeks, commencing **7/1/2022 through 10/26/2022** as provided in Section 8(b) of the Act.

Penalties

Respondent shall pay to Petitioner penalties of $**4,899.80**, as provided in Section 16 of the Act; and $**12,249.50**, as provided in Section 19(k) 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/ Raychel A. Wesley
Signature of Arbitrator

JANUARY 23, 2023

Ritter v U S Fire Protection, Inc.

MEMORANDUM OF DECISION OF ARBITRATOR

Findings of Fact

The Petitioner testified that he worked as a sprinkler fitter for 35 years. (Tr. P. 14). Sprinkler Fitters install overhead fire protections systems, using wrenches and drills to install pipes, valves, and fire pumps. (Tr. P. 15-17). Photographs received into evidence depict the size and type of materials used by a sprinkler fitter. (Tr. P. 18-20, 26, 28-33, PX8).

Petitioner explained the process of installing sprinkler systems. (Tr. P. 16-18). Pipe weighing from 30 to 200 lbs. is brought up to the ceiling using man lifts or put on the shoulder and walked up a ladder. (Tr. P. 17, 23). The pipe is then lifted up to hangers attached to the ceiling using an overhead Hilti drill. (Tr. P. 24-25). Two pipe wrenches are used to tighten the pipe overhead. (Tr. P. 31-32). This process is repeated 80 to 100 times a day. (Tr. P. 25-26). A job description confirmed Petitioner's testimony concerning his work duties. (Tr. P. 18, PX8).

According to *Sprinkler Fitter Job Elements*, when installing pipe, sprinkler fitters will bend over and pick up a piece of pipe, average length of twelve feet, and hold it overhead while attaching it to a fitting. (PX8). A hanger is attached to the ceiling using a Hilti drill and a pipe wrench is used to tighten the pipe. (PX8). This process is repeated 80-125 times in an average workday. (PX8).

Petitioner had been employed as a sprinkler fitter foreman with U.S. Fire Protection for the last five years of his 35 year career. (Tr. P. 18). Petitioner has additional supervisory duties as a foreman in addition to his installation duties. (Tr. P. 14, 35).

Petitioner testified that in December of 2020 and early January 2021, he began to experience pain in his left shoulder while working installing pipe overhead. (Tr. P. 35-36).

Petitioner testified that prior to December of 2020, he did not have any issues or problems with his left shoulder while working for Respondent. (Tr. P. 37).

Petitioner initially sought care with Ortho Illinois on January 11, 2021. (Tr. P. 37, PX1, PX7, P. 8-9). It was noted Petitioner complained of ongoing pain in the left shoulder since December 2020 with gradual onset and no known injury. (PX1, PX7, P. 36-37). An examination was positive for impingement. (PX1). The diagnosis was left shoulder bursitis, and Petitioner was prescribed an MRI and instructed to return. (Tr. P. 38, PX1).

Petitioner testified that he informed U.S. Fire Protection's Safety Director, Dave Curran, that he was experiencing pain in his left shoulder the following day, on January 12, 2021. (Tr. P. 38).

An April 29, 2021 MRI of the left shoulder revealed a near complete full thickness tear of the supraspinatus tendon, partial tear of the sub scapularis tendon and a split tear of the biceps tendon. (Tr. P. 39, PX1, PX7, P. 11). Petitioner notified his employer of the results of the MRI. (Tr. P. 39).

Petitioner returned to Dr. Rolando Izquierdo of Ortho Illinois as instructed on May 10, 2021. (Tr. P. 39, PX3, PX7, P. 12). At that time, Dr. Izquierdo noted the results of the MRI and diagnosed a left rotator cuff tear and recommended surgery. (Tr. P. 39, PX1, PX7, P. 12).

Petitioner testified that he continued to work full duty for Respondent. (Tr. P. 40). After May 10, 2021 he began to notice problems with his right arm while working due to compensating for the left arm. (Tr. P. 40). As a result, Petitioner returned to Dr. Izquierdo on August 9, 2021. (Tr. P. 40, PX1, PX7, P. 13). The office notes indicate the Petitioner reported right shoulder pain overhead that started a few weeks ago without trauma that Petitioner attributed to overcompensating for the left arm. (PX1, PX7, P. 13-14). Dr. Izquierdo diagnosed

right shoulder bursitis, and prescribed a Medrol Dose Pak, an MRI and instructed Petitioner to return to the clinic. (Tr. P. 40, PX1, PX7, P. 14).

Petitioner underwent a right shoulder MRI on August 17, 2021 that demonstrated a rotator cuff tear and bicep tendon tear. (Tr. P. 41, PX1, PX7, P. 15). On August 31, 2021, Dr. Izquierdo noted Petitioner's right shoulder pain started a few weeks earlier at work. (PX1, PX7, P. 15). Dr. Izquierdo reviewed the results of the MRI and diagnosed an acute right rotator cuff tear and recommended surgical repair and light duty, no lifting greater than 5 lbs. and no overhead work until surgery. (Tr. P. 41, PX1, PX7, P. 16).

Petitioner testified he was off work beginning September 2021 and was paid his full salary by his employer in September, October, November, and December. (Tr. P. 42). On December 20, 2021, Petitioner was cleared for surgery by his family physician. (Tr. P. 42, PX2).

On January 14, 2022, Petitioner underwent surgical repair of his right shoulder. (Tr. P. 42, PX1, PX7, P. 16). Petitioner returned for post-surgical follow up on January 17, 2022 complaining of right leg pain. (PX1). Petitioner was prescribed a doppler exam to rule out a DVT, medication, and instructed to begin physical therapy and remain off work. (Tr. P. 43, PX1). On February 28, 2022, Petitioner returned to Dr. Izquierdo and was instructed to continue therapy. (PX1).

A March 25, 2022 physical therapy note indicates Petitioner was complaining of increased left shoulder issues. (Tr. P. 43-44, PX5).

On July 1, 2022, Dr. Izquierdo performed a left subacromial decompression and debridement of the rotator cuff. (Tr. P. 44, PX1, PX7, P. 18). Petitioner returned for post-surgical follow up on July 5, 2022 and was prescribed medication, instructed to continue wearing

a sling, begin physical therapy, remain off work and to return to the clinic. (Tr. P. 44-45, PX1, PX7, P. 20).

Petitioner testified that since the surgery, he has remained in prescribed physical therapy and has remained off work pursuant to Dr. Izquierdo's recommendation. (Tr. P. 45, PX1). At the time of trial, Petitioner reported his right shoulder is not too bad and he performs activities as tolerated. (Tr. P. 45-46). Petitioner is still in physical therapy for the left shoulder and is limited with pain and movement. (Tr. P. 46). Petitioner remains off work pursuant to Dr. Izquierdo's orders, however, Respondent has not paid temporary total disability since January, 2022. (Tr. P. 46).

Petitioner presented the testimony of Dr. Izquierdo, a Board Certified Orthopedic Surgeon. (PX7, P. 4). 90% of his practice is treating patients with shoulder issues. (PX7, P. 5). He performs 600 shoulder surgeries a year. (PX7, P. 35). Dr. Izquierdo reviewed the "Sprinkler Fitter Job Element" submitted as PX8 and stated that the document accurately reflected his understanding of the work activities of Petitioner. (PX7, P. 7). Dr. Izquierdo opined that Petitioner's work activities as a sprinkler fitter caused or contributed to cause the right rotator cuff tear and need for surgery. (PX7, P. 21). Similarly, Dr. Izquierdo testified Petitioner's work activities as a sprinkler fitter caused or contributed to cause the left rotator cuff tear and need for surgery. (PX7, P. 21-22). Dr. Izquierdo testified that the tears seen at the time of surgery in the right shoulder were recent tears, and not chronic in nature. (PX7, P. 15, 22-23). Regarding the left shoulder, Dr. Izquierdo confirmed that the left shoulder issues were not related to arthritic changes, but acute in nature. (PX7, P. 10-11, 21-23). In addition, Dr. Izquierdo testified that Petitioner did not have any issues with his left shoulder prior to December 2020. (PX7, P. 23). Petitioner did have a previous rotator cuff tear in the right shoulder that was successfully

repaired by Dr. Izquierdo in May 2017 and Petitioner was able to return to work as a sprinkler fitter full duty in January of 2018. (PX7, P. 5-6).

Dr. Izquierdo also testified that Petitioner was unable to return to work in a full duty capacity after the January 14, 2022 right shoulder surgery. (PX6, P. 16-17, 18, 24-25). Dr. Izquierdo stated Petitioner's subjective complaints of pain were consistent with the objective diagnostic studies and at no time did Petitioner exhibit signs of malingering or secondary gain. (PX7, P. 12, 20-21, 23-24).

Respondent presented the evidence testimony of Dr. Mark Levin. (RX1). Dr. Levin acknowledged that if there were relevant materials that weren't provided to him, that his opinion could change. (RX1, P. 39-40). In that regard, Respondent failed to provide a job description outlining the work activities of Petitioner, the deposition of Dr. Izquierdo, or medical records past October 11, 2021. (RX1, P. 54-56). As a result, Dr. Levin was not aware of the number of times Petitioner's work activities require him to repetitively work overhead, nor could he comment on whether Petitioner's work activities could have caused his shoulder injuries. (RX1, P. 58-61). Instead, Dr. Levin testified he was not provided enough information to determine if the overhead work of a sprinkler fitter could cause degenerative changes. (RX1 P. 59-60). He did testify that not all sprinkler fitters get degenerative changes [in their shoulder]. (RX1 P. 59-60).

Dr. Levin was unaware Dr. Izquiedo ordered an MRI of the right shoulder, believing instead, that Petitioner prescribed his own MRI. (RX1, P. 28-319). Additionally, Dr. Levin was also not given the operative reports that demonstrated acute tears. (RX1 P. 66). Dr. Levin testified that at no time were there any issues of malingering or secondary gain. (RX1, P. 48-49).

Dr. Levin did not testify concerning the number of shoulder surgeries he does, but he did acknowledge that he did approximately 280 §12 exams a year. (RX1, P. 62-63).

Conclusions of Law

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

(F) Is Petitioner's present condition of ill-being causally related to the injury?

It is well-settled that an employee need only show that some act of employment was a causative factor, not the sole, nor principal cause, of his injury. Alderson v. Select Beverage, Inc., 06 I.W.C.C. 0095, 01 W.C. 33435 (2006). The fact that the employee had a preexisting condition, even though the same result may not have occurred had the employee been in normal health, does not preclude a finding that the employment was a causative factor. Id. The question is whether the evidence supports an inference that the work activities aggravated or accelerated the process which led to the employee's current condition of ill-being. Id. An injury arises out of a claimant's employment where it "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, 203 (2003).

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. Hopkins v. WSNS Telemundo, 02 IIC 0946, 99 W.C. 42128 (2002). In determining that an employee was entitled to compensation for aggravation of a preexisting injury in Hopkins, the Commission noted that petitioner was in good health prior to the fall, he had no restrictions prior to his fall, and following his fall he suffered a marked decrease in his health and ability to function at work.

The Arbitrator finds that Petitioner's right shoulder injury is causally connected to his repetitive overhead work activities with Respondent. Specifically, the Arbitrator finds that Petitioner suffered a rotator cuff tear as a result of his work activities that necessitated surgical repair. In addition, the Arbitrator finds that Petitioner's left shoulder injury is causally connected to his repetitive overhead work activities with Respondent. Specifically, the Arbitrator finds that Petitioner suffered a partial rotator cuff tear as a result of his work activities that necessitated surgical repair.

Petitioner testified that he began to experience left shoulder pain in December of 2020 while working for U.S. Fire Protection installing pipe overhead. This was confirmed by the medical records submitted into evidence. Dr. Izquierdo confirmed that Petitioner's work activities as a sprinkler fitter contributed to cause his bilateral shoulder conditions. Respondent's §12 examiner, Dr. Levin was not provided relevant materials and could not comment on Petitioner's work activities nor whether overhead lifting was a factor that contributed to the Petitioner's shoulder pain. The Arbitrator finds the opinions of Dr. Izquierdo more credible than the opinions of Dr. Levin. Dr. Levin acknowledged offering an opinion on causal connection without reviewing a job description outlining the repetitive nature of Petitioner's work. In addition, Dr. Levin engaged in circular logic to suggest that because all sprinkler fitters do not develop repetitive injuries, that somehow Petitioner could not have developed a rotator cuff tear due to his heavy repetitive work activities. The Arbitrator does not adopt this line of reasoning, and believes that the documents and information not provided to the Respondent's doctor did in fact impair his ability to assess the Petitioner accurately.

The Arbitrator further finds Petitioner's testimony to be credible. Petitioner's testimony is consistent with the medical records submitted into evidence. There are contradictions, but these are based on Dr. Levin's testimony and the Arbitrator is not relying on this testimony.

In this case, the *Sprinkler Fitter Job Elements* confirmed the repetitive, heavy duty, overhead nature of the work activities described by Petitioner. The Arbitrator notes that Respondent declined to offer testimony from Petitioner's co-workers or supervisors to refute Petitioner's testimony of his job activities or physical condition in December, 2020. It is well settled that the failure of a party to produce testimony or evidence within its control creates a presumption that the evidence, if produced, would be adverse or unfavorable. Reo Movers v. Industrial Commission, 226 Ill.App.3d 216, 589 N.E.2d 704, 168 Ill.Dec. 304, (1st Dist.), Stypula v. City of Chicago, 03 IIC 833.

With regard to repetitive overhead work activities causing shoulder injuries, the Arbitrator notes the Commission has found causal connection between various repetitive overhead work activities and shoulder injuries.

In Stout v. Gerresheimer Glass, 20 IWCC 0056, petitioner was a millwright who developed shoulder problems due to heavy overhead work. In finding causal connection between Petitioner's repetitive overhead activities and his shoulder injury, the Commission noted "[s]imply because an employee's work related injury is gradual, rather than sudden and completely disabling, should not preclude protection and benefits" under the Act. (citing Peoria County v. Industrial Commission, 115 Ill.2d 524 (1987).

In Parker v. Illinois Department of Transportation, 15 IWCC 0302, the Commission affirmed the Arbitrator's decision that petitioner's rotator cuff injury was a result of petitioner's repetitive, heavy duty, overhead work as a mechanic.

(E) Was timely notice of the accident given to Respondent?

In cases involving repetitive trauma, an employee must point to a date within the limitations period on which both the injury and its causal link to the employee's work became plainly apparent. This so-called manifestation date must come within the statute of limitations. Durand v. Industrial Com'n. 224 Ill.2d 53 (2006). There is no dispute that Petitioner filed both claims within the three year statute of limitations against Respondent.

In *Durand*, the Illinois Supreme Court indicated that the manifestation date for a repetitive trauma case can occur when the Petitioner's condition necessitated medical treatment. Id. at 74. The Court rejected the argument that Petitioner's own conclusions concerning the relationship between the symptoms and work activities determined the manifestation date, as that would result in a layperson giving expert medical testimony.

In this case the Arbitrator finds the manifestation date for Petitioner's left shoulder claim to be Petitioner's January 11, 2021 visit to Ortho Illinois. It was at that time that Petitioner was diagnosed with a left shoulder injury. It was this injury which ultimately necessitated surgical repair.

The Arbitrator finds that Petitioner gave proper notice of the claim of injury to Respondent. The day after his January 11, 2021 doctor's visit, Petitioner notified his employer's safety director in charge of worker's compensation claims of his injury and visit.

Concerning the right shoulder, the Arbitrator finds the manifestation date was the August 9, 2021 office visit with Dr. Izquierdo. Petitioner testified he notified his employer of Dr. Izquierdo's surgical recommendation of August 31, 2021 and was off work and receiving benefits September 1, 2021. Dr. Levin's §12 report reflects Petitioner notified Respondent of his right shoulder injury on August 10, 2021. (RX1, Ex. 3, P. 2).

Illinois statute requires that a claimant must provide notice of an accident "to the employer as soon as practicable, but not later than 45 days after the accident." 820 ILCS 305/6(c). Section 6(c) further holds that "[n]o defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings on arbitration or otherwise by the employee unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy." *Id*. Illinois courts have liberally construed Section 6(c), stating that "a claim is only barred if no notice whatsoever has been given," and "[i]f some notice has been given, but the notice is defective or inaccurate, then the employer must show that he has been unduly prejudiced." *Tolbert v. Ill. Workers' Compensation Commission*, 2014 IL App (4th) 130523WC (2014).

In this case, the unrebutted evidence demonstrates Petitioner notified Respondent of his left and right shoulder injuries within 45 days of manifestation.

(J) Were the medical services that were provided to Petitioner reasonable and necessary?

Petitioner submitted the following medical expenses without objection concerning reasonableness and necessity:

Exhibit 4 – Ortho Illinois - $41,926.50
Exhibit 6 – Algonquin Road Surgery Center - $44,985.00
Exhibit 9 – Athletico Physical Therapy - $21,934.00

Based on the above, the Arbitrator finds Respondent responsible for medical expenses by the above providers pursuant to the fee schedule.

(L) What amount of compensation is due for Temporary Total Disability?

The Arbitrator finds that Respondent is responsible for temporary total disability benefits from the date of Petitioner's first shoulder surgery on January 14, 2022 to the date of hearing, October 26, 2022, in the amount of $1,453.33 per week for a total of 41 weeks.

(M) Should penalties or fees be imposed upon Respondent?

Medical Expenses

Section 19(k) of the Illinois Workers' Compensation Act states that "(i)n cases where there has been any unreasonable or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award."

Section 19(l) of the Act state that "(i)f the employee has made written demand for payment of benefits under §8(a) or §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 §8(a) or §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 §8(a) or §8(b) have seen so withheld or refused, not to exceed $10,000.00. A delay in payment of 14 days or more shall create a rebuttable resumption of unreasonable delay."

Section 16 of the Act states that "(w)henever the Commission shall find that the employer, his or her agent, service company or insurance carrier has been guilty of delay or unfairness towards an employee in the adjustment, settlement or payment of benefits due such

employee within the purview of paragraph (c) of §4 of this Act; or has been guilty or unreasonable or vexatious delay, intentional under-payment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of §19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his or her insurance carrier."

Respondent purports to rely on the opinions of Dr. Levin to deny causal connection, however, conflicting medical opinions does not present an absolute defense to the imposition of penalties. "The test is not whether there is some conflict in medical opinions; rather, it is whether the employer's conduct in relying on the medical opinion to contest liability, is reasonable under all circumstances presented." Continental Distributing v. Industrial Commission, 98 Ill.2d 407 (1983).

It is well-settled that an employer's good faith basis for disputing a claim will not subject it to an award of penalties and fees. The reliance on the opinions of a qualified §12 examiner may demonstrate a good faith denial of benefits. However, in order to rely on a §12 examiner, Respondent may not fail to provide relevant materials and simply accept a demonstratively flawed opinion. Here, Dr. Levin was asked to opine on causal connection, and was not provided with a description of the repetitive work activities of Petitioner nor a complete set of medical records. Furthermore, he was asked to opine concerning specific dates of accidents when Petitioner was not claiming a specific date of injury. Respondent never requested Dr. Levin provide an opinion concerning repetitive claims despite the fact Petitioner stated he did not have a specific date of injury.

In light of this, it cannot be said that Respondent had a good faith basis for denying

Petitioner's claims based on the opinions of Dr. Levin. Regarding the assessment of penalties and fees, the respondent bears the burden to show that it had a reasonable belief that the denial of benefits was justifiable. Gallegos v. Rollex Corp., 03 IIC 0173. The employer must show that the facts in its possession would lead a reasonable person to believe the employee is not entitled to prevail under the Act. Cook County v. Indus. Comm'n, 160 Ill.App.3d 820 (1st Dist. 1987).

Therefore, the Arbitrator finds the failure to provide medical benefits under the Act to be vexatious and unreasonable and orders penalties pursuant to §19(k) of the Act in the amount of $54,422.75 (50% of outstanding medical of $108,845.50).

In addition, a delay in payment of 14 days or more creates a presumption of unreasonable delay. 820 ILCS 305/19(l). In this case, Respondent has not met its burden to show that the delay in paying the outstanding charges was reasonable. Pursuant to §19(l), the Arbitrator further awards penalties in the amount of $10,000.00. Finally, the Arbitrator awards attorneys' fees pursuant to §16 of the Act in the amount of $21,769.10.

Temporary Total Disability

Respondent did not dispute the period of temporary total disability, only liability. Therefore, the Arbitrator finds the failure to provide temporary total disability benefits under the Act to be vexatious and unreasonable and orders penalties pursuant to §19(k) of the Act in the amount of $29,793.27 (50% of outstanding benefits of $59,586.53). Finally, the Arbitrator awards attorneys' fees pursuant to §16 of the Act in the amount of $11,917.31.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC034534
Case Name	Ken Meyer v. Napleton Cadillac of Libertyville
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0493
Number of Pages of Decision	14
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Kevin Botha
Respondent Attorney	James Kelly

DATE FILED: 11/22/2023

/s/Stephen Mathis, 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

Ken Meyer,

Petitioner,

vs. NO. 19WC 34534

Napleton Cadillac of Libertyville,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 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.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $19,300.00. 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.

November 22, 2023

SJM/sj

o-10/11/2023

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC034534
Case Name	Ken Meyer v. Napleton Cadillac of Libertyville
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Michael Glaub, Arbitrator

Petitioner Attorney	Kevin Botha
Respondent Attorney	James Kelly

DATE FILED: 12/15/2022

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

/s/*Michael Glaub, Arbitrator*

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

KEN MEYER
Employee/Petitioner

v.

NAPLETON CADILLAC OF LIBERTYVILLE
Employer/Respondent

Case # **19** WC **34534**

Consolidated cases: ______

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Glaub**, Arbitrator of the Commission, in the city of **Waukegan**, on **September 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [x] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other ______

FINDINGS

On **May 10, 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 $**99,996.00**; the average weekly wage was $**1,923.00**.

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

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

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

Respondent shall be given a credit of $**0.00** 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 $**15,654.15** under Section 8(j) of the Act.

ORDER

- Respondent shall pay Petitioner temporary total disability benefits of $**1,282.00**/week for **2 1/7** weeks, commencing **September 18, 2019** through **October 2, 2019**, as provided in Section 8(b) of the Act.
- Respondent shall pay directly to the Petitioner, unpaid medical expenses in the amount of $**1,341.55**, pursuant to the Illinois Medical Fee Schedule as provided in Sections 8(a) and 8.2 of the Act.
- Respondent shall pay directly to the Petitioner, out of pocket medical expenses incurred by Petitioner in the amount of $**2,320.00**
- Respondent shall reimburse the Rawlings Company, Subrogation Agent for United Healthcare the sum of $**15,654.15**
- Respondent shall pay Petitioner permanent partial disability benefits of $**836.69**/week for **15** weeks, because the injuries sustained caused the **3**% 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.

Michael Glaub DECEMBER 15, 2022
Signature of Arbitrator

STATEMENT OF FACTS

Petitioner's Testimony

Petitioner testified that he had been employed by Respondent as an auto body technician since August 2018. He was previously employed at Knauz for 2-1/2 years and Libertyville Acura for 18 years as an auto body technician (Tr.8-9). He testified that his job as an auto body technician generally involved the disassembly and repair of wrecked or damage vehicles. He described the job of repairing the front end of a vehicle as having to remove the front end as well as everything that was damaged. This would entail removing a bumper weighing between 40-80 pounds, removing headlights, the fenders and radiator support if the damage was deeper (Tr.10). He testified he had no help performing these job tasks, and that there was no other help in the workshop other than a painter, but no other auto body technicians (Tr.11). He described the job of working on suspensions of vehicles as having to remove a wheel which could weigh between 80 and 90 pounds and then described struggling to get bolts out and get the parts off, to determine what was bent and what was not (Tr.11). He discussed removing and replacing door assemblies which could weigh 60 pounds and sometimes more than 100 pounds. He performed these jobs every day without any help (Tr.12). His work schedule was 40 hours per week and also involved pushing or pulling of tools and regular use of a pry bar to get damage parts off a vehicle. He described having to stick the bar in there and pull and yank and cut until you got it open, just like fire and rescue. He described the work generally as very strenuous and hard work (Tr.13-14). Petitioner's testimony as to his work activities was unrebutted.

In April 2019, Petitioner saw Dr. Stephen Tassler, his primary care physician for a physical exam and testified that in the days leading up to that appointment, he noticed bulges in his groin area (Tr.14). He testified that the bulge on the right had been there for a while but the bulge on the left side blew up like a golf ball while the right side was getting bigger (Tr.15). Dr. Tassler referred the Petitioner for a surgical consultation with Dr. Stephen Haggerty who examined the Petitioner on May 10, 2019. During that visit, Dr. Haggerty was advised of the Petitioner's work activities. Following the visit, Dr. Haggerty gave Petitioner a note to give to his employer indicating that Petitioner was under his care, was able to work and that the Petitioner was to be scheduled for surgery (Px.2) (Tr.16-17). Following this doctor's appointment, Petitioner returned to work later that day and had a conversation with his boss, Dave Wehrheim, the Body Shop Manager where he told him of his medical issue (the hernias) and that he needed to get it taken care of (Tr.17-18). He testified that after informing Dave, he had a later conversation with both Dave and Scott Inman, the Service Director who gave him a form to fill out (Tr.18). The form was identified as Petitioner's Exhibit #6, the Illinois Form 45 - Employer's First Report of Injury. Petitioner testified that he was told to complete the for and that once he turned it in, he would have to go home and could no longer work until it was taking care of (Tr.19). Petitioner testified that he did not complete the form until September 17, 2019, the day before his scheduled surgery (Tr.19). Surgery took place on September 18, 2019 and on September 24, 2019, Petitioner was released to go back to work without restrictions as of October 3, 2019 (Px.3) (Tr.20).

Petitioner testified that on April 3, 2017, he was seen at Condell Medical Center emergently for kidney stones and was advised to follow-up with urologist Dr. Peter Colegrove who recommended removal of the kidney stone. Petitioner testified that during the course of this treatment in April 2017, he was never advised that he had a hernia (Tr.21-22). He underwent a preop physical by Dr. Tassler on April 13, 2017 because he was scheduled to

undergo removal of the kidney stone on April 20, 2017 which ultimately was canceled because either Petitioner passed the stone, or it moved, but his pain was gone. The procedure was no longer necessary (Tr.22-23).

Petitioner testified that following his return to work after the surgery, he didn't have any problems regarding the hernia repairs. Petitioner received a November 12, 2019 letter from Flagship City Insurance denying his claim for Worker's Compensation benefits because he could not specify the date and time he sustained an injury at work and was not aware of a specific incident causing his injury (Px.9).

On cross-examination, Petitioner testified that he gave a recorded statement to the adjuster Peggy Madigan on September 24, 2019 and that during that recording, stated that he never had any prior work injuries and then admitted to cutting his head while working at Knauz on May 20, 2016, cut his right hand on sheet metal on October 5, 2016 and hurt his neck on May 23, 2018 striking his head on a wheel (Tr.27-28). He also testified that he did not file any Worker's Compensation claims for those injuries, his medical treatment was taken care of, and he did not miss any time from work (Tr.29).

Medical Evidence

On December 14, 2016, Petitioner underwent a routine physical exam by Dr. Stephen Tassler who noted that he had cuts and scrapes while working in the body shop (Px.1 p.50). Upon physical examination of the abdomen and male genitalia, the clinical notes specifically recorded no hernias (Px.1 p.52).

On April 3, 2017, the emergency room report from Advocate Condell Hospital indicated a history of present illness of a 57-year-old male presenting with a chief complaint of right flank pain with an onset of 3 hours. He was prescribed morphine and Toradol for pain intravenously (Px.1 p.46) while a CT of the abdomen and pelvis showed a 3 mm obstructing stone in the proximal right ureter causing mild hydroureter and hydronephrosis, a few punctate non-obstructing calculi in the left kidney and tiny bilateral fat-containing inguinal hernias and a small hiatal hernia (Px.1 p.48). Petitioner felt better following the pain medication and the pain resolved. He was advised to follow-up with urology. The diagnosis was a right ureteric calculus and a renal colic (Px.1 p.49).

On April 7, 2017 he was examined by Dr. Peter Colegrove (Urologist) for kidney stones (Px.1 p.41). On physical examination of the abdomen revealed that abdomen was soft and nontender with normal bowel sounds, no masses and no hernias. On examination of the gastro-urinary, scrotal contents were normal to inspection and palpation no hernias were identified. (Px.1 p.42). He was diagnosed with a right ureteral stone for which they would schedule removal at the end of the following week (Px.1 p.44).

On April 13, 2017, he was evaluated by Dr. Tassler for a preoperative consultation to undergo cystoscopy/ureteroscopy with lithotripsy and indwelling stent insertion (Px.1 p.34). Physical exam did not reveal any hernias (Px.1 p.36) and Petitioner was cleared for surgery (Px.1 p.37). This procedure was scheduled for April 20, 2017 but was canceled (Px.1 p.29).

He was evaluated by Dr. Stephen Tassler on February 28, 2018 for a routine physical exam. Dr. Tassler noted that he worked long days in the body shop at Knauz and had no exercise out of his work activity (Px.1 p.21). Physical examination of the abdomen revealed no hernias and examination of the male genitalia revealed normal findings without any hernias (Px.1 p.23).

On April 8, 2019, Petitioner saw Dr. Tassler for a routine exam and noted that he would like to get his herniae repaired. Dr. Tassler noted that he was working in the body shop at Cadillac in Libertyville and was the only worker there (Px.1 p.15). Physical examination of the male genitalia revealed right greater than left bilateral inguinal herniae (Px.1 p.17). Petitioner was referred to Dr. Stephen Haggerty for evaluation of bilateral inguinal hernias without obstruction or gangrene (Px.1 p.20).

On May 10, 2019, Dr. Haggerty examined Petitioner for a several month history of a right inguinal bulge detected on physical examination and then developed a bulge on the left side and both were enlarging. He had no pain. Dr. Haggerty noted that Petitioner had a history of heavy lifting (in an autobody shop more than 100 pounds) (Px.1 p.12). The impression was bilateral inguinal hernias right greater than left, both were reducible, and Dr. Haggerty recommended laparoscopic repair. Petitioner was examined by Dr. Tassler for a preoperative consultation for bilateral laparoscopic inguinal hernia repair on August 28, 2019 (Px.1 p.6) and was cleared for surgery (Px.1 p.10).

On September 18, 2019 Dr. Haggerty performed a laparoscopic bilateral inguinal hernia repair with a 4 x 6" mesh on both sides. Dr. Haggerty recorded a 2.8 cm hernia on the right and did not record the size of left sided hernia (Px.1 p.4-5).

On September 30, 2019, Dr. Haggerty advised Petitioner not to lift any more than 15-20 pounds for 2 more weeks then progress as tolerated (Px.1 p.2).

Petitioner's Recorded Statement

Petitioner consented to a recorded statement taken by Peggy Madigan from Erie Insurance on September 24, 2019. Of significance from this recorded statement, Petitioner testified consistently that he returned "the form" to his employer on September 17, 2019, and that the hernias progressed to a point where he needed to get it taken care of. He stated that he did not have any pain but just noted a lump which was very small (Rx.2 p.2). Petitioner confirmed that he did a lot of lifting at work (Rx.2 p.3). When Petitioner was questioned about reporting the injury to his employer, Petitioner stated that he never actually reported it to him. He just mentioned it to his boss as a courtesy that he might be going to get this taken care of and then an hour later, the Service Director ambushed the Petitioner with this form stating that he needed to fill it out and as soon as he completed the form they were going to send him home and couldn't come back to work until it was taken care of, so Petitioner did not turn the form and until the day before surgery (Rx.2 p.3). Petitioner admitted that he did not participate in any hobbies, sports and did not do any weightlifting or did not work out (Rx.2 p.6). Petitioner stated that his job duties involved working primarily on Cadillacs and that he worked alone (Rx.2 p.7). He further stated that he could not pinpoint exactly when the hernias developed or any specific incident which caused the hernias (Rx.2 p.7).

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 (D) What was the Date of Accident? The Arbitrator finds the following:

The Petitioner's testimony at the time of hearing was credible and unrebutted that his job activities required heavy lifting. This was also confirmed by his statements in Respondent's recorded statement. His job as an auto body technician involved the disassembly and repair of wrecked or damage vehicles. The repair of the front end of a vehicle would require removal of a bumper weighing between 40-80 pounds, removing headlights, fenders and radiator support. Suspension work would involve removal of a wheel which could weigh between 80 and 90 pounds. He also described struggling to get bolts out and get the parts off and removing and replacing door assemblies which could weigh 60 pounds and sometimes more than 100 pounds and he performed these job activities every day without any help, 40 hours per week. He testified to using a pry bar to remove damaged parts from a vehicle, having to "pull and yank" on the pry bar. Petitioner testified credibly that the work he performed was very strenuous and hard work. The Petitioner's testimony is corroborated by the medical evidence on April 8, 2019, Dr. Tessler noted that Petitioner was still working in the body shop at Respondent when he referred the Petitioner for evaluation by Dr. Hagerty. The records of Dr. Hagerty also support the history of heavy lifting while working at a body shop, lifting more than 100 pounds.

Based on the totality of the evidence, the Arbitrator finds that the Petitioner sustained accidental injuries of bilateral inguinal hernias which arose out of and in the course of his employment as a result of heavy and frequent lifting while performing his job as an auto body technician.

An employee alleging a repetitive trauma has the same burden of proof as an employee alleging a specific injury, that the injury resulted from an identifiable date of injury or manifestation, that is the date on which the injury and its causal relationship to work becomes plainly apparent to a reasonable employee. *Peoria City Bellwood Nursing Home v. Industrial Comm'n*, 115 Ill.2d 524, 505 N.E.2d 1026 (1987). The date may be the date the employee commences medical care, *Three D Discount v. Industrial Comm'n*, 198 Ill.App.3d 43, 556 N.E.2d 261 (1989), the date the employee discontinues working because of the condition, *Oscar Meyer & Co. v. Industrial Comm'n*, 176 Ill.App.3d 607, 531 N.E.2d 174 (1988), or the date a medical provider renders a diagnosis and relates the condition to the employment, *Darling v. Industrial Comm'n*, 176 Ill.App.3d 186, 530 N.E.2d 1135 (1988).

In the instant case, the Arbitrator finds that the manifestation date was the date that Petitioner commenced medical care and a diagnosis was rendered and Petitioner also reported his symptoms to the Respondent. This occurred on May 10, 2019, when the Petitioner was examined by Dr. Haggerty, the general surgeon, and was diagnosed bilateral inguinal hernias right greater than left, needing future surgical care. Dr. Hagerty noted that the Petitioner had a history of heavy lifting at work at an autobody shop requiring him to lift more than 100 pounds.

Accordingly, the Arbitrator finds that the Petitioner sustained an accidental injury to his bilateral inguinal area that arose out of and in the course of his employment with Respondent on that manifested on May 10, 2019.

In support of the Arbitrator 's Decision relating to (E), Was timely notice given to the Respondent? The Arbitrator finds the following:

As discussed *Supra*, the Arbitrator found that the Petitioner sustained accidental injuries that arose out of and in the course of his employment with a manifestation date of May 10, 2019.

Petitioner's credible and unrebutted testimony was that following his visit and diagnosis with Dr. Haggerty on May 10, 2019, Petitioner was given a note to give to his employer. The note was signed by Dr. Haggerty the same date and addressed "To Whom it May Concern" and certified that Petitioner was under his care, was able to work and the Petitioner was to be scheduled for surgery (Px.2). Following this appointment, Petitioner returned to work later that day and had a conversation with his boss, Dave Wehrheim, the Body Shop Manager where he told him of his medical issue and needed to get it taken care of. He also testified that after informing Dave, he had a later conversation with both Dave and Scott Inman, the Service Director who gave him a form to fill out. The evidence shows that that the form was the Illinois Form 45 - Employer's First Report of Injury, and Petitioner only returned it completed to Respondent on September 17, 2019, the day before his surgery. Petitioner's credible and unrebutted testimony is consistent with the recorded statement given to Respondent.

Consequently, the Arbitrator finds that the Petitioner has established by a preponderance of the evidence that on May 10, 2019, the Petitioner gave notice of his injury to the Respondent within the limits stated in the Act.

In support of the Arbitrator 's Decision relating to (F), Is the Petitioner's current condition of ill-being causally related to the injury? The Arbitrator finds the following:

To obtain compensation under the Act a claimant must show by a preponderance of the evidence that he or she has suffered a disabling injury arising out of and in the course of his employment. *Sisbro, Inc. v. Industrial Comm'n* 207 Ill. 2d 193, 203, 797 N.E. 2d 665, 671 (2003). The arising out of component addresses the causal connection between a work-related injury and the claimant's condition of ill-being. *Sisbro* at 207. A claimant need only prove that some act or phase of his employment was a causative factor in the ensuing injury. *Vogel v. Industrial Comm'n*, 354 Ill.App.3d 780, 821 N.E.2d 807, (2005). A work-related injury need not be the sole or principal causative factor so long as it was "a" causative factor in the resulting condition of ill-being. *Sisbro* at 205.

The Commission has previously held that proof of prior good health and change immediately following and continuing after an injury is sufficient to establish that an impaired condition was due to the injury. While there is no specific opinion of causation contained in the treatment records, such an opinion is not required where the chain of events demonstrates a previous condition of good health, an accident and subsequent injury resulting in the need for medical treatment.

Petitioner testified credibly that he never had any problems or pain related to the hernias and that in the days leading up to his physical exam with Dr. Tassler on April 8, 2019, he began noticing bulges in his groin with the right bulge being present longer than the left. The medical records from Dr. Tassler indicated that he was still working in the body shop at Cadillac in Libertyville and was the only worker there and diagnosed him with right greater than left bilateral inguinal herniae. On May 10, 2019, Dr. Haggerty was advised of the Petitioner's work activities and noted that Petitioner did have a history of heavy lifting (more than 100 pounds) at work in an autobody shop. Following the visit, Dr. Haggerty gave Petitioner a note to give to his

employer indicating that Petitioner was under his care, was able to work and the Petitioner was to be scheduled for surgery.

On December 14, 2016, Dr. Tassler specifically recorded that there were no hernias present. During April 2017 when Petitioner was being treated for kidney stones, a CT scan from April 3, 2017 revealed an incidental finding of tiny bilateral fat-containing inguinal hernias and a small hiatal hernia. During the all the examinations at this time, the Petitioner was never diagnosed with any hernias. On February 28, 2018 at a physical, there were no hernias present. Prior to April 8, 2019, Petitioner was never diagnosed with bilateral inguinal hernias. Petitioner admitted that he did not participate in any hobbies, sports and did not do any weightlifting or did not work out.

In _Larry Hanson v. Proctor Hospital_, 2006 Ill. Wrk Comp. LEXIS 317, 6 IWCC 284, the Commission found that Petitioner sustained an accident arising out of and in the course of his employment by repetitively lifting resulting in a left inguinal hernia. Petitioner only found out about the hernia when he went for a regular physical examination and then was diagnosed with a hernia. In that case, Petitioner testified that other than pushing activities while he performed at work, he did not do any other lifting outside of work.

In _Doug Brickey v. State Journal Register_, 2006 Ill. Wrk Comp. LEXIS 780, 6 IWCC 788, the Commission found that Petitioner was a pressman requiring to load and unload large heavy paper rolls. He first noticed a protuberance around his inguinal hernia in August 2002. Swelling persisted and became more prominent throughout August and September. The Commission found sufficient evidence that the Petitioner's occupation required heavy lifting which aggravated the Petitioner's hernia.

Having found that the Petitioner sustained accidental injuries that arose out of and in the course of his employment that manifested on May 10, 2019 and based upon the totality of the evidence, the Arbitrator finds that the Petitioner has established by a preponderance of the credible evidence that, as a result of his strenuous heavy lifting work activities, he sustained injury to his bilateral groin areas and the Arbitrator finds that the Petitioner's condition of ill-being of bilateral inguinal hernias is causally related to the accidental injury sustained by the Petitioner on May 10, 2019.

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

The dispute as to the Respondent's liability for a payment of medical expenses is based upon the disputed issues of accident, notice and causal connection. Based upon the record as a whole including the Petitioner's credible unrebutted testimony, the Exhibits submitted, and consistent with the Arbitrator 's findings with respect to accident, notice and causal connection, the Arbitrator finds that the Petitioner has established by a preponderance of the credible evidence that the following medical bills related to the treatment of the Petitioner's bilateral inguinal hernias contained in Petitioner's Exhibit 4 are reasonable, necessary and causally related to the accident of May 10, 2019.

Medical Provider	Date of Service	Amount
1. Northshore University HealthSystem	9/18/2019 (anesthesia)	$165.23
2. Northshore University HealthSystem	9/18/2019 (surgery bill)	$1,157.10
3. Northshore University HealthSystem	8/28/2019 (pre-op)	$19.22
		$1,314.55

The Arbitrator therefore finds that the Respondent shall pay to the Petitioner, the amount of $1,314.55 in the above outlined and unpaid medical expenses pursuant to Section(a) of the Act and pursuant to the Illinois Fee Schedule as outlined above.

The last page of Petitioner's Exhibit #4 demonstrates the Petitioner's out of pocket medical expenses when added up, total $2,320.00

The Respondent shall pay to the Petitioner, $2,320.00 for reimbursement of out-of-pocket medical expenses incurred by Petitioner.

At hearing, Petitioner introduced into evidence as Petitioner's Exhibit #5 a statement from the Rawlings Company Subrogation Division, a Lien for benefits paid totaling $15,654.15.

Respondent shall be given a credit of $15,654.15 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall reimburse Rawlings Company subrogation division the sum of $15,654.15.

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

After the Petitioner's diagnosis of bilateral inguinal herniae by Dr. Haggerty on May 10, 2019, Petitioner continued to work his regular job until his surgery date on September 18, 2019. On September 24, 2019, Dr. Haggerty issued a note that Petitioner was a patient under his care on whom he performed a surgical procedure on September 18, 2019 and Petitioner was released to return to work as of October 3, 2019 without restrictions (Px.3).

Petitioner's entitlement to temporary total disability benefits is based upon the disputed issues of accident, notice and causal connection. Having found that the Petitioner's injury of May 10, 2019 arose out of and in the course of his employment and that the Petitioner's condition of ill-being is causally related to that injury, the Arbitrator finds that the Petitioner has established by a preponderance of the credible evidence that the Respondent shall pay to the Petitioner temporary total disability benefits in the amount of $1,282.00 per week for 2 1/7 weeks for the period of September 18, 2019 through October 2, 2019.

In support of the Arbitrator 's Decision relating to (L), What is the Nature and Extent of the Petitioner's injury? The Arbitrator finds the following:

The act states that the Arbitrator must consider 5 factors in assessing permanency. The factors are as follows:
(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 medical records.

Regarding (i) of Section 8.1b(b) of the Act, the Arbitrator concludes the following:

The Arbitrator notes that the Illinois Appellate Court in Corn Belt Energy Corp. v. IWCC, 2016 IL App (3d) 150311WC does not impose an obligation on either party to submit an impairment rating. The Arbitrator notes that in this matter, neither party submitted an impairment rating. Accordingly, the Arbitrator gives no weight to this factor

Regarding (ii) of Section 8.1b(b) of the Act, the Arbitrator concludes the following:

The Petitioner's occupation is an autobody technician. The Arbitrator concludes that based on the physical or heavy nature of the Petitioner's job duties as an autobody technician, the Petitioner's bilateral hernia condition is more likely to recurrence than an individual who performs less physically demanding work. The Arbitrator finds that this factor weighs in favor of greater permanence.

Regarding (iii) of Section 8.1b(b) of the Act, the Arbitrator concludes the following:

The Petitioner was 59 years old at the time of the injury. The Arbitrator notes that petitioner is closer to the end of his natural work life and will have to work a shorter period of time with the residuals of his condition than a younger individual. The Arbitrator finds that this factor weighs in favor of decreased permanence.

Regarding (iv) of Section 8.1b(b) of the Act, the Arbitrator concludes the following:

There was no evidence offered of any decrease in earnings capacity by either party. The Arbitrator finds that this factor weighs in favor of decreased permanence.

Regarding (v) of Section 8.1b(b) of the Act, the Arbitrator concludes the following:

The Arbitrator notes that petitioner underwent bilateral inguinal hernia repairs with the use of two 4 x 6" patches of mesh. Petitioner had an uncomplicated post-operative recovery. Petitioner also testified that generally he is doing well following the bilateral hernia repair surgery and has had no problems. The Arbitrator finds that this factor weighs in favor of decreased permanence.

The determination of permanent partial disability is not simply a calculation, but an evaluation of all five factors stated in the Act. In making this evaluation of permanent partial disability, consideration is not given of any single enumerated factor as the sole determinant. Therefore, applying Section 8.1b of the Act, and having considered and weighed all five factors enumerated by the Act, the Arbitrator finds that the Petitioner has sustained accidental injuries that have caused 3% loss of use of the Petitioner's whole person. The Arbitrator further finds that the Respondent shall pay the Petitioner the sum of $836.69 per week for 15 weeks as provided for in Section 8(d)2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC018603
Case Name	Kevin Leary v. City of Chicago
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0494
Number of Pages of Decision	17
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Timothy E Takash
Respondent Attorney	Paul Pasche

DATE FILED: 11/22/2023

/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

KEVIN LEARY,

Petitioner,

vs. NO: 19 WC 18603

CITY OF CHICAGO,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission first modifies the Arbitrator's award for the outstanding charges due to Health Connection of Illinois as it relates to the vocational assessment completed by Edward Pagella, the vocational rehabilitation consultant hired by Petitioner. The invoice included charges of $1,135.12 for the preparation and arbitration testimony of Mr. Pagella. The Commission finds that Section 8(a) of the Act allows for payment, by the Respondent, of the reasonable and necessary expenses related to vocational rehabilitation services but does not provide for any arbitration or other trial-related expenses. Petitioner is therefore only entitled to an award of $1,800.00 which represents the charges for the actual vocational rehabilitation services provided to him by Mr. Pagella. The Arbitrator's Decision is modified accordingly.

The Commission next modifies the PPD award to 32.5% (thirty-two-and-a-half percent) loss of use of the person as a whole. The Commission affirms the Arbitrator's findings and the weight assigned to the five factors under Section 8.1b of the Act, but finds that 32.5% loss of use of the person as a whole a more appropriate award as to the nature and extent of Petitioner's disability and consistent with prior, similar decisions.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 21, 2022 is hereby modified as stated and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the reasonable and necessary outstanding bill for the vocational assessment completed by Health Connection of Illinois in the amount of $1,800.00 pursuant to Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner permanent partial disability benefits of $790.64 per week for 162.5 weeks because the injuries sustained caused 32.5% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act.

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

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

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

November 22, 2023
CAH/pm
O: 10/19/23
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	19WC018603
Case Name	Kevin Leary v. City of Chicago
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	Timothy E Takash
Respondent Attorney	Lucy Huang

DATE FILED: 10/21/2022

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

/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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Kevin Leary
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **19** WC **18603**

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 Rachael Sinnen**, Arbitrator of the Commission, in the city of **Chicago**, on **7/22/22 and 8/19/22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **5/9/18**, 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 $**98,140.10**; the average weekly wage was $**1,882.14**.

On the date of accident, Petitioner was 51 years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**178,211.05** for TTD, **$0** for TPD, 0$for maintenance, for a total credit of $**178,211.05.**

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

ORDER

Respondent shall pay Petitioner directly for the outstanding vocational services of $2,936.12, pursuant to Sections 8(a) of the Act.

The Arbitrator makes an award of 42% loss of use of the person as a whole under Section 8d2 which corresponds to 210 weeks of permanent partial disability benefits at a weekly rate of $790.64. 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.

OCTOBER 21, 2022

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Kevin Leary,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 19WC018603
	)	
	)	
City of Chicago,	)	
	)	
Respondent.	)	
	)	

FINDINGS OF FACT

This matter proceeded to hearing on 7.22.22 in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's Request for Hearing. Proofs were closed on 8.19.22. Issues in dispute include causal connection, vocational costs under Section 8(a), and the nature and extent of the injury. Arbitrator's Exhibit "Ax" 1; Transcript "T" 8.19.22)

Petitioner's Work History

Petitioner testified that he is 54 years old and has a bachelor's degree in interdepartmental communications, which he received in 1990. However, he has never worked in communications. Instead, he has been a member of Union Local 134 since 1995. Petitioner testified that he first started working as a union electrician for the city of Chicago in June of 1999. He has always held the position of an electrical mechanic. He installs light fixtures, receptacles, electrical panels, and switch gear. He runs conduit and pulls wire, which involves a lot of heavy pipe work and heavy overhead lifting. Petitioner testified that the work as an electrical mechanic is heavy-duty. He had to lift reels of electrical cable and huge spools of wire and he worked with drills that weigh 60 pounds. Petitioner testified that frequently had to use tools such as a band saw, hammer drills and pipe threaders. His duties involved measuring, cutting, bending, threading, assembling, and installing electrical conduit. (T. 7.22.22 pp. 77-78; 81-82)

Petitioner testified that, in total, he has worked as an electrician for the Respondent for 16 years. In 2009, he left the city to work in electrical sales but was unsuccessful and was re-hired in 2015. Petitioner testified that during the 16 years that he has worked for the Respondent, he has seen electricians who lost their job. In 2008, he estimated that approximately 10 electricians for the city lost their job because of economics. Petitioner testified that he is also aware of electricians who lost their jobs for disciplinary reasons. Petitioner testified that he works in Career Service. There

is a provision within his employment contract that anticipates that there could be employee layoffs. (T. 7.22.22 pp. 86-88)

Work Accident of May 9, 2018

Petitioner testified that he was involved in a work accident during the morning of May 9, 2018 ("the work accident"). He testified that when he tried to retrieve tools in his gang box that morning a pipe threader, which weighed approximately 300 pounds, was blocking his access. When he tried to move it, he heard a pop and immediately felt a burning sensation in his right arm. Petitioner testified that shortly thereafter, he could not lift his right arm. He called his supervisor, Jim Doody, and reported the accident that same day. Mr. Doody sent him to Concentra. (T. 7.22.22 pp. 83-84; 90)

Petitioner's Prior Medical Condition

Petitioner testified that he was in a state of good health prior to the work accident. (T. 7.22.22 pp. 75-76)

Other than breaking his right thumb in 2001, he never had any problems with his right hand or wrist. During the 20 years before his work accident, he was never on any work restrictions involving his right arm. Petitioner testified that he never had any medical treatment for his right elbow prior to the work accident and never injured his right elbow prior to that date. He was never diagnosed with cubital tunnel or carpal tunnel syndrome. He never had any problems with the fingers in his right hand prior to the work accident. Petitioner testified that prior to the work accident he was always able to do his work without any problems. (T. 7.22.22 pp. 75-76)

Petitioner further testified that he was always active outside of work prior to May 9, 2018. He played basketball and sports with his children, he coached his son's football team, he golfed and fished. Petitioner testified that he used to exercise frequently. He performed all home repairs and home maintenance. Petitioner testified that he was always able to do those activities prior to May 9, 2018 without any problems involving his right arm. (T. 7.22.22 pp. 79-81)

Petitioner testified that after the work accident he never re-injured his right elbow or his right hand. (T. 7.22.22 pp. 75-76)

Petitioner's Medical Treatment

At Concentra an x-ray was taken of his arm, and he underwent a drug screening. Petitioner testified that he was examined by a physician, who noticed the swelling where he tore the ligament in his elbow. The doctor immediately recommended occupational therapy. Petitioner testified that he was put on light-duty restrictions at that time. (T. 7.22.22 pp. 83-84; 90)

Petitioner attended therapy at Concentra for a few weeks, and then he switched to Parkview. While he was in therapy, he noticed that his fingers were drooping badly. Petitioner testified that his arm was fatigued. He could not lift his tool bag or even a gallon of milk with his right arm. He testified

that his arm was sore all of the time. Petitioner testified that the soreness has never gone away after the work accident. (T. 7.22.22 pp. 91-92)

On 7/26/18, an MRI of the right elbow was performed, which revealed 50% partial thickness interstitial tear of the common extensor at the lateral humeral epicondyle and mild tendonitis. (Petitioner's Exhibit "Px" 2)

On 7/31/18, Petitioner attended the initial visit with Dr. Baylor. X-rays of the right elbow were performed, which showed no fracture or dislocation. Petitioner was diagnosed with chronic right lateral elbow pain with questionable occult cubital tunnel and lateral epicondylitis of the right elbow. Dr. Baylis recommended electrophysiological studies of the right upper extremity. (Px. 2)

On 9/25/18, Petitioner underwent an EMG, which revealed evidence of right-sided cubital tunnel syndrome and no evidence of any median or radial neuropathy. Petitioner continued to attend follow-up visits with Dr. Baylor. (T. 7.22.22 pp. 93-94; Px. 2)

On 1/8/19, Petitioner attended an independent medical examination ("IME") at the request of the City with Dr. John Fernandez. Dr. Fernandez diagnosed Petitioner with right elbow lateral epicondylitis as well as right elbow cubital tunnel syndrome and right middle finger and ring finger trigger fingers. The doctor recommended cortisone and/or PRP injections. The doctor noted if Petitioner's symptoms would not improve with the injections, surgery should be considered. (Px. 3).

Petitioner testified that after the IME he started to see the Dr. Fernandez as a treating physician because he was a very reputable doctor. (T. 7.22.22 p. 103)

On 3/26/19, Dr. Fernandez administered an injection for the right ring finger. (Px. 3)

On 10/2/19, Petitioner underwent a right elbow nerve release with subcutaneous transposition cubital tunnel release, right elbow triceps tendon debridement and repair, right wrist carpal tunnel release, right ring finger A1 pulley release, right elbow lateral epicondyle injection with platelet rich plasma. (Px. 3)

On 3/18/20, Petitioner underwent a right elbow lateral epicondylectomy with common extensor tendon debridement. (Px. 3)

Petitioner attended a functional status evaluation at Athletico on July 21, 2020. When he attempted to lift or carry 20 pounds, the testing was stopped because he reported soreness and pain in his right elbow. Petitioner indicated that his right elbow was swelling at the end of each day. He reported fatigue and pain when lifting weight, gripping or weight bearing. The report concluded that the Petitioner could lift no more than 20 pounds bilaterally, which resulted in too much pain to tolerate. (T. 7.22.22 pp. 25-26)

On July 23,2020 Dr. Fernandez completed a City of Chicago Work Status Report. Dr. Fernandez indicated that the Petitioner was limited to pushing, carrying, and pulling 20 pounds, with limitations on the use of tools. Dr. Fernandez noted that those restrictions were permanent. (T.

7.22.22 p. 21)

The Petitioner underwent a functional capacity evaluation at Rush on August 4, 2020. The report noted that the Petitioner's job as an Electrical Mechanic is classified within the HEAVY physical demand category. The report stated that the Petitioner demonstrated consistent effort throughout 100% of the test and that he put forth full and consistent effort during the evaluation. He demonstrated the ability to perform within light physical demand category. The Petitioner reported pain during 50% of the evaluation. (T. 7.22.22 pp. 11-12)

On 8/5/20, Petitioner was found to be at maximum medical improvement ("MMI") by Dr. Fernandez. Dr. Fernandez released Petitioner back to work with permanent light-duty work restrictions. Petitioner was recommended following up as needed. (Px. 3)

IME with Dr. Balaram

On 11/10/20, Petitioner underwent an IME with Dr. Ajay Balaram at the request of Respondent. At this visit, Petitioner reported that he had no further appointment with Dr. Fernandez. (Respondent's Exhibit "Rx" 1 p. 1) On physical examination, Petitioner was apprehensive in guarding the right upper extremity without evidence of objective findings of pathology. It was noted Petitioner's subjective symptoms outweighed his objective findings on examination. (Rx. 1 p. 3)

Dr. Balaram opined:

> "I have reviewed the patient's functional capacity examination as well as the previous medical records provided. The questions presented is, does recalcitrant lateral epicondylitis constitute permanent restriction. Patient did not perform certain activities secondary to anxiety, pain, and self-termination of an activity. Functional capacity examination can be used as a guide of functional use, but from an objective standpoint, the patient's anatomy has been significantly altered to the point functional ability would be lost to the right upper extremity. The placement of permanent restrictions would indicate that lateral epicondylitis is a lifelong problem that will never allow the patient to regain functional use or strength associated with the right arm. I do not see this as being consistent with the natural history of lateral epicondylitis. In addition, I do not see that the patient's anatomy, range of motion and muscle bulk has changed sufficiently to require permanent restrictions. Although the patient does have decreased grip strength on evaluation in the functional capacity examination, strength in the hand can continue to improve with functional use of the right upper extremity. Therefore, I do not see a need for permanent restrictions associated with the right upper extremity after treatment of lateral epicondylitis. In my opinion, the patient can return to work in the capacity of an electrician given the lack of objective findings present and secondary to the self-limited nature of the patient's functional capacity exam findings." (Rx. 1 p.7)

Petitioner testified that he had an IME with Dr. Balaram on one occasion. It was a short meeting. Dr. Balaram really did not look at his arm. The doctor asked him a few questions about how the injury happened. (T. 7.22.22 pp. 136-137) Petitioner testified that Dr. Balaram's IME lasted 10 or

15 minutes. Dr. Balaram did not have him do and range of motion exercises like Dr. Fernandez requested during the IME. (T. 7.22.22 pp. 139)

Petitioner's Current Condition

Petitioner testified that he requested that he return to work in the storeroom and returned on June 23, 2021. (T. 7.22.22 pp. 140-141) He orders and stocks electrical material. Petitioner testified that he does not lift any heavy objects now at work. Because he worked in the field so long, he never used a computer. Although he still holds the title of electrical mechanic and earns the same wages, he is performing strictly light-duty work. (T. 7.22.22 pp. 126-128) Petitioner estimates that he has 10 more years before retirement, possibly as much as 15. However, he does not know if the city has made a final determination with regards to his request for reasonable accommodations. Petitioner testified that he is anxious to hold on to the accommodated position. (T. 7.22.22 pp. 147-148)

Petitioner testified that his arm is still sore. If he is on the computer too long, his arm will get sore and swell up and he will lose his grip strength. He testified that it is common for him to experience swelling or tightness in his right arm or elbow. If he rests his elbow on a desk for an extended period, it becomes totally numb. Petitioner testified that he has no feeling on the inside of his elbow. He has swelling both on the interior and exterior of his elbow. Petitioner testified that his arm was twitching and moving while he testified. The fingers on his right-hand droop. (T. 7.22.22 pp. 129-131)

Petitioner testified that he is still having problems at work, even with the accommodations. He does not want to lose his job because of his benefits. Petitioner testified that he is no longer capable of doing the type of work that he did before the work accident. He is not capable of working in the private sector because of the constant heavy lifting. Petitioner testified that he is unaware of any other occupations that he can do with his permanent restrictions that would pay him anywhere near what he is earning currently for the Respondent. (T. 7.22.22 pp. 132-133; 139)

He testified that he can only do light activities for a certain amount of time, and then he has to stop. Petitioner testified that he rarely plays catch with his son anymore, because he cannot do it for more than 10 minutes. (T. 7.22.22 pp. 134-135)

Testimony of Joseph DiFazio

Mr. DiFazio testified in an evidence deposition and the transcript was admitted as Respondent's Exhibit 8.

Mr. DiFazio testified that he has been employed by the city of Chicago for 25 years, and currently works in Access Information Services ("AIS"). He worked in the warehouse from 2005 until 2011. He became an electrical mechanic foreman in 2017. (Rx 8 pp. 5-6)

Mr. DiFazio testified that he has been a member of the Electrician's Union since 1986, and that he worked in the private sector for approximately 10 years. An electrician has to climb a ladder while

holding equipment or tools, which is a potentially hazardous condition. They work on viaducts and at the exterior of buildings. (Rx 8 pp. 24-25)

He testified that he currently supervises 11 electricians. Mr. DiFazio was shown a copy of job descriptions for an electrical mechanic for Respondent. It covers most of the tasks that an electrician in his group would have to perform. Those duties include the installation, maintenance and repair of electrical wiring and equipment, installing and maintaining conduit, and maintaining and repairing large motor pumps. Mr. DiFazio testified that the electricians are supposed to be able to use hammers and power tools and be able to climb ladders. They need to perform lifting of up to 50 pounds. He testified that when he worked with Mr. Leary prior to the work accident, Mr. Leary was able to perform all of those electrical duties described in the job description including climbing ladders, using hand and power tools, and lifting up to 50 pounds. (Rx 8 pp. 22-23)

Mr. DiFazio has been Mr. Leary's supervisor since Mr. Leary returned to work for the city in July of 2021. Mr. DiFazio testified that he sees Mr. Leary every day at work. He believes that Mr. Leary is earning $51.00 per hour. Mr. Leary works the same hours and number of days as other electricians in his group. (Rx 8 pp. 7-8; 9-10)

Mr. DiFazio testified that he is aware that Mr. Leary injured his right arm and right wrist and right hand due to a work accident in May of 2018. Mr. DiFazio testified that while Mr. Leary is working in the warehouse, he is not climbing ladders, or working with hand or power tools. (Rx 8 pp. 26-27) Mr. DiFazio testified that, since Petitioner returned to work, he continues to have problems with his right arm and right hand. Petitioner told him about the problems on more than one occasion. Petitioner described swelling in his hands and pain in his elbow while he is at work. An electrician needs full function of both of his hands and arms while he is at work to climb ladders and scaffolding. The same would hold true with the use of hand tools and power tools. (Rx 8 pp. 28-29)

Mr. DiFazio testified that he based upon his understanding and observations, Petitioner is not currently capable of safely using scaffolds and ladders. Petitioner is not currently capable of using hand tools and power tools. Mr. DiFazio does not believe that Petitioner would be able to work in the private sector. He testified that the private sector requires as much heavy-duty work as does an electrical mechanic for the city. (Rx 8 pp. 30-31) Mr. DiFazio testified that he has seen an electrical mechanic who got laid off for economic reasons. Being an electrical mechanic for the city is not a job that is guaranteed. (Rx 8 pp. 32-33) Mr. DiFazio testified that there is a chance that Petitioner could be reassigned out of the warehouse to other job sites. If Petitioner was transferred, he would need to have the ability to climb ladders and stairs and use hand and power tools. (Rx 8 pp. 39-40)

Testimony of Edward Pagella

Mr. Pagella testified at hearing that he is a vocational rehabilitation consultant. His CV was marked as Petitioner's Exhibit 6. He has testified for federal administrative law judges for the last 32 years while assisting them in determining the employability of individuals. He also determines the employability of individuals involving workers' compensation cases, and personal injury

matters. Mr. Pagella testified that he has a bachelor's and a master's degree in Rehabilitation Counseling. He has a Certified Rehabilitation Counseling Certification. He is a licensed clinical professional counselor with the Illinois Department of Professional Regulations. Mr. Pagella is the owner of Health Connection of Illinois for over 30 years. Fifty percent of his work involves workers' compensation. He has had extensive experience with labor market surveys and vocational counseling. He researches requirements or standards with the US Department of Labor. Over the past 32 years, he estimated that he has testified between 25,000-30,000 occasions. (T. 7.22.22 pp. 7- 11)

He was retained to perform a vocational assessment and determine the employability of Petitioner. Mr. Pagella testified that Petitioner's Exhibit 4 is a true and accurate copy of his Employability Report dated May 26, 2022 and Petitioner's Exhibit 5 is a true and accurate copy of the bill for the report. (T. 7.22.22 p. 12) He had a Zoom conference with Petitioner on April 5, 2022 and the interview with Petitioner lasted approximately 90 minutes. He found Petitioner to be cooperative and compliant. Mr. Pagella testified that Petitioner is a motivated individual who is trying to provide for his family. (T. 7.22.22 p. 15)

Mr. Pagella testified that Petitioner will never be able to go back to his original position, which is why the city had accommodated a position for him. According to the US Department of Labor, an electrical mechanic must perform heavy work. He must be able to perform frequent lifting or carrying objects weighing up to 50 pounds and thread pipe that is extremely heavy. Additionally, Dr. Fernandez limited Petitioner's use of tools. Mr. Pagella testified that those requirements are not within Petitioner's physical capabilities. (T. 7.22.22 p. 30)

Mr. Pagella testified that the accommodated position is not an appropriate position. The city created the accommodated position. Mr. Pagella testified that it is not a position that he could find in the local labor market. Mr. Pagella testified that he cannot find a position where an individual can do data entry in the morning and warehouse work in the afternoon. Those are two separate positions. (T. 7.22.22 p. 32)

The accommodated position does not fit within Petitioner's current physical capabilities. A stocker is required to perform medium work, which involves lifting up to 50 pounds on an occasional basis and requires the ability to use your hands on a constant basis. The data entry work involves constant typing. Petitioner said that he continues to experience problems even with the accommodated work. When he utilizes his right hand, it will swell up and cause him pain (T. 7.22.22 pp. 34-35)

Petitioner performed electrical sales in the past, which is an appropriate position. Mr. Pagella testified that he would recommend a position in electrical sales, like working in a lighting store. In electrical sales, Petitioner would only make between $18.00 and $20.00 per hour. If Petitioner were to lose his accommodated position for the city, his replacement wage would be $18.00 and $20.00 per hour. According to the US Department of Labor, there are over 100,000 retail store clerk positions, which pay only $15.83 per hour. (T. 7.22.22 pp. 36-39)

Mr. Pagella testified Petitioner lost his trade as an electrical mechanic. Mr. Pagella testified would have an extremely challenging time finding alternative work. Petitioner does not have a

professional resume. He has no idea how to interview, or what to do with his future. He would need to learn to explain his limitations to a potential employer in a very positive fashion. (T. 7.22.22 pp. 66-68)

CONCLUSIONS OF LAW

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

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

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

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds him to be a credible witness. Petitioner testified that some of the fingers on his right-hand droop and the Arbitrator observed this. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable.

Issue F, whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

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

Petitioner testified that he was in a state of good health prior to the work accident. Petitioner testified that on May 9, 2018 when he tried to retrieve tools in his gang box, he heard a pop and immediately felt a burning sensation in his right arm. Petitioner immediately went to Concentra and Respondent's initial Section 12 examiner, Dr. Fernandez, confirmed causation and then became Petitioner's treating surgeon.

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

Issue J, were the medical services that were provided to Petitioner reasonable and necessary, the Arbitrator finds as follows:

Section 8(a) of the Act includes payment of vocational services. Petitioner submitted into evidence a bill in the amount of $2,936.12 from Edward Pagella of Health Connection of Illinois. The Arbitrator relies on the opinions of Dr. Fernandez and Dr. Pagella over the opinions of Dr. Balaram. The Arbitrator finds that Petitioner did have permanent restrictions and was eligible for vocational services. The Arbitrator further finds that the vocational services provided by Mr. Pagella were reasonable and necessary.

As such, the Arbitrator orders Respondent to pay Petitioner directly for the outstanding vocational services of $2,936.12, pursuant to Sections 8(a) of the Act.

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 is an electrical mechanic for the Respondent. Prior to the work accident, he installed light fixtures, receptacles, electrical panels, and switch gear. He ran conduit and pulled wire, which involves a lot of heavy pipe work and heavy overhead lifting. Petitioner testified that the work as an electrical mechanic is heavy-duty. He must be able to lift reels of electrical cable and huge spools of wire and he work with drills that weigh 60 pounds. Petitioner testified that frequently

had to use tools such as a band saw, hammer drills and pipe threaders. His duties involved measuring, cutting, bending, threading, assembling, and installing electrical conduit. After the surgeries, Petitioner requested that he return to work in the storeroom. He orders and stocks electrical material. Petitioner does not lift any heavy objects now at work. Although he still holds the title of electrical mechanic and earns the same wages, he is performing strictly light-duty work. He no longer climbs ladders or scaffold, and he no longer uses hand or power tools. The Arbitrator therefore gives great weight to this factor in favor of Petitioner.

Under Section 8.1b(b)(iii), the age of the employee at the time of the injury, the Arbitrator notes that Petitioner was 51 years old at the time of the accident. Petitioner testified that he estimates needing to work another 10 to 15 years before retirement. During that time, Petitioner will need to work with his current work-related symptoms. The Arbitrator gives moderate weight to this factor in favor of Petitioner.

Under Section 8.1b(b)(iv), the employee's future earning capacity, the Arbitrator notes that Mr. Pagella testified that Petitioner can no longer work as an electrical mechanic based upon his permanent restrictions. Although Respondent created an accommodated position for Petitioner. Mr. Pagella testified that it is not a position that he could find in the local labor market. Mr. Pagella testified that he would recommend a position in electrical sales. He testified that, in electrical sales, the Petitioner would only make between $18.00 and $20.00 per hour. The Arbitrator gives great weight to this factor in favor of Petitioner.

Under Section 8.1b(b)(iv), evidence of disability corroborated by the treating medical records, the Arbitrator gives great weight to this factor in favor of Petitioner. Petitioner's MRI of the right elbow revealed 50% partial thickness interstitial tear of the common extensor at the lateral humeral epicondyle and mild tendonitis. An EMG revealed evidence of right-sided cubital tunnel syndrome and no evidence of any median or radial neuropathy. Dr. Fernandez diagnosed Petitioner with right elbow lateral epicondylitis as well as right elbow cubital tunnel syndrome and right middle finger and ring finger trigger fingers. Dr. Fernandez administered an injection for the right ring finger. Dr. Fernandez also performed a right elbow nerve release with subcutaneous transposition cubital tunnel release, right elbow triceps tendon debridement and repair, right wrist carpal tunnel release, right ring finger A1 pulley release, right elbow lateral epicondyle injection with platelet rich plasma. Petitioner underwent a second surgery (a right elbow lateral epicondylectomy with common extensor tendon debridement). Petitioner attended a functional status evaluation at Athletico which concluded that Petitioner could lift no more than 20 pounds bilaterally. As a result, Dr. Fernandez gave permanent restrictions limiting pushing, carrying, and pulling to 20 pounds, with limitations on the use of tools. Petitioner then underwent an FCE at Rush that demonstrated the ability to perform within light physical demand category. Petitioner testified that his arm is still sore. If he is on the computer too long, his arm will get sore and swell up and he will lose his grip strength. He testified that it is common for him to experience swelling or tightness in his right arm or elbow. If he rests his elbow on a desk for an extended period, it becomes totally numb. Petitioner testified that he has no feeling on the inside of his elbow. He has swelling both on the interior and exterior of his elbow. Petitioner testified that his arm was twitching and moving while he testified. The fingers on his right-hand droop. He testified that he can only do light activities for a certain amount of time, and then he has to stop. Petitioner

testified that he rarely plays catch with his son anymore, because he cannot do it for more than 10 minutes.

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 42% loss of use of the person pursuant to §8d2 of the Act which corresponds to 210 weeks of permanent partial disability benefits at a weekly rate of $790.64

It is so ordered:

Arbitrator Rachael Sinnen

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC030789
Case Name	Rick Long v. U.S. Fire Protection, Inc.
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0495
Number of Pages of Decision	20
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Kevin Veugeler
Respondent Attorney	Jason Allain

DATE FILED: 11/22/2023

/s/Carolyn Doherty, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICK LONG,

Petitioner,

vs. NO: 20 WC 30789

U.S. FIRE PROTECTION, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19(b) of the Act 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, medical expenses, prospective care, temporary total disability, and penalties and fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

The Commission modifies the Decision of the Arbitrator regarding the issue of medical expenses. The Arbitrator ordered Respondent to pay for the reasonable and necessary medical services, as provided in PX8-PX13, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act, and awarded Respondent a credit for any payments made towards the awarded outstanding expenses. Respondent objects, arguing that the award should be modified to account for the negotiated rate paid by Blue Cross Blue Shield (BCBS) regarding certain bills and thereby avoid a windfall, pursuant to *Perez v. Illinois Workers' Compensation Comm'n*, 2018 IL App (2d) 170086WC, ¶ 22. The Commission agrees and modifies the award as follows.

The parties do not dispute the unpaid charges in PX8, PX10, or PX13. Accordingly, the Commission awards Petitioner the reasonable and necessary medical expenses of: $12,642.23 for services provided by Athletico; $329.00 for services provided by Naperville Imaging; and

$1,155.79 in charges from Injured Workers' Pharmacy, all pursuant to the Act and the fee schedule. The Commission awards Petitioner this total of $14,127.02 in undisputed charges.

Regarding the disputed bills, the Commission awards the following amounts from the remaining exhibits.

Petitioner's Exhibit 9: Hinsdale Orthopaedics/IBJI

This exhibit is comprised of two bills.

- The first bill contains $0.00 in BCBS payments and has an insurance balance of $8,490.28.

- The second bill reflects that BCBS paid $2,135.90, with remaining charges to the insurer of $1,020.00, and to the patient $376.95.

Accordingly, the Commission awards Petitioner the $2,135.90 paid by BCBS, plus $9,887.23 pursuant to the Act and the fee schedule ($12,023.13 in total).

Petitioner's Exhibit 11: Salt Creek Surgery Center

- Regarding Petitioner's TFCC surgery, BCBS paid $1,278.06, with $690.46 in unpaid charges.

- Regarding the cubital tunnel release surgery, BCBS paid $582.61, with $583.57 in unpaid charges.

- Regarding Petitioner's arthrocentesis procedure, BCBS paid $0.00, with $73.95 in unpaid charges.

Accordingly, the Commission awards Petitioner the $1,860.67 paid by BCBS, plus $1,347.98 pursuant to the Act and the fee schedule ($3,208.65 in total).

Petitioner's Exhibit 12: IBJI Rehab

- Regarding the bill including charges between August 4, 2021 and August 30, 2022, BCBS paid $1,954.07, with $4,957.61 in unpaid charges.

- Regarding the bill including charges between September 30, 2022 and October 18, 2022, BCBS paid $490.77, with $86.59 in unpaid charges.

Accordingly, the Commission awards Petitioner the $2,444.84 paid by BCBS, plus $5,044.20 pursuant to the Act and the fee schedule ($7,489.04 in total).

In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated May 25, 2023, is modified as stated herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay for the reasonable and necessary medical services, as provided in Petitioner's Exhibits 8 through 13, in the amount of $6,441.41, representing the amount paid by BCBS, plus $30,406.43 in unpaid charges pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act, for a total award of $36,847.84.

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 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.

November 22, 2023
o: 11/16/23
CMD/kcb
045

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

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC030789
Case Name	Rick Long v. U.S. Fire Protection, Inc.
Consolidated Cases	
Proceeding Type	19(b)/8(a) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Ana Vazquez, Arbitrator

Petitioner Attorney	Kevin Veugeler
Respondent Attorney	Jason Allain

DATE FILED: 5/25/2023

THE INTEREST RATE FOR THE WEEK OF MAY 23, 2023 5.17%

/s/Ana Vazquez, Arbitrator
Signature

STATE OF ILLINOIS)
)SS
COUNTY OF COOK)

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

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

Rick Long
Employee/Petitioner

v.

U.S. Fire Protection, Inc.
Employer/Respondent

Case # **20** WC **030789**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Ana Vazquez**, Arbitrator of the Commission, in the city of **Chicago**, on **February 3, 2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to Respondent?

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

G. ☐ What were Petitioner's earnings?

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

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

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

K. ☒ Is Petitioner entitled to any prospective medical care?

L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD

M. ☒ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other

FINDINGS

On the date of accident, **September 21, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**63,544.00**; the average weekly wage was $**1,222.00**.

On the date of accident, Petitioner was **38** years of age, ***married*** with **1** 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 $**14,198.53** for TTD, $**0** for TPD, $**0** for maintenance, and $**0,** for other benefits, for a total credit of $**14,198.53**.

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

ORDER

Respondent shall pay for the reasonable and necessary medical services, as provided in Px8 through Px13, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act. Respondent is entitled to a credit for any payments made towards the awarded outstanding expenses and shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit.

Per the Parties' stipulation, Respondent is entitled to a credit in the amount of $7,515.30 for a Permanent Partial Disability advance payment made to Petitioner at the time that the nature and extent of the injury is considered and/or addressed. Ax1 at No. 9.

Respondent shall authorize and is liable for the prospective medical treatment plan recommended by Dr. Leah Urbanosky, including a right wrist arthroscopic wafer procedure and debridement of the extensor carpi ulnaris, as provided in Section 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$814.67/week** for **115 3/7** weeks, commencing **November 18, 2020** through **February 3, 2023**, the date of arbitration, as provided in Section 8(b) of the Act. Per the Parties' stipulation, Respondent is entitled to a credit in the amount of **$14,198.53** for TTD paid to Petitioner by Respondent. Ax1 at No. 9.

Petitioner's request for penalties/attorney's fees under Sections 19(k), 19(l) and 16 is **denied**.

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

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

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

____________________________________ **MAY 25, 2023**

Signature of Arbitrator

ICArbDec19(b)

PROCEDURAL HISTORY

This matter proceeded to hearing on February 3, 2023 in Chicago, Illinois before Arbitrator Ana Vazquez pursuant to Sections 19(b) and 8(a) of the Illinois Workers' Compensation Act ("the Act"). The issues in dispute are (1) accident, (2) causal connection, (3) unpaid medical bills, (4) temporary total disability ("TTD") benefits, (5) penalties/attorney's fees under Sections 19(k), 19(l), and 16 of the Act, and (6) prospective medical. Arbitrator's Exhibit ("Ax") 1. All other issues have been stipulated. The Parties stipulated that Respondent is entitled to a credit in the amount of $14,198.53 for TTD benefits paid to Petitioner. Ax1 at No. 9.

FINDINGS OF FACT

Petitioner testified that he is a union sprinkler fitter, and he was employed with Respondent in 2020. Transcript of Proceedings on Arbitration ("Tr.") at 10-11. More specifically, Petitioner was a third-year apprentice with Union 281 and was assigned to Respondent. Tr. at 11, 57. Petitioner's duties as a sprinkler fitter include installing overhead fire protection systems, climbing ladders, wrenching pipe, and using pipe threaders, drills, and other equipment. Tr. 12. Petitioner testified that the position of a sprinkler fitter is a "labor job" and that "it's a fairly strenuous job." Tr. 12. Petitioner was shown Petitioner's Exhibit ("Px") 15. Tr. at 12. Petitioner agreed that the first page of Px15 accurately described the job duties of a sprinkler fitter with Respondent. Tr. at 13. Petitioner also agreed that the second page of Px15 listed the different weights of the material that sprinkler fitters installed, and those weights were accurately described. Tr. at 13. Petitioner then described the photographs contained within Px15. Tr. at 14-20.

Petitioner testified that he is right-handed. Tr. at 20. Petitioner testified that he did not have any issues or problems with his right wrist or arm prior to September 21, 2020. Tr. at 21. Petitioner testified that he had not had any treatment, MRIs, or physical therapy on his right wrist or right arm prior to September 21, 2020. Tr. at 21. Petitioner did not have any pain with the use of his right wrist or right arm prior to September 21, 2020. Tr. at 21.

Accident

Petitioner testified that on September 21, 2020, he was working for Respondent at the Johansen Center in Beverly. Tr. at 20. Petitioner was wrenching on pipe, hanging pipe, putting on heads, and cutting pipe. Tr. at 20. Petitioner was working with Mike Walgren. Tr. at 20. Petitioner testified that while he was wrenching pipe, he felt a sharp pain from his wrist to his elbow. Tr. at 22.

Medical records summary

Petitioner presented at CHS Occupational Health-Munster on September 23, 2020. Px1 at 8-13. Petitioner reported that on September 21, 2020, while wrenching pipe at work, he felt a sharp pain in his right wrist. Petitioner reported pain from his right wrist to elbow. On exam, decreased grip strength and a positive Finkelstein's were noted. X-rays of Petitioner's right forearm and right wrist were obtained and were negative for acute osseous findings. Px1 at 16-17. Petitioner was assessed with a right forearm strain and a right wrist strain. Petitioner was dispensed a wrist splint and was placed on work restrictions including no repetitive use and no gripping, grasping or squeezing of the right forearm and right wrist, no lifting, pushing, or pulling with the right forearm and right wrist, no driving at work or using operating machinery, and use of a splint. Px1 at 5-7.

Petitioner returned to CHS Occupational Health-Munster on September 25, 2020. Px1 at 21-25. Petitioner's symptoms had not improved. Petitioner reported a new symptom of intermittent tingling to the right-hand fingertips. On exam of Petitioner's right wrist, decreased grip strength and range of motion were noted. Petitioner was assessed with strain of right forearm and strain of right wrist. An MRI of Petitioner's right forearm and right wrist was ordered. Petitioner's work restrictions were maintained.

On September 30, 2020, Petitioner presented at Hand to Shoulder Associates and was seen by Dr. Michael Vender. Px2 at 11-12. Petitioner testified that he was sent to Dr. Vender by Julie Minnich, the nurse case manager assigned to Petitioner's claim. Tr. at 26, 30. Petitioner reported a consistent accident history. Petitioner reported diffuse pain in the right wrist into the forearm and tingling. Dr. Vender noted that Petitioner was "relatively nondescript with regard to the nature of the symptoms." On exam of the right wrist, Dr. Vender noted that the range of motion was painful, that Petitioner was not able to tell him where the pain was located, that range of motion of the fingers was difficult to perform, and that Petitioner demonstrated pain behavior during the evaluation. Dr. Vender assessed Petitioner with right wrist pain. Dr. Vender noted that Petitioner presented with a history of developing diffuse symptoms in the right upper extremity after inactivity at work, that the nature of the symptoms and history provided were vague, and that Petitioner's physical examination was remarkable for mostly pain behavior. Dr. Vender also noted that the x-rays of the wrist were unremarkable and that it was unusual that Petitioner had no response to the previously prescribed Medrol dosepak. Dr. Vender ordered occupational therapy, and he placed Petitioner on work restrictions that included no forceful gripping and use of a splint.

Petitioner testified that Respondent accommodated the light duty restrictions given to him by Dr. Vender. Tr. at 27. Petitioner testified that the accommodation involved him having to drive from his home in Indiana to Lake Forest every day and that he would sort bolts while standing all day. Tr. at 27-28.

Petitioner returned to Dr. Vender on October 14, 2020. Px2 at 10. Dr. Vender noted that Petitioner had no benefit from several sessions of therapy or from the new course of anti-inflammatories, and that Petitioner's pain was radial and ulnar, and generalized. On exam of the right wrist, Dr. Vender noted that range of motion for flexion and extension was limited with self-resistance and significant pain behavior, that there were multiple areas of tenderness throughout the wrist and into the forearm and hand, and that pain behavior was again demonstrated. Dr. Vender's assessment was right wrist pain. An MRI of the right wrist was ordered, and Petitioner's work restrictions were maintained.

Petitioner underwent a right wrist MRI, without contrast, on October 20, 2020, which demonstrated (1) mild ulnocarpal and intercarpal synovial effusion, (2) subtle bone marrow edema pattern at distal pole of the triquetrum and hamate bones at the ventral aspect of the lunate bone, suggesting posttraumatic microtrabicular fractures. Px2 at 22. The triangular fibrocartilage complex ("TFCC") and carpal tunnel appeared unremarkable. Petitioner followed up with Dr. Vender on October 21, 2020. Px2 at 9. Petitioner's assessment was unchanged. Dr. Vender noted that Petitioner was still with significant complaints and pain behavior during evaluation and that his physical examination was still relatively unremarkable. Dr. Vender also noted that there were various nonspecific findings on MRI, but they would not correlate with the mechanism of injury or Petitioner's subjective complaints. Dr. Vender noted that he did not believe the MRI findings were clinically significant. Dr. Vender recommended two additional weeks of therapy and maintained Petitioner's work restrictions.

Petitioner retuned to Dr. Vender on November 4, 2020, at which time he reported improvement in pain and an additional week-and-a-half of therapy was ordered. Petitioner's assessment was unchanged, and his work restrictions were maintained, with Petitioner being released to unrestricted full duty work as of November 16, 2020. Px2 at 7. Petitioner testified that he returned to work on November 16, 2020, and that he returned to a job in Itasca where he was doing "light stuff and putting in sprinkler heads." Tr. at 34, 52. Petitioner testified that he was laid off from Respondent on November 18, 2020. Tr. at 34, 53. Petitioner testified that he was still in pain and could not perform the job. Tr. at 35.

Petitioner participated in 17 sessions of physical therapy from October 2, 2020 through November 13, 2020 at ATI Physical Therapy. Px2 at 14-21, 23-26; Px3. Petitioner testified that he was still in pain and he did not have the same strength that he had prior to the injury at the time he completed physical therapy. Tr. at 32-33.

Petitioner presented at Hinsdale Orthopedics on December 9, 2020 and was seen by Dr. Leah Urbanosky for an evaluation of his right upper extremity. Px4 at 5-9. Petitioner testified that he was referred to Dr. Urbanosky by his primary doctor, Dr. Orlowski. Tr. at 35. Petitioner reported a consistent accident history. Petitioner complained of sharp, shooting pain in his right hand/wrist, weakness of the right upper extremity, limited range of motion, tenderness, and occasional numbness and tingling. Petitioner also reported that he had returned to full duty work for one week following light duty work with pain, which increased during that time. On exam of the right wrist, Dr. Urbanosky noted painful snapping over the extensor carpi ulnaris ("ECU") with attempted wrist rotations and supination, significant radiocarpal ("RC") synovitis and associated tenderness at the RC joint, and significant guarding on all ranges of motion. On exam of the right hand, Dr. Urbanosky noted that Petitioner was able to make a full composite fist and extend the fingers fully. X-rays of the right hand were obtained and demonstrated a well-healed and remodeled fifth metacarpal fracture with residual apex-dorsal angulation. Dr. Urbanosky assessed a (1) right wrist radiocarpal joint sprain and synovitis with MRI findings of swelling in the lunate, triquetrum, and hamate bones and (2) right wrist ECU tendinitis, which she noted were the result of the work-related accident of September 21, 2020. A right wrist RC joint injection was administered, and Petitioner was fitted with a Tubigrip. Petitioner was placed off work.

Petitioner returned to Dr. Urbanosky on December 23, 2020 and he reported one-week relief after the RC joint injection. Px2 at 12-13. Petitioner's assessment was unchanged, and another right wrist RC joint injection was administered. Petitioner was kept off work. Petitioner followed up with Dr. Urbanosky on January 20, 2021 and February 17, 2021. Px4 at 16-17, 28-30. On January 20, 2021, Petitioner reported one-week relief following the second RC joint injection. An MRI arthrogram of the right wrist was ordered on February 17, 2021. Petitioner's assessment was unchanged, and he was kept off work.

Petitioner participated in 8 sessions of physical therapy from January 29, 2021 through February 22, 2021 at ATI Physical Therapy. Px3.

Petitioner underwent an MRI arthrogram of the right wrist on March 12, 2021, which demonstrated a full-thickness tear of the TFCC at the level of the ulna/lunate articulation. Px4 at 31. Petitioner again saw Dr. Urbanosky on March 24, 2021. Px4 at 35-37. Dr. Urbanosky noted that she reviewed the MRI arthrogram, and her personal interpretation was a right wrist TFCC tear, mid aspect; lunate intraosseous swelling resolved; and partial SL ligament tear. Dr. Urbanosky's assessment was six months status post right wrist radiocarpal joint sprain and synovitis with MRI and TFCC tear, mid aspect of the lunate. A right wrist arthroscopy with debridement was discussed. Petitioner was kept off work. On July 7, 2021,

Petitioner's assessment was unchanged, Dr. Urbanosky continued to recommend surgery, and Petitioner was kept off work.

On July 20, 2021, Petitioner underwent a right wrist arthroscopy with debridement of the TFCC tear to stable edges with preservation of the ulnar collateral ligament, extensive tenosynovectomy, and volar and dorsal capsulorraphy with low energy electrocautery. Px2 at 43-44; Px6 at 20-21. Petitioner's postoperative diagnosis was right wrist pain refractory to conservative management with MRI finding of TFCC tear with finding of a large TFCC central flap tear in addition to extensive dorsal tenosynovitis and ligamentous laxity. The operative report notes that during the procedure, a large flap tear in the TFCC area was seen and was ulnarly based resulting in central and radial tearing. Petitioner testified that he had elbow pain when he initially hurt his wrist, and that he had more pain in his elbow after wrist surgery. Tr. at 63-64.

Petitioner followed up with Dr. Urbanosky on August 4, 2021, September 10, 2021, and October 8, 2021. Px4 at 46-52, 65-68. On October 8, 2021, Petitioner complained of numbness and tingling into the right wrist and small and ring fingers for the past two weeks. Px4 at 65-68. Dr. Urbanosky noted a positive Tinel's at the right elbow. Dr. Urbanosky's assessment was (1) 11 weeks status post right wrist arthroscopy with TFCC debridement, (2) one-year status post right wrist radiocarpal joint sprain, synovitis, and TFCC tear at the mid aspect of the ulna/lunate, per MRI, and (3) cubital tunnel syndrome. Petitioner was instructed to continue therapy, and he was kept off work. On November 3, 2021, a right cubital tunnel injection was administered. Px4 at 76-80. Petitioner was kept off work. On January 22, 2022, an EMG/NCV of the right upper extremity was ordered, and Petitioner was kept off work. Px4 at 81-85. Petitioner underwent an EMG/NCV on January 19, 2022. Px4 at 86-89. The EMG/NCV results were normal with no obvious signs of mononeuropathy, peripheral neuropathy, radiculopathy, or plexopathy. Petitioner saw Dr. Urbanosky on January 21, 2022, at which time Dr. Urbanosky ordered a right elbow diagnostic ultrasound, and Petitioner was kept off work. Px4 at 90-94. On March 8, 2022, Petitioner underwent a MSK ultrasound examination of the right elbow at Naperville Imaging Center, which revealed subluxing right ulnar nerve at the elbow with abnormal increased caliber. Px5 at 4. Petitioner next saw Dr. Urbanosky on March 25, 2022. Px4 at 96-100. Dr. Urbanosky noted that the right elbow ultrasound revealed a subluxing right ulnar nerve at the elbow with abnormal increased caliber. A right cubital tunnel release and right wrist radiocarpal joint injection were discussed. Petitioner was kept off work.

Petitioner underwent a right ulnar nerve decompression with anterior interfascial transposition, partial medial triceps tenotomy, and right-sided radiocarpal wrist injection on May 31, 2022. Px4 at 101-103; Px6 at 27-30. Petitioner's postoperative diagnosis was right cubital tunnel syndrome, refractory to conservative management, and right wrist pain. The operative record reflects that significant tightening around the ulnar nerve was encountered during the procedure. Petitioner followed up postoperatively on June 15, 2022, July 14, 2022, and August 10, 2022. Px4 at 104-112. On August 10, 2022, Petitioner reported that he continued to experience constant pain in the medial and lateral elbow. He described the pain as sharp and shooting. Petitioner also reported that it was new pain, and different than the nerve pain. Petitioner was to continue occupational therapy and was kept off work. Px4 at 110-112. On August 31, 2022, Petitioner's assessment included right elbow medial epicondylitis and right elbow triceps tendinitis. Px4 at 149-159. A right elbow medial epicondylitis cortisone injection and a right wrist ECU injection were administered. Petitioner was kept off work. Px4 at 221. On October 5, 2022, Petitioner reported worse right wrist pain after the injection administered on August 31, 2022. Px4 at 226-232. Petitioner reported relief of elbow pain for one week after the August 31, 2022 injection. Petitioner denied numbness and tingling. Petitioner's assessments included (1) one-year status post right wrist

arthroscopy, (2) right elbow medial epicondylitis and triceps tendinitis, and (3) four months status post cubital tunnel release. An MRI arthrogram of the right wrist was ordered, occupation therapy was discontinued, and Petitioner was kept off work. Petitioner returned for follow up on October 26, 2022. Petitioner complained of constant pain with any movement of the right wrist and elbow. Px4 at 233-239. This record reflects that an MRI arthrogram of the right wrist was performed on October 18, 2022 and demonstrated (1) thinning of the TFCC immediately distal to the radial origin at the level of the ulna/lunate articulation, consistent with a full-thickness tear, and (2) cystic change along the proximal hamate bone with marrow edema. Petitioner was referred for a second opinion and was kept off work.

Petitioner participated in 25 sessions of physical therapy from June 15, 2022 through October 13, 2022 at Illinois Bone and Joint Institute. Px7.

Petitioner presented for a second opinion with Dr. Marc Fajardo on November 16, 2022. Px4 at 239-245. Dr. Fajardo's assessments were right wrist TFCC tear, right hamate cyst/contusion, and right golfer's elbow. A revision surgery was discussed, and a CT scan was ordered. Petitioner again saw Dr. Urbanosky on November 21, 2022 and she administered a right elbow medial epicondylitis triamcinolone injection, which provided 100% pain relief five-minutes post injection. Dr. Urbanosky noted that she would likely recommend a repeat arthroscopy with wafer procedure to alleviate ulnocarpal ("UC") compaction. Petitioner was kept off work. Px4 at 245-253. On December 14, 2022, Dr. Urbanosky noted that the injection administered on November 21, 2022 provided relief for one day, and that Petitioner's right elbow remained sensitive over the distal scar with shooting pain into the hand and fingers when touched. Px4 at 254-261. Dr. Urbanosky also noted that Petitioner underwent a right wrist CT on November 30, 2022, which demonstrated (1) no acute fracture or dislocation within the right wrist and (2) no mass or loculated collection within the dorsal wrist soft tissues to correspond to Petitioner's area of pain. Dr. Urbanosky's assessment included symptomatic right wrist ulnocarpal impaction and proximate hamate stress reaction. A right wrist arthroscopic wafer procedure and debridement of the ECU was recommended. Petitioner was kept off work.

Current condition

At arbitration, Petitioner testified that he was not terminated from the apprentice program, but he has not worked as an apprentice since August 2020. Tr. at 58-59. Petitioner testified that he was laid off in March 2020 because of the pandemic, however, it was his own choice. Tr. at 60. Petitioner applied for unemployment at that time. Tr. at 60. Petitioner testified that he applied for unemployment when he was laid off in November 2020. Tr. at 60.

Petitioner testified that some of his bills were paid by group health insurance. Tr. at 63.

Petitioner presented at arbitration wearing a splint. Tr. at 43. Petitioner testified that he also has a compression sleeve that goes over his elbow to help with swelling. Tr. at 43. Petitioner testified that at the time of arbitration he was uncomfortable and still in pain. Tr. at 49. When asked if he had any strength in the wrist and the elbow, Petitioner testified "[n]ot like I did before I had the injury." Tr. at 49.

Evidence Deposition Testimony of Dr. Leah Urbanosky

Dr. Leah Urbanosky testified via an evidence deposition on August 18, 2022. Px14. Dr. Urbanosky testified as to her credentials as a board-certified orthopedic surgeon with an added qualification for surgery of the hand. Px14 at 4-5.

Regarding the MRI of October 20, 2020, Dr. Urbanosky testified that it showed bone marrow edema at the distal pole of the triquetrum and hamate bone and the volar aspect of the lunate bone and also an effusion, or synovitis, at the ulnocarpal and intercarpal regions of the wrist. Px14 at 8. Regarding the suggestion of a posttraumatic microtrabecular fracture, Dr. Urbanosky testified that "[i]t's a torsional injury that [Petitioner's] describing, and the bottom line that it means for me is that it was enough torque to affect the bony structure of his wrist." Px14 at 8-9. The MRI of October 20, 2020, was without contrast, meaning that it was less likely to show intra-articular subtleties, like partial ligament tears or TFCC pathology. Px14 at 10. Dr. Urbanosky testified that her initial diagnosis was two-and-one-half months after a radiocarpal joint sprain with MRI findings. Px14 at 10.

Regarding the March 12, 2021 MRI arthrogram, Dr. Urbanosky testified that Petitioner was found to have a full thickness tear of the TFCC at the ulnolunate articulation, or over the ulnar aspect of the wrist. Px14 at 17. She testified that the MRI arthrogram no longer showed evidence of swelling in the carpal bones, which had been seen five months earlier, indicating that it was more likely related to an acute injury that had at least partially resolved. Px14 at 17.

Regarding the July 20, 2021 wrist surgery, Dr. Urbanosky testified that the area of tearing of the TFCC, over the radial aspect of the TFCC, was not repairable with any success, so it was debrided. Px14 at 19. Dr. Urbanosky testified that looking inside the wrist joint, Petitioner had significant swelling of the joint which obscured the view, and she debrided to the ulnar side of the joint to see the TFCC. Px14 at 20-21. Dr. Urbanosky testified that when she was by the TFCC, she observed a large flap tear that was ulnarly faced, which was not repairable. Px14 at 21. She debrided the flap and smoothed it out. Px14 at 21. Dr. Urbanosky testified that her objective surgical findings were consistent with Petitioner's subjective complaints. Px14 at 22. Dr. Urbanosky testified that Petitioner had a positive Tinel's on October 8, 2020, Px14 at 23-24. Dr. Urbanosky testified that she recommended continued occupational therapy for nerve glides at that time because Petitioner's nerve complaints had not been specifically addressed and that when you're in a sling after surgery, the elbow's bent position can further irritate or be more irritating to the ulnar nerve. Px14 at 25.

Petitioner still had a positive Tinel's and tenderness over the cubital tunnel on January 7, 2022 and Petitioner was referred for an EMG with Dr. Kirincic. Px14 at 28. Dr. Urbanosky testified that Petitioner did not have any evidence of slowing of the nerve at the left of the elbow on EMG. Px14 at 28-29. Dr. Urbanosky agreed that it was a fair statement that a negative or a normal EMG study does not necessarily rule out cubital or carpal tunnel syndrome, and she explained that an EMG is a static test that tests the nerve function in position of the arm, which is "just not how we live." Px14 at 29. Dr. Urbanosky testified that the right elbow ultrasound showed subluxation of the ulnar nerve over the medial epicondyle, which is an ongoing irritant to the ulnar nerve. Px14 at 30-31. Dr. Urbanosky testified that the examining physician who performed the ultrasound, also noted some mild generalized loss of normal fascicular echotexture, meaning that it was harder for him to distinguish the tiny individual fascicles of the nerve compared with what is considered to be normal, and was likely due to the repetitive nature of the subluxation. Px14 at 31. Dr. Urbanosky testified that the objective findings of the ultrasound were consistent with Petitioner's subjective complaints. Px14 at 32. Petitioner ultimately underwent an ulnar nerve decompression and partial medial triceps tenotomy. Px14 at 32-34. Dr. Urbanosky agreed that she had not released Petitioner to return to work from the time that she initially saw him to the date of her deposition. Px14 at 36.

Dr. Urbanosky testified that she believed Petitioner's TFCC tear and ulnar nerve injury were related to the September 21, 2020 work injury of Petitioner pulling on wrenches overhead. Px14 at 35. Dr. Urbanosky testified that all the treatment she had rendered to Petitioner's right upper extremity had been reasonable. Px14 at 36. Dr. Urbanosky testified that she did not notice any malingering or secondary gain issues, that she felt that Petitioner's symptoms were consistent, and the tests ultimately objectively defined his injuries and were consistent with his symptoms. Px14 at 37.

On cross examination, Dr. Urbanosky testified that the TFCC is involved in the mechanisms of a hand grasping an object and the forearm rotating, but it is not the sole stabilizing component. Px14 at 41. Dr. Urbanosky agreed that not all TFCC tears need to be treated surgically. Px14 at 41. Dr. Urbanosky testified that she commonly sees TFCC tears caused by pulling or using a wrench, since it is a torquing and torsion injury, which is what is exactly involved in stabilizing the wrist. Px14 at 42-43. Dr. Urbanosky testified that cubital tunnel syndrome can be caused by pulling on a wrench, "[i]f you have to pull enough torque that you're having to use power of the elbow," and she has seen it happen. Px14 at 43. Regarding cubital tunnel syndrome caused by pulling on a wrench, Dr. Urbanosky testified that it requires significant torque, and there is typically a significant torsional factor involved when it goes all the way up to the elbow. Px14 at 43. Dr. Urbanosky testified that the TFCC connects the ulnar column to the radial column. Px14 at 46. Dr. Urbanosky testified that ulnar nerve or cubital tunnel syndrome manifests in symptoms in the ulnar aspect over hand, wrist, and fingers over both the dorsal and lower aspects, particularly the entire small finger and half of the ring finger. Px14 at 56. Dr. Urbanosky testified that an acute trauma to the wrist depending on the circumstance can cause cubital tunnel syndrome. Px14 at 57. When asked if cubital tunnel syndrome would also require some sort of trauma to or use of the elbow, Dr. Urbanosky testified, "[g]enerally, when it's a direct injury – by "direct" I mean a torsional cause where you're holding something and either twisting or you're holding something that is twisting and resisting. People can have primary injuries here with secondary injuries here or vice versa depending on what's going on." Px14 at 57-58. Dr. Urbanosky agreed that cubital tunnel syndrome can happen when a person bends their elbow often, leans on their elbow a lot, or has an injury to the elbow. Px14 at 59. Dr. Urbanosky testified that arthritis can be a cause of cubital tunnel syndrome, but it is not a frequent cause. Px14 at 59. Dr. Urbanosky testified that a medial collateral ligament injury could potentially cause extra strain on the ulnar nerve. Px14 at 59. Dr. Urbanosky testified that because of Petitioner's lateral pain and the fact that it had been several months after his ulnar nerve release, Petitioner was told to resume use of the cock-up splint as a precaution in case of lateral epicondylitis. Px14 at 63-64.

On redirect examination, Dr. Urbanosky testified that she did not feel that Petitioner's TFCC tear was degenerative in nature. Px14 at 66.

<u>Evidence Deposition Testimony of Dr. Mark Cohen</u>

Dr. Mark Cohen presented for an evidence deposition on May 17, 2021 and presented for a second evidence deposition on December 5, 2022. Respondent's Exhibit ("Rx") 1; Rx2. Dr. Cohen is a board-certified orthopedic surgeon with an additional certificate of qualification in hand surgery. Rx2 at 2. Dr. Cohen is also a professor in the department of orthopedic surgery at Rush University Medical Center and is the director of the hand and elbow section, as well as the director of orthopedic evaluation at the university. Rx1 at 2-3; Rx2 at 6-7.

i. Evidence Deposition Testimony of May 17, 2021

Dr. Cohen testified that he saw Petitioner for an independent medical examination ("IME") on February 26, 2021 and he prepared a report in connection with that evaluation. Rx1 at 10. Dr. Cohen testified that he reviewed an extensive amount of records in connection with his evaluation and each record is chronologically listed in his report. Rx1 at 11. Dr. Cohen also performed a physical examination of Petitioner, and his findings are contained in his report. Rx1 at 14. Dr. Cohen reviewed the MRI of October 20, 2020, and Dr. Cohen testified that his opinion was that it showed no significant pathology or fractures. Rx1 at 19. Dr. Cohen testified that it was his opinion that the TFCC was normal on the October 20, 2020 MRI. Rx1 at 19.

Dr. Cohen testified that after his physical examination and review of Petitioner's medical records, he felt that Petitioner had right wrist pain with no identifiable pathology or explanation for the pain. Rx1 at 20. Dr. Cohen testified that he did not feel that Petitioner required any specific orthopedic workup or intervention. Rx1 at 20. Dr. Cohen testified that he did not feel that there was any medical contraindication or orthopedic contraindication to Petitioner returning to his previous job duties without restrictions. Rx1 at 20. Dr. Cohen felt that Petitioner was at maximum medical improvement ("MMI") at the time that he saw him. Rx1 at 20. Dr. Cohen testified that he felt that the conservative care provided to Petitioner was reasonable.

Dr. Cohen testified that he prepared an IME Addendum report on April 19, 2021, after reviewing a report of an MRI arthrogram of the wrist. Rx1 at 21. Dr. Cohen testified that he believed that the MRI arthrogram of the wrist showed a dye leak between the radioulnar joint and the distal radioulnar joint, which typically means that there is at least a perforation of the TFCC. Rx1 at 22. Dr. Cohen testified that none of his opinions changed based on the MRI arthrogram report. Rx1 at 23.

On cross examination, Dr. Cohen testified that there was no significant edema in the triquetrum, hamate, or lunate bones present on the MRI of October 20, 2020. Rx1 at 27. Dr. Cohen agreed that his opinion differed from that of the radiologist who read the MRI. Rx1 at 27. Dr. Cohen testified that he did not see any pathology on the wrist MRI and that he disagreed with the overall opinions of the radiologist that read the MRI. Rx1 at 28. Dr. Cohen testified that pulling on a wrench is typically not a competent cause or typical mechanism of injury for a TFCC tear. Rx1 at 33. Dr. Cohen testified that Petitioner was faking some of the findings during his February 26, 2021 examination. Rx1 at 35. Dr. Cohen testified that he had not been provided with a report from Dr. Urbanosky after late February 2021. Rx1 at 39. Dr. Cohen had not been provided a copy of the MRI film of March 12, 2021 for his review in connection with his IME Addendum report of April 19, 2021. Rx1 at 41. Dr. Cohen agreed that he was not provided with a copy of the MRI film of March 12, 2021 prior to his deposition testimony. Rx1 at 41. Dr. Cohen testified that he could not comment on the findings of the second MRI. Rx1 at 54.

On redirect examination, Dr. Cohen testified that his opinions would most likely not change if provided with the report and images of the second MRI. Rx1 at 56. Dr. Cohen testified that if the MRI report of March 2021 indicated a TFCC tear and if it was an accurate interpretation of the scan, it would suggest that Petitioner did something between October 2020 and March 2021 that led to a TFCC tear. Rx1 at 57.

ii. Evidence Deposition Testimony of December 5, 2022

On December 5, 2022, Dr. Cohen testified that he authored three additional IME addendum reports, one on November 5, 2021, one on May 23, 2022, and one on October 31, 2022. Rx2 at 11. Dr. Cohen reviewed additional treatment records in preparation of his November 5, 2021 report, which are listed in his report. Rx1 at 13. Dr. Cohen did not review any new imaging studies prior to his November 5, 2021 report. Rx2 at 16. Dr. Cohen testified that at the time of his November 5, 2021 report, he felt that Petitioner had atypical wrist pain. Rx2 at 16. Dr. Cohen testified that he felt that Petitioner's prognosis was guarded due to a concern for a psychological component to his complaints, and not due to organic pathology. Rx2 at 16. Dr. Cohen testified that based on his prior review of records and his evaluation of Petitioner, he was not in agreement that Petitioner was a surgical candidate. Rx2 at 17. Regarding MMI, Dr. Cohen testified that he stated that it would most likely take Petitioner three to four months to reach MMI following the wrist arthroscopic surgery. Rx2 at 17. Dr. Cohen testified that he referred to his previous opinions regarding work restrictions at that time, and that he did not have any new opinions.

Regarding his report of October 31, 2022, Dr. Cohen testified that he reviewed additional medical records that were chronologically listed in his report. Rx2 at 20. Dr. Cohen testified that his opinion regarding Petitioner's elbow condition was that he did not see an indication for cubital tunnel surgery. Rx2 at 20. Dr. Cohen testified that he did not review an EMG report, but he reviewed a note from March 25, 2022 in which Petitioner's treating physician indicated that the EMG returned within normal limits. Rx2 at 20. Dr. Cohen testified that there were no reports of numbness or tingling reported initially, and that Petitioner did not report any numbness or tingling when he saw him in February 2021. Rx2 at 21. Dr. Cohen then testified that there appeared to be some variability in complaints of numbness and tingling. Rx2 at 21-22. Dr. Cohen testified that cubital tunnel syndrome is most commonly an idiopathic condition with no cause per se, however, it can be seen in association with trauma about the elbow, such as a fracture, in association with surgical procedures performed around the elbow, in association with certain occupations, and in association with certain medical conditions, such as diabetes and obesity. Rx2 at 25. Dr. Cohen testified that tingling coursing from the hand or wrist up the arm is highly atypical and that when a nerve is compressed, it leads to symptoms toward the fingertips, in the arm. Rx2 at 25. Dr. Cohen testified that he did not feel that there was any clinical indication for the ulnar decompression surgery. Rx2 at 26. Dr. Cohen testified that he felt that Petitioner was at MMI at that time and that he did not see any orthopedic contraindication to Petitioner returning to any job duties that he previously performed. Rx2 at 27. Dr. Cohen testified that he did not have an anatomic explanation for Petitioner's complaints and problems.

On cross examination, Dr. Cohen agreed that Petitioner had had a TFCC tear. Rx2 at 36. Dr. Cohen was not aware of Petitioner having any right wrist treatment, symptoms, or complaints prior to September 21, 2020. Rx2 at 36-37. Dr. Cohen agreed that Petitioner had had consistent complaints of issues and problems with his right wrist after September 21, 2020. Rx2 at 37. Dr. Cohen testified that moderate TFCC tenderness was consistent with a TFCC tear. Rx2 at 38. Dr. Cohen agreed that the last record he reviewed in connection with his October 31, 2022 report was the record of March 25, 2022. Rx2 at 40. Dr. Cohen agreed that he was not aware of Petitioner's current condition. Rx2 at 40.

On redirect examination, Dr. Cohen testified that the ulnar nerve innervates the small finger and a part of the ring finger, and that tingling of the middle and ring fingers is not consistent with cubital tunnel syndrome. Rx2 at 58.

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission,* 44 Ill. 2d 214 (1969).

Credibility is the quality of a witness which renders his evidence worthy of belief. It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. *O'Dette v. Industrial Commission*, 79 Ill. 2d 249, 253 (1980); *Hosteny v. Workers' Compensation Commission*, 397 Ill. App. 3d 665, 674 (2009). Where a claimant's testimony is inconsistent with his actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972).

In the case at hand, the Arbitrator observed Petitioner's behavior and conduct during the hearing and finds him to be a credible witness. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable.

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

In order for a claimant to be entitled to benefits under the Act, a claimant must prove by a preponderance of the evidence that he suffered an injury that arose out of and in the course of his employment. *McAllister v. Ill. Workers' Comp. Comm'n*, *2020 IL 124848*, ¶32 (2020) citing *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). The "in the course of" element refers to the time, place, and circumstances under which the injury occurred. *Id.* at ¶34 citing *Scheffer 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 performing reasonable activities in conjunction with claimant's employment. *Id*. The "arising out of" component is primarily concerned with causal connection. *Id.* at ¶36. An injury "arises out of" a claimant's employment if it has its origin in some risk connected with or incidental to the employment so as to create a causal connection between the employment and injury. *Id.* at citing *Sisbro*, 207 Ill. 2d 193 at 203.

Having considered all the evidence, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that he sustained an accident that arose out of and in the course of his employment with Respondent on September 21, 2020. In support of her finding, the Arbitrator relies on Petitioner's credible testimony that: (1) he is a union sprinkler fitter and his duties include installing overhead fire protection systems, climbing ladders, wrenching pipe, and using pipe threaders, drills, and other equipment, (2) on September 21, 2020, while working for Respondent, he was wrenching on pipe, hanging pipe, putting on heads, and cutting pipe, and (3) while he was wrenching pipe, he felt a sharp pain from his wrist to his elbow. Tr. at 20-22. The Arbitrator also relies on the treatment records in evidence, which corroborate Petitioner's testimony and document treatment beginning on September 23, 2020.

<u>Issue F, whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows</u>:

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). An employer takes its employees as it finds them. *St. Elizabeth's Hospital v. Illinois Workers' Compensation Comm'n*, 371 Ill. App. 3d 882, 888 (2007). Even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied if the claimant can show that a work-related injury played a role in aggravating or accelerating his preexisting condition. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient to prove a causal connection between the accident and the claimant's injury. *International Harvester v. Industrial Com.*, 93 Ill. 2d 59, 63 (1982).

The Arbitrator finds that Petitioner's current conditions of ill-being as to his right wrist and right arm are causally related to the September 21, 2020 injury. The Arbitrator relies on the following in support of her findings: (1) the records of CHS Occupational Health-Munster, (2) the records and testimony of Dr. Leah Urbanosky, (3) Petitioner's credible denial of any issues or problems with his right wrist or right arm prior to September 21, 2020, (4) Petitioner's credible denial of any treatment, MRIs, or physical therapy of his right wrist or right arm prior to September 21, 2020, (5) Petitioner's credible denial of any pain with the use of his right wrist or right arm prior to September 21, 2020, and (6) the fact that none of the records in evidence reflect any right wrist or right arm issues or treatment prior to September 21, 2020. The Arbitrator notes that the evidence demonstrates that Petitioner was in condition of good health prior to September 21, 2020, consistent complaints and continuous symptomology of the right wrist and right arm following the September 21, 2020 injury, and that Petitioner was able to work full duty and without restrictions immediately prior to the work accident.

The Arbitrator has considered the opinions of Dr. Mark Cohen and finds that they do not outweigh the opinions of Dr. Leah Urbanosky. The Arbitrator finds that the record supports Dr. Urbanosky's opinion that Petitioner's right TFCC tear and right ulnar nerve injury are related to the September 21, 2020 work-injury, where Dr. Urbanosky credibly explained that Petitioner had a mechanism of injury that was consistent with the TFCC tear and ulnar nerve injury.

In resolving the issue of causal connection, the Arbitrator also finds that Petitioner is not at MMI for his right wrist or right arm conditions of ill-being.

<u>Issue J, whether the medical services that were provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follow</u>:

Consistent with the Arbitrator's prior findings as to accident and causal connection, the Arbitrator finds that the medical services that were provided to Petitioner were reasonable and necessary, and that Respondent has not paid all appropriate charges for all reasonable and necessary medical services. At arbitration, Petitioner presented the following unpaid medical bills: (1) ATI Physical Therapy ($12,642.23), (2) Hinsdale Orthopedics/Illinois Bone & Joint Institute ($19,669.63), (3) Naperville Imaging ($329.00), (4) Salt Creek Surgery Center ($11,277.13), (5) Illinois Bone & Joint Institute

Rehabilitation ($11,955.02), and (6) Injured Workers' Pharmacy ($1,155.79). Px8-Px13. As the Arbitrator has found that Petitioner's treatment was reasonable and necessary, the Arbitrator further finds that all bills, as provided in Px8 through Px13, are awarded and that Respondent is liable for payment of these bills, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act.

Respondent is entitled to a credit for any payments made towards the awarded outstanding expenses and shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit.

Issue K, whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows:

Consistent with the Arbitrator's prior findings, including that Petitioner is not at MMI for his right wrist or right arm conditions of ill being, the Arbitrator finds that Petitioner is entitled to prospective medical care as recommended by Dr. Urbanosky. As of December 14, 2022, Dr. Urbanosky's treatment recommendations include a right wrist arthroscopic wafer procedure and debridement of the ECU. Accordingly, the Arbitrator finds that Petitioner is entitled to a right wrist arthroscopic wafer procedure and debridement of the ECU, which is contemplated as compensable treatment under Section 8(a) of the Act, and therefore, Respondent is responsible for authorizing and paying for same.

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

Consistent with the Arbitrator's prior findings, the Arbitrator finds that Petitioner is entitled to TTD benefits. Petitioner claims that he is entitled to TTD benefits from November 18, 2020 through February 3, 2023, the date of arbitration. Ax1 at No. 8. Respondent disputes Petitioner's claim for TTD and claims "Subject to proof." Ax1 at No. 8.

The Arbitrator notes that the record demonstrates that Petitioner was laid off by Respondent on November 18, 2020 and that Dr. Urbanosky has consistently and continuously kept Petitioner off work since December 9, 2020. Accordingly, the Arbitrator finds that Petitioner is entitled to TTD benefits from November 18, 2020 through February 3, 2023, the date of arbitration.

Further, based on the Parties' stipulation, Respondent is entitled to a credit in the amount of $14,198.53 for TTD paid by Respondent to Petitioner.

Issue M, whether penalties/attorney's fees should be imposed upon Respondent, the Arbitrator finds as follows:

Petitioner's claim for penalties and attorney's fees is denied. The record does not support an award of Section 19(l) penalties and the Arbitrator finds that Respondent's disputes in this case are not vexatious or in bad faith, such that Section 19(k) penalties and/or Section 16 attorney's fees are merited.

ANA VAZQUEZ, ARBITRATOR

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	07WC028560
Case Name	Veronica Farmer v. City of Chicago/OEMC
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0496
Number of Pages of Decision	18
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Cameron Clark
Respondent Attorney	Joseph Zwick

DATE FILED: 11/22/2023

/s/Kathryn Doerries, Commissioner

Signature

23IWCC0496

STATE OF ILLINOIS)		
) SS.	☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
COUNTY OF COOK)	☐ 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

VERONICA FARMER,

Petitioner,

vs. NO: 07 WC 028560

CITY OF CHICAGO/OEMC,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the parties herein and notice given to all parties, the Commission, after considering the issues of benefit rates, causal connection, medical expenses, prospective medical, temporary disability, and permanent disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below, vacates the Arbitrator's award of temporary total disability (TTD), and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms and adopts the Arbitrator's Decision in its entirety except with respect to the award of TTD. Preliminarily, the Commission rectifies a scrivener's error in the heading of the section pertaining to TTD in the Arbitrator's Conclusions of Law. To that end, the Commission strikes the letter "L" from the heading on page 12 of the Arbitrator's Decision and substitutes the letter "K" to conform with page one's recitation of the disputed issues. Therefore, the heading of the section pertaining to TTD should read as follows: "In support of the Arbitrator's Decision relating to "K", what amount is due for temporary total disability, the Arbitrator finds:" The Commission further affirms and adopts the Arbitrator's Conclusions of Law under Section "K" except the last paragraph. The Commission strikes the last paragraph in Section "K", and substitutes the following:

The parties stipulated Petitioner had concurrent employment at the time of the work accident. Petitioner was earning $347.02 per week working part-time for Respondent and earning

$632.04 per week working for her primary, full-time employer, Computershare, on the date of accident. (T. 6-7, 10) Petitioner returned to work for Computershare on November 5, 2007, and worked for 4-5/7 weeks through December 7, 2007, before she was laid off. (T. 33, 20-21)

Therefore, the Commission finds that Petitioner is entitled to TTD for a total of 168 weeks representing two periods, commencing June 25, 2007, through November 4, 2007, and recommencing December 8, 2007, through October 15, 2010, at a rate of $652.71. Petitioner is also entitled to temporary partial disability (TPD) for 4-5/7 weeks commencing November 5, 2007, through December 7, 2007, at a rate of $231.35.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on November 2, 2022, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of temporary total disability benefits is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $652.71 per week for a period of 168 weeks, commencing June 25, 2007, through November 4, 2007, and recommencing December 8, 2007, through October 15, 2010, those being the periods of temporary total incapacity for work under §8(b) of the Act. Respondent shall be given a credit of $47,076.11 for temporary total disability benefits paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $231.35 per week for a period of 4-5/7 weeks, commencing November 5, 2007, through December 7, 2007, that being the period of temporary partial incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner permanent partial disability benefits of $587.44 per week for a period of 100 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 20% loss of the person as a whole and Respondent shall pay Petitioner permanent partial disability benefits of $587.44 per week for 20 weeks, because the injuries sustained caused disfigurement of the left forearm, as provided in §8(c) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical expenses of $14,300.67, as provided in §8(a) and §8.2 of the Act. The Parties stipulated that Respondent is entitled to any applicable credit under §8(j) of the Act. Respondent shall hold Petitioner safe and harmless from any claims made by the group insurance carrier or any medical providers of the services for which Respondent is receiving this credit.

IT IS FURTHER ORDERED BY THE COMMISSION Respondent shall pay Petitioner the compensation benefits that have accrued from 6/24/2007 through April 19, 2022, in a lump sum, and shall pay the remainder of the award, if any, in weekly payments.

IT IS FURTHER ORDERED BY THE COMMISSION that 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.

November 22, 2023
KAD/bsd
O092623
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	07WC028560
Case Name	Veronica Farmer v. City of Chicago/OEMC
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Jeffrey Huebsch, Arbitrator

Petitioner Attorney	Cameron Clark
Respondent Attorney	Joseph Zwick

DATE FILED: 11/2/2022

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 1, 2022 4.44%

/s/ Jeffrey Huebsch, 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

Veronica Farmer
Employee/Petitioner

Case # **07** WC **028560**

City of Chicago/OEMC
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **April 19, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **6/24/07**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**50,911.12**; the average weekly wage was $**979.06**.

On the date of accident, Petitioner was **36** years of age, ***married*** with **3** dependent children.

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

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

Respondent shall be given a credit of $**47,076.11** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**47,076.11**.

Respondent, as stipulated by the Parties, is entitled to any applicable credit under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical expenses of $14,300.67, as provided in Sections 8(a) and 8.2 of the Act. The Parties stipulate that Respondent is entitled to any applicable credit under Section 8(j) of the Act. Respondent shall hold Petitioner safe and harmless from any claims made by the group insurance carrier or any medical providers of the services for which Respondent is receiving this credit.

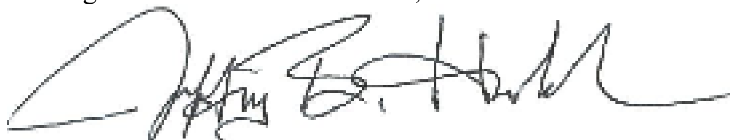
Respondent shall pay Petitioner temporary total disability benefits of $652.71/week, for 172-5/7 weeks commencing June 25, 2007 through October 15, 2010, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $587.44/week for 100 weeks, because the injuries sustained caused the 20% loss of the person as a whole, as provided in Section 8(d)2 of the Act and Respondent shall pay Petitioner permanent partial disability benefits of $587.44/week for 20 weeks, because the injuries sustained caused disfigurement of the left forearm, as provided in Section 8(c) of the Act.

Respondent shall pay Petitioner the compensation benefits that have accrued from 6/24/2007 through April 19, 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.



NOVEMBER 2, 2022

Signature of Arbitrator

FINDINGS OF FACT

Petitioner was employed as a traffic aide for the City of Chicago / OEMC ("Respondent"). This was a part-time position. Petitioner was hired in approximately June of 2006. Petitioner's job duties as a traffic aide included directing traffic at various locations throughout the City during times of grid lock or other traffic problems. Petitioner testified that she would work anywhere from 5 to 8 hours a shift with a 20-minute break. This job required Petitioner to constantly have her arms and hands moving to direct traffic flow.

Petitioner also had full-time/concurrent employment with a company called Computershare. She worked in the company's escheatment department. The Parties stipulated that Petitioner's concurrent earnings under the Act amount to an Average Weekly Wage of $979.06.

Petitioner testified that, prior to her work accident of June 24, 2007, she had never sustained any injuries or accidents involving her cervical spine, lumbar spine, left shoulder, and left front teeth. Petitioner also testified that, prior to June 24, 2007, she never underwent any medical treatment for these parts of her body. She did acknowledge having regular dental exams for cleanings.

The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of her employment by Respondent on June 24, 2007. She was performing her job duties as a traffic aide for Respondent. Petitioner testified that she was directing traffic on the SouthSide (31st and LaSalle streets) during a Cubs/White Sox game. While directing traffic, Petitioner was struck by a F150 truck. The mirror of the truck struck Petitioner's face and she was thrown up into the air, twisted around, and landed on her face on the pavement. Petitioner then rolled out of the way of traffic. Petitioner testified that after this incident she experienced multiple aches and pains and could not move her left shoulder. She had blood coming from her mouth from 2 fractured teeth. Petitioner was taken by ambulance to Northwestern Hospital.

Petitioner also testified to scaring that remains on her left upper extremity. At the time of the hearing, the Arbitrator did view Petitioner's scar on her left arm. It is located on the top of the left forearm/elbow area and is approximately 5"x1" with some keloid scarring. Dr. Coe described the scar as 4-inch long by 1-inch wide hypo and hyperpigmented, well-healed abrasion scar on the proximal aspect of the left forearm. (PX#12 at P. 8).

Petitioner testified that she initially received treatment at the Emergency Room at Northwestern Hospital. Petitioner underwent multiple x-rays of her left leg, shoulder, arm, chest and CT scans of her brain and cervical spine. The medical records document a laceration of her right check and left upper arm tenderness. The cervical CT scan was interpreted as showing central disc bulging at C3-C4. Dental evaluation found fractures of left upper 9th and 10th teeth. Petitioner was prescribed analgesic and muscle relaxant medication. She was

discharged from the hospital and advised to remain off work and follow up with her primary care doctor. (PX# 5 at P.33; PX#12 at P.2).

Petitioner testified that following her discharge from Northwestern Hospital, she had increased symptoms and sought additional care.

Petitioner was examined in the ER at Loyola on June 25, 2007. She was examined by Dr. Probst. Dr. Probst obtained the history of the motor vehicle accident and emergency treatment. During the visit, Petitioner complained of shortness of breath, left chest pain, dizziness and extremity pain. The examination found multiple abrasions and areas of tenderness. Dr. Probst prescribed various prescription medications and recommended that Petitioner receive follow up care. (PX# 7 at P.12).

Petitioner testified that following her work accident, she was required by Respondent to be evaluated at the company clinic, Mercy Works. Petitioner was first examined at Mercy Works on June 26, 2007. (PX#6). Petitioner testified that she required by Respondent to attend regular follow up appointments at Mercy Works from approximately June 26, 2007, through June 18, 2008. The initial treatment evaluation report lists Petitioner's injuries as follows: Facial contusions and abrasions; fractured teeth; cervical strain; chest contusion; left shoulder contusion and strain; left elbow contusion; abrasions left forearm; upper and lower thoracic and lumbar contusions and strain; left hip contusion; and left knee contusion. (PX# 6 at P.4). The medical records from Mercy Works document that Petitioner was examined by at least 4 different physicians. These company physicians had recommended various forms of treatment for Petitioner and that she remain off work from June 26, 2007, to January 18, 2008. Following the examination of January 18, 2008, Petitioner was given a sedentary work release. Following the examination of June 12, 2008, Petitioner was given a sedentary work restriction and "no directing traffic". (PX # 6 at P.12).

Petitioner testified that she was never provided with modified work by Respondent. Respondent presented no rebuttal evidence to Petitioner's testimony.

The Duty Status Exam report completed by Mercy Works on June 26, 2007 documents the fractures to Teeth #9 and #10. There was a recommendation for composite bonding and restorative work. In addition, the Mercy Works physician noted Petitioner's prognosis as "Guarded. No risk of losing #9 or #10, but the need for future root canal therapy and crowns is more than likely". (PX#6 at P.13) Petitioner testified that she underwent the recommended dental care with Dr. Boehm.

Petitioner testified that she returned to Loyola on July 6, 2007. On that date, she was examined by Dr. Alexander Ghanayem. Dr. Ghanayem examined her left shoulder and cervical spine. Dr. Ghanayem found soft tissue paraspinal tenderness. He recommended that Petitioner undergo physical therapy and MRI studies of the left shoulder (PX# 8). Petitioner testified that she underwent an MRI of her left shoulder on July 13, 2007, at

Mercy Hospital. The MRI study revealed moderate contusion involving the lesser tuberosity; and focal tendinopathy involving the infraspinatus insertion. (PX#1).

Petitioner participated in the recommended physical therapy at Athletico. Petitioner's initial evaluation occurred on July 9, 2007. Petitioner participated in physical therapy at Athletico from July 9, 2007, through December 20, 2007. Thereafter, at the direction of Dr. Gnatz from Loyola, Petitioner participated in an additional course of therapy at Athletico from October 22, 2009, through December 3, 2009. (PX#10).

Petitioner testified that she was seen by her family physician, Dr. Boblick on July 24, 2007. During this examination, Petitioner complained of pain with range of motion of the lower back and joint stiffness. Following the examination, Dr. Boblick diagnosed a low back strain/facet syndrome, low back contusion and cervical disc disease. Prescription medication was recommended. Petitioner returned to Dr. Boblick on August 26, 2007. Following that examination, an MRI of the cervical spine was recommended. (PX# 12 at P3).

Petitioner testified that she underwent the recommended cervical MRI on August 28, 2007. The MRI report details that Petitioner had disc herniations at the C3/4 and C5/6 levels. (PX#2 at P.2). Petitioner testified that she continued to treat with Dr. Boblick from August 27, 2007, through November 4, 2007. During this time period, Dr. Boblick prescribed physical therapy, muscle relaxers, and recommended that Petitioner remain off work. Following the examination of November 4, 2007, Dr. Boblick released Petitioner to work in a sedentary capacity and recommended follow up care.

Petitioner testified that she remained under active medical care with her treating physicians at Loyola. She attended multiple examinations with Dr. Boblick and Dr. Gnatz. Petitioner was last examined by Dr. Gnatz on March 7, 2008. Dr. Gnatz released Petitioner with a permanent sedentary work restriction and no directing traffic. (PX# 7 at P.20). Thereafter, Petitioner attended a follow up exam with Dr. Ghanayem. Dr. Ghanayem examined Petitioner and opined that the work restrictions place on Petitioner were appropriate and permanent. (PX#7 at P. 21). Petitioner remained under active medical care.

Following an examination in July 2010, Dr. Boblick recommended repeat MRI scans of the lumbar and cervical spine. Petitioner underwent the recommended studies on July 7, 2010. The lumbar MRI scan was interpreted as showing no specific abnormality. (PX# 3). The cervical MRI scan was interpreted as showing central protrusion at C3-C4 and left-sided neuroforaminal narrowing was found at C5-C6 due to a disc osteophyte complex. (PX#4; PX# 12 at P.4).

Petitioner returned to Dr. Boblick on July 10, 2010. Dr. Boblick reviewed the diagnostic studies. Following the examination, Dr. Boblick prescribed medication and recommended follow up care. Petitioner had a follow up examination with Dr. Boblick on July 27, 2010. Following that exam, Dr. Boblick released Petitioner to

return to work at a sedentary level only with no traffic direction. Dr. Boblick opined that this restriction was permanent. Petitioner was referred for a neurosurgeon evaluation. (PX#8).

Petitioner underwent a neurosurgeon evaluation on August 17, 2010, with Dr. Prabhu. Dr Prabhu reviewed the updated MRI studies. He noted that the MRI revealed a herniation at C3-C4. This did not appear to be changed when compared to the previous MRI. Dr. Prabhu also noted a symptomatic C5-C6 herniation causing left-sided C6 radiculopathy. Dr. Prabhu recommended cervical epidural steroid injections, physical therapy, including traction, and prescription medication. Dr. Prabhu also noted that Petitioner might be a candidate for a C5-C6 anterior cervical discectomy and fusion. (PX#8 at P.110).

Petitioner testified that she began the recommended physical therapy program at ATI on September 8, 2010. Petitioner participated in physical therapy at ATI from September 8, 2010 through November 26, 2010. (PX#11)

Petitioner testified that, at the request of Respondent, she attended a Section 12 examination with Dr. Zelby on September 8, 2010. The results of that examination are noted below.

On October 12, 2010, Petitioner was examined by both Dr. Boblick and Dr. Prabhu. Dr. Prabhu prescribed additional physical therapy for Petitioner's left shoulder and referred her for a left shoulder steroid injection. Petitioner returned to Dr. Boblick on January 8, 2011. On this date, Dr. Boblick again documented Petitioner's permanent work restriction. Petitioner returned to Dr. Boblick on May 12, 2011. Dr. Boblick noted that Petitioner had complaints of ongoing lower back pain. Examination revealed lumbar stiffness. Additional conservative therapy was prescribed and Dr. Boblick released Petitioner to return on a as needed basis. (PX#12 at P.5).

Petitioner testified that on November 11, 2011, her injured and repaired front left tooth loosened and came out. Petitioner underwent additional dental care at Worth Palos Dental. Thereafter, Petitioner testified that she underwent treatment for a replacement crown for one of her injured teeth on April 7, 2014. This treatment was completed at Worth Palos Dental. (PX# 9). Petitioner testified that she most recently returned to Worth Palos Dental on March 30, 2022, for treatment related to her injured teeth.

Petitioner testified that, at the request of her attorney, she was examined by Dr. Jeffrey Coe on November 22, 2011. The details of that examination are noted below.

Petitioner testified that, as of the date of arbitration, she had not sustained any new injuries or accidents involving her cervical spine, lumbar spine, left shoulder, or front teeth since the work accident of June 24, 2007. Petitioner's testimony was unrebutted. Petitioner also testified that she currently takes Aleve for her work injuries. With respect to her current complaints, Petitioner testified that she experiences pain in her lower back and neck. Petitioner also testified that she is unable to sit for prolonged period of time due to lumbar discomfort.

Petitioner testified that following her work accident of June 24, 2007, she was taken off work by her examining physicians. This included Respondent's company clinic physicians at Mercy Works. Petitioner further testified that on November 4, 2007, Dr. Boblick released her to return to work in a sedentary capacity. Petitioner testified that Respondent did not provide her with modified employment. However, Petitioner did briefly return to her job at Computershare on November 5, 2007, as it was within her work restrictions. Petitioner testified that her employment at Computershare ended on December 7, 2007, when she was laid off. On cross-examination, Petitioner confirmed that she had been laid off and that Computershare eventually closed. Following her layoff from Computershare, Petitioner was still under active medical care and not placed at MMI. Petitioner testified that Respondent did not provide her with modified work at any time. Petitioner's testimony was unrebutted.

Petitioner testified that she received payment of TTD benefits from Respondent from June 25, 2007, until approximately October 15, 2010. Thereafter, Respondent suspended benefits, apparently based on Dr. Zelby's Section 12 report of September 8, 2010. Petitioner testified that following the suspension of benefits, she sought and obtained work in several temporary positions within her restrictions. She eventually secured full-time employment at Northern Trust as a tech coordinator sometime in the last quarter of 2011

As set forth above, Petitioner submitted to two medical expert examinations. One at the request of Respondent. The other at the request of her attorney.

At the request of Respondent, Petitioner was examined by Dr. Andrew Zelby, a Board Certified Neurosurgeon, on September 8, 2010. (RX#1). Dr. Zelby's report documents Petitioner's work accident of June 24, 2007. Dr. Zelby also notes that Petitioner had 7 months of physical therapy after her injury, and 3 months of physical therapy in 2009. Petitioner reported starting an additional 12 weeks of physical therapy on September 8, 2010. Dr. Zelby reviewed the cervical MRI of August 28, 2007. At C2-C3 there is a tiny, focal central disc protrusion that causes partial effacement of the ventral CSF focally centrally. At C4-C5, there is a miniscule bulging disc. At C5-C6, there is a modest broad-based disc/osteophyte complex. Dr. Zelby also reviewed the cervical MRI of July 6, 2010. This showed that the disc pathology at C3-C4 is unchanged. However, at C5-C6, there is a more prominent disc/osteophyte complex and also a more prominent bilateral foraminal stenosis. There is also a suggestion of a fairly acute appearing paracentral left disc extrusion. This abnormality was not present in 2007. (RX# 1).

Dr. Zelby noted complaints of neck pain, quasi-radicular left arm pain and low back pain. Dr. Zelby goes on to opine that Petitioner's injuries associated with the spine and nervous system were cervical and lumbar strains. Dr. Zelby also noted symptom amplification. Dr. Zelby concluded that the work restrictions placed on Petitioner by Dr. Boblick were arbitrary and inappropriate. Dr. Zelby opined that Petitioner was qualified to return to all

of her usual job duties as a traffic control aide within 6 weeks of her injury. Of note, Dr. Zelby was provided a job description for a traffic control aide which described the job as being able to continuously lift and carry 10 pounds, continuously stand and walk and frequently bend. Finally, Dr. Zelby opined that Petitioner's current conditions of ill-being are not related to her 2007 work accident and that Petitioner required no treatment beyond a diligent, daily, self-directed range of motion and core strengthening exercise program. (RX# 1).

At the request of her attorney, Petitioner was examined by Dr. Jeffrey Coe on November 22, 2011. (PX#12). Dr. Coe is an Occupational Medicine physician. Dr. Coe performed a physical examination of Petitioner. Dr. Coe noted Petitioner's current complaints of pain in her neck, which was made worse by range of motion. She stated that the pain in her neck radiated into her left shoulder and upper arm, as well into her upper back. Her left shoulder remained stiff and sore. Her left shoulder symptoms were made worse by reaching or lifting. Petitioner also complained of pain and stiffness in her lower back. Her back pain was made worse by lifting, bending, prolonged sitting or walking. (PX#12 at P. 6).

During the examination, Dr. Coe found tender "trigger points" in the posterior cervical and upper thoracic musculature. There was associated decreased range of motion of the cervical spine in extension, bilateral rotation and bilateral bending. There was associated tenderness in the left shoulder joint. There was also associated decreased range of motion in left shoulder abduction, forward elevation, external and internal rotation with impingement and weakness. There was also posttraumatic scarring of Petitioner's left arm. (PX#12 at P.10).

Following his examination of Petitioner, Dr. Coe opined that Petitioner had suffered multiple contusions when she was struck by the vehicle on June 24, 2007. The injury aggravated degenerative change in her cervical spine and caused a symptomatic left-sided disc herniation of the C5-C6 intervertebral disc with chronic cervical discogenic and myofascial pain. The accident also caused a left shoulder contusion and strain with impingement pain. Additionally, the accident aggravated degenerative change in Petitioner's lower back with chronic lumbar myofascial pain and sacroiliac joint irritation. Finally, the June 24, 2007, work accident caused dental injuries with continued left frontal tooth weakness and pain. (PX# 12 at P.9).

Dr. Coe opined that there is a causal relationship between the injuries sustained by Petitioner on June 24, 2007, and her current symptoms and state of impairment. Dr. Coe further opined that the injuries sustained by Petitioner have caused permanent partial disability to the person as a whole with additional disability to the left arm. Dr. Coe recommended further medical treatment for Petitioner which would include physician followup, anti-inflammatory and muscle relaxant medication. In addition, Dr. Coe opined that Petitioner required work restrictions due to the condition of ill-being of her upper and lower back and left arm. Dr. Coe recommended a light duty demand level and that Petitioner avoid traffic direction work. (PX#12 at P. 10).

Petitioner entered into evidence various medical bills. Specifically, the following medical bills were entered into evidence:

1. ATI - $9,224.17
2. Care Rehab & Orthopedic Products - $1,212.00
3. Worth Palos Dentistry - $3,606.80
4. Loyola University Health System - $257.70

At the Arbitration hearing, Respondent claimed credit for bills paid through its group medical plan for which credit may be allowed under Section 8(j) of the Act. (see Arb.Ex. 1). The Parties stipulated that Respondent would also obtain credit for any awarded bills that were established to be paid or compromised and that any awarded bills would be directly paid by Respondent.

The Arbitrator notes that part of the medical bill from ATI was submitted through the Utilization Review. (PX#11 at P. 11). The unpaid portions of the bill from ATI are for the period of September 28, 2010 through November 15, 2010 and November 26, 2010. On September 15, 2010, a prescription for therapy was faxed to Respondent's U.R. department. A note dated September 22, 2010, indicates that 9 sessions of physical therapy were authorized. The October 1, 2010, U.R. report (PX#11 at P. 49) indicates that additional physical therapy was not authorized based on "no significant improvement from the initial evaluation". The Progress Summary indicates that Petitioner had in fact made gains in the range of motion of her left shoulder. (PX# 11 at P. 32). The Progress Summary report dated November 11, 2010, documents Petitioner's improvements with physical therapy, including increased shoulder range of motion (flexion and abduction), upper extremity strength, and postural improvements. (PX.#11 at P. 15).

CONCLUSIONS OF LAW

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

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d).

To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of her claim. (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)),

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

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

In support of the Arbitrator's decision relating to "F", whether Petitioner's present condition of ill-being is causally related to the injury, the Arbitrator finds:

The Arbitrator finds that there is a casual relationship between Petitioner's work accident of June 24, 2007, and her present conditions of ill-being, to wit: Status post truck mirror vs. pedestrian accident yielding multiple contusions resulting in aggravation of degenerative conditions in the cervical spine and a symptomatic left sided disc herniation at C5-C6 with chronic cervical discogenic and myofascial pain, left shoulder contusion and strain with impingement pain, aggravation of degenerative condition in the lumbar spine with chronic lumbar pain and sacroiliac joint irritation and dental injuries to the #9 and # 10 teeth, with continued left frontal tooth weakness and pain, as documented by Dr. Coe.

In support of the Arbitrator's decision, the Arbitrator finds that the testimony of Petitioner is credible. The Arbitrator has relied upon the various medical records admitted into evidence in this matter. In addition, the Arbitrator relies upon the medical records and opinions of Petitioner's treating physicians, Dr. Boblick, Dr. Ghanayem, Dr. Gnatz, and Dr. Prabhu. The Arbitrator also relies upon the opinions of Petitioner's medical expert, Dr. Jeffrey Coe. The medical records submitted into evidence by Petitioner document the multiple injuries sustained by Petitioner and the need for medical care, as prescribed by her treating physicians. The Arbitrator finds the medical opinions of Petitioner's treating physicians and Dr. Jeffrey Coe as more persuasive relative to Petitioner's conditions of ill-being and physical need for the medical care rendered. Furthermore, the Arbitrator notes that Petitioner was required by Respondent to be examined at Mercy Works from June 26, 2007, through at least June 16, 2008. All four of the Mercy Works physicians document the causal connection of Petitioner's injuries and recommended treatment and work restrictions for Petitioner. They also supported the ongoing treatment recommended by the treating physicians.

Considering the entirety of the evidence adduced and especially that Respondent's doctors at Mercy did not disagree with the treatment provided to Petitioner and the recommended work restrictions, Dr. Zelby's opinions are found to be not persuasive. Ex Post Facto RTW/MMI opinions by a Section 12 examiner sometimes carry little weight, especially when the injured worker is receiving treatment at a fine medical center such as Loyola and is having her treatment monitored by the employer's chosen medical clinic.

Here, Petitioner was in good health before the accident. She denied prior injuries or medical care to her cervical spine, lumbar spine, left shoulder and left front teeth. There was no evidence submitted to dispute her testimony and no evidence of any subsequent injuries to the involved body parts. Petitioner's testimony, the medical opinions and the chain of events supports the Arbitrator's finding on the issue of causation. International Harvester v. Industrial Commission, 93 Ill. 2d 59 (1982)

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 medical services provided to Petitioner were reasonable and necessary to cure or relieve the effects of the injuries that Petitioner sustained. Based upon the Arbitrator's finding above on the issue of causation, Petitioner's claimed medical bills are awarded.

In regard to the ATI bill and the Utilization Review documentation, the Arbitrator finds that Petitioner has established by a preponderance of the evidence that a variance from the standards of care used by the person performing the utilization review pursuant to Section 8(a) is reasonably required to cure or relieve the effects of Petitioner's injuries. This is documented by the medical report of Dr. Prabhu dated August 17, 2010, and the medical records and progress reports from ATI. The Progress Report dated November 11, 2010, clearly documents the increase in Petitioner's left shoulder range of motion and benefit from physical therapy. Thus, the additional therapy is merited.

At the Arbitration hearing, Respondent claimed credit for bills paid through its group medical plan for which credit may be allowed under Section 8(j) of the Act. (see: Arb.Ex. #1). The Arbitrator finds that all of the medical treatment provided to Petitioner was reasonable, necessary, and causally connected to her work accident of June 24, 2007.

Accordingly, the Arbitrator awards payment of the outstanding bills entered into evidence by Petitioner (ATI - $9,224.17; Care Rehab & Orthopedic Products - $1,212.00; Worth Palos Dentistry - $3,606.80 and Loyola University Health System - $257.70).

The awarded medical bills are subject to adjustments consistent with the Illinois Medical Fee Schedule and Section 8.2 of the Act. Respondent is entitled to a credit for any awarded medical bills that it has paid or compromised under Workers' Compensation.

The Arbitrator further orders Respondent to hold Petitioner safe and harmless from any claims made by her group health insurance carrier or from any medical providers whose bill was discharged by Petitioner's group health insurance carrier, in accordance with section 8(j) of the Act.

In support of the Arbitrator's Decision relating to "L", what amount is due for temporary total disability, the Arbitrator finds:

The Arbitrator notes that temporary total disability benefits are awarded for "the period of time between the injury and the date the employee's condition has stabilized." Ford Motor Company v. Industrial Commission, 126 Ill.App.3d 739 (1st. Dist. 1984).

The Arbitrator finds that Petitioner is entitled to temporary total disability benefits for a total of 172-5/7 weeks covering the periods of June 25, 2007 through October 15, 2010. Pursuant to the stipulated Average Weekly Wage, Petitioner is entitled to these benefits at the rate of $652.71 per week. The Arbitrator notes that the Parties stipulate that Petitioner was paid $47,076.11 in TTD benefits by Respondent. According to Petitioner's testimony, she was paid TTD benefits by Respondent up to the point of her Section 12 examination with Dr. Zelby. Respondent did not dispute this fact. The Arbitrator also notes that Respondent apparently paid Petitioner TTD benefits based on the average weekly wage of her position with Respondent, not on the stipulated concurrent employment average weekly wage. Finally, the Arbitrator notes Petitioner's unrebutted testimony that Respondent never provided her with modified duty employment. Whether or not Petitioner's employment at Computershare was within her work release, while under active medical care, is irrelevant. Petitioner was laid off from this position after a very short period of time, and the company eventually closed. Petitioner was injured working for Respondent. Accordingly, Respondent was not relieved of its obligation to Petitioner to either provide modified employment or continue to pay TTD benefits.

In support of this finding, the Arbitrator relies upon the credible testimony of Petitioner and the overwhelming medical evidence submitted into evidence at arbitration. The medical records clearly establish that Petitioner's condition had not stabilized during the aforementioned periods. Petitioner had been under a constant course of medical care for her conditions, and extensive treatment was performed by her treating physicians. The Arbitrator notes that Respondent's defense relative to Petitioner's claim for temporary total disability is that her entitlement to these benefits ended on August 5, 2007. Respondent claims on the RFH form that Petitioner is entitled to TTD for the period of June 25, 2007, through August 5, 2007, a period of 6 weeks. (Arb EX# 1) Respondent bases its argument on the medical opinion of Dr. Zelby rendered in September of 2010, some 3 years after the TTD period is claimed to have ended. Dr. Zelby's opinion is contrary to at least 8

physicians (including Respondent's chosen medical providers) in this matter and was rendered some three years after the TTD period was said to have ended. The Ex Post Facto opinion on TTD is not persuasive.

The Arbitrator notes Petitioner's testimony that after her TTD benefits were suspended in October 2010, she started performing part-time work within her work restrictions, while continuing to pursue the recommended medical care. Petitioner eventually obtained full-time employment with Northern Trust.

Given the Arbitrator's finding above on the issue of causation, Petitioner's testimony and the medical records, TTD is awarded from June 25, 2007 through October 15, 2010.

In support of the Arbitrator's Decision relating to "Nature and Extent of the Injury", the Arbitrator finds:

Petitioner testified to the subjective complaints which she experiences in her cervical spine, lumbar spine, left upper extremity and upper left front teeth. The injuries that Petitioner sustained to her cervical spine, lumbar spine, left upper extremity, and upper left front teeth are well documented by the medical records and by Dr. Coe. In addition, the Arbitrator had the opportunity to view the scarring on Petitioner's upper left forearm area. The Arbitrator noted an area of 5x1inches with some keloid scarring.

Petitioner also testified that her physicians have released her with a permanent work restriction of sedentary duty only and no traffic direction. Significantly, Petitioner was only 36 years of age when she had a sedentary work restriction placed upon her. The Arbitrator notes that Respondent's physicians at Mercy Works also placed the same work restrictions on Petitioner. In addition, Petitioner's examining medical expert, Dr. Jeffery Coe, opined that Petitioner requires permanent restrictions as a result of her June 24, 2007, accident. In this case, Dr. Zelby's opinion that Petitioner is capable of work without restriction is not persuasive.

In regard to her work activities, Petitioner's unrebutted testimony has established that she was never offered modified employment by Respondent. Rather, Petitioner conducted her own job search and obtained several temporary positions following the suspension of TTD benefits in October 2010. Thereafter, Petitioner testified that she ultimately secured full time employment within her sedentary work restriction with Northern Trust.

Considering the entire Record, the Arbitrator finds that, as a result of the injuries sustained, Petitioner suffered the 20% loss of use of the person as a whole, pursuant to Section 8(d)2 of the Act and 20 weeks disfigurement to the left forearm, pursuant to section 8(c) of the Act. Thus, the PPD award is 120 weeks of compensation at the rate of $587.44/week.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC011135
Case Name	Renard Bell v. Costco Wholesale
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0497
Number of Pages of Decision	16
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Joel Herrera
Respondent Attorney	Michelle LaFayette

DATE FILED: 11/22/2023

/s/Kathryn Doerries, 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 DU PAGE	)	☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☒ Modify Medical expenses down	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RENARD BELL,

Petitioner,

vs. NO: 17 WC 11135

COSTCO WHOLESALE,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection and medical expenses, and being advised of the facts and law, vacates the Arbitrator's award of medical expenses in part, affirms in part, and modifies the Amended Decision of the Arbitrator as stated below, and otherwise affirms and adopts the Amended Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms and adopts the Arbitrator's Decision except with respect to the medical expenses award. After careful review of the evidence, the Commission vacates the Arbitrator's award of medical expenses, in part, and affirms, in part, as described herein. The Commission vacates the award for medical bills in the amount of $37,875.00, for services rendered by Windy City Medical Specialist for the VascuTherm cold therapy unit and the Continuance Passive Motion Device (CPM) following the second surgery. (PX8) The Commission affirms the award of the medical bills in the amount of $11,374.20 for services rendered on April 24, 2017, by Lakeshore Surgery Center FAC, vacates the medical bill in the amount of $11,374.20 for services rendered on March 5, 2018, by Lakeshore Surgery Center FAC, affirms the award of the medical bill in the amount of $3,356.49 and affirms the award of $245.00 for services rendered by Lakeshore Surgery Center PHY on March 5, 2018. (PX4) The Commission further affirms the award of medical bills for services rendered by Delaware Physicians in the amount of $9,668.81 which excludes the transportation charges, (PX2) Montanari Medical, Inc., in the amount of $10,300.00, (PX8) and Prescription Partners in the amount of $7,275.72, (ArbX1) pursuant to the

fee schedule. In further support thereof, the Commission sets forth modifications of the Arbitrator's Decision below.

Preliminarily, in the Arbitrator's Conclusions of Law under section "J", the Commission strikes the first sentence in the first paragraph on page six, "Respondent doesn't dispute the medical necessity of the treatment Petitioner received." The Commission notes medical necessity of the treatment Petitioner received was specifically at issue at arbitration. Further, the Commission views the evidence differently than the Arbitrator and modifies the last paragraph in section "J" for the reasons set forth below.

The Act entitles a claimant to receive benefits "for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred" so long as they are "reasonably required to cure or relieve from the effects of the accidental injury." *820 ILCS 305/8(a)* (West 2008). The Commission finds Petitioner has failed to prove the medical bills for Windy City Medical Specialists VascuTherm cold therapy unit for services rendered after the second surgery of March 5, 2018, were medically reasonable and necessary. The March 15, 2018, Utilization Review (UR) report submitted by Respondent addressed whether the requested 6–13-week rental of a VascuTherm cold therapy unit/DVT for the right shoulder was medically necessary given the lack of guideline support for cold compression therapy for the shoulder. (RX4) A Peer-to-Peer Contact was attempted with Dr. Markarian March 14, 2018, and March 15, 2018. No response was received per the UR report. *Id.* The UR report stated that the VascuTherm cold compression unit was not recommended for the shoulder. It further noted that the "Official Disability Guidelines (ODG) shoulder (Acute & Chronic) Procedure Summary stated that while limited evidence may support occasional post-operative use following major knee surgery, it has not been shown to be much better than simple cost-effective ice packs following shoulder surgery." *Id.* The device was non-certified and there is no evidence an appeal of the non-certification was filed. The Commission finds the VascuTherm cold compression device is not medically necessary based on the UR.

Further, under 820 ILCS 305, 8.7 (i)(4), when a payment for medical services has been denied or not authorized by an employer or when authorization for medical services is denied pursuant to utilization review, the employee has the burden of proof to show by a preponderance of the evidence that a variance from the standards of care used by the person or entity performing the utilization review pursuant to subsection (a) is reasonably required to cure or relieve the effects of his or her injury. Here, the Commission finds the UR is reliable and persuasive and thus affords it significant weight. Further, Petitioner did not prove a variance in the standard of care was reasonably required in this case. Absent this, and relying on the UR, the Commission declines to award the medical bills for the VascuTherm cold therapy device after the second surgery.

The Commission likewise denies the medical bills for the CPM device after the second surgery. The UR report states that the procedures performed did not meet the requirements based on applicable guidelines for CPM devices. It states the "Official Guidelines (ODG) shoulder (Acute & Chronic) Procedure Summary does not recommend continuous passive motion (CPM) in the shoulder beyond adhesive capsulitis; it is not recommended for shoulder rotator cuff problems after shoulder surgery. There are no exceptions in this case." The device was non-certified and there is no evidence the provider appealed the non-certification. The Commission finds the UR is persuasive and finds Petitioner failed to prove the medical bills for the CPM

machine after the second surgery were medically necessary and declines to award same. Therefore, the Commission, vacates the Arbitrator's award of the medical bill in the amount of $37,875.00 for the VascuTherm cold therapy device and the CPM machine rendered by Windy City Specialists after the second surgery.

The Commission affirms the Arbitrator's award for the $11,374.20 medical bill for services rendered by Lakeshore Surgery Center FAC on April 24, 2017, under CPT code 29823, pursuant to the fee schedule. (PX 4) The Commission notes Respondent's "Explanation of Benefits", disputed this CPT code as "procedure not documented in operative report," using explanation code x129. (RX7) However, upon review of the operative report, the Commission finds the operative report documents "synovectomy and debridement of labral fraying". Therefore, finding documentation, the Commission affirms the Arbitrator's award of the medical bill in the amount of $11,374.20 for services rendered by Lakeshore Surgery Center FAC, on April 24, 2017, pursuant to the fee schedule.

The Commission vacates the award of the medical bill in the amount of $11,374.20, billed under CPT code 29826, for services rendered by Lakeshore Surgery Center FAC, on March 5, 2018. The Commission finds this code does not appear in the Fee Schedule. The Commission notes that Section 1(c) of the "Instructions and Guidelines" states that a code is excluded when, "The procedure is relatively minor, and the facility component is included in the physician's charge for the procedure." Therefore, since the code is not in the Fee Schedule, the Commission declines to award this bill.

The Commission affirms the award of the medical bill in the amount of $245.00 for services rendered by Lakeshore Surgery Center PHY for CPT code 99213, office visit or other outpatient, and also awards the medical bill in the amount of $3,356.49 for CPT code 29826 for physician services rendered on March 5, 2018, the date of Petitioner's second arthroscopic shoulder surgery, pursuant to the fee schedule. (PX 4) This is supported by the medical records, including the operative report, and is reasonable and necessary.

The Commission further affirms the award of medical expenses for services rendered by Delaware Physicians in the amount of $9,668.81 which excludes the transportation charges, Montanari Medical Inc., in the amount of $10,300.00, and Prescription Partners, in the amount of $7,275.72, subject to the fee schedule.

Thus, the Commission modifies the first two sentences in the last paragraph in Section "J", so they read as follows: "The Commission finds Petitioner proved by the preponderance of the evidence the medical treatment received was reasonable and necessary to diagnose, relieve or cure Petitioner from the effects of his injury with the exception of the transportation charges found in the Delaware Physicians bill, the charges for the VascuTherm cold therapy unit and CPM machine following the second surgery found in the Windy City Medical Specialists bill, and the billed amount under CPT code 29826, found in the Lakeshore Surgery Center FAC, for services rendered on March 5, 2018. As such, Respondent shall pay the medical expenses identified in Petitioner's Exhibits 2, 4, 8, and 9 pursuant to Sections 8.2 and 8(a) of the Act subject to the fee schedule with the exception of the transportation charges identified in the Delaware Physicians bill ($1,925.00), the Windy City Medical Specialists charges for the VascuTherm cold therapy unit and CPM machine following the second surgery ($37,875.00) and the billed amount under CPT code 29826,

for services rendered by Lakeshore Surgery Center FAC, on March 5, 2018 ($11,374.20).

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on October 12, 2022, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's award of medical expenses is vacated, in part, and affirmed, in part.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $286.00 per week for a period of 100 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the 20% loss of Petitioner's person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the medical expenses identified in Petitioner's Exhibits 2, 4, 8, and 9 pursuant to Sections 8.2 and 8(a) of the Act subject to the fee schedule with the exception of the transportation charges identified in the Delaware Physicians bill, the charges for the VascuTherm cold therapy unit and CPM machine following the second surgery found in the Windy City Medical Specialists bill, and the billed amount under CPT code 29826, found in the Lakeshore Surgery Center FAC, for services rendered on March 5, 2018. Respondent shall be given credit for medical bills previously paid and Respondent shall hold Petitioner harmless from bills which Respondent claims a credit.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $67,600.00. 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.

November 22, 2023

KAD/bsd
O092623
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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	17WC011135
Case Name	Renard Bell v. Costco Wholesale
Consolidated Cases	
Proceeding Type	
Decision Type	Amended Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Frank Soto, Arbitrator

Petitioner Attorney	Joel Herrera
Respondent Attorney	Michelle LaFayette

DATE FILED: 10/12/2022

THE INTEREST RATE FOR THE WEEK OF OCTOBER 12, 2022 4.03%

/s/*Frank Soto, Arbitrator*

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF DUPAGE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
AMENDED ARBITRATION DECISION

Renard Bell
Employee/Petitioner
v.
Costco Wholesale
Employer/Respondent

Case # **17WC011135**

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 **August 26, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **12/16/2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**18,850.00**; the average weekly wage was $**362.50**.

On the date of accident, Petitioner was **41** years of age, ***single*** with **2** dependent children.

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

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

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

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

ORDER

Respondent shall pay the medical expenses identified in Petitioner's Exhibits 2, 4, 8, and 9 pursuant to Sections 8.2 and 8(a) of the Act subject to the fee schedule with the exception of the transportation charges identified in the Delaware Physicians bill. Respondent shall be given credit for medical bills previously paid and Respondent shall hold Petitioner harmless from bills which Respondent claims a credit.

Respondent shall pay Petitioner permanent partial disability benefits of $286.00/week for 100 weeks, because the injuries sustained caused the 20% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from December 16, 2016 through August 26, 2022 and shall pay the remainder of the award, if any, in weekly payments.

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

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

OCTOBER 12, 2022

By: */o/ Frank J. Soto*
Arbitrator

Procedural History

This case was tried on August 26, 2022. The disputed issues were whether Petitioner's current condition of ill-being is causally connected to his injury, whether Respondent is liable for outstanding medical expenses and the nature and extent of Petitioner's injury. (Arb. Ex. #1).

Findings of Fact

Renard Bell (hereinafter referred to as "Petitioner") was employed by Costco Wholesale (hereafter referred to as "Respondent") as a stocker. Petitioner testified he retrieves products from overhead shelfing. Petitioner testified, on December 16, 2016, he was stocking products and while lifting cases he felt a pop in his right shoulder.

Petitioner reported the accident and he was referred to Dreyer Clinic by Respondent. At that time, Petitioner was placed on work restrictions of no lifting greater than 15 pounds which Respondent could not accommodate. Dreyer Clinic recommended physical therapy which Petitioner attended at Little Company of Mary from January 26, 2017 through March 7, 2017. (Px 10).

On April 10, 2017, he came under the care of Dr. Steven Sclamberg, an orthopedic surgeon at Delaware Physicians, who diagnosed impingement syndrome with a partial thickness rotator cuff tear and recommended right shoulder surgery. Petitioner presented for surgery on April 17, 2017 but due to several failed intubation attempts the surgery was canceled. (Px 4).

Petitioner left the surgery center and he presented to Trinity Hospital complaining of throat swelling, pain and difficulty swallowing. (Px 5). Petitioner was prescribed hydrocodone. Two days later, Petitioner saw Dr. Nancy Roberts at Advocate Medical Group who noted the intubation attempts traumatized Petitioner's pharynx causing bleeding and throat soreness. Thereafter, Dr. Roberts cleared Petitioner for shoulder surgery after performing a laryngoscopy. (Px 1).

On April 24, 2017, Dr. Sclamberg performed an arthroscopic rotator cuff repair, subacromial decompression debridement and synovectomy of the right shoulder. The surgery revealed a full-thickness tear of the rotator cuff. Dr. Sclamberg ordered a Game Ready Unit and a Continuous Passive Motion Device (CPM). The devices were distributed by Montanarri Medical Inc. (Px 4, Px 8).

Petitioner testified Dr. Sclamberg left the practice at Delaware Physicians so Dr. Gregory Markarian took over his care. On May 8, 2017, Dr. Markarian removed Petitioner's stitches, prescribed physical therapy, and kept Petitioner off work. (Px 2).

From May 16, 2017 through October 2017, Petitioner underwent physical therapy at Premier Therapy. (Px 3). Petitioner continued to report persistent pain so Dr. Markarian prescribed additional diagnostic tests. (Px 2). On August 18, 2017 and September 22, 2017, Petitioner underwent diagnostic right-sided gleno-humeral intra-articular joint arthrography by Dr. Axel Vargas of Lakeshore Open MRI. On October 9, 2017 Petitioner returned to Dr. Markarian who reviewed the CT scan which showed fluid extravasation not visualized on MRI arthrogram. (Px 2).

On October 16, 2017, Petitioner was examined by Dr. Charles Bush-Joseph pursuant to Section 12 of the Act. Dr. Bush-Joseph opined that Petitioner was suffering from right shoulder capsulitis following a rotator cuff repair. Dr. Bush-Joseph opined Petitioner's complaints correlated with his objective findings. Dr. Bush-Joseph recommended 20 lb. work restrictions and additional physical therapy. Dr. Bush-Joseph indicated that additional surgery may be necessary if Petitioner doesn't respond well to therapy. Dr. Bush-Joseph also opined Petitioner's medical treatment had been appropriate and causally related to the work injury. (Rx 1).

Respondent offered Petitioner a light duty position consistent with Dr. Bush-Joseph's 20-pound lifting restrictions. Petitioner returned to work on November 8, 2017 but upon returning to work Petitioner experienced an increase in shoulder pain. On December 11, 2017, Dr. Markarian took Petitioner off work and recommended a revision surgery. (Px 2).

The surgery was scheduled for February 12, 2018 at Lakeshore Surgery Center but due to repeat difficulties intubating Petitioner the surgery was canceled. Petitioner left the surgery center and went home. At home, Petitioner experienced shortness of breath and noticed dark red blood when coughing. (Px 5). Petitioner was taken by ambulance to Trinity Hospital and admitted into the hospital where he remained until February 15, 2018. (Px 5).

On March 5, 2018, Petitioner underwent the second shoulder surgery. Dr. Markarian performed a right shoulder arthroscopic biceps tenotomy, labral reconstruction using two 1.9 PushLock anchors of the anterior superior quadrant reconstructing the middle glenohumeral ligament, arthroscopic subacromial bursectomy with an open subpectoral bicep tenodesis using a 8 x 12 Arthrex Bioscrew. (Px 4). Dr. Markarian prescribed Vascutherm cold therapy and the unit

was provided by Windy City Medical Specialist. (Px 8). On March 7, 2018, Petitioner followed up with Dr. Markarian who prescribed Lidocaine, Diclofenac, Ondansetron, Eszopiclone and Cyclobenzaprine which were disbursed by Prescriptions Partners. (Px 2, Px 9).

On April 30, 2018, Dr. Markarian prescribed physical therapy which was done at Athletico. (Px 2). Thereafter, Petitioner attended work conditioning which was completed on September 17, 2018. (Px 6). On September 17, 2018, Petitioner underwent a functional assessment which showed Petitioner could perform his job demands. (Px 6). Despite meeting 100% of his job demands, it was recommended that Petitioner only occasionally perform overhead lifting. (Px 6).

On September 25, 2018, Petitioner followed up with Dr. Markarian who recommended Petitioner not return to work at that time due to soreness associated with the functional assessment. (Px 2). Petitioner returned to work on October 3, 2018 and he reached MMI on November 5, 2018. (Px 2)

On March 4, 2020, at Respondent's request, Dr. Edward Diamond authored a report addressing Petitioner's throat condition. Dr. Diamond opined that Petitioner suffered either pulmonary edema or chemical pneumonia from aspiration because of the failed intubation attempts. (Rx 3).

At to his current condition, Petitioner testified he is constant pain with limited range of motion of his right shoulder. He testified he cannot throw or shoot a ball with his kids. He testified he continues to work as a stocker in the freezer department which is less strenuous than the department he previously worked. Petitioner describes the workload in the freezer department to be lighter with fewer time restrictions. Petitioner also testified to continued throat complications following the failed intubation attempts. He testified that he continues to experience throat soreness and had seen an ENT but was informed that there is nothing further could be done.

The Arbitrator found the testimony of Petitioner to be 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. When a worker's physical structures, diseased or not, give way under the stress of their usual tasks, the law views it as an accident arising out of and in the course of employment. *General Electric Co. v. Industrial Comm'n,* 89 Ill.2d 432, 60 Ill.Dec. 629, 433 N.E.2d 671 (1982). Even though an employee has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. *Caterpillar Tractor Co. v. Industrial Comm'n,* 129 Ill.2d 52, 133 Ill. Dec. 454, 541 N.E.2d 665 (1989). Employers are to take their employees as they find them *A.C.&S. v. Industrial Commission,* 710 N.E.2d 8347 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Commission,* 433 N.E.2d 671, 672 (1982). Causal connection between work duties and an injured condition may be established by a claim of events including claimant's ability to perform duties before the date of an accident and inability to perform same duties following date of accident. *Darling v. Industrial Commission*, 176 Ill.App.3d 186, 530 N.E.2d 1135 (1st Dist. 1988) "When the claimant's version of the accident is uncontradicted and his testimony is unimpeached, his recital of the facts surrounding the accident may be sufficient to sustain an award. *International Harvester v. Industrial Comm'n*, 93 Ill.2d 59, 63-64 (1982).

The Arbitrator carefully reviewed and considered all medical evidence along with all the testimony. The Arbitrator finds Petitioner proved by the preponderance of the credible evidence that his current right shoulder and throat conditions are causally related to his work accident of December 16, 2016.

The parties stipulated Petitioner injured his right shoulder while lifting beverage products on December 16, 2016. Petitioner underwent two shoulder surgeries. Petitioner testified prior to this accident he had never injured his right shoulder and since the accident he had not suffered any subsequent accidents. Dr. Bush-Joseph, Respondent's section 12 examiner, opined Petitioner's right shoulder injury was causally related to the work accident. (Rx 1).

Petitioner also testified he had persistent throat complaints following the failed intubation attempts. Petitioner required medical attention after each episode which included a laryngoscopy and a 3-day stay at Trinity Hospital. Petitioner testified he continues to experience throat soreness. The medical records from the Lakeshore Surgery Center and Trinity Hospital confirm the surgery was postponed on two separate occasions due to failed intubation attempts. (Px 4 & Px 5). Dr. Edward Diamond authored report on which opined the failed intubation attempts caused either post-intubation pulmonary edema or chemical aspiration which required the medical care rendered at Trinity Hospital. (Rx 3).

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).

Petitioner claims the following medical bills are outstanding:

Lakeshore Surgery Center (facility charges):	$22,748.40
Lakeshore Surgery Center (physician charges):	$245.00
Delaware Physicians:	$11,593.81
Montanari Medical Inc:	$10,300.00
Windy City Specialist:	$37,875.00
Prescription Partners:	$7,275.72
(Arb. Ex. #1)	

With regards to the Lakeshore Surgery Center facility bill, Petitioner claims Respondent failed to pay a $11,374.20 charge for the surgery performed on April 24, 2017 with CPT Code 29823. (*see* Px 4, p. 66 & Rx 7, p. 1). Petitioner also claims Respondent failed to pay a similar charge for the surgery performed on March 5, 2018. (Px 4, p.66). Petitioner further claims Respondent failed to pay a $245 physician charge for the March 5, 2018 surgery. (Px 4, p. 67). The Delaware Physician bill involves charges for medications, teracin patches, a TLSO brace and transportation. (Px 2, p. 67-68). The Montanari and Windy City Specialist bills involves charges for Cold Compressive therapy and a Game Ready unit prescribed following each surgery. Montanari billed for these units in April and May 2017 following the initial shoulder

surgery. (Px 8, p. 6). Windy City Specialist billed for the same Cold Compressive therapy and Game Ready units along with Durable Medical Equipment prescribed following the March 5, 2018 surgery. (Rx 8, p. 3-5). Petitioner testified the Game Ready unit and Cold Compressive therapy allowed him to avoid using narcotic medications. The bill from Prescription Partners involves medications prescribed by Dr. Markarian on March 7, 2018 following the second shoulder surgery. (Px 9, p. 3,4). Respondent did not pay for the Lidocaine, Diclofenac, Ondansetron, Eszopiclone and Cyclobenzaprine disbursed at that time. (Px 9).

Respondent doesn't dispute the medical necessity of the treatment Petitioner received. Respondent's Section 12 examiner found the medical treatment reasonable and necessary. Respondent submitted into evidence a Utilization Review Report dated June 2, 2017 which non-certified the cold compressive therapy and Game Ready system therapy prescribed after the initial shoulder surgery. (Rx 4). Respondent also submitted into evidence a Utilization Review report dated March 15, 2018 which non-certified both the Vascutherm Cold Therapy Unit and the Continuous Passive Motion (CPM) machine. (Rx 4). The Arbitrator considered the Utilization Review reports but was not swayed by them noting that Dr. Bush-Joseph, Respondent's own Section 12 examiner, found Petitioner's treatment reasonable and necessary. The Arbitrator notes Dr. Bush-Joseph did not opine that the items identified by the Utilization Review reports were not reasonable or necessary. The Arbitrator also considered the secondary benefit these devices by allowing Petitioner to avoid narcotic medications and allowing Petitioner to be able to return to work full duty after undergoing two shoulder surgeries.

The Arbitrator finds Petitioner proved by the preponderance of the evidence the medical treatment received was reasonable and necessary to diagnose, relieve or cure Petitioner from the effects of his injury with the sole exception of the transportation charges found in the Delaware Physicians bill. As such, Respondent shall pay the medical expenses identified in Petitioner's Exhibits 2, 4, 8, and 9 pursuant to Sections 8.2 and 8(a) of the Act subject to the fee schedule with the exception of the transportation charges identified in the Delaware Physicians bill. Respondent shall be given credit for medical bills previously paid and Respondent shall hold Petitioner harmless from bills which Respondent claims a credit.

Regarding issue (L) the nature and extent of Petitioner's injuries, the Arbitrator finds as follows:

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 the record does not contain an impairment rating so the Arbitrator gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), Petitioner was employed as a stocker which is a position that is physically demanding. As such, the Arbitrator gives some weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes Petitioner was 41 years old at the time of the accident. Petitioner has a significant work life remaining to endure the effects of his injury. As such, the Arbitrator gives this factor some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earning capacity, the Arbitrator notes that there was no evidence of impairment of earning capacity. As such, the Arbitrator gives this factor no weight.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records. Petitioner suffered an impingement syndrome and a full thickness rotator cuff tear that required two extensive surgeries. The first surgery involved a rotator cuff repair, subacromial decompression and synovectomy with debridement. (Px 4, p. 5). The second surgery was more extensive requiring a bicep tenotomy, a labral reconstruction using two 1.9 Pushlock Anchors, a subacromial bursectomy and an open subpectoral bicep tenodesis using an 8 x 12 Arthrex Bioscrew. (Px 4, p. 55). Petitioner testified to persistent pain with reduced range of motion which has impacted his life both at work and at home. These complaints were verified in the medical records. Following the second surgery, Dr. Markarian noted the limitation with range of motion at his post-op visits in June, July, and August of 2018. (Px 2, p. 9, 13 & 15). The records from Athletico reveal Petitioner regularly reported pain to his physical therapist. (See Px 6, p. 2-134). At completion of physical therapy on August 1, 2018, the therapist noted Petitioner continued to have limited range of motion, strength along with scapular instability. (Px 6, p. 66). Petitioner continued to report high levels of shoulder pain at the time of his discharge from work conditioning in October 2018. (Px 6, p. 2-3). Petitioner testified this accident has impacted his life, both at work and at home. He described constant right shoulder pain with limited range of motion. He testified he cannot throw or shoot a ball with his kids. He testified he continues to work as a stocker but he can manage as he now works in the freezer department where the workload is less demanding. He also testified to continued throat complications following the failed intubation attempts prior to his surgeries. He testified that he feels continued throat soreness and has seen an ENT but was informed that medically there is nothing further to be offered. The Arbitrator places greater weight on this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 20% person-as-a-whole pursuant to Section 8(d)2.

By: /o/ *Frank J. Soto* October 12, 2022
Arbitrator Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC014326
Case Name	Thomas Dyer v. Tom's Appliances Service Inc.
Consolidated Cases	21WC032814;
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0498
Number of Pages of Decision	13
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Mark DePaolo
Respondent Attorney	Emily Schlecte

DATE FILED: 11/27/2023

/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

THOMAS DYER,

Petitioner,

vs. NO: 21 WC 14326

TOM'S APPLIANCE SERVICE, 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 accident, causal connection, temporary total disability, medical expenses, and prospective medical, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

The Commission, herein, modifies the Arbitrator's decision to add the following to the Order section to correspond with the narrative under Section J of the Arbitrator's Conclusions of Law:

"Respondent shall pay reasonable and necessary medical expenses incurred by Petitioner in the treatment of his cervical spine condition as a result of the April 8, 2021, work accident pursuant to Section 8(a) and 8.2 of the Act."

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 28, 2022 is, otherwise, 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 $40,000.00. 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.

November 27, 2023
o-9/26/23
KAD/jsf
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	21WC014326
Case Name	Thomas Dyer v. Tom's Appliances Service Inc.
Consolidated Cases	
Proceeding Type	19(b)/8(a) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Elaine Llerena, Arbitrator

Petitioner Attorney	Mark DePaolo
Respondent Attorney	Emily Schlecte

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)
- [x] None of the above

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

Thomas Dyer
Employee/Petitioner
v.
Tom's Appliance Service Inc.
Employer/Respondent

Case # **21** WC **014326**

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 **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. [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. [x] Was timely notice of the accident given to Respondent?

F. [x] Is Petitioner's current condition of ill-being causally related to the injury?

G. [ ] What were Petitioner's earnings?

H. [ ] What was Petitioner's age at the time of the accident?

I. [ ] What was Petitioner's marital status at the time of the accident?

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

K. [x] Is Petitioner entitled to any prospective medical care?

L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD

M. [x] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other ______

FINDINGS

On the date of accident, **April 8, 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 $**52.000.00**; the average weekly wage was $**1,000.00**.

On the date of accident, Petitioner was **56** 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

Respondent shall pay Petitioner temporary total disability benefits of $666.00 per week for 60 weeks, commencing April 29, 2021, through June 22, 2022, as provided in Section 8(b) of the Act.

Respondent shall authorize and pay for prospective medical care for Petitioner as recommended by Drs. Lorenz, Chudik, and Citow, specifically surgical treatment to Petitioner's cervical spine.

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 filed 3 prior Workers' Compensation cases in Illinois and received permanent work restrictions prior to his employment with Respondent in 2015 (T. 13-15, 54-56. Petitioner initially testified that he could not lift "anything heavy" before quantifying that to 60 pounds. (T. 62) then ultimately testified that he could not lift more than 60 pounds. (T.62). Petitioner also underwent vocational services and testified that he did not comply with the vocational service provider. (T. 62-63).

Petitioner testified that on January 14, 2013, he signed a settlement agreement in his prior case stipulating that he was physically incapable of returning to work. (T. 65). Petitioner did not work from 2013 – 2015. (T. 15).

Petitioner testified that he did not provide Respondent with any documentation of his prior permanent work restrictions. (T. 65-66). Respondent also testified that they were not aware of Petitioner's permanent restrictions at any time during Petitioner's employment with Respondent. (T. 96).

1. March 9, 2021

a. Petitioner's Testimony Regarding Alleged March 9, 2021, Accident

Petitioner began working for Respondent in March 2015 as an Appliance Repairman and worked on appliances in various homes. (T. 11-12). Petitioner's job duties included the repair of washers, dryers, and dish washers. (T. 12). Petitioner testified that he would receive daily call sheets for the service calls assigned to him. (T. 146-147).

Petitioner testified that on March 9, 2021, he received a job assignment to repair a newer GE top loading washer located around 90th and Dante Street in Chicago, Illinois. (T. 20-21). Petitioner received a service call sheet that day reflecting where the job was located, and he wrote the times on the sheet for each service. (T.149; RX. 4). During cross-examination, Petitioner admitted that Dante Street was not listed on his March 9, 2021, service call sheet. *Id.*

Petitioner testified that the washer weighed approximately 120 – 150lbs, would not run and he needed to look under the machine for a specific sensor. (T. 21; T. 29). Petitioner further testified that the machine had a cardboard stabilizer underneath the bottom of the washer, and he pulled the washer away from the wall, tilted it and saw cardboard wrapped around the transmission. (T. 21-24). Petitioner determined that he needed to lift the machine. *Id.* Petitioner testified that he pulled the machine onto his knees, balanced it and the customer pulled out the cardboard. (T. 29). After the lift, Petitioner noticed pain in the back of his left shoulder and went on 2 more service calls. (T. 26-27).

Petitioner testified that his left arm began to hurt, and he had associated numbness and tingling. (T. 27).

Petitioner testified that on March 10, 2021, he reported his accident to Dave Dyer. (T. 27-29). Petitioner did not seek treatment following the March 9, 2021, incident and continued working for Respondent. (T. 29).

Petitioner testified that he did not complete and accident report for the March 9, 2021, incident. (T. 58).

b. Dave Dyer's Testimony Regarding Alleged March 9, 2021, Accident.

Mr. Dyer owns and operates Respondent company and is Petitioner's brother. (T.73)

Mr. Dyer testified that he was not aware of Petitioner's alleged March 9, 2021, accident until April 8, 2021, when Petitioner reported a subsequent accident. (T. 82). Mr. Dyer reviewed the call sheets after hearing about the alleged accident and testified that Petitioner was not sent to a job on Dante Street on or around March 9, 2021. *Id*.

Mr. Dyer testified that Petitioner gave him his 2-week's notice on March 24, 2021. (T. 83). Petitioner did not resign due to his alleged arm condition or work accident. *Id*. Petitioner did not report any work issues with his shoulder, neck, or any other body part when he spoke to Mr. Dyer on March 24, 2021. *Id*.

Mr. Dyer testified that the GE washer that Petitioner allegedly serviced weighed closer to 125-150lbs and is not the type of washer that someone could "bear hug" to lift up. (T. 84). Further, the washer did not have a cardboard stabilizer and you could not see under the machine. (T. 127).

Mr. Dyer testified that if one of his employees gets hurt on the job and they need medical attention then they would get it as he would not try to hide the injury from his insurance carrier. (T. 107).

2. April 8, 2021

a. Petitioner's Testimony Regarding Alleged April 8, 2021, Accident

Petitioner testified that on April 8, 2021, he had a call in Crestwood, Illinois on a Maytag washing machine. (T. 31). The machine was an older model and the top that he had to move weighed 60-70lbs. (T. 35). On re-direct Petitioner indicated the machine weighed 50-60lbs. (T. 69-70).

Petitioner testified that while working on the machine, he had to pull the washer away from the wall about 1-1.5 feet to clear overhead cabinets and ultimately rested the top of the washer on the cabinets to work on the machine. (T. 34 – 35). Petitioner further testified that as he was putting the inner tub back into the machine, he lost sensation in his left hand and the tub "wobbled" while he was holding on with the right hand. (T. 37). Petitioner subsequently lost his balance, fell forward into the machine which caused the machine to slide back, and the top came "crashing" down onto the top of his head. (T. 38).

Petitioner testified that the lid fell approximately 2.5 feet on the top of his head, he was not cut and there was a red mark on him where the top hit him. (T. 40, 68).

Petitioner testified that immediately after the incident, he felt sharp pain in his neck; could not turn his head and had radiating pain down the left side of his neck with associated numbness and pain in the left shoulder (T. 39-42).

Petitioner did not complete an accident report for the April 8, 2021, incident. (T. 58).

b. Dave Dyer's Testimony Regarding Alleged April 8, 2021, Accident

Mr. Dyer testified that Petitioner did not call him after the April 8, 2021, service call as directed by Respondent and instead waited until he was at the ER to report a work injury. (T. 86).

To report the incident to his insurance company, Mr. Dyer spoke with the homeowner and was informed that Petitioner had a little red mark on his forehead. (T. 87).

Mr. Dyer testified to photographs of a Maytag Dependent Care Washer which was represented to be the same washer that Petitioner worked on at the time of the alleged April 8, 2021, accident. (T. 90-91). Mr. Dyer testified that the top of the washer weighed a maximum of 35-40lbs.(T. 90-91).

Regarding Petitioner's body positioning at the time of the alleged accident, Mr. Dyer described how the top console would have been lower than Petitioner's head and could not fall on the top of his head based on how Petitioner described the accident. (T. 94-96)

Mr. Dyer testified that it was impossible for the whole console top to slam down on top of Petitioner's head. (T. 95).

Mr. Dyer testified that for Petitioner to have sustained an injury to his head from the top falling down he would have had to be below the level of the machine for it to fall full force down on the head, which was impossible because of the tub. (T. 111). He clarified and said that Petitioner's head would have to be hip high at the time the lid came down. (T. 111).

3. Medical Treatment

ER treatment and Subsequent Treatment with Dr. Lorenz and Dr. Chudik

On April 8, 2021, Petitioner went to Palos Community Health ER. (PX. 1). Petitioner reported that he was injured while lifting a tub out of a washer and the lid hit him in the head. *Id.* Petitioner complained of left arm pins and needles with associated numbness, and bilateral shoulder pain. *Id*. Petitioner also reported that his bilateral arm paresthesias had been "going on" for the past couple of weeks. *Id.* Petitioner told the provider that while he was lifting he experienced worsening tingling, dropped the washer, and the lid hit him in the head. *Id*. Petitioner said that when the lid hit his head he felt worsening tingling in the right arm compared to the left. *Id*.

Petitioner then reported that a few weeks ago he was lifting a dryer by himself and said that after he lifted it, he got sharp shooting pains in the bilateral trapezius region with tingling down the arms into the fingers. (PX. 1). Petitioner was diagnosed with: (1) paresthesias; (2) head injury; (3) cervical radiculopathy and it was noted that Petitioner may have exacerbated his symptoms, especially on the right. *Id.* Petitioner was instructed to follow up with spine surgery and neurology. *Id.*

Petitioner underwent a cervical spine CT, the results of which revealed loss of cervical lordosis, no evidence of fracture, and degenerative change of the cervical spine. Id. Petitioner also underwent a head CT which revealed no evidence of intracranial hemorrhage. Id.

On April 29, 2021, Petitioner saw Dr. Lorenz and reported that he was injured at work on March 9, 2021, when he was lifting a washer and immediately after, began to feel discomfort in the arms. (PX. 2). Petitioner also reported that on April 8, 2021, a washer lid fell on his head, and he had constant left arm numbness. *Id*. Dr. Lorenz noted that Petitioner was repairing a washing machine and the propped-up lid struck him on the head. *Id.* Petitioner reported increasingly left arm pain and numbness at that time and looking to the left side causes arm pain yet looking right alleviates it. *Id*. Dr. Lorenz diagnosed Petitioner with a C6/7 disk herniation with C6/7 radiculopathy on the left side, recommended a cervical spine MRI, and placed Petitioner off work. *Id*.

A May 20, 2021, cervical spine MRI revealed multilevel lumbar spondylosis with findings most prominent at C6/7 with a suggestion of moderate central canal stenosis and possible cord signal abnormality

which may represent myeomalacia; moderate-severe right and severe left neural foraminal stenosis at C6/7; multi-level narrowing at other levels; and no other areas of high-grade central canal narrowing noted. Id.

On May 24, 2021, Dr. Lorenz noted that Petitioner's radiculopathy was worse on the left side vs. right side and referred Petitioner to Dr. Darwish due to concerns for myelomalacia and consideration of an ACDF and decompression. (PX. 2).

On June 23, 2021, Petitioner saw Dr. Jonathan Citow for an independent medical examination (IME) regarding the cervical spine. (RX.1). Petitioner reported that on March 9, 2021, he was lifting a washer and developed a sudden onset of left shoulder pain and denied experiencing neck pain or right-sided symptoms as a result of that accident. *Id*. Petitioner also reported that on April 8, 2021, a washer console weighing 20lbs fell onto his head and he developed left-sided neck pain with numbness and weakness through the left arm. (RX. 1). Petitioner denied radicular arm pain or right-sided symptoms stemming from the April 8, 2021, incident. *Id.* Dr. Citow requested Petitioner's cervical spine MRI images and opined that Petitioner may have cervical radiculopathy. *Id*.

On July 7, 2021, Petitioner saw Dr. Chudik upon referral from Dr. Lorenz regarding left shoulder and neck pain. (PX. 2). Petitioner reported that his pain began on March 9, 2021, after lifting a washer at a customer's home. *Id*. Dr. Chudik diagnosed Petitioner with left shoulder pain with concern for rotator cuff tear due to a March 9, 2021, work injury and recommended a left shoulder MRI. *Id*.

Petitioner underwent the left shoulder MRI on July 21, 2021, the results of which revealed high-grade articular surface partial-thickness tearing of the anterior and central supraspinatus tendon with up to 7mm retraction of the torn articular surface fibers and probable punctate full thickness tear; SLAP type tear of the superior labrum extending through the entirety of the posterior and inferior labra most likely to the anterior inferior labrum; inferiorly projecting AC arthrosis, correlate for outlet impingement; and subacromial bursitis with probable body within the subacromial bursa. (PX. 2).

On July 21, 2021, Dr. Citow reviewed Petitioner's cervical spine MRI and found that based on Petitioner's reporting, he would be a candidate for C6/7 anterior cervical discectomy and fusion. (RX. 2). Further, Dr. Citow opined that Petitioner did not require work restrictions for the cervical spine and would not require restrictions until he underwent surgery. *Id*. Dr. Citow found that Petitioner's subjective complaints did not match up with his objective findings. *Id.* Dr. Citow found that Petitioner's cervical spine condition was degenerative and preexisted the April 8, 2021, work injury, but that the temporal relationship of the onset of symptoms to the work injury suggested that the work accident could have contributed to the cervical radiculopathy. *Id.*

On July 28, 2021, Dr. Chudik recommended left shoulder arthroscopy and rotator cuff repair. (PX. 2).

On November 16, 2021, Dr. Chudik reviewed Dr. Citow's IME report and opined that Petitioner's March 9, 2021, work injury contributed to Petitioner's cervical radiculopathy and recommended anterior cervical discectomy and fusion. (PX. 2).

On November 30, 2021, Dr. Phillips performed an IME of Petitioner regarding the left shoulder. (RX. 3). During his examination, Petitioner was hostile, angry and oftentimes screamed at the physician. *Id*. Petitioner reported that on March 9, 2021, he was lifting a GE washing machine to remove a cardboard box and the machine weighed approximately 120lbs. *Id.* Petitioner demonstrated a bear hug to Dr. Phillips and said that as he was lifting the machine, he noticed a gradual onset of pain in the left upper arm as well as numbness radiating down to the tips of his index and middle fingers. *Id*. Petitioner reported that on April 24, 2021, he was

changing a transmission of a washing machine and the lid of the tub fell forward onto his head and he experienced worsening left arm pain. *Id.* Petitioner also reported that he fell approximately 1 foot and he noticed increased pain/burning around the left trapezius radiating into his arm. *Id*. Petitioner's intake paperwork reflected 10/10 pain in his left arm. (RX. 3). During his examination, Petitioner changed his pain rating to 4-5/10 at rest and 8-9/10 with activity and did not have an explanation for the discrepancy. *Id.* Dr. Phillips noted that following inconsistencies in Petitioner's examination and prior treatment records Petitioner alleged an accident date of March 19, 2021, on April 29, 2021, Petitioner told Dr. Lorenz that putting his hand above his head alleviated his left shoulder and arm pain. *Id.* Dr. Phillips opined that this is the opposite of what he would expect with a rotator cuff problem. *Id.* Dr. Phillips also found evidence of symptoms magnification during the examination. *Id.* Ultimately, Petitioner refused to allowed Dr. Phillips to finish his examination due to alleged pain. *Id.*

Dr. Phillips reviewed Petitioner's medical records and left shoulder diagnostic studies and opined that while lifting a washing machine the way he described could exacerbate underlying rotator cuff pathology, this would not cause burning, numbness or tingling and none of those symptoms are relate to the rotator cuff. *Id.* Dr. Phillips noted numerous inconsistencies during Petitioner's examination and opined that Petitioner had myofascial pain around his left shoulder that was not related to any structural cause. *Id.* Dr. Phillips opined that Petitioner's pain was not caused by any traumatic injury, including the March 2021 or April 8, 202, incidents. *Id.* Regarding additional treatment, Dr. Phillips recommended a therapeutic cortisone injection to the left shoulder and physical therapy with possible rotator cuff repair and opined that these treatments are not related to the alleged work accidents. *Id.* Dr. Phillips also reported that Petitioner was very hostile towards his work environment and Dr. Phillips could not opine as to MMI for myofascial pain due to Petitioner's refusal to complete the examination. *Id*. Dr. Phillips recommended a 5-pound overhead work restriction due to the left shoulder but did not relate those restrictions to Petitioner's alleged work accidents. *Id.*

On February 14, 2022, Dr. Chudik reviewed Dr. Phillips' IME report and opined that Petitioner had a high-grade partial to full thickness rotator cuff tear and that lifting a heavy washer on March 9, 2021, was a reasonable and competent mechanism to injury and aggravate his rotator cuff and recommended left shoulder arthroscopy with rotator cuff repair. (PX. 2).

Petitioner testified that he was honest and truthful with his physicians as well as Dr. Phillips and Dr. Citow. (T. 53).

Petitioner testified that he first experienced neck pain on April 8, 2021, first experienced left shoulder pain on March 9, 2021, and did not doubt the accuracy of the information contained in his medical records. (T. 53 – 54).

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).

After a complete review of the evidence provided, the Arbitrator finds Petitioner's testimony credible and supported by the medical evidence.

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

The Arbitrator notes that Petitioner described the April 8, 2021, work accident consistently throughout his treatment. The only exception appears to be during his evaluation by Dr. Phillips, which appeared to be contentious.

The Arbitrator further notes that Mr. Dyer opined that the accident, as described, could not have occurred and relied on his own experiences in disputing Petitioner's claim of work injury. However, as noted above, the Arbitrator finds Petitioner's testimony credible and the supported by the record. Additionally, Mr. Dyer testified that when he investigated the accident, the customer indicated that Petitioner had a red mark on his forehead following the accident.

Therefore, based on the above, the Arbitrator finds that Petitioner sustained an accident arising out of and in the course of his employment with Respondent on April 8, 2021.

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

The Arbitrator notes that Mr. Dyer testified that Petitioner called him from the ER to tell him about the work accident. Considering Petitioner told Respondent of the accident the day it occurred, the Arbitrator finds that Petitioner provided timely notice of the accident to Respondent of the April 8, 2021, work accident.

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

The Arbitrator notes that Petitioner had been working full duty, without any problems with his neck, prior to the April 8, 2021, work accident. At the ER, Petitioner was diagnosed with: (1) paresthesias; (2) head injury; (3) cervical radiculopathy and it was noted that Petitioner may have exacerbated his symptoms, especially on the right The Arbitrator further notes that the cervical MRI taken after the April 8, 2021, work accident showed multilevel lumbar spondylosis with findings most prominent at C6/7 with a suggestion of moderate central canal stenosis and possible cord signal abnormality which may represent myeomalacia; moderate-severe right and severe left neural foraminal stenosis at C6/7; multi-level narrowing at other levels. Dr. Citow reviewed Petitioner's cervical spine MRI and found that based on Petitioner's reporting, he would be a candidate for C6/7 anterior cervical discectomy and fusion. Also, as noted before, Petitioner was consistent in his reporting of the mechanism of injury during the April 8, 2021, work accident.

Therefore, based on the above, the Arbitrator finds Petitioner's cervical spine condition causally related to the April 8, 2021, 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:

Based on the Arbitrator's finding on causal connection detailed above, the Arbitrator finds that Petitioner's medical treatment to date has been reasonable and necessary. Therefore, Respondent shall pay all medical expenses incurred by Petitioner in the treatment of his cervical spine condition as a result of the April 8, 2021, work accident pursuant to Sections 8(a) and 8.2 of the Act.

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

Based on the Arbitrator's finding on causal connection detailed above, the Arbitrator finds that Petitioner is entitled to prospective medical care regarding his cervical spine condition as recommended by Drs. Lorenz, Chudik, and Citow, specifically cervical spine surgery. Therefore, Respondent shall authorize and pay for prospective medical care as recommended by Drs. Lorenz, Chudik, and Citow pursuant to the Sections 8(a) and 8.2 of the Act.

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

The Arbitrator notes that Dr. Lorenz took Petitioner of work on April 29, 2021, and has not released Petitioner to return to work pending additional treatment. Based on Dr. Lorenz taking Petitioner off work and the Arbitrator's finding on causal connection, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits from April 29, 2021, through June 22, 2022, the date of hearing.

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

Based on the evidence provided, the Arbitrator finds that Respondent had a good faith basis for the denial of benefits based on the opinions of Dr. Phillips and Dr. Citow. Additionally, both Petitioner and Mr. Dyer had different opinions as to the possibility of the mechanism of injury based on their experience as machine service men. Respondent's reliance on Mr. Dyer's take was not unreasonable.

Therefore, the Arbitrator finds that Respondent had a good faith basis for denial of benefits pending the hearing on the merits of the case. As such, Petitioner's claim for penalties and attorney's fees under Sections 16, 19(l), and 19(k) is denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC032814
Case Name	Thomas Dyer v. Tom's Appliance Service Inc.
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	23IWCC0499
Number of Pages of Decision	11
Decision Issued By	Kathryn Doerries, Commissioner, Amylee Simonovich, Commissioner

Petitioner Attorney	Mark DePaolo
Respondent Attorney	Emily Schlecte

DATE FILED: 11/27/2023

/s/Kathryn Doerries,Commissioner

Signature

DISSENT: /s/Amylee Simonovich, 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 Accident	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

THOMAS DYER,

Petitioner,

vs. NO: 21 WC 032814

TOM'S APPLIANCE SERVICE, 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 accident, causal connection, notice, medical expenses and prospective medical, and being advised of the facts and law, reverses the Arbitrator's Decision finding that Petitioner sustained his burden of proving an accident that arose out of and in the course of his employment. Therefore, all other issues are rendered moot.

The Commission affirms and adopts the Arbitrator's Findings of Fact, but reverses the Arbitrator's Conclusions of Law regarding the issue of accident, instead finding that Petitioner failed his burden of proving he sustained an accidental injury that arose out of and in the course of his employment with Respondent for the reasons set forth below.

The Commission's assessment of the Petitioner's credibility differs from the Arbitrator's as it relates to the subject accident. The Commission finds Petitioner's testimony is inconsistent with the facts and the evidence in the record and thus strikes the last sentence under the Conclusions of Law before the first heading "With Respect to Issue (C), Did an Accident Occur That Arose Out of and in The Course of the Petitioner's Employment by the Respondent." Further, the Commission strikes the three paragraphs under the heading, "With Respect to Issue (C), Did

an Accident Occur That Arose Out of and in The Course of the Petitioner's Employment by the Respondent" and substitutes the paragraphs set forth below.

The Commission finds Petitioner's testimony regarding his job assignment on March 9, 2021, to repair a GE top load washer at an address on Dante in Chicago and sustaining an injury on that date, is not credible based on his brother, David Dyer's testimony, inconsistencies in the medical records and based upon the §12 evaluation performed by Dr. Craig Phillips on November 19, 2021, and noted in his November 30, 2021, opinion report.

Petitioner testified that he worked for Respondent since March 2015. (T. 12) Prior to that that he sustained injury to his lumbar spine in a work accident in 2007, while employed by Rinnai Corporation. (T. 12-13) As a result of the 2007 work accident, Petitioner underwent a lumbar fusion, treating with Dr. Mark Lorenz of Hinsdale Orthopedics. (T. 13-14) Petitioner did not work between the accident in 2007 until he began working for Respondent in March 2015. (T. 15) Following the surgery, Petitioner was released to return to work in 2013 with significant restrictions including no heavy lifting. (T. 14) The Palos Community Hospital records confirm Petitioner actually underwent four lumbar surgeries, in 1995, 1997, 2005 and 2007. (PX1)

Petitioner's brother, David Dyer (David) testified that he owns his own company, Tom's Appliances, Inc., and that he has owned it since 2005 or 2006 after purchasing it from his father. (T. 73) He further testified that he worked for the business since 1986, fixing all major appliances, heating, air conditioning, everything. *Id.* David testified that he hired his brother in 2015, 2016 but that was not the first time they worked together. (T. 73-74) David testified they worked together when their father was still running the company, but shortly after he took over the business, he had to fire Petitioner for stealing from the company, and taking the cash tickets. (T. 74) David also testified that when his father owned the company and they all worked there, his father fired Petitioner for taking a service vehicle, driving it to South Dakota, and burning up the engine. (T. 75) His father rehired Petitioner in either 2008 or 2009 or before. His father hired Petitioner before David took over the business, so that would be 2003 or 2004. (T. 75) Petitioner worked for the company for a couple of years, then when David took over the business, he let him go because Petitioner was stealing from the company, and they had issues, so they went their separate ways. (T. 75-76)

In the years after his father sold the business to David, David assigned work based on service call requests that come in to the business. David testified, "[t]he girls write them up and they distribute them on to the guys' capability of what they can work on and stuff like that." (T. 76) Petitioner only worked on washers and dryers. (T. 76-77)

David further testified that every morning servicemen would come in to work and their routes would be written out for them. The servicemen write down the time zones, what time of the day he would be there, in front of the routes of those service calls for that day. Then either the girls or serviceman would let the customers know what time of day he is going to show up. (T. 77) After each and every call, the service technician is supposed to call in to the office and have the

office call the next customers when the technician is on the way. The office would then know the calls completed and where the serviceman is at on his schedule. David testified his brother, Petitioner, did not like to do that. David testified they had no record and no way of knowing how many calls Petitioner had done, where he was at, or "how many of his calls were completed that day because you are supposed to call in after every call." (T. 78)

David further testified that the business keeps a log of the service calls that employees run and they keep the logs for a month or two. They keep them in the office to refer to, so if a customer calls in to report a serviceman had been there before, and worked on an appliance, they can go back in the logs and verify. David testified, "it allows us to know when we were exactly out there and what calls we had done." (T. 79) David explained it also helped to identify the prior serviceman as they would go back to the logs and identify which serviceman was assigned to that address and "send the same technician back to fix what he didn't fix correctly the first time." (T. 79-80)

David also testified that on the date of the alleged accident, March 9, 2021, Petitioner came in to work that morning and told David that his arm was bothering him. (T. 80) David testified that he specifically asked, and Petitioner responded, that he did not know what had happened, advising David that maybe he had slept on it wrong. Petitioner described it as "numb or something" and David advised Petitioner to give it a couple of days and if it persists, to go to a doctor. David did not send him to a doctor. To David's knowledge, Petitioner did not seek medical treatment on March 9, 2021. (T. 81)

David testified that he heard Petitioner testify that on March 9, 2021, he worked a service job on Dante. (T. 81) David had the service log for March 9, 2021, with him at the arbitration hearing. (T. 81-82) David further testified that the log did not show Petitioner had a service call on Dante that day or any day in March or February 2021. (T. 82) David found out about the alleged March 9, 2021, accident on April 8, 2021, when Petitioner reported a second accident. David testified that he had a conversation with Petitioner again on March 24, 2021, and Petitioner did not mention a March 9, 2021, injury. (T. 83) David testified that Petitioner gave him a two-week notice on March 24, 2021, but did not report that he was resigning because of his arm or neck or any other body part. (T. 83)

David testified that he was familiar with the GE top load washing machine Petitioner referred to in his testimony. (T. 84) David understood Petitioner reported lifting the new washer (weighing about 120 pounds) to get a piece of cardboard out that was wrapped around the transmission. David testified that the washer probably weighed more like 125-150 pounds and that the machine is too bulky and big to do a bear-hug lift. *Id.* David testified that you cannot get your arms around the machine to do that type of bear-hug lift. *Id.* David had worked on those units many times, thousands of times in thirty-six years. (T. 85) David testified that in the 1980's and 1990's those models had a hollowed-out bottom, but the newer machines that Petitioner talked about have a metal-based pump so you cannot get up to the transmission from underneath or see into the transmission from underneath. David testified that you would have to remove the front

panel to get into or see the transmission. (T. 85-86)

David testified that when he hired Petitioner in 2015, Petitioner never told him about his work restrictions. (T. 96) David further testified Petitioner never told him he was precluded from lifting anything heavy or that he could not lift anything over 60 pounds *Id.* During his employment, Petitioner did not give any indication he could not physically perform his job. *Id.* David testified he knew Petitioner had a back problems as they were brothers. David had not reviewed any medical records of the prior back injury. (T. 96-97)

On cross examination, David further testified that he did not speak with Petitioner on March 10th. David further testified the only conversation he had with Petitioner about his left shoulder was when Petitioner told him on the morning of March 9 that it was bothering him. Petitioner did not tell David "what from" and David "did not know what it was from." (T. 117) David further testified that he had difficulties with Petitioner's description of the accident. (T. 125) David testified he did not believe that Petitioner could have looked underneath the machine because it has a metal bottom and it is solid, thus Petitioner could not have seen through it. (T. 126-127) This machine also does not have a stabilizer carton. It has a plastic ring that locks up onto the top when you lift the lid. It has a plastic donut shaped ring that keeps the tub stable. There is no cardboard stabilizing piece or anything of that nature. David testified that his explanation is based upon his expertise and that his company used to sell that machine. (T. 127-128)

David further testified on cross examination that on March 9, Petitioner probably had five or six calls. All of Petitioner's calls did not always result in repairs. Every day they went through his tickets and every day Petitioner had jobs where he "condemns the machine and doesn't fix it." (T. 130) David further testified that he would have to look at the actual call log for that day to determine if Petitioner had any calls on March 9 that did not result in repair, adding Petitioner did not have a call on Dante that day. David further testified that if a stabilizer carton had been left on a machine, in general, and that machine broke, it would not void the warranty. (T. 131) He explained, "[t]he warranty, the manufacturer warranty, the machine is warranted for one year from the manufacturer. They cover basically everything. Because I do work for warranty, and they cover everything." (T. 132)

David further testified on cross examination that there are no machines that do not have a solid metal bottom or a stabilizer carton mounted from the bottom. Cardboard is not strong enough to stabilize a machine. They have stabilizers, plastic. Speed Queen has a plastic donut shaped cone piece that goes through the cardboard box that the machine actually sits in when it is brand new, and it goes through the metal base at the bottom. It locks in, and that keeps it straight. And then they also have a plastic stabilizer up on top. But the machine in question is a GE from what Petitioner stated, and it was a new GE from what he stated. (T. 132-133)

On redirect examination, David testified that his father terminated Petitioner because it was "a revolving door," Petitioner would come and go. As the owner, David fired Petitioner when he worked for David previously for stealing, pocketing tickets and taking cash tickets and taking them

home. (T. 137) That would have been in 2005 or 2006 shortly after David took over the business and then David rehired Petitioner in 2015, 2016. David testified that he did not fire him subsequent to that time. Petitioner quit subsequent to his rehiring at that time. (T. 138)

Petitioner had identified a yellow lined sheet of paper as something he knew as a call sheet. (T. 147) A yellow lined sheet of paper was shown to Petitioner he confirmed looked exactly like the service sheets. Further, Petitioner testified that he wrote the time on the paper shown to him. (T. 149) David testified that the girls who had created the sheet of service calls for each worker were his wife or Mary Lou. The sheets are kept in the office and are prepared for every employee. The girls write them up the day they are provided to the employees. (T. 159-160) David testified that RX4 is Petitioner's schedule sheet for March 9, written up by his wife and she wrote up all the calls on it. The time zones were written by his brother, Petitioner. (160-161) David testified the service technician's name was written on each piece of paper so they know whose route is whose. They date the document so they know what (service) date it is. (T. 161) RX4 is the original copy. (T. 162) The Commission notes that RX4 evidences a list of service call addresses Petitioner had responded to on the alleged date of accident. The list did not reveal a 'Dante' address for March 9, 2021.

Therefore, the Commission finds that Petitioner's testimony regarding the events on March 9, 2021, was credibly rebutted by his brother, David's testimony. David testified Petitioner had arrived at work the morning of March 9, 2021, and advised him that Petitioner's shoulder was already bothering him when he got up and he did not know the reason. David testified that Petitioner also never indicated that he had any type of work injury that day nor did he indicate that he had any type of work injury when he gave his notice on March 24, 2021. David testified that he never found out Petitioner alleged he suffered a work injury until April 8, 2021. Petitioner further testified that there was cardboard packing material under the unit and he was going to try to get it out from the underside of the machine. David had been working on similar appliances for many years and had sold that appliance. David testified that on that particular GE model washing machine, there was a solid metal base and to get at any packing material you would have to remove the front cover to remove anything. Petitioner testified he lifted the washer using a 'bear-hug'. David testified that there was no way Petitioner could 'bear-hug' and lift that model washer. Further, the Commission notes that Petitioner had significant lifting restrictions from his prior injury.

Petitioner was shown Respondent's service call list for the day of the alleged accident. Petitioner agreed the service call sheets were created daily for each serviceman and the servicemen then wrote down the expected time they would be at the call with the estimate of time to perform the needed work. Petitioner noted the times he wrote on the left-hand margin of that service call sheet. Petitioner agreed he had seven service calls March 9, 2021, and that there was no 'Dante' street address noted for that date.

Petitioner testified he had the left shoulder pain since March 9, 2021, but Petitioner did not seek medical treatment until after he had a second, subsequent accident on April 8, 2021, when

Petitioner went to Palos Community Hospital.

Furthermore, David testified, without rebuttal, that his brother abused company policy by stealing, absconding with a company vehicle and blowing out its engine, coming and going, generally disregarding rules and what he called "condemning" machines and just not fixing them, thus discrediting the reliability of his testimony. Since Petitioner "condemned" machines on a regular basis and consequently did not fix them, the Commission finds that the testimony regarding bear-hugging the heavy washing machine not credible. Petitioner's testimony is contradicted by David's credible testimony that what Petitioner described is not plausible or necessary because you would remove the front cover to get to the stabilizer and cardboard is not a stabilizer.

The Commission further finds that Petitioner's concealment of his lifting restrictions from Respondent prior to and during his employment also taints Petitioner's credibility. That kind of deceit, coupled with various inconsistencies in the medical records regarding the occurrence of an alleged work accident on March 9, 2021, and extreme symptom magnification according to Dr. Phillips' §12 opinion report, undermine Petitioner's credibility.

At Petitioner's first medical consult at Palos Community Health on April 8, 2021, he reported he injured himself three weeks prior and then today, and he complained of bilateral shoulder pain while lifting a tub out of a washer and being hit with a lid. (PX. 1). Petitioner said that when the lid hit his head, he felt worsening tingling in the right arm compared to the left. *Id* . Petitioner also reported that a couple of weeks ago he *lifted a dryer by himself* (emphasis added) and afterward got "sharp shooting pains in the bilateral trapezius region with tingling down the arms and fingers" and said that he experienced intermittent tingling. *Id.* The Commission notes that three weeks prior, would be on or about March 18, 2021. Petitioner also told Dr. Phillips he was injured on March 19, 2021. (RX3, p. 2) The Commission finds those dates are inconsistent with Petitioner's testimony. Furthermore, he reported to the emergency room that three weeks prior he was lifting a dryer, not a washer. (PX1) Some inconsistencies are less notable than others, but based on the totality of the evidence, the Commission is not persuaded by Petitioner's testimony.

Dr. Phillips also documented that Petitioner was hostile, angry and screamed at Dr. Phillips. (RX3, p. 2) The Commission views this erratic behavior against the credibility of the Petitioner, as he did not allow the evaluation to be completed. Dr. Phillips noted Petitioner demonstrated a bear hug and said as he was lifting the machine he noticed a gradual onset of pain in the left upper arm. *Id.* Petitioner advised, and his medical records confirm, a history of four low back surgeries. (RX3, p. 3; PX1) Dr. Phillips reviewed various treatment records and opined that when Dr. Lorenz examined Petitioner on April 29, 2021, Petitioner reported putting his hand above his head alleviated his left arm pain, which is the opposite of what Dr. Phillips would expect with a rotator cuff problem. (RX3)

Dr. Phillips further opined rotator cuff pathology would not cause burning, numbness or

tingling. Dr. Phillips opined Petitioner's left shoulder had chronic rotator cuff pathology based upon his MRI and his right shoulder examination and his chief complaint at the time of the exam was numbness which is not related to his shoulder. (RX3, 10-11) Dr. Phillips opined that based on his examination Petitioner was self-limiting. (RX3, 11)

Finally, Dr. Phillips noted that Petitioner exhibited evidence of symptom magnification in several tests, although Petitioner would not allow Dr. Phillips to complete his examination. (RX3, 12) When Dr. Phillips performed the Spurling test to the right, it elicited 6/10 pain in the left paracervical musculature, which Dr. Phillips opined, is a not a concordant finding. When performing gentle Lhermitte's, whereby he placed gentle pressure on the top of Petitioner's head "barely putting any pressure" Petitioner reported pain in the left paracervical area which Dr. Phillips noted "does not make sense." *Id.*

The Commission finds Petitioner's testimony regarding a work accident on March 9, 2021, is clearly contradicted and not supported by the evidence for all the reasons set forth above. In short, the evidence the Commission finds compelling includes David Dyer's testimony that Petitioner advised him before work on March 9, 2021, that he had pain in his shoulder from an unknown reason, that the alleged repair would not require lifting the washing machine, that the Respondent's business record of Petitioner's service calls for the day indicated Petitioner had no service call on a 'Dante' street address, the inconsistent accident dates in the medical records plus references to lifting both a washing machines and a dryer in the medical records, the symptom magnification noted at Petitioner's §12 evaluation with Dr. Phillips, as well as his erratic behavior at that exam.

Therefore, the Commission finds that Petitioner's testimony regarding the alleged March 9, 2021, accident is not credible and Petitioner failed to sustain his burden of proving that he sustained accidental injuries arising out of and in the course of his employment.

> Where the sole support for an award rests upon the claimant's own testimony and claimant's actual behavior or conduct is inconsistent with that testimony, we have held the award cannot stand. (*Rockford Clutch* and cases there cited.) *McDonald v. Industrial Comm'n*., 39 Ill. 2d 396, 405, 235 N.E.2d 824, 829.

Thus, the Commission, reverses the decision of the Arbitrator and finds that Petitioner failed to sustain his burden of proving accident. All other issues are rendered moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on November 28, 2022, is hereby modified for the reasons stated herein, reversed on the issue of accident, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that with the finding Petitioner failed to prove he sustained an accidental injury that arose out of and in the course of his

employment, all other issues are moot, and the Arbitrator's award of prospective medical is hereby vacated. All claims for compensation by Petitioner are hereby denied.

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

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

November 27, 2023
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/s/*Kathryn A. Doerries*
Kathryn A. Doerries

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

DISSENT

After carefully considering the totality of the evidence, I respectfully dissent from the opinion of the majority and would affirm the Decision of the Arbitrator.

Petitioner claimed two accidents: March 9, 2021 and April 8, 2021. Respondent's owner, and Petitioner's brother, Dave Dyer, testified regarding both claims. With regards to the second accident on April 8, 2021, Mr. Dyer testified that it was impossible for Petitioner's injury to have occurred as claimed. T. 94-96. Yet, the majority agreed that Mr. Dyer's testimony was not credible in this regard as he confirmed with the homeowner that there was a red mark on Petitioner's forehead. T. 87.

Despite not accepting Mr. Dyer's testimony regarding the second accident on April 8, 2021, the majority is finding Mr. Dyer's testimony more credible with regards to the first accident on March 9, 2021. I find this inconsistent, as Mr. Dyer provided the same self-serving testimony with regards to both accidents not being able to have occurred as alleged.

There were numerous inconsistencies in Mr. Dyer's testimony, especially surrounding his history of working with this brother:

Q. Now you hired your brother, the Petitioner in this case, back in 2015, 2016?
A. Sounds about right.
…
Q. Did you – tell me about that. When did you work with him prior to –

> A. I worked with him when my dad was still running the company. But in 2005 or '6, shortly after I had taken over the business, we had to fire him because he was stealing from the company, taking tickets, the cash tickets.
> …
> Q. You testified that you previously worked with your brother prior to owning the company in –
>
> A. Yes.
>
> Q. -- 2005, 2006, is that accurate?
>
> A. That is correct.
>
> Q. Okay. And approximately how long did work with your brother prior to hiring him in 2015?
>
> A. I worked with him two different occasions. I worked with him back in the day when my dad owned it and we all worked there, and then my dad fired him. He took a service vehicle and went to South Dakota and burned up the engine, you know, they let him go. Then he came back. My dad hired him again, around 2008-ish, '9-ish, somewhere or before. He hired him before I took the business, so that would be 2003 '4. Hired him then. He worked for us a for a couple of years. And then when I took over the business I let him go. I had to fire him because he was stealing from the company and we had issues, so we just separated, went separate ways.
>
> Q. Okay. Now that was back when your father owned the company. When you rehired him in 2015, 2016 –
>
> A. Well my dad rehired him before my dad sold the business to me.
>
> T. 74-76.

Mr. Dyer gives multiple conflicting dates regarding when Petitioner was hired, fired, and when Mr. Dyer took over the business. Petitioner sustained an accident while working for Rinnai Corporation on August 14, 2007. T. 56. The case was settled January 14, 2013. T. 64. He was released from care in "2013-ish" after undergoing significant treatment, including L4-5 fusion. T. 13-15. Petitioner testified that following this injury he did not work until starting for Respondent in March 2015. T. 12, 15. The facts of this prior injury and Mr. Dyer's testimony are in direct conflict. Petitioner testified it was after Mr. Dyer took over for his father in 2015 that he asked his brother for a job, and his father convinced Mr. Dyer to hire him. T. 16. Petitioner's timeline is consistent with the prior accident. It is unclear when Mr. Dyer could have previously hired and fired his brother.

The Arbitrator was correct to be unpersuaded by the call log provided for March 9, 2021. RX4. This was handwritten by Mrs. Dyer and very vague. While it did not specifically state "Dante St.," Petitioner testified he was "around 90th and Dante." T. 20. Mr. Dyer admitted that Petitioner did not always follow the procedure with the call sheet: "You know, we had no record, you know, no knowing how many calls he's done, where he's at, what's going on. You know, we didn't know how many calls were completed that day, you know, because you are supposed to call in after every call so we know." T. 78.

Further, Mr. Dyer admitted that you could wrap your arms around the machine and pull it back on your knees, just as Petitioner described in his direct testimony. T. 120-123. He also confirmed that Petitioner reported arm/shoulder pain to him the next day, March 10, 2022. T. 118-120.

Finally, Mr. Dyer's testimony regarding Respondent having no other work-related accidents was contradicted. Mr. Dyer testified, "I have never had an employee get hurt." T. 78. He then corrected, "I mean, I had a guy I guess he drilled into his finger, and he called me right away when that happened, you know, from the job site. You know, it wasn't really bad. He just nicked his finger, you know." T. 78-79. On cross-examination, he was asked whether anybody was ever hurt before, and he stated, "Not that we had to fill out any forms or anything, yeah, no." T. 107. Petitioner testified a former employee, Jason, broke his hand. T. 141. Mr. Dyer also admitted he paid the bills for Petitioner's hernia, as well as his time off work. T. 110.

It is clear there was a lot of history and animosity between these two brothers. The Arbitrator was able to witness this dynamic and found Petitioner more credible. For the foregoing reasons, I would affirm the Decision of the Arbitrator.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC034949
Case Name	Cheryl Johnson v. State of Illinois - Dixon Correctional Center
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0500
Number of Pages of Decision	15
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Tracy Jones
Respondent Attorney	Joseph Blewitt

DATE FILED: 11/27/2023

/s/Maria Portela, 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 LASALLE)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Cheryl Johnson,

Petitioner,

vs. NO: 21 WC 034949

Dixon Correctional Center,

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 8(j) credit, temporary total disability duration, penalties 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 March 2, 2023 is hereby affirmed and adopted.

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

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

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

November 27, 2023
o110723
MEP/yp

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC034949
Case Name	Cheryl Johnson v. Dixon Correctional Center
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Roma Dalal, Arbitrator

Petitioner Attorney	Tracy Jones
Respondent Attorney	Joseph Blewitt

DATE FILED: 3/2/2023

THE INTEREST RATE FOR THE WEEK OF FEBRURAY 28, 2023 4.94%

/s/Roma Dalal, Arbitrator

Signature

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

March 2, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

TATE OF ILLINOIS)
)SS.
COUNTY OF LaSalle)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Cheryl Johnson
Employee/Petitioner

v.

Dixon Correctional Center
Employer/Respondent

Case # **21** WC **034949**

Consolidated cases: ______

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Roma Dalal**, Arbitrator of the Commission, in the city of **Ottawa** on **12/15/2022** and **Kankakee** on **1/30/2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. [ ] Was there an employee-employer relationship?

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

D. [ ] What was the date of the accident?

E. [ ] Was timely notice of the accident given to Respondent?

F. [x] Is Petitioner's current condition of ill-being causally related to the injury?

G. [ ] What were Petitioner's earnings?

H. [ ] What was Petitioner's age at the time of the accident?

I. [ ] What was Petitioner's marital status at the time of the accident?

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

K. [x] Is Petitioner entitled to any prospective medical care?

L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD

M. [x] Should penalties or fees be imposed upon Respondent?

N. [x] Is Respondent due any credit?

O. [ ] Other ______

FINDINGS

On the date of accident, **1/18/2021**, 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 $**121,327.37**; the average weekly wage was $**1,995.31**.

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

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule regarding Petitioner's left upper extremity and back as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for amounts paid. Respondent shall also pay $65.00 in copay charges to Petitioner.

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

Pursuant to Section 8(a) of the Act, the Respondent shall authorize and pay for, pursuant to the fee schedule, the treatment recommended by Rockford Spine, including, but not limited to a sacroiliac joint injection.

Respondent shall pay Petitioner temporary total disability benefits of $1330.21 per week for 3 6/7 weeks, commencing May 5, 2022 through June 1, 2022, as provided in Section 8(b) of the Act. Respondent shall receive credit for amounts paid.

Petitioner's request for penalties and fees is denied.

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

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

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

Signature of Arbitrator
ICArbDec19(b)

March 2, 2023

STATE OF ILLINOIS)
) SS
COUNTY OF OTTAWA)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Cheryl Johnson,)
)
Petitioner,)
)
v.)
) Case No. 21 WC 034949
Dixon Correctional Center,)
)
)
Respondent.)

FINDINGS OF FACT

This matter proceeded to hearing on December 15, 2022 in Ottawa, Illinois. Proofs were subsequently closed on January 30, 2023 in Kankakee, Illinois before Arbitrator Roma Dalal on Petitioner's 19(b) hearing. Issues in dispute include causation, disputed medical, 8(J) credit, TTD benefits, future medical and penalties. (Arb. Ex.1).

Petitioner testified as of January 2021, she worked as a security officer. At that time, she worked for almost 20 years. Petitioner's job duties consisted of keeping an eye on the inmates, walking them to and from court and to and from the medical unit. On January 18, 2021, Petitioner testified she was walking through an employee parking lot and fell on the ice. Petitioner fell on her left elbow and her left hip. Petitioner testified there were witnesses who saw the fall. After she fell, Petitioner advised her shift supervisor and filled out an accident report. (RX1).

On January 20, 2021, Petitioner presented to Physicians Immediate Care. Petitioner presented with a chief complaint of left elbow and left hip pain after falling on ice at work. (PX1, p.7). Petitioner was diagnosed with a contusion of the left elbow and left hip. Petitioner was provided ice and medication and was to return in a week. *Id*. at 10. Petitioner followed up on January 27, 2021 with continued soreness. Petitioner was to continue with medication and return. *Id*. at 25.

Petitioner returned to Physicians Immediate Care on February 4, 2021. (PX1, p.34). Both X-rays of the left elbow and hip were negative. Petitioner was provided the same medication. It was advised if there was no significant improvement, she would begin therapy. *Id*. at 36. In a February 12, 2021 follow up, Petitioner's shoulder still hurt. Petitioner was to begin physical therapy three times a week for four weeks for her left upper arm pain and low back pain, pertinent after her fall. Petitioner was still able to work full duty. *Id*. at 49. On February 25, 2021, Petitioner had worsening shoulder pain with interference with sleep. *Id*. at 65. Petitioner was diagnosed with subacromial bursitis or deltoid tendonitis. Petitioner was referred to physical therapy. *Id*. at 67.

Petitioner returned on March 4, 2021. Petitioner reported an initial improvement in the right shoulder, but her pain had returned. Petitioner was still awaiting approval for physical therapy. (PX1, p.84). X-rays taken of the sacrum revealed no gross acute displaced fracture. Petitioner was referred for an MRI. *Id*. at 86-87.

On March 12, 2021 Petitioner presented to Athletico for an initial evaluation. Petitioner was a 58-year-old female presenting to physical therapy with left shoulder stiffness, pain, and weakness and low back pain without radiculopathy. Petitioner was to undergo therapy three times a week for six weeks. (PX5, p.343-347). The Arbitrator notes Petitioner's intake paperwork notes pain in her shoulder, arm and back. *Id*. at 412.

On March 15, 2021 Petitioner underwent a left shoulder MRI which revealed moderate rotator cuff tendinosis, mild degenerative changes in the bicep tendon, moderate glenohumeral osteoarthritis, severe AC joint osteoarthritis impinging supraspinatus myotendinous junction. (PX1, p.97-98, PX4, p.236-237).

Petitioner followed up at Physicians Immediate Care on March 18, 2021. Petitioner followed up for pain in her left elbow and left hip. Petitioner had since retired since the injury. (PX1, p.107). Petitioner was to continue with physical therapy and medications. *Id*. at 109. Petitioner followed up with Physicians Immediate Care on April 1, 2021 with no improvement in her left shoulder and low back. Petitioner was referred to orthopedics. *Id.* at 126-129.

On April 12, 2021 Petitioner was seen at KSB by William Shaw, a physician's assistant. Petitioner was a retired prison guard noting she fell on ice injuring her left shoulder. Petitioner was diagnosed with bicipital tendinitis of the left shoulder, tendinopathy of the left rotator cuff, arthritis of the left acromioclavicular joint. A repeat cortisone injection was recommended. Petitioner was to continue with physical therapy. (PX2, p.157-158).

On April 21, 2021, Petitioner was discharged from therapy for her left shoulder. She had attended 18 visits of therapy. (PX5, p.281).

Petitioner followed up KSB with the physician assistant again on May 25, 2021. Petitioner's discomfort was exactly the same. She was also complaining of discomfort in her low back. A cortisone injection was administered into Petitioner's left shoulder. She was diagnosed with left impingement, tendinopathy left rotator cuff, arthritis of the left acromioclavicular joint, bicipital tendinitis of the left shoulder and low back pain. Petitioner was referred for a back MRI. (PX2, p.159-160).

On June 25, 2021 Petitioner underwent an MRI of the low back which revealed no disc herniation or spinal canal stenosis. There was mild degenerative disc and degenerative joint changes as well as moderate facet joint degenerative change on the right at L5-S1. (PX2, p.174-175).

Petitioner returned to KSB with the physician assistant on June 28, 2021 for an evaluation of her low back and left shoulder pain. Petitioner continued to have discomfort in her left shoulder despite the cortisone injection as well as continued back pain. Petitioner was referred to pain

management for her low back and referred to Dr. Hernandez to discuss possible shoulder surgery. (PX2, p.180).

Petitioner presented to Dr. Thomas Hernandez on July 26, 2021. Petitioner complained of pain in the left shoulder for which she underwent an injection which gave her some relief. Petitioner still had discomfort. The Doctor diagnosed Petitioner with shoulder impingement. Petitioner wanted to continue with observation as the pain was slowly improving. Petitioner was to return in four to six weeks. (PX2, p.186-187). Petitioner followed up with Dr. Hernandez on August 30, 2021. Petitioner noted she still had localized pain to the superior shoulder and the lateral proximal arm. She also underwent an MRI of the of back. Petitioner still wanted to defer surgery. Petitioner was to return in four to six weeks. If she still had pain, he would consider a repeat injection. He also noted her MRI revealed some mild degenerative changes in the low spine with no evidence of any significant herniation or foraminal compromise. (PX2, p.192-193).

Petitioner returned to Dr. Hernandez on September 27, 2021. Petitioner had multiple steroid injections with minimal relief. Petitioner's pain was localized to the superior shoulder with overhead activity. The pain continued to bother Petitioner to the point where she was interested in surgical intervention. The Doctor noted this was a reasonable step. (PX2, p.198).

On February 24, 2022 Petitioner presented to Rockford Spine Center and seen by Kelsey Montana, a nurse practitioner. Petitioner went over her work injury, indicating pain to her left arm and left hip. Petitioner advised she initially did six weeks of physical therapy for her low back which helped with her range of motion, however, the pain never subsided. She rated her pain a 3 out of 10. Petitioner's MRI was within normal limits. Petitioner was diagnosed with chronic axial sacroiliac joint mediated pain. Petitioner was recommended another course of therapy and medication. If that did not work, she could consider a sacroiliac joint injection. It was noted nothing in her spine needed surgery. (PX6, p. 445-447).

On March 4, 2022, Petitioner underwent an MRI of the left shoulder. The MRI revealed mild degenerative changes at the acromioclavicular joint and humeral head with type II inferior curved acromion with subacromial bursitis. In comparison to the prior exam, March 15, 2021, there was no significant interval changed. (PX4, p.233-235).

Petitioner began therapy for her back and right hip on March 14, 2022. Petitioner was recommended therapy twice a week for six weeks. (PX5, p.273-276).

Petitioner underwent surgery to the left shoulder on May 17, 2022 consisting of a left shoulder arthroscopy, decompression, and open Mumford procedure by Dr. Scott Nyquist. (PX12, p.738-739).

Petitioner followed up with Dr. Nyquist on May 23, 2022. Petitioner followed up for her shoulder, the incision looked great. Petitioner was to start therapy. (PX3, p. 221).

On May 23, 2022 Petitioner presented for physical therapy. Petitioner was to undergo therapy one to three times a week for twelve weeks. (PX10, p.689-694).

On June 1, 2022 Petitioner presented to Dr. Scott Nyquist for a follow up of her left arm. Petitioner was improving and attending physical therapy. Petitioner was to follow up in three weeks. Petitioner's activity/work note was noted as "not applicable." Petitioner was to weight bear as tolerated and follow up in three weeks. (PX3, p. 210-211). Petitioner returned on June 22, 2022 to Dr. Nyquist. Petitioner was making good progress in therapy and was off her narcotics. It was noted Petitioner was retired. She was to return in six week. (PX11, p.719). Petitioner was advised to continue with stretching and strengthening exercises and to be careful with any activities that cause significant pain. *Id*. at 722.

On August 3, 2022 Petitioner followed up with Dr. Nyquist. Petitioner started a new exercise at therapy and had taken a step back. Petitioner was to continue with home exercises and return as needed. (PX11, p.709). Petitioner was advised that activities such as overhead lifting may aggravate her symptoms. This did not mean she cannot do any of these activities but had to be careful with how much she did them. *Id*. at 712-713.

On August 31, 2022 Petitioner followed up in therapy, undergoing 12 weeks of therapy with 90% improvement. Petitioner was discharged from therapy. (PX10, p.536-540).

At trial, Petitioner testified consistently with her medical records. She testified she retired shortly after the injury on February 26, 2021. (RX2). Her retirement was in motion prior to her work accident. She noted in regards to her shoulder she has to be cautious with overhead lifting. In regards to her back pain, she has pain in the low back. She cannot get a good night sleep. She testified she wanted to undergo the injection and follow up treatment for her low back, but it was not approved.

Petitioner testified that prior to retirement she worked her regular job and used sick/vacation time. She also testified that her Doctor took her off work. She advised that she never received any TTD benefits or short-term benefits. She was never provided an offer of light duty and had not returned back to work. Petitioner acknowledged she has not been looking for a job nor has looked for work. Lastly, she noted she has not provided any restrictions to Respondent.

In regards to her medical bills, she had made some payments and was not reimbursed. She testified that she has a BlueCross BlueShield group health plan through Respondent, and that BCBS paid some of her medical bills.

Respondent called Samantha Swenson to testify. Ms. Swenson testified she was employed at Tristar for 1 year and administers workers' compensation benefits for the State of Illinois claims. Ms. Swenson identified Respondent's exhibit 3 as a document that is generated in the normal course of business. She explained that it appeared to be a payment ledger showing payments to various medical providers regarding Petitioner's claim. She explained that column 2 is the status which indicates payment was approved and column one indicates when the check is issued. Ms. Swenson testified on cross examination that she did not know who generated respondent's exhibit 3. She was, however, familiar with Petitioner's file as she had worked on it. She also testified it was a standard form and had no reason to doubt it.

At trial, Petitioner submitted medical bills into evidence. (PX7).

CONCLUSIONS OF LAW

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

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

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

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds her to be a credible witness. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable. The Arbitrator finds Petitioner's testimony to be straightforward, truthful, and consistent with the record as a whole.

With regard to Issue "F", whether Petitioner's current condition of ill-being is causally related to the injury and Issue "K" whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows:

The Findings of Fact and Conclusions of Law, as stated above, are adopted herein. To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in her ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Industrial Com.*, 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982). Prior good health followed by a change immediately following an accident allows an inference that a subsequent condition of ill-being is the result of the accident. *Navistar International Transportation Co. v. Industrial Commission*, 315 Ill. App. 3d 1197, 1205, 248 Ill. Dec. 609, 734 N.E.2d 900 (2000).

When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's

current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *St. Elizabeth's Hospital v. Workers' Compensation Commission*, 864 N.E.2d 266, 272-273 (5th Dist. 2007). Even when a preexisting condition exists, recovery may be had if a claimant's employment is a causative factor in his or her current condition of ill-being. *Sisbro, Inc. v. Industrial Commission,* 797 N.E.2d 665 (2003). Allowing a claimant to recover under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. *Land & Lakes Co. v. Industrial Commission*, 834 N.E.2d 583 (2d Dist. 2005).

Petitioner fell at work due to ice in the parking lot. Accident is not in dispute. Respondent also does not dispute causal connection of the left arm/shoulder injury, only to the back condition. (Arb. Ex.1). Petitioner proceeded for medical care on January 20, 2021 complaining of left elbow and left hip pain. By February 4, 2021, Petitioner complained of shoulder and low back pain. Petitioner testified she never had any prior left shoulder or back problems prior to the injury. In addition, the chain of events presented in this case show Petitioner's left shoulder and back became symptomatic after her work accident. There is no evidence whatsoever that prior to Petitioner's work accident, she received any medical treatment for these body parts. The record does not reflect Petitioner had ever taken time off work due to left shoulder or back pain. No evidence was introduced about Petitioner's pre-accident work performance not being satisfactory. There was no mention Petitioner requested any accommodation because of a shoulder or back condition. There was no evidence presented of intervening or subsequent injuries to the left shoulder or back that could explain Petitioner's injury and current condition. The Arbitrator finds Petitioner met her burden of proof by a preponderance of the evidence that her condition of ill-being was causally related to her work accident based on the chain of events in addition to the medical opinions contained in the record giving causal connection.

In regards to her back complaints, Petitioner continues to be symptomatic. Petitioner had no known injury or treatment to her back prior to January 18, 2021 and no injury after her work accident. Petitioner's treating physician at Rockford Spine opined if therapy and medication did not work Petitioner could consider an injection. Respondent did not offer any medical opinion to refute causal connection. Petitioner testified that she had not received treatment nor injured her back before this work injury. The accident is not disputed. The contemporaneous medical records demonstrate immediate report of pain in the left hip and then low back following the slip and fall at work. Based on the same, the Arbitrator finds Petitioner's accident to be a cause of Petitioner's current condition of ill-being in her back.

Regarding the issue of whether Petitioner is entitled to any prospective medical care, following consideration of the testimony and evidence presented, the same is incorporated by reference. In regards to Petitioner's left shoulder, the Arbitrator finds Petitioner has undergone physical therapy, diagnostic testing, injections, and surgery. As of August 3, 2022 Dr. Nyquist opined Petitioner should return as needed. Her records indicate she was discharged from therapy as of August 31, 2022. Petitioner testified she has not treated for her shoulder after this date. Based on the same, the Arbitrator finds Petitioner reached maximum medical improvement for her left shoulder as of August 31, 2022.

In regards, to Petitioner's back, it is found Petitioner's condition is causally related to her work accident and has not stabilized or otherwise reached MMI. Based on the same the Arbitrator finds Petitioner is entitled to prospective medical care as recommended by Rockford Spine, for her back to include a sacroiliac joint injection. For the reasons stated above, Respondent shall authorize and pay for this and such other reasonable medical treatment pursuant to the statutory fee schedule.

With regard to issue "J", whether the medical services provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for reasonable and necessary medical services, and with regard to issue "N", whether Respondent is due any credit, the Arbitrator finds as follows:

The Arbitrator incorporates by reference the above Findings of Fact and refers to them by reference herein. In reviewing the medical services provided to Petitioner, the Arbitrator finds Respondent has not paid all appropriate charges for all reasonable and necessary medical services. The Arbitrator finds the medical services provided to Petitioner were reasonable and necessary. Section 8(a) of the Act states a Respondent is responsible … "for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury…" A claimant has the burden of proving that the medical services were necessary, and the expenses were reasonable. See *Gallentine v. Industrial Comm'n*, 201 Ill.App.3d 880, 888 (2nd Dist. 1990).

Overall, the Arbitrator finds Petitioner's treatment to be reasonable and necessary. Petitioner submitted six bills into evidence. The first bill submitted into evidence is from Athletico with a statement date of December 30, 2022 showing a $0.00 balance. This bill also shows Petitioner paid a co-pay of $35.00. It also has payments by an HMO BCBS plan. (PX7).

The second bill from Forest City Diagnostic Imaging also shows a $0.00 balance. Again, it looks like the payment was by a BCBS HMO plan. The third bill from KSB Hospital is paid with a $0.00 balance. The fourth bill from Rockford Spine Center is paid with a $0.00 balance. (PX7).

The fifth bill is from Swedish American Medical Group. It was noted Petitioner paid a copay of $30.00. The remaining was paid by Insurance with a $0.00 balance. The final bill is from Swedish American Hospital. Once again, the bill shows a $0.00 patient balance, but also indicated that there is an insurance balance of $29,426.74. (PX7).

In regards to Respondent's 8(j) credit, Respondent did not delineate an exact amount of credit. Petitioner, however, did testify that she had insurance through her employer, specifically an HMO BCBS plan. The Arbitrator finds there is no suggestion of any other 8(j) involvement. The medical bills also show payments made by an HMO BCBS shield. As such, Respondent is entitled to an 8(j) credit to the extent they paid. (PX7).

In regard to the remaining unpaid medical, the Arbitrator finds it difficult to decipher what is actually paid and what is unpaid. Regardless, the Arbitrator finds it to be reasonable and

necessary and finds Respondent shall pay for any unpaid medical treatment, if any exist. The majority of the medical bills show a $0.00 balance; however, some have insurance pending claims. As such, if any providers have outstanding balances, Respondent will be liable for the same. In addition, the medical bills show Petitioner paid $65.00 in co-pays. Based on the same Respondent will be liable for the same.

Given the same, the Arbitrator finds Respondent is liable for reasonable and necessary medical treatment of the causally related condition. The Arbitrator orders Respondent to pay Petitioner all other reasonable and necessary medical expenses incurred in connection with the care and treatment of her causally related conditions pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid and shall hold Petitioner harmless from any claims by any provider of the services for which Respondent receives credit pursuant to Section 8(j) of the Act.

With respect to Issue "L", what temporary benefits are in dispute, the Arbitrator finds as follows:

In order to prove entitlement to TTD benefits, a claimant must establish not only that he did not work, but that he was unable to work. *Sharwarko v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 131733WC. An employee is temporarily totally disabled from the time that an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118 (1990). Once an injured employee's physical condition stabilizes or he has reached MMI, he is no longer eligible for temporary total disability benefits. *Archer Daniels Midland Co.*, 138 Ill. 2d at 118. A claimant reaches MMI when he is as far recovered or restored as the permanent character of his injury will permit. *Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1067, 1072 (2004). Factors to be considered in determining whether a claimant has reached MMI include whether he has been released to return to work, medical evidence, testimony concerning the claimant's injury, the extent of his injury, and whether the injury has stabilized. *Nascote Industries*, 353 Ill. App. 3d at 1072. The period of time during which a claimant is temporarily and totally disabled is a question of fact to be determined by the Commission, and its resolution of the issue will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Archer Daniels Midland*, 138 Ill. 2d at 119-20.

Petitioner is claiming TTD benefits beginning on May 15, 2022 through the trial date, of January 30, 2023 as provided in Section 8(b) of the Act. Respondent denies the same as Petitioner retired as of February 26, 2021.

The Arbitrator finds Petitioner has not recovered from her injuries and has not reached Maximum Medical Improvement. The Arbitrator also finds Petitioner retired as of February 26, 2021. (RX2). Throughout the evidence presented, it is noted Petitioner underwent a compensable shoulder surgery as of May 5, 2022. Petitioner followed up with Dr. Nyquist on May 23, 2022. Restrictions were silent. It was not until June 1, 2022 that Dr. Nyquist specifically indicated activity/work status was "not applicable." The Arbitrator finds that it is reasonable that Petitioner would have been off work for a period of time due to the shoulder surgery. As of June 1, 2022, Dr. Nyquist would have addressed the same but chose not to due to Petitioner's retirement. As

the records are silent on restrictions and Petitioner's off work status, the Arbitrator awards TTD benefits from May 5, 2022 through June 1, 2022, i.e., 3 6/7 weeks. The Arbitrator does note Petitioner testified she was off work for this period, but also acknowledges her medical records do not corroborate the same.

Based on the same, TTD benefits are awarded at a rate of $1330.21 per week for 3 6/7 weeks, commencing May 5, 2022 through June 1, 2022 provided in §8(b) of the Act. Respondent shall receive credit for amounts paid.

With respect to Issue (M), should penalties or fees be imposed upon Respondent, the Arbitrator finds as follows:

Petitioner claims that she is entitled to penalties and fees for nonpayment of medical bills and TTD benefits. While the Arbitrator does not agree with Respondent's arguments, the evidence presented does not warrant the imposition of penalties. The Arbitrator finds that in regards to TTD benefits, there are no clear off work slips. As such, although it would be reasonable that TTD is owed, the Arbitrator does not find Respondent's behavior to be vexatious and unreasonable. In addition, the majority of the medical bills show $0.00 balances. In addition, the Arbitrator notes Respondent did issue payments and/or the Respondent's HMO issued payments for the medical bills. (RX3, PX7). As such the Arbitrator does not find penalties are owed for the same.

The Arbitrator notes that the parties had pre-trials on this matter wherein the Respondent indicated they would approve the recommended injection. The Arbitrator notes this was never done and admonishes the Respondent for the misrepresentation. The Arbitrator, however, notes, that failure to authorize medical care does not constitute a basis for penalties. (See *Hollywood Casino-Aurora v. IWCC*, 2012 IL App (2d) 110426WC, the Court held there is no statutory authority for awarding 19(k) penalties based solely on an employer's failure to authorize recommended treatment; See Also *O'Neil v. IWCC*, 2020 IL App (2d) 190427WC, the Court clarified that nothing in 19(l) allows for an award of penalties based on an employer's revocation of previous authorization for surgery. The Court emphasized that the availability of penalties depends on the failure of payment, not authorization).

Therefore, Petitioner's request for penalties and fees is denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC005221
Case Name	Johannes Davidge v. Lindemann Chimney Service Inc
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0501
Number of Pages of Decision	20
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Peter Schlax
Respondent Attorney	Glenn Blackmon

DATE FILED: 11/27/2023

/s/Amylee Simonovich, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Johannes Davidge,

Petitioner,

vs. NO: 20 WC 005221

Lindemann Chimney Service,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, benefit rates/average weekly wage, causal connection, medical expenses, temporary total disability ("TTD"), and permanent partial disability ("PPD"), and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof.

The Commission agrees with the analysis and reasoning of the Arbitrator regarding the issue of accident and affirms the Arbitrator's finding that Petitioner met his burden of proving an accident arising out of and in the course of his employment occurred on January 23, 2020.

The Commission modifies the calculation of average weekly wage to $587.81 and provides additional support thereof:

1. Petitioner began working for Respondent in November of 2019. T. 55.
2. §10 of the Act governs the calculation of average weekly wage and provides several potential calculation methods to be applied based upon a Petitioner's terms and time of employment.
3. Based upon the short period of employment with the Respondent prior to the injury, the Commission finds the applicable calculation under §10 of the Act to be the third potential calculation, which states: "Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee actually earned wages shall be followed." 20 ILCS 305/10.

4. Petitioner's earnings from November 19, 2019 through November 23, 2019 total $256.50 for one week of work.
5. Petitioner's earnings from November 24, 2019 through December 7, 2019 total $1,377.00 for two weeks of work.
6. Petitioner's earnings from December 8, 2019 through December 21, 2019 total $1,462.50 for two weeks of work.
7. Petitioner's earnings from December 22, 2019 through January 4, 2020 total $432.00. Due to vacation time used during this period, Petitioner worked one week.
8. Petitioner's earnings from January 5, 2020 through January 18, 2020 total $1,174.50 for two weeks of work.
9. Based upon the above determinations, the Commission finds that Petitioner earned a total of $4,702.50 during the totality of his employment with Respondent prior to the injury.
10. The Commission further finds that Petitioner worked a total of 8 weeks during said period.
11. Thus, pursuant to the third calculation under Section 10, the Commission finds the Petitioner's average weekly wage to be $587.81, based upon the division of his total earnings of $4,702.50 by 8 weeks, the weeks and parts thereof worked by Petitioner in the totality of his employment with Respondent.

The Commission agrees with the Arbitrator's award of temporary total disability from January 24, 2020 through July 30, 2020, however calculates this period to span a 27 total of weeks. Additionally, as a direct result of the above adjustment of the average weekly wage rate to $587.81, and pursuant to §8(b) of the Act, the temporary total disability rate shall also be adjusted to $391.87. The Commission modifies the award of temporary total disability benefits to 27 weeks of temporary total disability at a rate of $391.87.

The Commission modifies the award of permanent partial disability benefits for Petitioner's January 23, 2020 right foot injury. While the Commission agrees with the analysis of the Arbitrator under criteria set forth under §8.1b, we disagree with the weight afforded factors (ii) and (iv). Under Section (ii), the Arbitrator noted Petitioner had not returned to work in his prior capacity as a result of the injury. Under Section (iv), the Arbitrator noted that Petitioner was earning less at the time of hearing than he was at his previous job with the Respondent. Both considerations prompted the Arbitrator to afford those factors greater weight. However, the Commission notes that the job change described in those criteria occurred after the Petitioner was returned to work full duty. The Commission therefore affords no weight to factor (ii), less weight to factor (iv), and modifies the award of permanent partial disability from 35 % to 30% loss of use of the right foot.

With regard to the award of medical bills, the Commission affirms the award with regard to Respondent's responsibility to pay the medical bills cited by the Arbitrator and referenced in Petitioner's supporting exhibits. However, the Commission disagrees with the Arbitrator's award of $61,090.92, reflecting the full value of the incurred medical bills.

Medical bills awarded under §8(a) of the Act are to be paid by: (1) the negotiated rate, if applicable, or (2) the lesser of the health care provider's actual charges, or (3) according to the fee schedule pursuant to §8.2. 820 ILCS 305/8(a).

Pursuant to the Illinois Administrative Code, §7110.90(d), the employer shall pay the lesser of the rate set forth in the schedule or the provider's actual charge. If an employer or insurance carrier contracts with a provider for the purpose of providing services under the Act, the rate negotiated in the contract shall prevail. 50 Ill. Adm. Code 7110.90(d), amended at 36 Ill. Reg. 17108 (eff. Nov. 20, 2012).

The evidence reflected the existence of group carrier insurance coverage for Petitioner under BlueCross BlueShield during at least some of the incursion of medical bills for the work-related injury. See PX 5; PX 2, p. 19-20,22-24; PX 6, p. 1, 3; PX 8; PX 9, p. 6, 75, 113-114.

Respondent is not required to show an affiliation of the group insurance to Petitioner's employment in order to be afforded the negotiated rate. *Perez v. Illinois Workers' Compensation Commission*, 2018 IL App (2d) 170086WC, 420 Ill. Dec. 439, 442. There is no limitation within §7110.90(d) to restrict the negotiated rate application solely to the employer's own insurance carrier, as the presence of the term "or" demonstrates any insurance carrier can negotiate a reduced rate under §8(a) of the Act. *Id.,* at 443.

As such, Petitioner shall be entitled to payment of the bills at the BlueCross BlueShield negotiated rate or the fee schedule amount, whichever is less. To the extent any balances remain regarding the awarded bill which stem from Petitioner's deductible, co-payments and/or co-insurance, the Respondent shall reimburse Petitioner accordingly under Section 8(a) of the Act. 820 ILCS 305/8.2(e); See *Sims v. South Berwyn School District #100*, 20 IWCC 0412; 2020 Ill. Wrk. Comp. LEXIS 711.

IT IS THEREFORE ORDERED BY THE COMMISSION the Respondent shall pay to Petitioner reasonable and necessary medical bills pursuant to § 8(a) and 8.2, for treatment rendered at:

- Northwestern Medicine as referenced in Petitioner's Exhibit 2
- Centegra Health System as referenced in Petitioner's Exhibit 9, p. 113-114
- Huntley Anesthesia Associates as referenced in Petitioner's Exhibit 5 and 8, p. 4
- Central DuPage Physicians Group as referenced in Petitioner's Exhibit 5, p. 3-8.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner temporary total disability benefits for 27 weeks at the adjusted rate of $391.87, pursuant to Section 8(b) of the Act.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner the sum of $352.69 per week for a period of 50.1 weeks, as provided in Section 8(e) of the Act, for the reason that the injury sustained caused the loss of use of 30% of the right foot.

IT IS FURTHER ORDERED that the Decision of the Arbitrator filed on May 4, 2022, is modified as stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED that the Respondent pay to Petitioner interest under §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.

November 27, 2023

o: 9/26/23
AHS/kjj
051

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC005221
Case Name	DAVIDGE, JOHANNES v. LINDEMANN CHIMNEY SERVICE, INC.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	15
Decision Issued By	Paul Seal, Arbitrator

Petitioner Attorney	Peter Schlax
Respondent Attorney	Glenn Blackmon

DATE FILED: 5/4/2022

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

/s/ *Paul Seal, Arbitrator*

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Johannes Davidge
Employee/Petitioner

v.

Lindemann Chimney Service, Inc.
Employer/Respondent

Case # **20** WC **005221**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Seal**, Arbitrator of the Commission, in the city of **Rockford**, on **March 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 January 23, 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 $34,482.24; the average weekly wage was $663.12.

On the date of accident, Petitioner was 24 years of age, ***single*** with no 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

Medical benefits

Respondent shall pay reasonable and necessary medical services of $61,090.92, as provided in Sections 8(a) and 8.2 of the Act.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $442.08/week for 26 6/7 weeks, commencing 01/24/2020 through 07/30/2020, 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 the record contains an impairment rating of 8% of lower extremity as determined by Dr. Levin, pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. (Exhibit #). The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Workers' Compensation Act, but instead is a factor to be considered in making such a disability evaluation. The doctor noted retained hardware and reduced range of motion, 3 out of 10 pain complaints, two scars; one of which is 14 centimeters in length. Because of the extent of injury, the Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a helper in training to become a chimney sweep at the time of the accident and that he *has* not returned to work in his prior capacity as a result of said injury. The Arbitrator notes that Respondent elected to terminate Petitioner rather than take him back to work. Because of Petitioner's change of 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 24 years old at the time of the accident. Because of his youth and life expectancy to endure the effects of the injury, 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 because Petitioner is now earning $13.50 an hour rather than $18.00 an hour as in its previous job, 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 suffered a major fracture of his right ankle requiring fixation with a large plate and 10 screws. Respondent's examiner agreed Petitioner has reduced range of motion and ongoing discomfort. Because of the extent and permanency of the injury, the Arbitrator therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 35% loss of use of a right foot pursuant to §8(e) of the Act.

Penalties

Penalties and fees are denied.

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

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

______________________________________ MAY 4, 2022

Signature of Arbitrator

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Statement of Facts

a. Petitioner's Testimony

Petitioner began working for Respondent in November of 2017 as a helper, in training to become a chimney sweep. He reported for work by driving directly to customer locations unless previously instructed by the chimney boss to meet at the company warehouse in order to load the truck. (Trans. Pp. 55-56). Periodically, Petitioner was assigned to work instead at the company warehouse. Work assignments and locations were shown on a schedule maintained by the company and accessible to the workers via a company internet portal. Workers were instructed to regularly check and to rely upon this "portal schedule" for their work assignments and locations. (Trans. Pp. 56-57 and Resp. Ex. 1).

Petitioner was hired as a full-time, 40 hour, Monday through Friday employee. Occasionally, weekend work attendance was requested by the company. An example is memorialized in a text message exchange between the company and Petitioner on January 22, 2020, the day before Petitioner's accident, confirming Petitioner's agreement to work a half day on Saturday, January 25th in exchange for receiving a half day off on Friday, January 24th. That text exchange also documents Respondent's specific instruction to Petitioner to "refresh your schedule as it now reflects a half day on Friday and your shift on Saturday." (Pet. Ex. 7, pp. 2-3).

Petitioner testified he was scheduled to work at the warehouse on January 23rd. He accessed the portal at 1:00 a.m. in the early morning hours that day before later driving the one-hour distance to the company warehouse arriving at 6:00 a.m. Upon arrival and while traversing from the employee parking lot to the employee warehouse door entrance, he slipped and fell on the icy driveway. (Trans. Pp. 60-

61). He experienced immediate onset of pain. He was brought to the emergency room by co-worker Joshua Byars. X-rays confirmed he had suffered a leg fracture. (Trans. Pp. 60-63).

Invoicing for the emergency room charges was made, at least initially, to Berkshire Hathaway Home State (Pet. Group Ex. 2, p. 6), Respondent's workers' compensation insurance carrier. (Resp. Ex. 6, p. 1). Petitioner, upon receiving his diagnosis, texted the company that in light of his injury would not be able to work on Saturday as previously arranged. The Respondent's representative replied "thank you for letting us know. We will make adjustments on our end." No mention is made in the exchange of any question regarding Petitioner being scheduled to work that day, January 23, 2020. (Pet. Ex. 7, p. 4).

Later, on the way home from the hospital, Petitioner received a call from the company informing him that he was not scheduled to be at work that day. Petitioner disputed the assertion and stated that he would not have gotten up early nor driven an hour had he not been scheduled to work. (Trans. Pp. 65-66). On January 24th, Petitioner checked the portal schedule and noted several changes had been made. (Pet. Ex. 7). He took a screen shot showing not only his work schedule for January 23rd had been changed but also the schedule for January 24th and 25th, (documented in the email exchange only two days previous on January 22nd in Exhibit 3), had been changed to reflect that Petitioner was off work. Other anomalies were shown. Each and every other day that Petitioner was scheduled off work, listed a reason – be it vacation, sick day, etc., or now – as in the case of January 24-25, - work injuries. In contrast, the January 23rd entry merely showed "off work". Inexplicably, the schedule continued to show Petitioner scheduled to work the upcoming warehouse move on February 7th despite having a fractured leg. (Trans. Pp. 67-69).

Petitioner came under the care of orthopedic surgeon, Nixon, who performed an open reduction internal fixation surgical procedure with the use of a plate and 10 screws. He was restricted from

working and given a full duty release on July 30, 2020. Petitioner testified that after his work release on that day he attempted to access the work portal in order to email his release but found he was unable to log in. Only, thereafter, was he for the first time, contacted by the company and told his employment had been terminated. (Trans. Pp. 69-71).

Petitioner currently experiences soreness and stiffness in his leg and ankle. Symptoms worsen with prolonged activity. He favors his other leg while performing physical activity. He has to be careful on uneven ground. He has 6" and 3" surgical scars which become inflamed and for which he takes occasional anti-inflammatory medication.

As a result of his termination, he has obtained alternative employment now in a less physical job allowing him to minimize being on his feet too long during the day. (Trans. Pp. 72-73). He has received no temporary total disability payments nor have any of his medical bills been paid by Respondent. He reiterated his work schedule for Respondent was 40 hours, Monday through Friday at $18.00 an hour. (Trans. P. 74).

Petitioner admitted on cross-examination he was relying exclusively on the portal work schedule when coming to work to the warehouse that morning of the accident and not any other instruction. (Trans. Pp. 76-80). He acknowledges being released full duty by Dr. Nixon on July 20, 2020, and that he has not sought medical care since then. (Trans. P. 83). His current employment demands include a 50 pound lifting requirement. He earns $13.50 an hour. (Trans. P. 84). He fishes, kayaks and occasionally hikes. While on light duty he did take a short hike, less than a mile, to Mt. Charleston in Las Vegas but stayed mostly on the path. (Trans. Pp. 84-90), (Resp. Ex. 10).

b. Joshua Byars Testimony

Byars testified he was employed by Respondent as its Director of Marketing, was in charge of the warehouse and was the supervisor on staff the morning of Petitioner's fall. He testified Petitioner's

primary job was as a laborer attached to the chimney sweep service but also occasionally worked in the warehouse under his supervision. He described Petitioner as an "okay" employee, his only criticism being his occasional tardiness to work. He otherwise followed directions. Byars described the employer premises consisting of two adjacent warehouse buildings, each with employee parking separated by a drive which serviced the company premises only. He agreed that there had been a snowstorm the morning of Petitioner's fall.

c. Amber Blanchard Testimony

Amber Blanchard testified that she was employed by Respondent as its Field Operations Manager on January 23, 2020. Her duties included maintaining the online scheduling system. She inputted the information which resulted in the portal view made available to Petitioner and other workers. (Trans. Pp. 23-24). Respondent Ex. 3 confirms Petitioner did log into the portal site at 1:11 a.m. on January 23rd and previously on January 22nd and January 21st. (Trans. Pp. 24-26). Respondent Ex. 4, like Petitioner's Ex. 7 pages 2-3, documents the email exchange between Blanchard's assistant, Rachel regarding the agreement that Petitioner receive one half day off Friday, January 24th in return for working Saturday, January 25th. (Trans. Pp. 25-27).

She identified Respondent's Ex. 5 as the "overall calendar view" for Petitioner showing what Petitioner would actually see when he logged onto the portal to check his schedule. (Trans. Pp-27-28). She acknowledged that she "tried to keep her staff Monday to Friday, that variables including weather, call outs and weekend work could cause schedule changes, but that the "base line" was Monday through Friday". (Trans. P. 28).

She acknowledged that she could input changes to the online schedule at "any time" and that it is a "live schedule". (Trans. Pp. 28-29). She acknowledged that she did not know when the screen shot

of the schedule view depicted in Respondent Exhibit 5 was taken, nor whether it was taken before or after January 23rd. (Trans. P. 30).

She clarified that rather than directly editing the calendar view, she relied on a different platform view available to her to input changes. (Trans. Pp. 31-33). She identified Resp. Ex. 2 as confirming Petitioner's January 23rd off work status as inputted by her into the system on January 21 at 3:19 p.m. She acknowledged, however, that Ex. 2 does not reflect the Friday/Saturday schedule change - "I don't know I have no idea". (Trans. P. 34). She reiterated that "each day can get changed on any different day". (Trans. P. 35). In fact, Respondent Ex. 5 itself must have been updated a day later, on January 22nd at 2:15 in the afternoon to reflect the information detailed in the text exchange between Petitioner and Rachel that same afternoon and time. (Trans. Pp. 35-36).

She acknowledged that the screenshot depicted on Exhibit 5 was, in fact, taken **after** January 23rd because it reflects "do not book-injury" status for the Petitioner on January 27th, 28th and 29th. (Trans. P. 36). She acknowledged that at some point in time the portal view available to Petitioner would have shown Petitioner having worked a half day Friday and Saturday, but that Respondent Ex. 5 does not show it. (Trans. P. 38). She further acknowledged that Respondent Ex. 5 does not show Petitioner working on February 1st Saturday warehouse moved shift reflected on the screen shot taken by Petitioner on January 24, 2020 (Pet. Ex. 7). (Trans. Pp. 40-41). Lastly, she acknowledged that the portal view depicted on Petitioner's Ex. 7 lists specific reasons for each instance of Petitioner's off work status be it, vacation, holiday, sickness and injury. The **sole** exception is his work status on January 23rd, listing no reason whatsoever. (Trans. Pp. 41-42)

d. Medical Records and IME

Petitioner was seen at Lake Forest Hospital emergency room with a history of "walking into work and slipped on some ice and fell on his ankle". (Pet. Ex. 1 p. 43). He was found to have suffered

a displaced and comminuted fracture of his tibia and fibula. He was told the fracture was unstable and would require surgical fixation. (Pet. Ex. 1, pp. 44-45). Billing for the ER visit was issued to Berkshire Hathaway Home State (Pet. Ex. 2, p. 6), Respondent's workers' compensation carrier. (Resp. Ex. 6, p. 1).

Petitioner came under the care of orthopedic surgeon Robert Nixon who, with some apparent difficulty due to the complexity of the fracture, performed an open reduction and internal fixation surgical repair with the use of a plate and 10 screws. (Pet. Ex. 9, pp. 15-16, 48-49). He progressed until being released to full duty on July 30, 2020, with instructions to continue stretching and strengthening. (Pet. Ex. 10, p. 8).

He was examined at Respondent's request by Dr. Mark Levin on August 27, 2020. He reported to Dr. Levin more stiffness than pain and that he is able to go hiking and fishing but avoided skateboarding and running. Dr. Levin noted a 10 degree diminishment in range of motion and opined that Petitioner suffered a lower extremity impairment rating of 8. (Resp. Ex. 6).

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING "C" (ACCIDENT ARISING OUT AND IN THE COURSE) AND "F" (CAUSAL CONNECTION),THE ARBITRATOR FINDS THE FOLLOWING FACTS:

Petitioner testified, and Respondent's Ex. 3 confirms, that he logged onto Respondent's online portal and confirmed his schedule before driving over an hour through a snowstorm and arriving at Respondent's warehouse to report for work on January 23, 2020. He parked in the employee lot and fell on the company leased drive while approaching the employee entrance suffering a bimalleolar fracture. Respondent proffers testimony and documents to rebut Petitioner's testimony, asserting that Petitioner was, in fact, scheduled off at the time of his fall.

Obviously, Petitioner bears the burden of proving he was in the course of his employment when the accident happened. The Arbitrator finds Petitioner's testimony to be persuasive proof. Petitioner's supervisor testified that Petitioner did follow instructions and the evidence is the Petitioner did. He did regularly log onto Respondent' online work schedule to check his work status, as demanded by Respondent's written directive issued only three days prior (Resp. Ex. 1), and as is confirmed by Respondent's computer log (Resp. Ex. 3). The Arbitrator is not persuaded that Petitioner, having checked his work schedule, would have made such a trip, at such a time, at such an hour, in such conditions, only in hopes that Respondent would let him in the door despite not being scheduled to work.

To rebut Petitioner's testimony, Respondent proffers testimony based upon documents that its principal witness admits are not, in fact, the schedule view that Petitioner would have seen when he logged on at 1:11 a.m. on January 23, 2020, before departing for work. Respondent's witness admits having exclusive and complete control to input information at any time which would alter the portal view available to Petitioner. Although Respondent asserts that its Exhibit 2 establishes Petitioner's off work status on January 23, 2020, as of January 21st, Respondent's witness admits that additional information was necessarily inputted to change that portal view the very next day on January 22nd. Yet, Respondent has not produced the January 22nd input log, leaving in doubt whether the portal view available to Petitioner was as they suggest.

The Arbitrator finds Petitioner's testimony was also credible with regard to his injury and recovery. The Arbitrator notes that Petitioner did not belabor the extent of his pain or limitations despite suffering a significant leg fracture. Review of the surgeon's office notes (Pet. Ex. 3 and 10) and the complaint history documented by Respondent's examining physician are largely consistent with Petitioner's trial testimony. (Resp. Ex. 6). The Respondent was no doubt hoping to impeach Petitioner

with activity pictures it withheld from evidence until the end of his cross-examination, but such hope was largely unfulfilled. Petitioner readily volunteered that he has engaged in fishing and hiking since his injury, and in fact, previously volunteered such to the examining physician himself. (Resp. Ex. 6, p. 3). Furthermore, the examining physician makes no indication that Petitioner was magnifying his symptoms. Rather, his examination confirms the loss motion Petitioner described.

In all, the Arbitrator is persuaded that Petitioner has met his burden with his credible testimony that he was scheduled to work and therefore finds that Petitioner's accident did arise out of and in the course of his employment with Respondent on January 23, 2020, and that his current condition of illbeing is causally connected to that accident.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING "G" (EARNINGS), THE ARBITRATOR FINDS THE FOLLOWING FACTS:

Both Petitioner and Respondent's witness agree that Petitioner was hired as a full-time employee. Respondent Ex. 8 is a record of his earnings. Pay periods ending November 23, 2019, January 4, 2020, and February 1, 2020, are clearly incomplete or partial weeks. In the remaining three, two week pay periods (ending December 7, 2019, December 21, 2019, and January 18, 2020), Petitioner worked non-overtime hours totaling 221.05, for an average hours worked per week over those six weeks of 36.84 hours a week. It is undisputed Petitioner's pay rate was $18.00 per hour. The Arbitrator finds that Petitioner's average weekly wage, excluding overtime, is $663.12, yielding an applicable TTD rate of $442.08 and PPD rate of $397.87.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING "J" (MEDICAL SERVICES), THE ARBITRATOR FINDS THE FOLLOWING FACTS:

The Arbitrator reiterates his findings above regarding accident and causal connection. Petitioner incurred medical expenses as follows:

1. Northwestern Medicine - $22,895.55 (Pet. Ex. 2)
2. Centegra Health System - $31,786.27 (Pet. Ex. 9, pp. 113-114)
3. Huntley Anesthesia Associates - $3,720.00 (Pet. Ex. 8, Pet. 5, p. 4)
4. Central DuPage Physicians Group - $2,689.10 (Pet. Ex. 5, pp. 3-8)

Total: $61,090.92

The parties agree that Respondent has paid no medical bills either via workers' compensation or through group provided medical coverage for which 8(j)credit would be allowed. Therefore, the Arbitrator awards medical expenses as itemized above totaling $61,090.92 as provided in Sections 8(a) and 8.2 of the Act.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING "K" (TTD), THE ARBITRATOR FINDS THE FOLLOWING FACTS:

The Arbitrator reiterates his findings above regarding accident and causal connection. It is undisputed that Petitioner was restricted from working from the date of the accident through July 30, 2020. The parties agree that no TTD benefits have heretofore been provided. The Arbitrator therefore awards temporary total disability benefits for period commencing January 24, 2020, through July 30, 2020, at a rate of $442.08 for a period of 26 6/7 weeks.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING "L" (NATURE AND EXTENT OF THE INJURY) THE ARBITRATOR FINDS THE FOLLOWING FACTS:

As described by Respondent's examining physician Petitioner suffered "a right displaced medial malleolar ankle fracture with syndesmotic disruption and fibular fracture." (Resp. Ex. 6, p. 6). Dr. Nixon's operative report describes comminution of fracture fragments and difficulty encountered in reducing and fixing the fracture. Petitioner has retained hardware in his ankle. He has documented loss of range of motion and describes residual discomfort in his ankle.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that the record contains an impairment rating of 8% of a lower extremity as determined by Dr. Levin, pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. (Resp. Exhibit #6). The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Workers' Compensation Act, but instead is a factor to be considered in making such a disability evaluation. The doctor noted retained hardware and reduced range of motion, 3 out of 10 pain complaints, two scars; one of which is 14 centimeters in length. Because of the extent of injury, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a helper in training to become a chimney sweep at the time of the accident and that he has not returned to work in his prior capacity as a result of said injury. The Arbitrator notes that Respondent elected to terminate Petitioner rather than take him back to work. Because of Petitioner's change of 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 24 years old at the time of the accident. Because of his youth and life expectancy to endure the effects of the injury, 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 because Petitioner is now earning $13.50 an hour rather than $18.00 an hour as in its previous job, the Arbitrator 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 suffered a major fracture of his right ankle requiring fixation with a large plate and 10 screws. Respondent's examiner agreed Petitioner has reduced range of

motion and ongoing discomfort. Because of the extent and permanency of the injury, the Arbitrator therefore gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 35% loss of use of a right foot pursuant to §8(e) of the Act.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING "M" (PENALTIES) THE ARBITRATOR FINDS THE FOLLOWING FACTS:

Despite the respondent not rebutting the petitioner credibly bearing his burden of proof, the Arbitrator finds that its denial of benefits was not unreasonable, vexatious, dilatory or in bad faith. Penalties and attorneys fees are denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC007804
Case Name	Akerria Daniels v. State of Illinois
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0502
Number of Pages of Decision	15
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Gary Stone
Respondent Attorney	Rachel Peter

DATE FILED: 11/27/2023

/s/Amylee Simonovich, Commissioner

Signature

23IWCC0502

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

Akerria Daniels,

Petitioner,

vs. NO: 22 WC 007804

State of Illinois,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical care and temporary total disability ("TTD"), 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 modifies the Arbitrator's decision, Issue (F), last sentence of last paragraph, to read "Thus, the Arbitrator finds that, based on the medical evidence, and the opinions of Dr. Coats, Dr. Primus, Dr. Shah, and Dr. Murtaza, the May 11, 2021, accident is causally related to Petitioner's current condition of ill-being in the cervical, thoracic and lower back which was asymptomatic prior to the work accident." Decision, p. 8.

To provide further clarification of the prospective medical awarded, the Commission also modifies the Arbitrator's decision, Issue (K), paragraph 3, to read "As such, the Arbitrator finds that Respondent shall provide and pay for 18 sessions of work conditioning as recommended by Dr. Coats and attendant follow-up care." Decision, p. 9.

Additionally, the Commission modifies the Arbitrator's second paragraph of the Order, which references prospective medical to read, "Respondent shall provide and pay for 18 sessions of work conditioning by Dr. Coats and attendant follow-up care."

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on October 7, 2022, is modified as stated herein, and otherwise affirmed and adopted.

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

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review.

November 27, 2023
O: 9/26/23
AHS/kjj
051

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC007804
Case Name	Akerria Daniels v. State of Illinois
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Antara Nath Rivera, Arbitrator

Petitioner Attorney	Gary Stone
Respondent Attorney	Rachel Peter

DATE FILED: 10/7/2022

THE INTEREST RATE FOR THE WEEK OF OCTOBER 4, 2022 3.85%

/s/Antara Nath Rivera, Arbitrator
Signature

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

October 7, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Akerria Daniels
Employee/Petitioner
v.
State of Illinois
Employer/Respondent

Case # **2022** WC **007804**

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 **08/25/2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to Respondent?

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

G. ☐ What were Petitioner's earnings?

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

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

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

K. ☒ Is Petitioner entitled to any prospective medical care?

L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other ______

FINDINGS

On the date of accident, **05/11/2021**, 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 $**39,208.00**; the average weekly wage was $**754.00**.

On the date of accident, Petitioner was **38** years of age, ***single*** with **2** dependent children.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, and as outlined in PX 1, PX 3, PX 4, and RX 3, which includes the medical bills from Chicago Center for Sports Medicine and Orthopedic Surgery ($2,262.32) and Improved Functions ($1,600.00), as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall approve and pay for any treatment, recommended by Dr. Coats, as provided in Section 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner TTD benefits of $502.67/week for 32 3/7 weeks, commencing January 12, 2022, through August 25, 2022, 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.

OCTOBER 7, 2022

Signature of Arbitrator

ICArbDec19(b)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Akerria Daniels,)
Petitioner,)
) Case No. 22WC007804
v.)
)
State of Illinois, Ludeman Development Center,)
Respondent.)

This matter proceeded to hearing on August 25, 2022, in Chicago, Illinois before Arbitrator Antara Nath Rivera on Petitioner's Request for Hearing. Issues in dispute include i) causation between Petitioner's current condition of ill-being and the injury; ii) unpaid medical bills; and iii) total temporary disability ("TTD") benefits. (Arbitrator's Exhibit "AX" 1)

STATEMENT OF FACTS

Akerria Daniels ("Petitioner") is employed by the State of Illinois at the Elisabeth Ludeman Development Center ("Respondent") as a mental health technician. Petitioner testified that Respondent is an individual home type facility, for mentally and physically disabled individuals, located in Park Forest, Illinois. (Transcript "T." at 13) Petitioner testified that the facility is comprised of separate homes where up to 10 individuals, or residents, can reside. (Transcript "T." at 14-15) Petitioner testified that she has been a state employee for seven years. (T. 14) Petitioner testified that her job duties were to assist residents with daily living skills, such as lift them out of bed, get them dressed, push their wheelchairs, take residents to doctor appointments, and deal with their behaviors. (T. 14-15) Petitioner testified that if they become physically aggressive, then she would handle them. (T. 15)

Petitioner testified that on May 11, 2021, she worked her shift from 6:10am to 2:10pm. (T. 16) Petitioner testified that she was given the assignment of a "one-to-one" with a resident. (T. 17) Petitioner testified that meant that she was assigned to one person due to that particular resident's behavior and/or medical condition. (T. 17-18) Petitioner testified that she was familiar with the female resident. (T. 18) Petitioner testified that the resident was fine in the morning, but around 12:00 pm, the resident got out of her seat, went to Petitioner, and began pulling on Petitioner's hoodie strings. (T. 19) Petitioner testified that the resident also pulled on the bottom of Petitioner's hoodie and pulled Petitioner. *Id.* Petitioner testified that she made the resident sit down. *Id.* Petitioner testified that the resident got up again and began to hit her head on the brick wall. *Id.* Petitioner testified that she blocked the resident from hitting her head on the wall by using her hands to block the wall from the resident's head. *Id.*

Petitioner testified that she and other staff tried to bring her back to her room because she believed that would calm the resident down. (T. 20) Petitioner testified that after the resident was brought back to her room, she banged her head on the bed frame and wall. *Id.* Petitioner testified that the resident then fell on the floor. *Id.* Petitioner testified that when she tried to get the resident back up, to prevent the resident from banging their head on the floor, Petitioner twisted her back and felt a pop. *Id.*

Petitioner testified that she immediately notified her supervisor because she was in pain and needed someone to help her. *Id.* Petitioner testified that the pain was in the middle of her back. (T. 21) Petitioner testified that supervisors came to help her after an hour. *Id.* Petitioner testified that she told those supervisors what happened and that she hurt her back and was in a lot of pain. (T. 21-22) Petitioner testified that after her shift was over, she went home and took ibuprofen. (T. 22) Petitioner testified that she felt more pain at night and had trouble sleeping. *Id.*

Petitioner testified that the next morning, she went to work, at the usual time, because it was her intention to work. (T. 23) Petitioner testified that she was in a lot of pain and told “Christy,” and another person present at Respondent’s facility, that she was in pain and couldn’t work. (T. 24) Petitioner testified that “Christy” and other person gave her a packet to notify Tristar and was instructed, by them, to call Tristar. *Id.* Petitioner testified that she called Tristar and that Tristar told her to call a doctor’s office in the packet. (T. 25) Petitioner testified that she called the Chicago Center for Sports Medicine & Orthopedic Surgery. *Id.*

On May 12, 2021, Petitioner presented to the Chicago Center for Sports Medicine & Orthopedic Surgery and was seen by Dr. Dore Robinson, D.O.. (PX 1) Petitioner reported that she was injured when she tried to prevent a resident from hurting themselves and complained of intense pain over the left middle to lower back. (PX 1 at 126; 160) Dr. Robinson diagnosed Petitioner with a thoracic and sprain of ligaments of lumbar spine. (PX 1 at 126; 156) Dr. Robinson also administered a Toradol injection. *Id.* Petitioner was instructed to remain off work and instructed to start physical therapy. (T. 26-27; PX 1 at 126-128, 156)

On May 24, 2021, Petitioner presented to Dr. Gregory Primus, M.D., at the Chicago Center for Sports Medicine & Orthopedic Surgery. (PX 1 at 124) Dr. Primus diagnosed Petitioner with thorax sprain and lumbar spine sprain. *Id.* Dr. Primus recommended a treatment plan that included aerobic exercise, stretching, strengthening, and physical therapy. *Id.*

Between May 26, 2021, and September 24, 2021, Petitioner was periodically seen by Dr. Robinson, Dr. Primus, and Dr. Robert Coats, M.D., at the Chicago Center for Sports Medicine & Orthopedic Surgery. (PX 1 at 140-148) All doctors kept Petitioner off work and continued Petitioner’s physical therapy. *Id.* Petitioner testified that, during her treatment, she continued to complain of back pain and that the back pain intensified in the middle of the back, specifically the bra line area. (T. 31)

On June 25, 2021, Dr. Coats gave Petitioner a Medrol Dosepak after she reported low and mid back pain and pain down left shoulder. (PX 1 at 93; T. 33) Petitioner testified that by the end of June, finally able to sleep through the night. (T. 34) Petitioner testified that in July 2021, she felt pain and pain going down left arm, mid-back, and finger went numb. *Id.* Dr. Coats recommended continuing physical therapy. (PX 1 at 93)

Petitioner testified that she participated in physical therapy for approximately four months, from June 3, 2021, through September 24, 2021. (T. 59-60) During that time, her pain continued to wax and wane. (PX 1; T. 31) Petitioner continued to report mid back pain, burning sensation left inferior of the scapula, and limited ability to carry and lift as required for her to return to work as well as care for her child. (PX 1 at 82)

On July 30, 2021, Petitioner presented to Dr. Coats and indicated minimal improvement. (T. 35; PX 1 at 71) She reported pain in the back radiating from the left shoulder and her symptoms were exacerbated after strengthening exercises in therapy. (PX 1 at 71) She has pain with daily activities which is mostly located below the shoulder blades and mid back. *Id.* She also has pain in the low back during activities. *Id.* After his examination, Dr. Coats recommended continuing physical therapy and medication, start Medrol Tablet Therapy, and indicated that he would consider an MRI if Petitioner did not improve. (PX 1 at 72) Petitioner testified that between July 30, 2021, and August 31, 2021, she was unable to go to physical therapy due to an increase in her pain. (T. 36) Petitioner continued to have difficulty with lifting and taking care of her child due to this pain during that time. (PX 1 at 54)

On September 24, 2021, Petitioner saw Dr. Coats for a follow up examination. (PX 1 at 35) She reported that the last few days she felt significantly better, however, when she feels inflamed her fingers tingle and she still has weakness. *Id.* She also reported that she completed physical therapy and would like another round. *Id.* After his examination, Dr. Coats recommended continuing physical therapy and added topical pain cream. *Id.* Petitioner testified that she tried the topical cream, but it did not help. (T. 37-38)

On November 9, 2021, Dr. Coats administered an injection. (PX 1 at 138) Dr. Coats also referred Petitioner to Dr. Sajjad Murtaza, M.D., a spine specialist, for Petitioner's lumbar and thoracic spine pain. (PX 1 at 33; 138) Petitioner testified that she told Dr. Coats that she was not in physical therapy at this time because it was no longer approved by workers' compensation. (T. 38) Petitioner testified that, at this point, she was in a lot of pain in her entire back and the injections did not help with the pain. (T. 42)

On November 17, 2021, Petitioner presented to Dr. Murtaza. (PX 1 at 29-30) Petitioner complained of lower back, neck, and thoracic pain, and burning on the left side, under the scapula that wraps around to the front. *Id.* Dr. Murtaza noted therapy helped with the pain but not to the point of ideal functionality and that her pain can still be intense and affect her activities of daily living. (PX 1 at 29). Dr. Murtaza also noted that Petitioner's pain level before therapy was 10/10, 5-8/10 post therapy, and that Petitioner has pain flares with any activity. *Id.* Dr. Murtaza's examination revealed tenderness in the paraspinal muscles, the mid thoracic area, and medial scapula border. *Id.* Further, he noted left rib pain that runs across the intercostal nerve and goes anteriorly toward the ribs. (PX 1 at 29-30) He noted paraspinal muscle spasm on the left and

tenderness of the rhomboid muscles. (PX 1 at 30) Dr. Murtaza diagnosed Petitioner with thoracic radiculopathy, low back pain, and cervical radiculopathy. *Id.* Dr. Murtaza noted the thoracic pain was the most bothersome and that Petitioner failed conservative therapy and ordered an MRI of the thoracic spine. *Id.*

On December 29, 2021, Petitioner underwent an MRI of the thoracic spine at Future Diagnostics Group. (PX 1 at 151) The MRI was unremarkable. (PX 1 at 151-152)

On January 13, 2022, Erica Cain from Tristar Risk Management, the authorized third-party administrator for the State of Illinois employee's workers' compensation program, sent Petitioner a letter advising her that as a result of being a 'no show' to the independent medical examination ("IME") on January 5, 2022, her indemnity benefits will be terminated, and no further treatment will be authorized as of January 12, 2022. (PX 5) Petitioner testified that she received the letter regarding the examination, but she and her son had been exposed to Covid and were really sick. (T. 48) Petitioner testified that she misplaced the letter and missed the appointment. *Id.* Petitioner testified that as soon as she was alerted to this issue, she called Tristar and requested that the examination be rescheduled. (T. 49)

On January 26, 2022, Dr. Murtaza reviewed the MRI and opined that the results were unremarkable, however, the results did not correlate with Petitioner's pain complaint. (PX 1 at 21) Dr. Murtaza ordered a cervical MRI. *Id*. Petitioner continued to complain of pain on the left side of the upper back and pain and burning around the base of the shoulder blade. (PX 1 at 20) She also has pain in the same area when she takes a deep breath. *Id.* Further, any twisting or bending causes pain in her left upper back/shoulder blade area and she notes numbness and tingling in her left hand. *Id.* She noticed slight weakness in her left arm and was told by her physical therapist that her spinal muscles on the left are weaker. *Id.* Her current pain level is 4-5/10 but when she does not take medication, it is 8-9/10. *Id.* After examination, Dr. Murtaza ordered a cervical spine MRI and will consider intercostal nerve block. *Id.*

On February 7, 2022, Petitioner underwent an MRI of the cervical spine at Future Diagnostics Group. (PX 1 at 149) The impression was straightening of the normal cervical lordosis, otherwise no significant abnormality noted. (PX 1 at 150)

On March 2, 2022, Petitioner appeared for an IME with Dr. Matthew Colman, M.D.. (RX 3) Petitioner testified that there was no physical examination done and that Dr. Colman only saw her for five minutes. (T. 50) Petitioner testified that Dr. Colman asked her what happened, reviewed her images, and asked her what the other doctor wanted to do. *Id.* Petitioner testified that she told Dr. Colman she wanted injections and he said that he would approve that. *Id.*

Dr. Colman diagnosed Petitioner with thoracic, cervical, and lumbar strain and noted the cervical and lumbar conditions are not resolved. (RX 3 at 6) Dr. Colman noted that Petitioner continued to complain of thoracic pain radiating along her chest wall and is worse at night with a pain rating on average of 7/10. (RX 3 at 5-6) Dr. Colman noted that there was causality between the sprain or strain injuries to the neck, upper back, and lower back given the significant mechanism of injury. (RX 3 at 6) He further noted the

Petitioner was reasonable, appropriate, and consistent with her reporting of the injury and he did not detect any signs of preexisting condition or preexisting symptoms. *Id*. Dr. Colman further opined that medical treatment has been reasonable and necessary, although he went on to state that physical therapy sessions beyond 18 sessions was not reasonable or necessary and that the compounding cream was not appropriate. *Id*. Dr. Colman further stated he did not believe Petitioner requires ongoing use of prescriptive muscle relaxers but should use Tylenol and Ibuprofen over the counter as directed for maintenance therapy. *Id*. Additionally, Dr. Colman advised that Petitioner should continue home physical therapy exercises to maximize stretching and strengthening of the back muscles as maintenance therapy to deal with chronic pain. *Id*. However, the need for this ongoing treatment is no longer related to May 11, 2021. *Id*.

Dr. Colman opined that he could not necessarily relate the patient's current pain back to May 11, 2021 since sprain or strain is expected to resolve within 2-3 months following an injury. *Id*. He further opined that the prognosis is excellent and does not believe there is any reason why the Petitioner cannot return to asymptomatic baseline. *Id*. Finally, Dr. Colman stated Petitioner is at maximum medical improvement ("MMI") and could return to work at full duty capacity without restrictions. *Id*. Petitioner testified that Dr. Colman did not tell her to go back to work nor did he tell her what was in his report. (T. 69) Petitioner testified that she was kept off work by the doctors from the Chicago Center for Sports Medicine and Orthopedic Surgery. (T. 70)

On April 15, 2022, Dr. Coats administered a trigger point injection to Petitioner's left scapular region. (PX 1 at 8) Petitioner testified that the injections provided relief for a day or two, but the pain came back. (T. 43)

On May 13, 2022, Petitioner returned to the clinic and was seen by Dr. Ravi Shah, M.D., an associate of Dr. Coats. (PX 1 at 4) After examining Petitioner, Dr. Shah recommended starting physical therapy for the thoracic strain in the form of postural training, core strengthening, scaption (scapular plane elevation of the arms), RTC (rotator cuff) strengthening, manual treatment, local modalities, HEP, 2-3 times a week for 4-6 weeks. (PX 1 at 5) Additionally, Dr. Shah ordered a Functional capacity exam ("FCE") to compare Petitioner's functional state to the job's physical demand level and for Petitioner to return thereafter. *Id.* Dr. Shah disagreed with Dr. Colman as Petitioner was still having significant pain with movement and lifting heavy load. *Id.* Further, Dr. Shah noted Petitioner's job requires her to lift patients and she would benefit from more physical therapy to help strengthen her thoracic spine. *Id.*

On July 7, 2022, physical therapist Steven Sedlacek of Improved Functions performed the FCE. (PX 2) Mr. Sedlacek determined that Petitioner's FCE was valid. (PX 2 at 2) He noted that Petitioner was unable to return to work to her previous job as a mental health technician because she would be unable to restrain or transfer residents. *Id.* Mr. Sedlacek concluded that "[s]ince Ms. Daniels has been off of work for over a year, she would benefit from a court of work conditioning and then a follow-up FCE." *Id*. Petitioner testified that she had difficulty lifting and holding on during resistance test because her left arm was too weak. (T. 45-46) Petitioner testified that all activities caused pain in her mid-back shoulder area and fingers were

tingling. (T. 46-47) Petitioner was in a lot of pain for days following the FCE. (T. 47) Petitioner testified that she continued to take medication, however, that only took the edge off but did not remove the pain. *Id*.

On August 19, 2022, Dr. Coats ordered 18 sessions of work conditioning for thoracic strain and peri-scapular pain. (PX 1 at 3) Petitioner testified that if this was approved, Petitioner would proceed with this treatment because she wants to go back to work. (T. 51)

Petitioner testified that her last appointment at the Chicago Center for Sports Medicine & Orthopedic Surgery was May 2022 and that she was always kept off of work. (PX 1; T. 28) Petitioner testified that she continues to have pain with lifting and bending at times, and the all-around pain is still present, worse on the left side. (T. 51-52) Petitioner testified that she continues to have difficulty driving, taking care of her young child, difficulty walking for a long period of time, and difficulty bending because of the pain. (T. 52-53; 68) Petitioner testified that she takes medication and performs home exercises to manage her pain. (T. 53-54) Petitioner testified that, at the hearing, her pain level is a seven. (T. 66) Petitioner testified that she is not receiving disability payments while she is off work. (T. 67) While Petitioner testified that she has not been back to work since the accident because her doctors from the Chicago Center for Sports Medicine and Orthopedic Surgery kept her off work, it is her intention and desire to return to work. (T. 51; 56; 69-70)

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 her to be a credible witness. Petitioner was calm, well-mannered, composed, and spoke clearly. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable.

WITH RESPECT TO ISSUE (F), IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CASUALLY 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. 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). "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Industrial Com.,* 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982).

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to the May 11, 2021, work accident. The Arbitrator notes that Petitioner began treatment for her back injuries on May 12, 2021, even after attempting to return to work, at Chicago Center for Sports Medicine & Orthopedic Surgery, the medical facility she was directed to by Tristar, her employer's third-party administrator. (T. 24-25, 70; PX 1) The Arbitrator notes that Dr. Robinson diagnosed Petitioner with a thoracic and sprain of ligaments of lumbar spine. (PX 1 at 126; 156) Dr. Robinson instructed Petitioner to remain off work and instructed to start physical therapy. (T. 26-27; PX 1 at 126-128, 156) The Arbitrator notes that Dr. Primus diagnosed Petitioner with thorax sprain and lumbar spine sprain. (PX 1 at 124) The Arbitrator notes that Dr. Murtaza diagnosed Petitioner with thoracic radiculopathy, low back pain, and cervical radiculopathy. (PX 1 at 30) Dr. Murtaza noted the thoracic pain was the most bothersome and that Petitioner failed conservative therapy. *Id.*

The Arbitrator notes beginning on June 25, 2021, and continuing throughout her treatment, the physicians at Chicago Center for Sports Medicine and Orthopedic Surgery (Dr. Coats, Dr. Primus, and Dr. Shah) opined that "based on the patient's given history, our review of any pertinent records that were provided, physical examination and review of images, we believe the injuries evaluated today are causally and directly related to the work injury." (PX 1 at 5, 9, 13, 17, 24, 27, 33, 36-37, 52, 72, and 92) The Arbitrator further notes that Mr. Sedlacek determined that Petitioner's FCE was valid. (PX 2 at 2) He noted that Petitioner was unable to return to work to her previous job as a mental health technician because she would be unable to restrain or transfer residents. *Id.*

The Arbitrator notes that IME Dr. Colman, diagnosed Petitioner with thoracic, cervical, and lumbar strain and specifically noted the cervical and lumbar conditions are not resolved. (RX 3 at 6) The Arbitrator notes that Dr. Colman opined that there is a causality between the sprain or strain injuries to the neck, upper back, and lower back given the significant mechanism of struggling and catching a resident who was trying to self-harm. (RX 3 at 6)

The Arbitrator considered the opinions of Dr. Colman as well as those of Dr. Robinson, Dr. Coats, Dr. Primus, Dr. Murtaza, Dr. Shah, and Mr. Sedlacek, and found the opinion of Dr. Colman less persuasive. Thus, the Arbitrator finds that, based on the medical evidence, and the opinions of Dr. Coats, Dr. Primus, Dr. Shah, and Dr. Murtaza, the May 11, 2021, accident is casually related to Petitioner's current condition of ill-being with respect to her lower back as well as his pain which was asymptomatic prior to the 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:

Consistent with the Arbitrator's prior finding that Petitioner's current condition of ill-being was causally related to the injury sustained on May 11, 2021, the Arbitrator finds that the medical treatment and services Petitioner received was reasonable and necessary. (PX 1-4; RX 3) 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 notes that between May 26, 2021, and August 19, 2022, Petitioner was continually seen by Dr. Robinson, Dr. Primus, Dr. Coats, and Dr. Shah, at the Chicago Center for Sports Medicine & Orthopedic Surgery, as well as Dr. Murtaza. (PX 1 at 3-4; 29-30; 140-148) The Arbitrator also notes that Petitioner credibly testified to her symptoms and persistent pain.

As the Arbitrator found that Petitioner's treatment was reasonable and necessary, the Arbitrator finds that Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, and as outlined in PX 1, PX 3, PX 4, and RX 3, which includes the medical bills from Chicago Center for Sports Medicine and Orthopedic Surgery ($2,262.32) and Improved Functions ($1,600.00), as provided in Sections 8(a) and 8.2 of the Act.

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

As the Arbitrator found that Petitioner's current condition of ill-being was causally related to the injury sustained on May 11, 2021, the Arbitrator finds that the Petitioner is entitled to prospective medical care as recommended by Dr. Coats. (PX 1, PX 2, RX 3)

The Arbitrator notes that based on Dr. Shah and Mr. Sedlacek's opinions, Dr. Coats ordered 18 sessions of work conditioning for thoracic strain and peri-scapular pain. (PX 1 at 3) Petitioner testified that if this was approved, Petitioner would proceed with this treatment because she wants to go back to work. (T. 51)

As such, the Arbitrator finds that Respondent shall approve and pay for any treatment, recommended by Dr. Coats, as provided in Section 8(a) and 8.2 of the Act.

WITH RESPECT TO ISSUE (L), WHETHER PETITIONER IS ENTITLED TO ANY TEMPORARY TOTAL DISABILITY BENEFITS, THE ARBITRATOR FINDS AS FOLLOWS:

Under Illinois law, temporary total disability is awarded for the time period between when an injury incapacitates the petitioner to the date the petitioner's condition has stabilized or the petitioner has recovered to the amount the character of the injury will permit. *Whiteney Productions, Inc. v. Industrial Comm'n*, 274 Ill.App.3d 28, 30 (1995). In determining whether a claimant remains entitled to receiving TTD benefits, the primary consideration is whether the claimant's condition has stabilized and whether she is capable of a return to the workforce. *Interstate Scaffolding, Inc. v. Illinois Workers' Comp. Comm'n*, 236 Ill.2d 132, 148 (2010).

Based on the Arbitrator's finding that Petitioner's current condition of ill-being was causally related to the work accident, the Arbitrator finds that Petitioner is entitled to TTD benefits. Petitioner claims to be entitled to TTD for a period of January 12, 2022, through August 25, 2022. (AX 1 at line 8) Respondent claims that Petitioner received benefits from May 18, 2021, through January 12, 2022. *Id.* The Arbitrator notes that Petitioner credibly testified that she has been off work since January 12, 2022. (AX 1 at line 8; PX 1; TX 28; 49) The Arbitrator further notes that Petitioner's treating physicians have not deemed Petitioner to be at MMI. (PX 1) Further, the Arbitrator notes that, following an FCE, Petitioner is not yet capable of returning to the workforce. (PX 2)

As the Arbitrator previously found that all of Petitioner's treating physicians to be more persuasive than Dr. Colman, the Arbitrator finds that Respondent shall pay Petitioner TTD benefits of $502.67/week for 32 3/7 weeks, commencing January 12, 2022, through August 25, 2022, as provided in Section 8(b) of the Act.

It is so ordered:

Arbitrator Antara Nath Rivera

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC034949
Case Name	Cheryl Johnson v. State of Illinois - Dixon Correctional Center
Consolidated Cases	
Proceeding Type	Petition for Penalties
Decision Type	Commission Decision
Commission Decision Number	23IWCC0503
Number of Pages of Decision	4
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Tracy Jones
Respondent Attorney	Joseph Blewitt

DATE FILED: 11/28/2023

/s/Maria Portela, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHERYL JOHNSON,

Petitioner,

vs. NO: 21WC034949

DIXON CORRECTIONAL CENTER,

Respondent.

DECISION AND OPINION ON PETITION FOR PENALTIES AND ATTORNEY FEES

This matter comes before the Commission on Petitioner's "Petition for Penalties Under IWCA §19(k) & (l) and Attorney Fees Under IWCA §16," (hereafter "Petition") filed on April 26, 2023. A hearing was held before Commissioner Carolyn Doherty on August 9, 2023, in Ottawa, Illinois and a record was made.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1) On December 15, 2022, an arbitration hearing was held in this matter and Arbitrator Dalal issued a Decision on March 2, 2023, awarding temporary total disability ("TTD"), medical expenses and prospective medical treatment. Respondent was given a credit under §8(j) of the Act and Petitioner's request for penalties and fees was denied.

2) Respondent issued two checks on March 9, 2023, which were received by Petitioner's attorney on March 14, 2023. *8/9/23-Exhibit B*. The first check indicated it was for "TTD PER AWARD" from May 5, 2022 through June 1, 2022 in the amount of $4,520.00. *Id.* The second check was in the amount of $65.00 for "CO-PAY REIMBURSEMENT PER AWARD." *Id.*

3) On March 14, 2023, Petitioner's attorney emailed Respondent's attorney stating, in part, that the TTD amount should have been $5,130.81 calculated as 3-6/7 weeks at $1,330.21 per week.

4) On March 17, 2023, Petitioner filed a timely Petition for Review ("PFR") on the issues of TTD duration, Respondent's §8(j) credit and the Arbitrator's denial of penalties and fees.

5) On March 23, 2023, Petitioner's attorney sent an email to Respondent's attorney "regarding the award check I received on this case" and stating, "I need clarification before we can process it. Please respond." *8/9/23-Exhibit C.*

6) On April 23, 2023, while her Petition for Review was still pending before the Commission, Petitioner filed the penalties and fees petition at issue here.

7) On April 25, 2023, Petitioner's attorney emailed Respondent's attorney asking him to sign the authentication page for the transcript "and return it to me without delay. Please also have the courtesy to reply to my prior emails in this matter." *8/9/23-Exhibit D.*

8) That same day, Respondent's attorney replied via email, "I have reviewed the transcript and signed and attached the signature page. Regarding your prior email, I do not believe you are entitled to payment of an award or penalties while your case is on appeal." *8/9/23-Exhibit D.*

9) Petitioner's attorney responded later that day via email, "Case law is actually clear on that issue. If Respondent does not file an appeal, payment on the award must be made without delay" (*8/9/23-Exhibit E.*) and, in a separate email, cited the case of *Jacobo v. IWCC*, 2011 Ill. App. 3d.100807WC. *8/9/23-Exhibit F.*

10) On July 24, 2023, Respondent's agent mailed "Notice of Stop-Aged Payment" notices to Petitioner indicating that payment had been stopped on both checks "since 120 days have passed since we issued the check." *8/9/23-Exhibit G.*

11) On November 7, 2023, Oral Arguments on Review were held, on the underlying case, before Commission Panel A.

12) The Commission issued a decision on November 27, 2023, which affirmed and adopted the Arbitrator's Decision.

Although Respondent chose not to file a PFR in this case, Petitioner did so and her PFR lists the following issues: TTD duration, Penalties and Fees, and "Entitlement to 8(j) credit and amount awarded for medical bills." Thus, Petitioner put all of these issues before the Commission on Review. This situation differs from that in *Jacobo*, which Petitioner cites, because *Jacobo* only involved the issues of penalties and fees on Review, while the other issues of TTD, medical expenses and permanency benefits were not disputed.

Once Petitioner placed TTD duration at issue, Respondent had the right, on Review, to dispute that issue, which it did in its brief. This matter is complicated by the fact that Petitioner had voluntarily retired prior to undergoing the left-shoulder surgery, which is the basis for her claim of TTD benefits. On Review, the Commission could have accepted Respondent's argument that Petitioner had voluntarily removed herself from the workforce and was not entitled to TTD at all. Similarly, there are no off-work or medical restriction notes in evidence and it was possible the

Commission could have found that Petitioner had failed to prove entitlement to TTD on that basis. Therefore, we find it was not unreasonable for Respondent to withhold issuance of replacement checks, after the payments were stopped on the initial checks, while the case was pending on Review.

In addition, we note that Respondent did not stop payment on the checks as soon as Petitioner filed her PFR on March 17, 2023. Instead, Petitioner was informed four months later that the checks were "stop-aged" after 120 days "for your protection and ours." Although Respondent's attorney indicated, on April 25, 2023, that he did not believe Petitioner was entitled to payment of the Arbitrator's award or penalties while the case was on Review, nothing prevented Petitioner's attorney from cashing the checks up until Petitioner received the "Notice of Stop-Aged Payment" in late July 2023. Further, the July 24, 2023 "Notice of Stop-Aged Payment" states, "If this check has already been reissued, please disregard this notice. Otherwise, contact your adjuster to make arrangements for reissuing the payment." *8/9/23-Exhibit G*. There is no evidence that Petitioner or her attorney made a written demand to Respondent's attorney to reissue the check after the date of that notice.

We also find Petitioner made "amount awarded for medical bills" an issue on Review. Petitioner has failed to prove that Respondent had not timely paid the medical bills after allowing for the §8(j) credit, which the Arbitrator granted and the Commission affirmed.

Therefore, the Commission finds that Respondent's conduct was not unreasonable or vexatious and it did not unreasonably delay payment of the Arbitrator's award.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's "Petition for Penalties Under IWCA §19(k) & (l) and Attorney Fees Under IWCA §16" is hereby denied.

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.

November 28, 2023

/s/ *Maria E. Portela*

SE/
R: 8/9/23
49

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC034797
Case Name	Toni McKire v. Pepsi Beverages Co
Consolidated Cases	15WC027042; 18WC029418;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0504
Number of Pages of Decision	17
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Matthew Gannon, Neil Schelhammer
Respondent Attorney	Robert Smith

DATE FILED: 11/28/2023

/s/Amylee Simonovich, 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 (Medical expenses)	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Toni McKire,

Petitioner,

vs. NO: 13 WC 34797

Pepsi Beverages Co.,

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, temporary total disability (TTD), nature and extent, and penalties, 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.

Initially, the Commission notes that prior to the arbitration hearing the parties consolidated this case with two subsequent cases. In the current case, Petitioner alleged she sustained a work-related injury on October 4, 2013. In case 15 WC 27042, Petitioner alleged she sustained a work-related injury on August 5, 2015. Finally, in case 18 WC 29418, Petitioner alleged she sustained a work-related injury on September 17, 2018. While the parties addressed all three cases during the arbitration hearing, the Arbitrator issued separate Arbitration Decisions for each case. The Commission addresses the issues raised on review relating to the companion cases in separate Decisions.

In the interest of efficiency, the Commission relies on the detailed recitation of facts provided in the Decision of the Arbitrator. The Commission affirms the Arbitrator's conclusion that Petitioner's condition of ill-being was causally related to the October 4, 2013, work accident only through December 30, 2013. The Commission affirms the Arbitrator's awards of TTD benefits and permanent partial disability. The Commission also affirms the Arbitrator's denial of penalties in this matter. However, the Commission modifies the award of medical expenses.

Medical Expenses

As the Commission affirms the Arbitrator's conclusion that Petitioner's condition of ill-

being after December 30, 2013, is not causally related to the work injury, the Commission must also modify the Arbitrator's award of medical expenses. The credible evidence shows Petitioner's medical treatment only through December 30, 2013, was reasonable, necessary, and causally related to the work accident. Therefore, Respondent is only liable for reasonable and necessary medical charges incurred through that date. There is no evidence that any charges for treatment rendered through December 30, 2013, remain outstanding.

Additional Modifications to the Decision

The Commission makes the following modifications to the Decision of the Arbitrator. On page five (5) of the Arbitration Decision, the Arbitrator wrote: "On July 27, 2015, Petitioner saw Dr. Montella and reported that her symptoms persisted. (PX1, pg. 613)." The Commission inserts the below sentence after the above-referenced sentence:

> Petitioner alleges to have sustained a second accident on August 5, 2015, which is the subject of Case No. 15 WC 27042.

On page six (6) of the Decision, the Arbitrator wrote: "On August 27, 2018, Dr. Montella recommended that Petitioner try additional oil ointments for pain relief. (PX1, Pg. 473)." The Commission inserts the below sentence after the above-referenced sentence:

> Petitioner alleges to have sustained a third accident on September 17, 2018, which is the subject of Case No. 18 WC 29418.

On page nine (9) of the Decision, the Commission strikes the paragraph beginning: "Lastly, the Arbitrator notes that per the medical records and Petitioner's testimony, in September 2016, Petitioner was involved in a non-work-related motor vehicle accident resulting…" in its entirety. Additionally, on page nine (9) of the Decision the Arbitrator wrote, "Based on the above, the Arbitrator finds that Petitioner's current condition of ill-being is not causally related to the October 4, 2013, work accident." The Commission replaces the above-referenced sentence with the following:

> Based on the above, the Arbitrator finds that Petitioner's condition of ill-being was causally related to the October 4, 2013, work accident only through December 30, 2013, the date of Dr. Kornblatt's Section 12 examination.

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 July 21, 2022, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary total disability benefits of $508.67/week for 7-1/7 weeks commencing November 11, 2013, through December 30, 2013, as provided in Section 8(b) of the Act. Pursuant to stipulation by the parties,

Respondent shall receive credit for TTD benefits previously paid to Petitioner in the amount of $5,087.00. The $1,453.57 overage in TTD benefits paid by Respondent shall be applied to the award of permanent partial disability.

IT IS FURTHER ORDERED that Respondent is only liable for reasonable and necessary medical charges incurred through December 30, 2013. There is no evidence that any medical charges for treatment rendered through that date remain outstanding.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner permanent partial disability benefits of $457.81/week for 25 weeks, because the injuries sustained caused the 5% loss of the whole person, as provided in Section 8(d)2 of the Act.

IT IS FURTHER ORDERED that Petitioner's Petition for Penalties and Attorneys' Fees is denied.

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 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 $10,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

November 28, 2023

o: 10/17/23
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	13WC034797
Case Name	Toni McKire v. Pepsi Beverages Co
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Elaine Llerena, Arbitrator

Petitioner Attorney	Matthew Gannon
Respondent Attorney	Robert Smith

DATE FILED: 7/21/2022

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

/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

Toni McKire
Employee/Petitioner
v.
Pepsi Beverages Co.
Employer/Respondent

Case # **13** WC **034797**

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 **November 22, 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 **October 4, 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 $**39,676.51**; the average weekly wage was $**763.01**.

On the date of accident, Petitioner was **34** years of age, ***single*** with **3** dependent children.

Respondent shall be given a credit of $**5,087.00** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**5,087.00**.

Respondent is entitled to a credit of $**1,865.26** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $508.67 per week for 7-1/7 weeks, commencing November 11, 2013, through December 30, 2013, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $457.81 per week for 25 weeks, because the injuries sustained caused the 5% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Petitioner's Petition for Penalties and Attorneys' Fees is denied.

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

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

Elaine Llerena **JULY 21, 2022**

Signature of Arbitrator

STATEMENT OF FACTS

On October 4, 2013, Petitioner was a forklift driver for Respondent at Respondent's distribution warehouse. (T. 10-11) As a forklift driver, Petitioner's job duties included repackaging soda that came into the distribution center, loading, and unloading trucks. (T. 12)

On October 4, 2013, Sarah Ferry, Petitioner's supervisor, directed her to unload a shipment of pallets from the back of a semi-truck with a fork-lift. (T. 18) While driving the forklift to access the back of the truck, Petitioner drove over a defective lift, causing her and the forklift to fall a couple of feet. (T. 16-17) When the forklift fell, Petitioner hit her head on the top rail of the forklift. (T. 19) Petitioner thought a truck driver was driving the truck away when she fell in the forklift. (T. 17) Instantly after the fall, Petitioner experienced pain in her neck and back. (T. 19) Petitioner described the pain as throbbing and aching. (T. 20) Petitioner reported the accident to supervisors Ed Montgomery and Sarah Ferry. *Id.* Respondent sent Petitioner to Concentra. (T. 20-21)

Petitioner presented to Concentra and reported sustaining an injury at work that day when the forklift she was driving dropped while on a loading ramp. (PX5, pg. 3) Petitioner reported experiencing pain in the lumbar region and left shoulder and a headache. *Id.* Petitioner was diagnosed with lumbar and trapezius strains. (PX5, pg. 4) Petitioner was given restrictions of no lifting over ten pounds, no pushing or pulling over 20 pounds of force, no bending more than two times per hour, no driving or operating machinery, and no driving of company vehicles. (PX5, pg. 5)

Petitioner returned to Concentra on October 7, 2013, with continued lumbar pain. (PX5, pg. 7) Petitioner had not worked since the accident because light duty was not available. *Id.* The same work restrictions were kept in place for Petitioner. (PX5, pg. 8) On October 14, 2013, Petitioner returned to Concentra with increased pain in her lower back and pain extending upwards in her back. (PX5, pg. 9) Additionally, Petitioner's pain had begun to radiate down her right leg. *Id.* Petitioner was diagnosed with lumbar and thoracic strains and the same work restrictions were imposed. (PX5, pg. 10) On October 21, 2013, Petitioner complained of low back pain which extended down her left leg to her foot, as well as numbness and paresthesia in the left leg. (PX5, pg. 12) Petitioner was again diagnosed with lumbar and thoracic strains, as well as lumbar radiculopathy. (PX5, pg. 13) The same work restrictions were given to Petitioner. *Id.* Petitioner returned to Concentra on October 28, 2013, with the same complaints of pain. (PX5, pg. 14) An MRI was performed which revealed a disc bulge at L4-L5. (PX5, pg. 15) Petitioner was given the same work restrictions and referred to see an outside doctor. *Id.*

Petitioner saw Dr. Bruce Montella of Midwest Sports Medicine & Orthopaedic Surgical Specialists, Ltd. on November 11, 2013. (PX1, pg. 14) Petitioner complained of lower back pain from an injury occurring at work on October 4, 2013. *Id.* Petitioner reported that the injury occurred while Petitioner was driving a forklift at work when it dropped two to four feet with her inside. *Id.* Petitioner reported that, since the accident, her symptoms had worsened. *Id.* Petitioner described her symptoms as constant, stabbing and aching. *Id.* Petitioner reported numbness, weakness, sleep disturbances, difficulty walking, radiating pain, and headaches. *Id.* Dr. Montella diagnosed Petitioner with a work-related lumbar disc herniation. (PX 1, pg. 16) Dr. Montella ordered physical therapy and took Petitioner off work. (PX1, pgs. 16, 693)

Petitioner began a course of physical therapy at NovaCare Rehabilitation on November 19, 2013. (PX3, pg. 4)

Petitioner returned to Dr. Montella on December 16, 2013, reporting sharp, searing pain in her back at times, a cracking sensation in the sternum/chest, and sleep disturbance due to the prescribed medication. (PX1,

pg. 9) Dr. Montella advised Petitioner to continue medication and prescribed Norco to help with pain control. (PX1, pg. 11) Petitioner was instructed to continue physical therapy. (PX1, pg. 25)

On December 30,2013, Petitioner underwent an independent medical evaluation (IME) by Dr. Michael Kornblatt at Respondent's request pursuant to Section 12 of the Illinois Workers' Compensation Act (Act). (RX1) Petitioner provided a history of the October 4, 2013, work accident wherein she was working as a warehouse loader for Respondent when the forklift she was driving dropped, resulting in upper back and lower back pain. (RX1, pg. 10) Dr. Kornblatt performed a physical examination of Petitioner and noted that Petitioner appeared in no distress but had complaints of discomfort with palpation of the mid-thoracic spinal processes as well as the medial boarder of the bilateral scapula. *Id.* Petitioner had full range of motion and strength in the upper extremities with no atrophy. (RX1, pg. 11) Petitioner reported complaints with palpation of the lumbosacral junction and all lumbar spinous processes as well as the left and right lumbar paraspinal muscles. *Id.* Range of motion of the lumbar spine was normal and straight leg raising test was negative. *Id.* There was no abnormality involving the spinal cord. (RX1, pgs. 11-12) Dr. Kornblatt noted that the examinations of the thoracic and lumbar spine regions were normal. (RX1, pg. 12) Dr. Kornblatt diagnosed Petitioner with a history of thoracic and lumbar strain with mechanical thoracic and low back pain related to the October 4, 2013, work accident. *Id.* Dr. Kornblatt found there were no objective findings to justify her pain complaints at the time and he did not believe that Petitioner required any work restrictions and found her to be at maximum medical improvement (MMI). (RX1, pg. 13) Dr. Kornblatt found that Petitioner underwent appropriate conservative care, but that she did not require any steroid injections having reached MMI. (RX1, pgs. 13-14) Dr. Kornblatt also indicated that the MRI from October 25, 2013, was clinically unnecessary and disagreed with the findings of a lumbar disc herniation. (RX1, pgs. 30, 32) Dr. Kornblatt stated that a diagnosis of a herniated disc is not solely based on an MRI but based on a patient's history, physical examination, as well as radiographic findings. (RX1, pg. 33) Utilizing the 6th Edition of the AMA Guides, Dr. Kornblatt issued 0% whole person impairment. (RX1)

On January 6, 2014, Petitioner returned to Dr. Montella and was given a lumbar epidural steroid injection in the L4-L5 region. (PX1, pg. 8) On January 17, 2014, a utilization review by Dr. David Trotter determined that the two pair of orthotics for Petitioner's low back pain were not medically necessary. (RX3, pg.1) On February 10, 2014, Petitioner reported that she had not been approved to continue physical therapy or receive steroid injections by the workers' compensation insurance carrier. (PX1, pg. 100) Petitioner completed her initial course of physical therapy at NovaCare Rehabilitation on March 11, 2014. (PX3)

Petitioner followed up with Dr. Montella on March 17, 2014, complaining of worsened back pain. (PX1, pg. 95) Dr. Montella prescribed Ultram and Mobic. (PX1, pg. 97) Petitioner returned on April 30, 2014, with pain that had worsened in the back and left leg, especially when standing for prolonged periods at work. (PX1, pg. 90) Dr. Montella stated that Petitioner should be seen by a foot and ankle specialist, and have custom orthotics made. (PX1, pg. 91) On July 28, 2014, Petitioner returned to Dr. Montella, reporting that the pain had spread from the lower back down through the left leg and into the left foot. (PX1, pg. 86)

On August 18, 2014, Petitioner went to St. Margaret Mercy North Emergency Department. (PX2, pg. 8) Petitioner was negative for symptoms of back pain, joint swelling or gait problems and she had normal range of motion with no edema or tenderness. (PX2, pgs. 11-12)

Petitioner presented to Franciscan St. Margaret Hospital on October 24, 2014, with complaints of both legs and feet going numb. (PX2, pg. 53) The emergency room doctor took a history from Petitioner involving an accident at work about a year earlier, where she fell while on a forklift. *Id.* Upon discharge, Petitioner was diagnosed with paresthesias and ordered to follow up with her doctor. (PX2, pg. 57)

Petitioner saw Dr. Erwin Friedman on November 10, 2014, at the Dr. Montella's instruction to receive orthotics. (PX1, pg. 77) On December 1, 2014, Petitioner returned to Dr. Friedman to receive her orthotics. (PX1, pg. 67)

Petitioner returned on December 8, 2014, to Dr. Montella and received a lumbar epidural steroid injection. (PX1, pg. 66)

On December 29, 2014, Petitioner went to St. Margaret Mercy North Emergency Department. (PX2, pg. 105) Petitioner was negative for symptoms of arthralgias, myalgias and neck pain. (PX2, pg. 107)

On March 9, 2015, Petitioner reported that her symptoms had worsened, especially when standing or walking for an extended period. (PX1, pg. 180) Petitioner was instructed to continue taking pain medication. *Id.*

Dr. Kornblatt conducted a second IME on March 30, 2015. (RX1) Petitioner reported that she returned to her regular job in February 2014 and had been performing her regular job duties. (RX1, pg. 86) She also reported that she had received three lumbar spine injections in January 2014, December 2014, and February 2015. *Id.* Petitioner reported that she had been utilizing orthotics since January 2015, noting no relief of her back pain with the orthotics. (RX1, pg. 87) Petitioner's exam was again normal with no abnormal objective findings to the low thoracic spine, lumbar spine, or upper and lower extremities. (RX1, pg. 15) Dr. Kornblatt did not attribute her complaints on this date to a history of a lumbar strain. (RX1, pg. 16) Petitioner reported complaints of low back pain and pain radiating up to the thoracic spine toward the shoulder blade. *Id.* Dr. Kornblatt indicated Petitioner's myofascial-type complaints were unrelated to the strain from 2013. *Id.* Dr. Kornblatt defined myofascial pain as complaints of muscular pain without abnormal objective findings on physical examination. (RX1, pg. 36) He noted that he would treat similarly situated patients with certain exercises and activities as well as over-the-counter medications and possibly trigger point injections. (RX1, pgs. 16-17) Dr. Kornblatt found that foot orthotics, epidural injections, or facet injections would not be indicated. (RX1, pg. 17)

On April 12, 2015, Petitioner went to St. Margaret Mercy North Emergency Department. (PX2) Petitioner was noted to be ambulating with a steady gait. (PX2, pg. 137)

On July 27, 2015, Petitioner saw Dr. Montella and reported that her symptoms persisted. (PX1, pg. 613) Petitioner returned to Dr. Montella on August 26, 2015. (PX1, pg. 607) Petitioner reported her symptoms had worsened since her last visit and explained that she had aggravated her back the week before and that her left leg went numb. *Id.* Petitioner indicated that lifting cases about 200 cases of pop at work heavier than 7 lbs aggravated her symptoms. *Id.* Petitioner complained of pins and needles feeling in her back and left leg. *Id.* Dr. Montella ordered physical therapy. (PX1, pg. 609) On September 23, 2015, Petitioner returned to Dr. Montella complaining of worsened pain which led to her going to the hospital over the weekend. (PX1, pg. 601) Dr. Montella prescribed Norco and continued physical therapy. (PX1, pg. 603)

Dr. Kornblatt performed a third IME on February 29, 2016. (RX1, pg. 18) Petitioner denied any recent injury but noted a flare up of her back pain in August 2015. (RX1, pg. 20) She complained of pain in the upper and lower lumbar spine, which was constant and worsened after working three of four hours, as well as standing or sitting for that amount of time. *Id.* She noted increased pain toward the end of the day and denied radicular leg pain, though she reported some aching in the front of her thighs. *Id.* Petitioner reported that she was taking Norco four times a day and occasionally Motrin. *Id.* Dr. Kornblatt diagnosed her with mechanical low back pain and lumbar myofascial pain, which was unchanged from the prior diagnosis. (RX1, pg. 21) He noted that her lumbar strain had resolved but she still had myofascial pain. *Id.* Dr. Kornblatt did not believe that Petitioner required work restrictions. *Id.* He also noted that she might require care referrable to her back aches but

disagreed with the necessity for long-term narcotic usage for pain, especially for Petitioner's diagnosis. (RX1, pgs. 22-23) Dr. Kornblatt testified that utilization of narcotic pain medication should not be solely based on subjective complaints and did not feel that it was appropriate in this case. *Id.* He testified that he believed that Dr. Montella was deviating from the normal standard of care. *Id.* He also noted that if Petitioner presented with trigger point complaints, then intermuscular steroid injections would be appropriate, but not injections around nerves or facet joints. (RX1, pg. 23)

On April 8, 2016, Dr. Montella prescribed a topical compound pain cream along with Norco and a back brace. (PX1, pg.593) Petitioner complained of continued worsening pain throughout. (PX1, pgs. 321-598)

Dr. Kornblatt testified by evidence deposition on August 22, 2016. (RX1) Dr. Kornblatt's testimony was consistent with his findings and opinions in his IME reports.

On September 13, 2016, Petitioner presented to Community Healthcare Emergency Department following a motor vehicle accident with complaints of neck pain and low back pain radiating to her bilateral legs. (RX4, pg. 154) She reported that she had been rear-ended and tried Motrin and Advil without relief. *Id.* She also reported that she had no history of back pain. *Id.* Physical examination revealed paraspinal spasms along her entire spine with some extension into her trapezius bilaterally but no step off or crepitus. (RX4, pg. 157) Petitioner was diagnosed with muscle spasms and headaches and prescribed Valium. (RX4, pg. 158)

Dr. Montella also had Petitioner undergo additional diagnostic testing. On September 14, 2016, Petitioner underwent a lumbar MRI, the results of which noted that only a limited study was completed due to Petitioner's pain. (PX1, pg. 719; PX2, pg. 1) The MRI showed no significant posterior disc bulging, protrusions or herniations and no spinal stenosis or significant neuroforaminal narrowing. *Id.* On September 28, 2016, Petitioner underwent a cervical spine MRI which found posterior disc protrusions at the C3-C4, C4-C5, C5-C6, and C6-C7 levels in addition to right lateral recess narrowing at C5-C6 and spinal stenosis and bilateral neuroforaminal narrowing at C4-C5. (PX2, pg. 2) On November 28, 2016, Dr. Montella diagnosed Petitioner as having cervical disc disorder at the C4-C5 and C5-C6 level in addition to cervical disc displacement at the C6-C7 level. (PX1, pg. 522) On April 3, 2017, Dr. Montella recommended two pairs of orthotics and Flexeril. (PX1, pg. 506) On June 22, 2017, Petitioner underwent another lumbar MRI, the results of which showed a disc bulge at L4-L5. (PX1, pg. 296) Dr. Montella placed Petitioner on restricted duty consisting of no lifting more than 10-15 lbs. (PX1, pg. 303)

On September 13, 2017, Petitioner reported to Dr. Montella worsened pain after returning to full duty work. (PX1, pg. 229) On November 8, 2017, Petitioner reported pain that spread to her legs along with a stinging sensation from the back brace. (PX1, pg. 215) On December 6, 2017, Dr. Montella indicated that Petitioner might require surgery. (PX1, pg. 210) On March 19, 2018, Petitioner reported worsening symptoms to the point of having to go to the emergency room on March 14, 2018, due to back pain. (PX1, pg. 441) Petitioner also reported that she had been having more flareups which resulted in her missing work. *Id.*

Petitioner underwent another lumbar MRI on May 7, 2018, which confirmed the L4-L5 disc bulge. (PX1, pg. 488) On August 27, 2018, Dr. Montella recommended that Petitioner try additional oil ointments for pain relief. (PX1, pg. 410) Petitioner underwent another lumbar MRI on October 3, 2018, which showed a disc herniation at L5-S1. (PX1, pg. 473) On October 15, 2018, Dr. Montella kept Petitioner on limited duty with no lifting restrictions. (PX1, pg. 452) On October 29, 2018, Dr. Montella diagnosed Petitioner as having intervertebral disc disorders with radiculopathy, cervical displacement at the C4-C5 region, C5-C6 region, and the high cervical region. (PX1, pg. 388) Petitioner complained of continued neck and lumbar pain during subsequent follow up visits. (PX1)

On January 7, 2019, Dr. Montella placed Petitioner on light duty. (PX1, pg. 377) On February 25, 2019, Petitioner complained of ongoing symptoms which now included muscle spasms that began in her neck and left shoulder. (PX1, pg. 344) On March 20, 2019, Petitioner complained of weakness in both arms and legs. (PX1, pg. 337) On April 23, 2019, Dr. Montella ordered physical therapy. (PX1, pg. 334) On June 19, 2019, Petitioner reported that she had been taken off work by her employer until she could work full duty. (PX1, pg. 323). Dr. Montella noted that Petitioner had not worked since May 24, 2019. *Id.* Dr. Montella kept Petitioner on limited duty restrictions. (PX1, pg. 321)

Petitioner continues to follow up monthly with Dr. Montella telephonically due to the COVID-19 pandemic. (T. 82-84, 103) Petitioner continues to take Norco as prescribed by Dr. Montella (T. 85) Dr. Montella has indicated that Petitioner my require surgery in the future. (PX1, pg. 210) Petitioner testified that Dr. Montella has suggested to her that she undergo a fusion. (T. 56-57)

At the time of Petitioner's injury on October 4, 2013, she was working in a full duty capacity without any restrictions. (T. 13, 58) Petitioner testified that she had not injured her back previously and that at no point in her life did she have any back injuries or issues. *Id.* Petitioner testified that Respondent terminated her employment after telling her they could no longer accommodate her restrictions. (T. 53) Petitioner testified that she has asked Respondent to accommodate her restrictions on numerous occasions, with no success. (T. 55)

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

It is well-settled that an injury is sustained in the course of employment if it occurs within a period of employment, at a place where the worker may reasonably be in the performance of their duties, and while they are fulfilling those duties or engaged in actions incidental thereto. *Saunders v. Industrial Comm'n*, 189 Ill.2d 623, 727 N.E.2d 247, 244 Ill.Dec. 948 (2000). A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling their duties. *Fisher Body Division, General Motor Corp. v. Industrial Comm'n*, 40 Ill.2d 514, 516, 240 N.E.2d 694 (1968); see also *Schwartz v. Industrial Comm'n*, 379 Ill. 139, 144, 39 N.E.2d 980 (1942).

For an injury to "arise out of" the employment, its origin must be in some risk connected with, or incidental to the employment so as to create a causal connection between the employment and the injury. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.2d 193, 203 (2003). The phrase "in the course of" refers to the time, place and circumstances under which the accident occurred. *Orsini v. Indus. Comm'n*, 117 Ill.2d 38, 44 (1987). Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing her duties and while a claimant is at work, or within a reasonable time before and after work, are generally deemed to have been received in the course of employment. *Johnson v. Ill. Workers Comp. Comm'n*, 2011 IL App (2d) 100418WC, ¶21. A workers' compensation claimant need prove only that some act or phase of her employment was a causative factor in the ensuing injury. *Vogel v. Indus. Comm'n*, 354 Ill.App.3d 780 (2nd Dist. 2005).

The Arbitrator notes that Petitioner credibly testified regarding her work injury that occurred on October 4, 2013, while employed by Respondent. Petitioner testified that while she was driving a forklift into the back of a semi-truck to unload material, she drove over a lift which broke off and caused her and the forklift to drop approximately a couple of feet. Petitioner testified that she instantly felt a sharp, throbbing pain in her back. All the medical evidence is consistent with Petitioner's testimony as to how the accident occurred. Petitioner immediately reported the incident to her supervisors, who then sent Petitioner to Concentra. The medical records from Concentra and Dr. Montella detail a mechanism of injury consistent with Petitioner's testimony.

Specifically, the Arbitrator notes, that Dr. Montella noted that Petitioner's back injury began on October 4, 2013, at work when she "was driving a forklift at work and it dropped 2-4 feet with her inside." Additionally, the October 4, 2013, records from Concentra state, "that while at work today, [Petitioner] was driving a forklift, when the forklift went off of the ramp, causing the machine to drop. After the impact of the drop, [Petitioner] began to experience pain in the lumbar region." Further, Petitioner testified that she never had any previous injuries or problems with her lower back. Petitioner also testified that she never sought any medical treatment for her lower back prior to October 4, 2013.

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. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill.App.3d 582, 593 (2nd Dist. 2005). A workers' compensation claimant need only to prove some act or phase of his or her employment was a causative factor, in his or her ensuing injury to receive benefits under the Workers' Compensation Act. *North American Ins. Co. v. Kemper Nat. Ins. Co.*, 259 Ill.Dec. 448, 758 N.E.2d 856, 325 Ill.App.3d 477, *rehearing denied*. Every natural consequence that flows from an injury arising out of and in the course of workers' compensation claimant's employment is compensable unless such injury is caused by an independent intervening act between the employment and the claimant's condition of ill-being. *Greaney v. Industrial Com'n*, 295 Ill.Dec. 180, 832 N.E.2d. 331, 358 Ill.App.3d 1002, *on remand* 2006 WL 3931452, *opinion corrected and superseded* 2007 WL 891186.

Here, Petitioner had no prior issues with her lower back until the October 4, 2013, work injury. There is no medical evidence that Petitioner suffered a previous injury or had any previous complaints regarding her lower back. Petitioner has also provided a consistent medical history in which she denied any history of prior back pain or prior injuries.

Petitioner testified that she was working in a full duty capacity prior to the October 4, 2013, work injury. Petitioner testified that immediately after the forklift dropped while she was seated in it on the day of the accident, she instantly felt a throbbing and aching pain in her back. Petitioner testified she was driving the forklift at the direction of her supervisor.

Based on the above, the Arbitrator finds that Petitioner sustained an accident that arose out of and in the course of her employment with Respondent on October 4, 2013.

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

The Arbitrator finds the opinions of Dr. Kornblatt to be most credible here. In connection with his initial evaluation from December 30, 2013, Dr. Kornblatt diagnosed Petitioner with a history of thoracic and lumbar strain with mechanical thoracic and low back pain related to the work incident from October 4, 2013. Dr. Kornblatt found that there were no objective findings to justify Petitioner's ongoing pain complaints at the time. Dr. Kornblatt noted that Petitioner had reached MMI and did not require any further treatment or work restrictions.

When Petitioner returned to Dr. Kornblatt for a second evaluation on March 30, 2015, Dr. Kornblatt noted that Petitioner's exam was normal with no abnormal objective findings to the low thoracic spine, lumbar spine, or upper and lower extremities. Petitioner had previously returned to her regular job in February 2014 and had been performing her regular job duties. Dr. Kornblatt indicated Petitioner's myofascial-type complaints, muscular pain without abnormal objective findings, were unrelated to the strain from 2013.

The Arbitrator also finds that the subjective complaints and physical examination findings per the contemporaneous treatment records from Dr. Montella, as well as Petitioner's testimony, are inconsistent and unreliable. First, Petitioner testified that she received no relief from the epidural injection in January 2014. Yet, the medical records indicate that she felt improved, with minimal pain, and was able to reduce the amount of Norco she was taking. Similar representations were noted following the December 2014, epidural injection.

Additionally, Petitioner continued to report limited range of motion and strength, tenderness, and an antalgic gait, when presenting to Dr. Montella. Yet, when she would present for unrelated treatment at St. Margaret Emergency Department, she was negative for back pain, joint swelling and gait problem and had normal range of motion with no edema or tenderness.

Lastly, the Arbitrator notes that per the medical records and Petitioner's testimony, in September 2016, Petitioner was involved in a non-work-related motor vehicle accident resulting in complaints of neck pain and low back pain radiating to her bilateral legs. The Arbitrator finds that the motor vehicle accident was an independent intervening cause that broke any causal connection between the October 4, 2013, work accident and Petitioner's back and neck condition. See *Global Products v. Workers' Compensation Comm'n,* 392 Ill.App.3d 408, 411 (2009). Per the contemporaneous records, Petitioner reported that she had no history of back pain prior to the motor vehicle accident. Dr. Montella's records also indicate that there was no previous injury to the neck.

Based on the above, the Arbitrator finds that Petitioner's current condition of ill-being is not causally related to the October 4, 2013, 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:

Based on the Arbitrator's finding regarding causation detailed above, the Arbitrator finds that Petitioner is not entitled to medical services not otherwise provided by Respondent or through group health insurance.

Furthermore, the Arbitrator notes that Petitioner has not submitted any medical record evidence for treatment after the office visit with Dr. Montella on June 19, 2019. There are no medical records provided that reflect the services provided by Dr. Montella after June 19, 2019, were in relation to the work injury. Therefore, Respondent is not liable for medical treatment with Dr. Montella after June 19, 2019.

Accordingly, based on the above, Respondent is not liable for any of the disputed medical charges. Respondent is entitled to a credit under Section 8(j) of the Act for medical benefits paid by the group health insurance carrier, Blue Cross Blue Shield, as itemized in Respondent's Exhibit 6.

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 she is entitled to temporary total disability from November 11, 2013, through February 10, 2014. The Arbitrator notes that the parties stipulated that Respondent paid $5,087.00 total in temporary disability benefits. (AX1)

For an employee to be entitled to temporary total disability benefits under the Act, the employee must prove he/she is "totally incapacitated for work by reason, of the illness attending the injury." *Mt. Olive Coal Co. v. Industrial Commission*, 129 N.E. 103, 104 (Ill. 1920).

Based on the Arbitrator's finding regarding causation and the opinions of Dr. Kornblatt, the Arbitrator finds that Petitioner is entitled to temporary disability benefits from November 11, 2013, through December 30, 2013, the date of Dr. Kornblatt's IME.

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

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

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.
(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors;
(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

With regard to subsection (i) of Section 8.1b(b), the Arbitrator notes that the record contains an impairment rating of 0% of an individual as a whole as determined by Dr. Kornblatt pursuant to the 6th edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Workers' Compensation Act, but instead is a factor to be considered in making such a disability evaluation. The Arbitrator gives this factor some weight.

With regard to subsection (ii) of Section 8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a warehouse worker/forklift driver at the time of the accident and that she was able to return to work in her prior capacity as a result of said injury. The Arbitrator gives this factor considerable weight.

With regard to subsection (iii) of Section 8.1b(b), the Arbitrator notes that Petitioner was 34 years old at the time of the accident. The Arbitrator gives this factor some weight.

With regard to subsection (iv) of Section 8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that no evidence was provided that Petitioner's future earning capacity was impacted by the October 4, 2013, work accident. The Arbitrator gives this factor some weight.

With regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner was initially diagnosed with a lumbar and trapezius strain. Petitioner's treating physician, Dr. Montella, diagnosed her with lumbar disc herniation. Dr. Kornblatt disagreed with the findings of a lumbar disc herniation, noting that Petitioner never presented clinically with a lumbar disc herniation, based on the history presented, complaints of the patient, MRI report and findings on his examination. Dr. Kornblatt stated that a diagnosis of a herniated disc is not solely based on an MRI but based on a patient's history, physical examination, as well as radiographic findings. The Arbitrator gives this factor considerable weight.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 5% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act.

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

The imposition of penalties and attorneys' fees under Section 19(k) and Section 16 is discretionary. *McMahan v. Industrial Commission*, 183 Ill.2d 499 (1998). The standard for awarding penalties and attorneys' fees under Sections 19(k) and 16 is higher than the standard for awarding penalties under Section 19(l). *Id.* 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 to award penalties under Sections 19(k) and 16. Both require an unreasonable or vexatious delay in payment. *Vulcan Materials Co. v. Industrial Comm'n*, 362 IllApp.3d 1147, 1150 (2005).

Typically, an employer's reasonable and good faith challenge to liability ordinarily will not subject it to penalties under the Act. *Matlock v. Industrial Comm'n*, 321 Ill.App.3d 167, 173 (2001). Where an employer is in possession of facts that would justify a denial of benefits, penalties and fees are generally inappropriate. *ElectroMotive Division v. Industrial Comm'n*, 250 Ill.App.3d 432, 436 (1993). Good faith must be assessed objectively, thus the question is whether an employer's denial of benefits was reasonable. *ElectroMotive*, 321 Ill.App.3d at 436. The employer bears the burden of demonstrating that its denial of benefits was reasonable. *Id.*

Petitioner filed her Petition for Penalties and Attorneys' Fees pursuant to Sections 19(k), 19(l) and 16. Respondent filed its Response to the Petitioner for Penalties and Attorneys' Fees making specific denials to Petitioner's allegations and averments. Specifically, Respondent disputed that Petitioner's allegation of a causal link between Petitioner's current condition of ill-being as well as the necessity for work restrictions.

Petitioner sought penalties and attorneys' fees based upon Respondent's denial for interim benefits. Here, Respondent reasonably relied on the opinions and conclusions of its IME, Dr. Kornblatt, regarding Petitioner's ability to return to work in a full duty capacity and did not engage in unreasonable and vexatious delay in any benefit payment. On December 30, 2013, Dr. Kornblatt, recommended that Petitioner return to unrestricted work. However, Petitioner did not return to work until February 2014, when she was given a full duty release by Dr. Montella. Petitioner continued to work full duty without restrictions until approximately May 2019.

As such, the Arbitrator finds Respondent's actions did not rise to the level of callousness or unreasonableness required for an imposition of penalties or fees. Therefore, the Arbitrator finds that Petitioner did no prove entitlement to penalties and attorneys' fees.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC027042
Case Name	Toni McKire v. Pepsi Beverages Co
Consolidated Cases	13WC034797; 18WC029418;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0505
Number of Pages of Decision	13
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Neil Schelhammer
Respondent Attorney	Robert Smith

DATE FILED: 11/28/2023

/s/Amylee Simonovich, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Toni McKire,

Petitioner,

vs. NO: 15 WC 27042

Pepsi Beverages Co.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on July 21, 2022, is hereby affirmed and adopted.

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 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.

November 28, 2023

o: 10/17/23
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	15WC027042
Case Name	Toni McKire v. Pepsi Beverages Co
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Elaine Llerena, Arbitrator

Petitioner Attorney	Matthew Gannon
Respondent Attorney	Robert Smith

DATE FILED: 7/21/2022

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

/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

Toni McKire Case # **15** WC **027042**
Employee/Petitioner
v.
Pepsi Beverages Co.
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 **Elaine Llerena**, Arbitrator of the Commission, in the city of **Chicago**, on **November 22, 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 5, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

In the year preceding the injury, Petitioner earned $**46,072.00**; the average weekly wage was $**886.00**.

On the date of accident, Petitioner was **36** years of age, ***single*** with **3** dependent children.

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 $**6,537.01** under Section 8(j) of the Act.

ORDER

Petitioner did not prove that she sustained accidental injuries arising out of and in the course of her employment with Respondent on August 5, 2015.

Petitioner's claim for benefits 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.

Elaine Llerena
Signature of Arbitrator

JULY 21, 2022

ICArbDec p. 2

STATEMENT OF FACTS

Petitioner testified that on August 5, 2015, she was working as a general plant worker for Respondent which involved repacking soda and driving a forklift. (T. 37-38) She testified that she was working in a full duty capacity at the time. (T. 39) She testified that she was driving the forklift carrying a pallet of soda when she ran over a pothole inside the warehouse that jerked her back. (T. 40) She noted pain in her back and neck. (T. 42)

On August 26, 2015, Petitioner attended a follow up visit with Dr. Bruce Montella regarding her prior work accident on October 4, 2013 (13WC034797), and indicated that she aggravated her back the week before, causing her left leg to go numb and prompting her to see another doctor. (PX1, pg. 607) She noted that lifting about 200 cases of pop at work heavier than 7 pounds aggravated her symptoms. *Id.* Straight leg raise test was negative and she had decreased strength and tenderness. (PX1, pg. 608) Physical therapy and topical cream were prescribed. (PX1, pg. 609)

On September 19, 2015, Petitioner presented to Community Healthcare System Emergency Department with complaints of neck and pelvic pain. (RX4, pg. 41) Petitioner reported constant lower left sided abdominal pain radiating into her back for the past three days. (RX4, pg. 43) She also reported neck pain but denied any recent injury. *Id.* Muscle tenderness in the left neck was noted on physical examination. (RX4, pg. 45) Petitioner was diagnosed with neck pain and other unrelated conditions. (RX4, pg. 48)

Petitioner returned to Dr. Montella for follow up on September 23, 2015, reporting that she had gone to the hospital over the weekend due to severe back and neck pain and was given a muscle relaxant. (PX1, pg. 601) She had full strength, an antalgic gait and tenderness. (PX1, pg. 602) Physical therapy and Norco were prescribed. (PX1, pg. 603)

On November 4, 2015, Petitioner reported that she continued to experience the same symptoms and pain levels as before. (PX1, pg. 596) Straight leg raise was positive. (PX1, pg. 597). She was prescribed Norco and a series of epidural injections were ordered. (PX1, pg. 598). Petitioner presented for follow up on her back pain on January 11, 2016. (PX1, pg. 588) She reported that she continued to experience the same symptoms and pain levels as before. *Id.* Petitioner reported that she was working without restrictions and was tolerating it well. *Id.* Straight leg raise test was negative and she had full strength and no tenderness. (PX1, pg. 589) Petitioner was prescribed Norco. (PX1, pg. 590) During these visits, toxicology screens were negative for Norco. (PX1)

At the February 10, 2016, follow up, Petitioner noted that she was taking more medication and trying to do lighter work to not aggravate her back. (PX1, pg. 578) Norco was prescribed for pain. (PX1, pg. 580) The toxicology screen was negative for Norco. (PX1, pg. 746)

On February 29, 2016, Petitioner underwent an independent medical examination (IME) by Dr. Michael Kornblatt pursuant to Section 12 of the Illinois Workers' Compensation Act (Act). (RX1) Petitioner denied any recent injury during the examination but noted a flare up of her back pain in August 2015. (RX1, pg. 20) Petitioner complained of pain in the upper and lower lumbar spine which was constant and worsened after working, standing and sitting for three hours. *Id.* Petitioner denied radicular leg pain and reported some aching in the front of her thighs. *Id.* She advised that she was taking Norco four times a day and occasionally Motrin. *Id.* Dr. Kornblatt diagnosed Petitioner with mechanical low back pain and lumbar myofascial pain. (RX1, pg. 21) He noted that Petitioner's lumbar strain from her prior October 4, 2013, work accident had resolved but she still had myofascial pain. *Id.* Dr. Kornblatt did not believe that Petitioner required work restrictions. *Id.* He also noted that she might require care referrable to her back aches but disagreed with the necessity for long-term narcotic usage for pain, especially for Petitioner's diagnosis. (RX1, pgs. 22, 23) Dr. Kornblatt testified that

utilization of narcotic pain medication should not be solely based on subjective complaints and did not feel that it was appropriate in this case. *Id.* He testified that he believed that Dr. Montella was deviating from the normal standard of care. (RX1, pg. 39)

On March 7, 2016, Petitioner presented to Community Healthcare Emergency Department with complaints of palpations and dizziness. (RX4, pg. 69) Petitioner reported no myalgias, back pain, arthralgias, or neck pain. (RX4, pg. 72) Physical examination revealed normal range of motion. (RX4, pg. 73)

Petitioner reported continued back pain at 8/10 at the March 16, 2016, follow up with Dr. Montella. (PX1, pg. 575) Straight leg raise test was negative. (PX1, pf. 576) Petitioner was prescribed Norco. (PX1, pg. 577) The toxicology screen was negative for Norco. (PX1, pg. 740) At the April 8, 2016, follow up Petitioner complained of more pain in her low back due to prolonged standing at work and working more hours. (PX1, pg. 591) Petitioner was waiting to schedule her lumbar steroid injection and noted that in the past it helped alleviate her pain for a month. *Id.* Norco and a back brace were prescribed. (PX1, pg. 593) The toxicology screen was positive for Norco. (PX1, pg. 736)

On June 6, 2016, Petitioner presented to Community Healthcare Emergency Department with complaints of epigastric abdominal pain. (RX4, pg. 102) Petitioner reported no myalgias or arthralgias. (RX4, pg. 104) Petitioner had normal range of motion. (RX4, pg. 105)

On June 8, 2016, Petitioner reported to Dr. Montella she went to the ER the day before due to severe low back pain and that she was not given any treatment at the hospital because she was on a pain management contract with Dr. Montella's office. (PX1, pg. 563) A back brace and Norco was prescribed. (PX1, pg. 565).The toxicology screen was positive for Norco. (PX1, pg. 726) At the June 26, 2015, follow up, Petitioner reported no significant change in her symptoms. (PX1, pg. 176) Physical examination revealed mild tenderness, full range of motion and strength, and negative straight leg raise. (PX1, pf. 177) The toxicology report from this visit was negative for Norco. (PX1, pg. 192)

On July 2, 2016, Petitioner presented to Community Healthcare Emergency Department with complaints of generalized abdominal pain. (RX4, pg. 126) She was negative for myalgias and back pain and had normal range of motion in her back and neck. (RX4, pgs. 128-129) Petitioner was diagnosed with abdominal pain and prescribed medications including Norco. (RX4, pg. 130) Petitioner testified that no other physician besides Dr. Montella prescribed her Norco. (T. 77)

On July 18, 2016, Petitioner returned to Dr. Montella and reported continued constant low back pain at 8/10 with medication and 10/10 without. (PX1, pg. 560) Petitioner was to continue regular duty work and was prescribed Norco. (PX1, pgs. 562, 791) The toxicology screen was positive for Norco. (PX1, pg. 721) At the September 12, 2016, follow up Petitioner noted continued low back pain and taking 5 tablets of Norco per day. (PX1, pg. 542) An MRI of the lumbar spine was ordered and Norco was prescribed for pain. (PX1, pg. 544)

On September 13, 2016, Petitioner presented to Community Healthcare Emergency Department following a motor vehicle accident with complaints of neck pain and low back pain radiating to her bilateral legs. (RX4, pg. 154) She reported that she had been rear-ended and tried Motrin and Advil without relief. *Id.* Petitioner also reported that she had no history of back pain. *Id.* Physical examination revealed paraspinal spasms along her entire spine with some extension into her trapezius bilaterally but no step off or crepitus. (RX4, pg. 157) Petitioner was diagnosed with muscle spasms and headaches and prescribed Valium. (RX4, pg. 158)

At the recommendation of Dr. Montella, Petitioner underwent an MRI of the lumbar spine on September 14, 2016, the results of which noted that all the lumbar intervertebral discs appeared unremarkable without significant posterior disc bulging, protrusions or herniations. (PX1, pg. 1)

On September 26, 2016, Petitioner presented to Dr. Montella with complaints of pain at 9/10 in the neck and bilateral shoulder. (PX1, pg. 548) She reported that she was driving on the expressway and was hit from behind. *Id.* An MRI of the cervical spine was ordered as well as a course of therapy. (PX1, pg. 550)

On September 28, 2016, Petitioner underwent an MRI of the cervical spine, the results of which showed 2-4 mm subligamentous posterior disc protrusions/herniations at C3-4, C4-5, C5-6 and C6-7. (Px 4, p. 2). The radiologist noted right lateral recess narrowing at C5-6 and some spinal stenosis and mild bilateral neuroforaminal narrowing at C4-5. (PX4, pg. 2)

Petitioner followed up with Dr. Montella and noted Petitioner that her neck symptoms had continued to worsen since the motor vehicle accident from September 12, 2016. (PX1, pg. 532) Petitioner reported weakness in her hands with pain in the neck radiating to the posterior left shoulder blade. *Id.* Physical therapy and Norco were prescribed. (PX1, pg. 534) The toxicology screen was positive for Norco. (PX1, pg. 645) At the October 5, 2016, follow up Petitioner reported increasing low back pain. (PX1, pg. 539) Dr. Montella indicated that the September 2016 MRI of the lumbar spine was limited but showed no significant bulging, protrusions or herniations. (PX1, pg. 540) Dr. Montella prescribed Norco. *Id.*

On October 6, 2016, Petitioner presented to Community Healthcare Emergency Department with complaints of palpitations. (RX4, pg. 177) She noted that she had an MRI done earlier for back pain. *Id.* Petitioner exhibited normal range of motion with no edema. (RX4, pg. 180)

Petitioner returned to Dr. Montella on November 9, 2016, and reported pain at 9/10 in her back. (PX1, pg. 529) Petitioner was working without restrictions. *Id.* A thermal back brace was prescribed. (PX1, pg. 530) The toxicology screen was positive for Norco. (PX1, pg. 641) Petitioner returned for a follow up on November 28, 2016, and reported neck pain at 9/10. (PX1, pgs. 522-523) No work restrictions were provided, and Petitioner was prescribed Norco. (PX1, pg. 524, 788)

An initial evaluation/plan of care report from ATI noted that Petitioner was involved in a motor vehicle accident, wherein she was rear-ended by another driver, resulting in significant pain in the neck and back. (PX1, pg. 640). The therapy discharge summary from December 23, 2016, indicated that she had attended two visits and missed five. (PX1, pg. 638)

Petitioner continued to follow up with Dr. Montella in January, February and April of 2017, complaining of continued back pain. (PX1, pgs. 513-517) Dr. Montella continued to prescribe Norco throughout. *Id.* On April 3, 2017, Petitioner reported she was driving a forklift when she hit a bump aggravating her low back pain. (PX1, pg. 508) Petitioner also mentioned that she stands on concrete all day which causes her back pain. *Id.* Dr. Montella recommended orthotics for her back pain and prescribed Norco. (PX1, pg. 510)

On April 28, 2017, Petitioner saw Dr. Friedman to be scanned for a new pair of orthotics and noted significant improvement in her symptoms. (PX1, pg. 500) Petitioner noted less pain in her feet since wearing the orthotics. *Id.*

Petitioner continued to follow up with Dr. Montella. (PX1) In May and June of 2017, Petitioner reported working full duty and taking more than 5 Norcos a day. (PX1, pgs. 244, 248) Dr. Montella advised Petitioner

not to take more than 4 Norcos a day. (PX1, pg. 250) Toxicology screenings for these visits were negative for Norco. (PX1, pgs. 287, 293)

On June 12, 2017, Dr. Montella ordered a lumbar MRI which was performed on June 22, 2017, and the results of which showed no interval change from the previous report from October 25, 2013, and the presence of a 1-2 mm posterior annular disc bulge with mild bilateral neuroforaminal narrowing at L4-5. (PX1, pgs. 246, 296)

On July 17, 2017, Petitioner returned to Dr. Montella complaining of worsened low back pain. (PX1, pg. 236) Petitioner reported that her new boss told her to carry 30-40 lbs of mail repetitively, which had been aggravating her low back. *Id.* Physical examination showed tenderness, diminished range of motion, decreased strength and positive straight leg raise. (PX1, pg. 237) Dr. Montella recommended a 10-15 lb work restriction and prescribed Norco and Flexeril. (PX1, pgs. 238, 302)

On August 16, 2017, Petitioner reported that Norco takes the edge off her pain, but she can only take so much at work, and that she wanted to try a trial period of work to see if she could tolerate the pain. (PX1, pg. 233) Physical examination was unchanged. (PX1, pg. 234) Dr. Montella prescribed a course of physical therapy, Norco and recommended a 1–2 week trial of full duty work, depending on Petitioner's pain tolerance. (PX1, pgs. 235, 300-301) The toxicology screen from this date was negative for Norco, which was not expected with the prescribed medication. (PX1, pg. 283)

On September 13, 2017, Petitioner reported an increase in her pain since returning to work full duty. (PX1, pg. 226) Petitioner stated that she could not tolerate therapy due to pain. *Id.* Norco was again prescribed for pain. (PX1, pg. 228)

A Discharge Summary from ATI from September 6, 2017, indicates Petitioner missed four (4) therapy visits due to complaints of pain and that she was unable to tolerate therapy. (PX1, pg. 277)

Petitioner continued to follow up with Dr. Montella in September, October, November and December of 2107. (PX1, pgs. 2019-225) At the September, November and December visits, Petitioner did not report any significant change in her symptoms and Dr. Montella continued to prescribe Norco. *Id.* On October 11, 2017, Petitioner reported that she went to the hospital two weeks prior due to radiating pain, numbness, and difficulty walking. (PX1, pg. 218) She reported that she had a flare up and that her symptoms were subsiding, but she still had pain. *Id.* She had been working full duty. *Id.* Dr. Montella noted decreased strength, evidence of deconditioning and positive straight leg raise test and prescribed Norco. (PX1, pgs. 219-220). On December 6, 2017, Dr. Montella indicated that Petitioner would need intermittent medication and physical therapy for flare ups and may also ultimately require surgery. (PX1, pgs. 209-210)

Petitioner continued to follow up with Dr. Montella through August 2018. (PX1, pgs. 197-204, 254, 435-447 & 487) Petitioner would periodically report flare ups in back pain. *Id.* Dr. Montella continued to prescribe Norco and kept Petitioner on full duty work. *Id.* On March 19, 2018, Petitioner reported that she had gone to the emergency room on March 15, 2018, due to back pain. (PX1, pg. 438) Dr. Montella prescribed Norco and updated Petitioner's FMLA forms to include frequent flare up episodes. (PX1, pg. 440) On May 7, 2018, Petitioner underwent an MRI of the lumbar spine which found no interval change from the June 22, 2017, study which showed a 1-2 mm posterior disc bulge at L4-5. (PX1, pg. 488) On July 23, 2018, Petitioner reported that her back pain increased over the last few days, that she had been bedridden due to the pain and that she was out of medication because she took more when her pain increased. (PX1, pgs. 413-414). Dr. Montella prescribed Norco. (PX1, pg. 415) On August 27, 2018, Petitioner reported that she had been using a forklift at work to help with lifting but that the vibration and movement over potholes worsened her back pain. (PX1, pg.

408) Physical examination found limited range of motion and an antalgic gait. (PX1, pg. 409) Petitioner was prescribed Norco. (PX1, pg. 410)

Petitioner continues to follow up monthly with Dr. Montella telephonically due to the COVID-19 pandemic. (T. 82-84, 103) Petitioner continues to take Norco as prescribed by Dr. Montella (T. 85) Dr. Montella has indicated that Petitioner my require surgery in the future. (PX1, pg. 210) Petitioner testified that Dr. Montella has suggested to her that she undergo a fusion. (T. 56-57)

Petitioner testified that Respondent terminated her employment after telling her they could no longer accommodate her restrictions. (T. 53) Petitioner testified that she has asked Respondent to accommodate her restrictions on numerous occasions, with no success. (T. 55)

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

A claimant bears the burden of proving by a preponderance of the evidence that her injury arose out of and in the course of the employment. 820 ILCS 305/2. Both elements must be present in order, to justify compensation. *Illinois Bell Telephone Co. v. Industrial Commission*, 131 Ill. 2d 478 (1989).

The phrase "in the course of" refers to the time, place, and circumstances under which an incident occurred. *Orsini v. Industrial Commission*, 117 Ill. 2d 38 (1987). The words "arising out of" refer to the origin or cause of the incident and presuppose a causal connection between the employment and the accidental injury. *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52 (1989). "Preponderance of the evidence is evidence which is of greater weight or more convincing than the evidence offered in opposition to it; it is evidence which as a whole shows that the fact to be proved is more probable than not." *Parro v. Industrial Commission*, 260 Ill.App.3d 551 (1st Dist. 1993); *Central Rug & Carpet v. Industrial Commission*, 361 Ill.App.3d 684 (1st Dist. 2005).

Among the factors to be considered in determining whether a claimant has sufficiently carried her burden is her credibility. See, *Parro*, supra. Credibility is the quality of a witness, which renders her evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the witness's demeanor and any external inconsistencies with testimony.

The Commission is not required to find for a claimant merely because there is some testimony which, if it stood alone and undisputed, might warrant such a finding. *Burgess v. Industrial Commission*, 169 Ill.App.3d 370 (1st Dist. 1988). The mere existence of testimony does not require its acceptance, *U.S. Steel Corporation v. Industrial Commission*, 8 Ill. 2d 407 (1956), and the Commission is not required to accept unrebutted testimony. *Sorenson v. Industrial Commission*, 281 Ill.App.3d 373, 384 (1996). Where the sole support for an award rests on the claimant's own testimony, and claimant's actual behavior and conduct is inconsistent with that testimony, 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). To determine whether a claimant has met her requisite burden of proof by a preponderance of credible evidence, it is necessary for the Arbitrator to look for consistency and corroboration between a witness' testimony, conduct, and other documentary evidence to determine the truth of the matter. Where that other evidence tends to impeach or undermine a claimant's testimony, there may be sufficient cause to find that a claimant has failed to meet her requisite burden.

For the reasons set forth, the Arbitrator finds that Petitioner's claimed accident of August 5, 2015, is not supported by the record or by Petitioner's testimony which contains numerous contradictions and calls into question her testimony as a whole as to the alleged accident.

Petitioner testified that she was driving a forklift carrying a pallet of soda when she ran into a pothole inside the warehouse that jerked her back causing pain in her back and neck. However, when she presented for medical care with Dr. Montella on August 26, 2015, Petitioner reported that she aggravated her back the week before, approximately August 16, 2015-August 22, 2015, and her entire left leg went numb, prompting her to see another doctor. The Arbitrator notes that no record was introduced into evidence regarding this appointment with another doctor. Additionally, Petitioner reported lifting about 200 cases of pop at work heavier than 7 pounds was the mechanism of injury and not driving a forklift over a pothole.

The Arbitrator further notes that when Petitioner was evaluated by Dr. Kornblatt in February 2016 she denied an injury occurred in August 2015. There is no indication in the contemporaneous record in evidence of an incident involving Petitioner running into a pothole on August 5, 2015.

The Arbitrator finds that *Shell Oil v. Industrial Commission*, 2 Ill. 2d 590 (1954), is instructive in the case at bar. In that case, the court noted that "declarations of an injured person to a treating physician as to his physical condition, and the cause thereof, are admitted into evidence for the reason that it is presumed that a person will not falsify such statements to a physician from whom he expects and hopes to receive medical aid." *Id.* citing, *Shaughnessy v. Holt*, 236 Ill. 485 (1908).

Similar language was cited by the Illinois Supreme Court in *Jensen v. Elgin, Joliet and Eastern Railway Company*, 24 Ill. 2d 383 (1962), for the proposition that the desire for proper treatment outweighs any motive to falsify. By way of general evidentiary concepts, greater weight is ordinarily afforded to contemporaneous medical records and histories, instead of later, less reliable and self-serving histories by those who have had time to formulate statements.

Applying the applicable case law to this case, and based on the totality of the circumstances and weighing the credibility of Petitioner, the Arbitrator concludes that Petitioner failed to sustain her burden of proof by a preponderance of evidence that she sustained accidental injuries arising out of and in the course of her employment with the Respondent on August 5, 2015.

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

Based on the Arbitrator's finding that Petitioner failed to prove that she sustained accidental injuries arising out of and in the course of her employment with Respondent on August 5, 2015, the issue of causation is moot.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's finding that Petitioner failed to prove that she sustained accidental injuries arising out of and in the course of her employment with Respondent on August 5, 2015, the issue of medical expenses is moot.

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:

Based on the Arbitrator's finding that Petitioner failed to prove that she sustained accidental injuries arising out of and in the course of her employment with Respondent on August 5, 2015, the issue of temporary total disability is moot.

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

Based on the Arbitrator's finding that Petitioner failed to prove that she sustained accidental injuries arising out of and in the course of her employment with Respondent on August 5, 2015, the issue of permanency is moot.

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

Based on the Arbitrator's finding that Petitioner failed to prove that she sustained accidental injuries arising out of and in the course of her employment with Respondent on August 5, 2015, the issue of penalties and attorneys' fees is moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC029418
Case Name	Toni McKire v. Pepsi Beverages Co
Consolidated Cases	13WC034797; 15WC027042;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0506
Number of Pages of Decision	12
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Neil Schelhammer
Respondent Attorney	Robert Smith

DATE FILED: 11/28/2023

/s/Amylee Simonovich, Commissioner

Signature

STATE OF ILLINOIS	)	[ ] Affirm and adopt (no changes)	[ ] Injured Workers' Benefit Fund (§4(d))
	) SS.	[X] Affirm with changes	[ ] Rate Adjustment Fund (§8(g))
COUNTY OF COOK	)	[ ] Reverse	[ ] Second Injury Fund (§8(e)18)
			[ ] PTD/Fatal denied
		[ ] Modify	[X] None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Toni McKire,

Petitioner,

vs. NO: 18 WC 29418

Pepsi Beverages Co.,

Respondent.

DECISION AND OPINION ON REVIEW

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

Initially, the Commission notes that prior to the arbitration hearing the parties consolidated this case with two prior cases. In the current case, Petitioner alleged she sustained a work-related injury on September 17, 2018. In case 13 WC 34797, Petitioner alleged she sustained a work-related injury on October 4, 2013. Finally, in case 15 WC 27042, Petitioner alleged she sustained a work-related injury on August 5, 2015. While the parties addressed all three cases during the arbitration hearing, the Arbitrator issued separate Arbitration Decisions for each case. The Commission addresses the issues raised on review relating to the companion cases in separate Decisions.

In the interest of efficiency, the Commission relies on the detailed recitation of facts provided in the Decision of the Arbitrator. The Commission affirms the Arbitrator's conclusion that Petitioner's condition of ill-being is not causally related to the September 17, 2018, work accident. The Commission also affirms the Arbitrator's denial of temporary total disability benefits and medical expenses. The Commission affirms the Arbitrator's conclusion that Petitioner did not sustain any permanent partial disability due to the work accident. Finally, the Commission affirms the Arbitrator's denial of penalties in this matter.

The Commission makes the following modifications to the Decision of the Arbitrator. On page three (3) of the Decision, the Arbitrator wrote, "The Arbitrator notes that there were no records of this Concentra visit introduced into evidence." The Commission modifies the above-

referenced sentence to read as follows:

> The Arbitrator notes that there are Physician Work Activity Status Reports from Concentra dated September 17, 2018, and September 19, 2018, but the corresponding office visit notes were not introduced into evidence.

On page six (6) of the Decision, the Arbitrator wrote, "Based on the Arbitrator's finding regarding causation…the Arbitrator finds that Petitioner is not entitled to medical services not otherwise provided by Respondent…" The Commission modifies the above-referenced sentence to read as follows:

> Based on the Arbitrator's finding regarding causation detailed above, the Commission adopts Dr. Butler's opinion that none of Petitioner's medical treatment was reasonable, necessary, or causally related to the September 17, 2018, work accident.

On page six (6) of the Decision, the Commission also strikes the paragraph beginning: "Furthermore, the Arbitrator notes that Petitioner has not submitted any medical record evidence for treatment after the office visit with Dr. Montella on June 19, 2019…" in its entirety. Finally, on page seven (7) of the Decision, the Arbitrator wrote that Respondent's actions did not rise to the level of callousness required for the imposition of penalties. The Commission modifies the above-referenced sentence to read as follows:

> As such, the Arbitrator finds Respondent's actions did not rise to the level of **vexatiousness** or unreasonableness required for an imposition of penalties or fees.

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 July 21, 2022, is modified as stated herein.

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 Respondent pay to Petitioner interest pursuant to §19(n) of the Act, if any.

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

November 28, 2023
o: 10/17/23
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	18WC029418
Case Name	Toni McKire v. Pepsi Beverages Co
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Elaine Llerena, Arbitrator

Petitioner Attorney	Matthew Gannon
Respondent Attorney	Robert Smith

DATE FILED: 7/21/2022

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

/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

Toni McKire Case # **18** WC **029418**
Employee/Petitioner
v.
Pepsi Beverages Co.
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 **Elaine Llerena**, Arbitrator of the Commission, in the city of **Chicago**, on **November 22, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **September 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**46,072.00**; the average weekly wage was $**886.00**.

On the date of accident, Petitioner was **39** years of age, ***single*** with **3** dependent children.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**10,617.87** for other benefits, for a total credit of $**10,617.87**.

Respondent is entitled to a credit of $**3,886.67** under Section 8(j) of the Act.

ORDER

Petitioner's current condition of ill-being is not causally related to the September 17, 2018, work accident. The Arbitrator finds that Petitioner did not suffer any permanent partial disability as a result of the September 17, 2018, work accident.

Petitioner's Petitioner for Penalties and Attorneys' Fees is denied.

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

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

Elaine Llerena **JULY 21, 2022**

Signature of Arbitrator

STATEMENT OF FACTS

Petitioner testified that she was working for Respondent as a general plant employee on September 17, 2018. (T. 47) She reported she had the same job duties that she had on August 5, 2015 (15WC027042). (T. 48). Petitioner testified that she was taking sodas to a car and going through a carwash in a forklift when she went through a door and hit a pothole. (T. 49) Petitioner explained that she was taking samples of product to an employee from a different location and had never had to do this before. (T. 69-70) She testified that she felt like the pothole aggravated her low back. (T. 49) Petitioner testified that she was sent to Concentra by Respondent following the accident. (T. 50) The Arbitrator notes that there were no records of this Concentra visit introduced into evidence.

On September 24, 2018, Petitioner saw Dr. Bruce Montella for follow up regarding preexisting low back issues and reported a new work accident of September 17, 2018. (PX1, pg. 398) Petitioner reported that that she was driving a forklift and passed through the garage doors when she hit a pothole and felt sudden pain in her neck, right shoulder, low back and both legs. *Id.* She was working light duty but reported difficulty doing her job. *Id.* She reported tenderness, limited range of motion, and a mildly antalgic gait. (PX1, pg. 399). MRIs of the cervical and lumbar spine were recommended along with work restrictions and Norco. (PX1, pgs. 401, 453)

Petitioner underwent MRIs of the lumbar and cervical spine on October 3, 2018. (PX1, pg. 396, 472-473). The cervical MRI showed 2-3 mm herniations at C4-5 and C5-6 with a 1-2 mm disc protrusion/herniation at C3-4. (PX1, pgs. 396, 472). The lumbar spine showed a 2-3 mm posterior disc herniation at L5-S1. *Id.*

On October 15, 2018, Petitioner returned to Dr. Montella and reported no improvement. (PX1, pgs. 394) She complained of an increase in radiating pain in both legs and in neck pain. *Id.* Dr. Montella recommended light duty restrictions and prescribed Norco. (PX1, pgs. 397, 452)

Petitioner continued to follow up with Dr. Montella in October, November and December of 2018 and January, February, March and April of 2019. (PX1, pgs. 337-343, 354, 368-387, 448-451) Dr. Montella continued to prescribe Norco. *Id.* On February 25, 2019, Petitioner reported her symptoms had worsened and noted that she had gone back to full duty work and wanted to go back on restrictions. (PX1, pg. 340) Dr. Montella placed Petitioner back on light duty and prescribed Norco. (PX1, pgs. 339, 352-353)

On December 4, 2018, Petitioner underwent an independent medical examination (IME) with Dr. Jesse Butler at Respondent's request pursuant to Section 12 of the Illinois Workers' Compensation Act (Act). (RX2) Dr. Butler noted that Petitioner reported that she had another episode of severe lower back pain after hitting a pothole at work on September 17, 2018. (RX2, pg. 11) Dr. Butler noted that Petitioner had a remote history of work injuries with multiple complaints of reinjury over the years and an injury from a motor vehicle accident in September 2016 when she was rear ended. *Id.* Petitioner also reported that she had been diagnosed with fibromyalgia and prescribed medical marijuana in July 2018. (RX2, pg. 12) Petitioner reported pain complaints with virtually all activities of daily living, noting that she could not lift or carry anything at all, and that pain prevented her from walking more than a quarter of a mile. (RX2, pg. 13) Petitioner stated that her pain was 10/10 at the time of the examination and at best it was 9/10. (RX2, pg. 14) Dr. Butler recorded Petitioner's blood pressure at 115 over 85 with a pulse at 94 beats per minute, which he noted was inconsistent with a pain score of 10/10. (RX2, pgs. 14-15) Though Dr. Butler found that Waddell's test was negative, he felt that Petitioner's pain complaints were the result of symptom magnification. (RX2, pgs. 27, 54) Dr. Butler noted that the physical examination showed Petitioner had normal posture, normal gait, sat comfortably on the exam table and there were no neurological, strength, sensation, or reflex abnormalities. (RX2, pg. 15) Petitioner reported mild tenderness to palpation of the cervical spine, moderate tenderness to the lower back, and negative straight leg raise testing. (RX2, pg. 16) Dr. Butler reviewed the MRI scans from September 14, 2016, September 28,

2016, June 22, 2017, May 7, 2018, and October 3, 2018, and noted that there was no difference in the pathology and that the scans were all normal. (RX2, pgs. 23, 35) Dr. Butler did not believe that reviewing the other MRIs was necessary, stating that reviewing three normal scans was enough. (RX2, pg. 35) Dr. Butler found that the most remarkable uncommon issue regarding the MRI scans were that they were all completely normal given Petitioner's age. (RX2, pg. 24) Dr. Butler also reviewed the MRI reports from June 22, 2017, May 7, 2018, and October 3, 2018. (RX2, pg. 20) With respect to the June 22, 2017, MRI, he noted that the finding by the radiologist of a 1-2 millimeter posterior annular bulge was of no clinical significance and explained that a disc bulge is a non-specific term that can be associated with findings of aging. (RX2, pgs. 18, 21) Regarding the findings by the radiologist of neuroforaminal narrowing, Dr. Butler testified that he did not find there to be any foraminal stenosis or narrowing. (RX2, pgs. 21, 22) Dr. Butler diagnosed Petitioner with chronic cervical and lumbar pain and was unable to explain her high levels of subjective pain given her imaging studies and objective findings were completely normal. (RX2, pgs. 24-25). Dr. Butler did not believe that there was any relationship between the work accident and Petitioner's condition of ill-being. (RX2, pg. 27) Dr. Butler did not believe that Petitioner suffered any work-related injury. (RX2, pg. 28)

Petitioner was discharged from physical therapy ordered prior to the September 17, 2018, work accident on April 19, 2019. (PX1, pgs. 359-362) The therapist noted improvements in Petitioner's overall strength and stability but found that her subjective reports of pain had not changed. *Id.* She was discharged from therapy, after 6 visits, due to a lack of change in her daily pain levels. (PX1, pgs. 360, 362)

On April 23, 2019, Dr. Montella recommended work restrictions and physical therapy. (PX1, pgs. 350-351) On May 21, 2019, Petitioner reported she had been working with restrictions. (PX1, pg. 327) Dr. Montella continued light duty restrictions and recommended a course of physical therapy and chiropractic treatment. (PX1, pgs. 329, 348-349)

Dr. Butler's testimony was taken via an evidence deposition on May 21, 2019. (RX2) Dr. Butler's testimony was consistent with the findings and opinions in his IME report. Dr. Butler testified that there was no objective pathology and no clinical response to any of the medications Petitioner was prescribed, the orthotics, or the injections. (RX2, pg. 28) Dr. Butler, considering the September 17, 2018, work accident and Petitioner's prior claimed work accidents, found the orthotics, injections, chronic use of narcotic pain medication and recurrent physical therapy were unreasonable especially with no reported benefits. (RX1, pg. 29) Dr. Butler did not believe that there was an objective basis for additional or further care, activity limitations or work restrictions. (RX2, pg. 28) He testified that Petitioner had "one of the healthiest lumbar spines I've ever seen in a 40-year-old." *Id.* Dr. Butler noted that per the toxicology reports it appeared that at times Petitioner was taking the medication and at other times was not and that some of the reports document the absence of any opioid medication in Petitioner's blood. (RX2, pg. 26)

On June 19, 2019, Petitioner reported no significant changes in her symptoms and that she had not worked for Respondent since May 24, 2019. (PX1, pg. 319) Dr. Montella again prescribed Norco and recommended physical therapy and chiropractic treatment. (PX1, pgs. 321, 346-347)

Petitioner testified that she continues to treat with Dr. Montella. (T. 56) The medical records in evidence do not show treatment past June 19, 2019. Petitioner also testified that she hasn't presented for an in-person evaluation with Dr. Montella since March 2020. (T. 83) She testified that Dr. Montella continues to prescribe Norco every month since November 2013. (T. 77) She testified that she takes the medication as prescribed but did not do so when she was working. (T. 85) Petitioner testified that Dr. Montella recommended a fusion surgery in 2015 or 2017, before the September 17, 2018, accident. (T. 56-57, 64-65)

Petitioner testified that she was terminated from Respondent but later clarified that she had received a letter from an attorney for Respondent. (T. 90) Petitioner explained that she never received any correspondence from Respondent, nor did she receive a phone call from Respondent telling her that she was terminated, nor did she speak with anyone from Respondent's Human Resources Department telling her she was terminated. (T. 90-91) The Arbitrator notes that the letter in question was not introduced into evidence at trial.

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

It is well-settled that an injury is sustained in the course of employment if it occurs within a period of employment, at a place where the worker may reasonably be in the performance of their duties, and while they are fulfilling those duties or engaged in actions incidental thereto. *Saunders v. Industrial Comm'n*, 189 Ill.2d 623, 727 N.E.2d 247, 244 Ill.Dec. 948 (2000). A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling their duties. *Fisher Body Division, General Motor Corp. v. Industrial Comm'n*, 40 Ill.2d 514, 516, 240 N.E.2d 694 (1968); see also *Schwartz v. Industrial Comm'n*, 379 Ill. 139, 144, 39 N.E.2d 980 (1942).

For an injury to "arise out of" the employment, its origin must be in some risk connected with, or incidental to the employment so as to create a causal connection between the employment and the injury. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.2d 193, 203 (2003). The phrase "in the course of" refers to the time, place and circumstances under which the accident occurred. *Orsini v. Indus. Comm'n*, 117 Ill.2d 38, 44 (1987). Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing her duties and while a claimant is at work, or within a reasonable time before and after work, are generally deemed to have been received in the course of employment. *Johnson v. Ill. Workers Comp. Comm'n*, 2011 IL App (2d) 100418WC, ¶21. A workers' compensation claimant need prove only that some act or phase of her employment was a causative factor in the ensuing injury. *Vogel v. Indus. Comm'n*, 354 Ill.App.3d 780 (2nd Dist. 2005).

The Arbitrator notes that Petitioner testified that she was driving a forklift, taking samples of product to an employee from a different location, when she hit a pothole aggravating her low back condition on September 17, 2018. Per the medical records, she advised that she was driving a forklift and passed through the garage doors when she hit a pothole and noticed sudden pain in her neck, right shoulder, low back and both lower legs. Petitioner also told Dr. Butler that she had another episode of severe lower back pain after hitting a pothole at work on September 17, 2018. Therefore, in reviewing the medical records in evidence and the testimony, the Arbitrator does find that Petitioner suffered a work accident arising out of and in the course of her employment with Respondent on September 17, 2018.

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

The Arbitrator finds the opinions of Dr. Butler to be most credible here. Dr. Butler indicated that Petitioner had a normal physical examination, with normal posture, normal gait, sat comfortably on the exam table and had no neurological, strength, sensation, or reflex abnormalities. Dr. Butler also reviewed multiple MRI scans and found no difference in the pathology, stating that the scans were all normal. Dr. Butler stated that there were no objective findings to support Petitioner's reported high levels of subjective pain. Further, Dr. Butler opined that Petitioner's pain complaints were the result of symptom magnification, noting that her pain complaints of 10/10 were inconsistent with Petitioner's normal blood pressure, pulse, and Dr. Butler's

observations of the Petitioner at the time of his examination. Ultimately, he did not believe that there was any relationship between the work accident and her alleged current condition of ill-being.

The Arbitrator also notes that Petitioner was already undergoing treatment with Dr. Montella when the September 17, 2018, work accident occurred. Further, the Arbitrator notes that the treatment records establish that Petitioner's condition and symptoms remained essentially the same following the September 17, 2018, work accident.

Based on the above, the Arbitrator finds that Petitioner's current condition of ill-being is not causally related to the September 17, 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:

Based on the Arbitrator's finding regarding causation detailed above, the Arbitrator finds that Petitioner is not entitled to medical services not otherwise provided by Respondent or through group health insurance.

Furthermore, the Arbitrator notes that Petitioner has not submitted any medical record evidence for treatment after the office visit with Dr. Montella on June 19, 2019. There are no medical records provided that reflect the services provided by Dr. Montella after June 19, 2019, were in relation to the work injury. Therefore, Respondent is not liable for medical treatment with Dr. Montella after June 19, 2019.

Accordingly, based on the above, Respondent is not liable for any of the disputed medical charges. Respondent is entitled to a credit under Section 8(j) of the Act for medical benefits paid by the group health insurance carrier, Blue Cross Blue Shield, as itemized in Respondent's Exhibit 6.

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 she is entitled to temporary total disability from May 24, 2019, to present. The Arbitrator notes that the parties stipulated that Respondent paid $10,617.18 in short-term disability benefits. (AX3)

For an employee to be entitled to temporary total disability benefits under the Act, the employee must prove he/she is "totally incapacitated for work by reason, of the illness attending the injury." *Mt. Olive Coal Co. v. Industrial Commission*, 129 N.E. 103, 104 (Ill. 1920).

Based on the Arbitrator's finding regarding causation and the opinions of Dr. Butler, the Arbitrator finds that Petitioner has not proven entitlement to temporary total disability benefits from May 24, 2019, to present.

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

Based on the Arbitrator's finding that Petitioner failed to establish a causal connection between the September 17, 2018, work accident and Petitioner's current condition of ill-being, the issue of permanency is moot.

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

The imposition of penalties and attorneys' fees under Section 19(k) and Section 16 is discretionary. *McMahan v. Industrial Commission*, 183 Ill.2d 499 (1998). The standard for awarding penalties and attorneys' fees under Sections 19(k) and 16 is higher than the standard for awarding penalties under Section 19(l). *Id.* 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 to award penalties under Sections 19(k) and 16. Both require an unreasonable or vexatious delay in payment. *Vulcan Materials Co. v. Industrial Comm'n*, 362 IllApp.3d 1147, 1150 (2005).

Typically, an employer's reasonable and good faith challenge to liability ordinarily will not subject it to penalties under the Act. *Matlock v. Industrial Comm'n*, 321 Ill.App.3d 167, 173 (2001). Where an employer is in possession of facts that would justify a denial of benefits, penalties and fees are generally inappropriate. *ElectroMotive Division v. Industrial Comm'n*, 250 Ill.App.3d 432, 436 (1993). Good faith must be assessed objectively, thus the question is whether an employer's denial of benefits was reasonable. *ElectroMotive*, 321 Ill.App.3d at 436. The employer bears the burden of demonstrating that its denial of benefits was reasonable. *Id.*

Petitioner filed her Petition for Penalties and Attorneys' Fees pursuant to Sections 19(k), 19(l) and 16. Respondent filed its Response to the Petitioner for Penalties and Fees making specific denials to Petitioner's allegations and averments. Specifically, Respondent disputed that Petitioner's allegation of a causal link between Petitioner's current condition of ill-being as well as the necessity for work restrictions.

Petitioner sought penalties and attorneys' fees based upon Respondent's denial for interim benefits. Here, Respondent reasonable relied upon the opinions and conclusions of its IME, Dr. Butler, regarding Petitioner's ability to return to work in a full duty capacity and did not engage in unreasonable and vexatious delay in any benefit payment. On December 4, 2018, Dr. Butler opined that there was no causal relationship between the work accident and Petitioner's condition of ill-being. Respondent's reliance on Dr. Butler's findings and opinions was reasonable.

As such, the Arbitrator finds Respondent's actions did not rise to the level of callousness or unreasonableness required for an imposition of penalties or fees. Therefore, the Arbitrator finds that Petitioner did no prove entitlement to penalties and attorneys' fees.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC012976
Case Name	Stephen Connolly v. Great Lakes Plumbing & Heating, Inc.
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0507
Number of Pages of Decision	17
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Kevin Veugeler
Respondent Attorney	George Klauke

DATE FILED: 11/28/2023

/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

STEPHEN CONNOLLY,

Petitioner,

vs. NO: 16 WC 12976

GREAT LAKES PLUMBING &
HEATING, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Arbitrator had denied an award for medical bills related to Dr. Kelly May of Illinois Foot and Ankle Center, Dr. Ronald Berger of Body Bliss Wellness Center and Accelerated Open MRI based on the Arbitrator's determination that Petitioner had exceeded his choice of physicians pursuant to Section 8(a) of the Act. By his Brief, Petitioner argued that Petitioner's choice of physicians, or the "two-doctor" rule, was not a disputed issue in this case and had Respondent raised this issue at arbitration, Petitioner stated that he would have offered evidence in rebuttal.

On the Request for Hearing form signed by the parties at arbitration, Respondent indicated that it was contesting liability for medical bills on two bases: (1) that the medical treatment was not reasonable, necessary or related, and (2) that the group insurance carrier paid all or part of the disputed bill(s). Nowhere in the Request for Hearing form did Respondent indicate that it disputed the medical charges incurred due to Petitioner exceeding his choice of physicians. Further, the Arbitrator reviewed the Request for Hearing form with the parties and specifically asked Respondent on the record if there was anything else that it wanted to clarify on the issue of medical bills. At that point in the record, Respondent again failed to raise the issue of choice of physicians and instead disputed the medical bills on the basis that they did not reflect the medical fee schedule amount nor did the bills indicate what the group carrier had paid. (T.4-5; T.86-87).

It has long been established that a party's failure to raise an issue before the arbitrator results in its forfeiture. *Greaney v. Indus. Comm'n*, 358 Ill. App. 3d 1002, 1020 (2005). Respondent's act of checking the box on the Request for Hearing form to indicate it disputed liability for certain medical bills was not sufficient to put Petitioner on notice of a claim that Petitioner had exceeded the number of physicians allowed under Section 8(a) of the Act. The Appellate Court held as such in *C&B Steel, Corp. v. Ill. Workers' Comp. Comm'n*, 2015 IL App (1st) 142176WC-U, ¶ 53. The Commission therefore finds that Respondent failed to raise the issue of choice of physicians as grounds to dispute liability for certain medical bills and thus forfeited the issue. Based on the Commission's findings related to choice of physicians, the award of medical expenses necessitates modification.

The Commission first affirms the Arbitrator's award of the following medical bills that the Arbitrator determined were reasonable, necessary and related to the October 20, 2015 work injury. By its Brief, Respondent does not dispute this specific award:

a) Midwest Orthopaedics at Rush (BCBS payments of $1,476.46);
b) Athletico (BCBS payments of $3,990.08);
c) Chicagoland Foot & Ankle/Dr. Sheffey (BCBS payments of $3,039.27);
d) Preferred Open MRI (BCBS payments of $500.82); and,
e) $591.82 in out-of-pocket expenses

The Commission, however, modifies the Arbitrator's Decision with respect to the medical bills from Dr. May, Dr. Berger/Body Bliss Wellness Center, and Accelerated Open MRI. The Commission finds that the charges incurred were also reasonable, necessary and related to Petitioner's work-related injury to his left foot and Petitioner is entitled to an award for these charges.

The medical evidence demonstrated that on November 30, 2016, Petitioner reported to his treating physician, Dr. Lee, that overall his range of motion and strength were almost normal but that his main issue was significant pain over the plantar medial calcaneus. Petitioner had been in therapy receiving deep tissue massage over his Achilles and plantar fascia which Petitioner stated had been improving. Dr. Lee's office ordered and reviewed the results of an MRI of the left ankle that Petitioner completed on November 30, 2016. Petitioner was advised to continue with conservative treatment. On February 11, 2017, Petitioner began treating his left foot with Dr. May, a new podiatrist closer to his home. Petitioner's treatment with Dr. May included orthotics, medication and a cortisone injection. By June 5, 2017, Petitioner reported to Dr. May that he was doing well post-injection but wanted to hold off on further injections. Petitioner instead commenced chiropractic treatment and physical therapy with Dr. Berger at Body Bliss Wellness Center on June 14, 2017. Dr. May subsequently ordered an updated MRI of the left foot on July 7, 2020 due to Petitioner's continued left foot pain. The office visit note stated that Petitioner's left foot condition had improved over the years but was never 100-percent. Petitioner was returning for new custom orthotics. Petitioner completed the MRI of the left foot on July 22, 2020 at Accelerated Open MRI.

The Commission notes that Dr. Lee provided the sole opinion regarding Petitioner's medical treatment and specifically as it related to therapy. Dr. Lee opined that chiropractic

manipulation alone would probably not be effective treatment, but added that if there was a physical therapy component to the treatments, then he believed the treatment would be reasonable. The Commission finds that Petitioner's therapy at Body Bliss Wellness Center included the recommended physical therapy.

In light of the foregoing, the Commission finds that the additional medical services Petitioner received from Dr. May and Dr. Berger/Body Bliss Wellness Center, as well as the July 22, 2020 MRI ordered by Dr. May, were reasonable and necessary to cure or relieve Petitioner from the effects of his work-related injury to his left foot. As such, the Commission awards the following medical bills as well:

f) Accelerated Open MRI (BCBS payments of $379.08);
g) Dr. May (BCBS payments of $2,117.25); and,
h) Dr. Berger/Body Bliss Wellness Center (BCBS payments of $2,708.22 + $354.99 for the April 3, 2019 date of service):

With respect to the Body Bliss Wellness Center charges, the Commission finds that Petitioner also received unrelated treatment for his left shoulder, his entire spine and right leg. The Commission finds that Petitioner is only entitled to an award of medical expenses related to his specific claim of a work-related injury to his left foot. As such, the Commission awards the payments made by BCBS for treatment rendered to the left foot on June 14, 2017 through June 4, 2018 and on April 3, 2019.

The Commission further notes the parties' stipulation on the Request for Hearing form, as well as their Briefs, that Respondent is not entitled to a credit pursuant to Section 8(j) of the Act as Petitioner submitted his medical bills through BCBS, his own insurer. BCBS paid most of the medical bills with the exception of the April 3, 2019 date of service from Body Bliss Wellness Center. Therefore, for those bills that BCBS paid, Respondent shall pay the negotiated rate detailed in the itemized statements in evidence pursuant to Section 8(a) of the Act and consistent with this Decision.

Finally, the Commission modifies the PPD award. The Commission agrees with the weight the Arbitrator assigned to the five factors under Section 8.1b of the Act but finds that the evidence supports an increased award of 7.5% (seven-and-a-half percent) loss of use of the foot. Petitioner decided to treat conservatively for his left foot injury although additional laser treatment and an Achilles release had been recommended as of Petitioner's last visit with Dr. Lee on April 14, 2021. Dr. Lee noted that Petitioner had continued plantar foot pain, including tenderness with direct palpation of the plantar fascia insertion and tenderness along the medial calcaneal tuberosity. Petitioner was also mildly tender along the tarsal tunnel region. Dr. Lee diagnosed Petitioner with left heel pain consistent with plantar fasciitis versus tarsal tunnel syndrome. Petitioner testified that his pain persisted and affected his sleep. He also continued to wear his orthotics at work and at home. Accordingly, the Commission finds that Petitioner is entitled to 7.5% loss of use of the foot in PPD benefits.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 2, 2023 is hereby modified 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 consistent with this Decision 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 $1,313.33 per week for 10 4/7 weeks, commencing March 23, 2016 through June 5, 2016, that being the period of temporary total incapacity for work under Section 8(b) of the Act. Respondent shall receive a credit for an advancement of temporary total disability benefits in the amount of $4,139.19.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner permanent partial disability benefits of $755.22 per week for 12.525 weeks because the injuries sustained caused 7.5% loss of use of the foot pursuant to Section 8(e) of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $34,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

November 28, 2023

CAH/pm
O: 11/16/23
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	16WC012976
Case Name	Stephen Connolly v. Great Lakes Plumbing & Heating, Inc.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Rachael Sinnen, Arbitrator

Petitioner Attorney	Kevin Veugeler
Respondent Attorney	George Klauke

DATE FILED: 2/2/2023

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

/s/*Rachael Sinnen, Arbitrator*

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Stephen Connolly
Employee/Petitioner

Case # **16** WC **12976**

v.

Consolidated cases: ______

Great Lakes Plumbing & Heating, Inc.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Rachael Sinnen**, Arbitrator of the Commission, in the city of **Chicago**, on **November 30, 2022.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **October 20, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $***102,440.00***; the average weekly wage was $***1,970.00***.

On the date of accident, Petitioner was ***37*** years of age, ***married*** with ***3*** dependent children.

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

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

Respondent shall be given a credit of $***4,139.19*** for TTD, $***0*** for TPD, $***0*** for maintenance, and $***0*** for other benefits, for a total credit of $***4,139.19***.

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

ORDER

Respondent shall pay Petitioner directly for out-of-pocket expenses in the amount of $591.82 as well as the following outstanding medical services, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act and Perez v. Illinois Workers' Compensation Comm'n, 2018 IL App (2d) 170086WC, ¶ 17, 96 N.E.3d 524: Midwest Orthopaedics at Rush (BCBS payments of $1,476.46); Athletico (BCBS payments of $3,990.08); Chicagoland Foot & Ankle/ Dr. Sheffey (BCBS payments of $3,039.27); and Preferred Open MRI (BCBS payments of $500.82). The Arbitrator finds Petitioner's treatment with Ronald Berger at Body Bliss & Wellness Center to be unreasonable and unnecessary and said charges (BCBS payment of $3,064.00) are denied. Medical bills from Illinois Foot & Ankle/Dr. May (BCBS payment of $2,117.25) and Accelerated Open MRI (BCBS payment of $379.08) are denied.

Respondent shall pay Petitioner temporary total disability benefits of $1,313.33 per week for 10 4/7 weeks, commencing March 23, 2016 through June 5, 2016, as provided in Section 8(b) of the Act. Respondent shall receive a credit for an advancement of temporary total disability benefits in the amount of $4,139.19.

The Arbitrator makes an award of 5% loss of use of the foot under Section 8e of the Act, which corresponds to 8.35 weeks of permanent partial disability benefits at a weekly rate of $755.22. See Conclusions of Law for Arbitrator's considerations under §8.1b(b) of the Act.

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

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

Signature of Arbitrator

FEBRUARY 2, 2023

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Stephen Connolly,)
)
Petitioner,)
)
v.)
) Case No. 16WC12976
Great Lakes Plumbing & Heating, Inc.)
)
)
Respondent.)

FINDINGS OF FACT

This matter proceeded to hearing on November 30, 2022 in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's Request for Hearing. Issues in dispute include accident, notice, causation, unpaid medical bills, temporary total disability "TTD" benefits, and nature and extent of the alleged injury. Arbitrator's Exhibit "Ax" 1.

Petitioner's Job Duties and Prior Medical Condition

Petitioner, Stephen Connolly, is a Local 130 union plumber. He has been a plumber over the last 24 years. In October of 2015, he was employed by Respondent, Great Lakes Plumbing & Heating, Inc., where he had worked for about 7 years. He was a working foreman with duties from layout, budget, and whatever the job required. He did have to be on his knees for floor penetrations. He used tools, like pipe wrenches, saws, channel locks, levels, and grinders. The jobs were mostly commercial, industrial, or institutional. It was a fast paced, high-profile job.

Prior to October 20, 2015, Petitioner did not have any issues or problems with his left foot or ankle. Similarly, Petitioner did not seek or receive any medical treatment for his left foot or ankle before October, 2015. No medical records were submitted that reflect any medical treatment prior to October 20, 2015.

Alleged Accident of October 20, 2015 and Notice to Respondent

On 10/20/2015 Petitioner was working on a water riser on the 44th floor of the John Hancock building. The fitting was 25 to 30 feet in the air. He had to "monkey" his way to the fitting between duct work and rods hanging from the ceiling. Once at the work area, he had to stand on pipes. The water riser was supposed to be shut down. He cut bolts off the old valve and water was started leaking out.

The Arbitrator witnessed Petitioner in a squat position with both heels raised as he demonstrated how the accident occurred. Petitioner testified that he was in a squat position holding a valve fitting for 4 to 6 hours as his co-worker scrambled to find the building manager to determine why the water service was not shut down. The riser was eventually shut off and the water stopped. He then replaced the valve. On his way down from the work area on a ladder, as soon as his left foot hit the floor it felt like a sledgehammer hit is foot.

Petitioner stated that he notified John Reidy about his injury the following day. He continued working and testified that his first day off work as a result of his injury was 21 weeks post-accident on March 23, 2016 at the recommendation of Dr. Lee.

Summary of Medical Records

Petitioner first sought treatment on November 25, 2015 at the Chicagoland Foot and Ankle Clinic with Dr. Robert Sheffey, D.P.M. (PX3). Dr. Sheffey noted a history of one and a half to two months of left heel pain, no specific injury but walks and stands on pipes for hours at a time. (PX3). The note indicated Petitioner tried new boots and ice and heat therapy on his own without success. (PX3). X-rays revealed a large spur on the left calculus with no issues with the right foot. (PX3). Petitioner was diagnosed with plantar fasciitis of the left foot, was given an injection in the foot, prescribed a Cam Walker Boot and anti-inflammatory medication, and instructed to return to the clinic. (PX3).

Petitioner returned as instructed on November 30, 2015 and underwent ultrasound and electric stimulation therapy. (PX3). Petitioner was instructed to continue using the Cam Walker boot and perform a home exercise program. (PX3).

Petitioner continued to receive treatment by Dr. Sheffey in December of 2015. (PX3). The doctor's notes reveal Petitioner continued to receive ultrasound and electric stimulation therapy and Petitioner was wearing night splints and the Cam Walker boot as instructed. (PX3). On December 28, 2015, Petitioner was provided custom orthotics due to complaints of severe pain and prescribed an Unna boot. (PX3).

Petitioner returned on January 11, 2016 noting the custom orthotics improved his condition, but he still felt soreness at the end of his workday. Dr. Sheffey ordered a second set of custom orthotics to be worn in his non-work shoes. (PX3). On February 1, 2016, Petitioner returned for an unscheduled visit complaining of increased left foot pain while working. Dr. Sheffey ordered an MRI. (PX3).

A February 4, 2016 MRI of the left foot revealed findings consistent with moderate plantar fasciitis. (PX3).

At a February 13, 2016 office visit, Dr. Sheffey reviewed the results of the MRI and prescribed a Medrol Dosepak and physical therapy. (PX3). Petitioner testified he began physical therapy. Dr. Sheffey's March 12, 2016 note indicates Petitioner was participating in physical therapy as well as reflexology and acupuncture. (PX3). Dr. Shelley diagnosed possible Baxter's nerve

entrapment and recommended continued physical therapy, medication, and potential surgery if conservative treatment failed. (PX3).

Petitioner participated in physical therapy at Athletico starting February 22, 2016. (PX2).

On March 24, 2016 Petitioner was evaluated by orthopedic surgeon, Dr. Simon Lee of Midwest Orthopedics at Rush. (PX1). The history indicated Petitioner complained of left heel pain but denied that any specific traumatic event occurred. Instead, Petitioner reported that in October 2015 he was putting increased stress through his bilateral feet secondary to climbing on large, elevated pipes and crawling through narrow spaces. Petitioner reported jumping from pipe to pipe and squatting and/or crawling for 8 hours a day. Petitioner reported that he continued to push through his symptoms and in November 2015 followed up with a podiatrist. (PX1). X-rays were reviewed and confirmed the presence of an osteophyte on the left heel and the February 4, 2016 MRI was reviewed that was consistent with plantar fasciitis. (PX1). Dr. Lee prescribed continued use of a Cam Walker boot and off work.

On April 7, 2016, Petitioner returned to Dr. Lee for follow up of possible plantar neuritis and fasciitis. (PX1). Petitioner was instructed to continue with the Cam Walker boot, prescribed a Medrol Dosepak, tramadol and an EMG/NCV. (PX1).

Petitioner returned to Dr. Sheffey on April 11, 2016, for follow up of his plantar fasciitis and nerve entrapment. (PX1). After an examination, Petitioner was instructed to continue the Cam Walker boot, remain off work, ice, rest, and was referred to an orthopedic surgeon for a surgical nerve decompression. (PX1).

On April 22, 2016, Petitioner attempted to have an EMG at Rush Medical Center but was unable to tolerate the test. (PX1). Petitioner testified that he jumped off the table when the test was attempted.

Dr. Sheffey authored a letter on April 27, 2016 stating that Petitioner did not experience a specific injury such as falling or kicking something or dropping something on his fee. Rather, he was standing on pipes for six hours that ultimately the patient feels causes pain.

Petitioner's next visit with Dr. Lee was May 4, 2016. (PX1). Dr. Lee noted Petitioner could not tolerate the EMG and prescribed additional physical therapy. (PX1). Additional orthotics were provided. (PX1).

On June 1, 2016, Petitioner returned to Dr. Lee for follow up of possible plantar neuritis. (PX1). Dr. Lee noted Petitioner was using orthotics and night splints, was off work and participating in physical therapy. (PX1). Petitioner was instructed to continue with therapy and released back to work June 6, 2016. (PX1).

Petitioner was sent for a §12 exam with Dr. Armen Kelikian on July 18, 2016. Respondent did not submit a §12 report from that examination nor did Respondent call Dr. Kelikian to testify at trial. Petitioner's counsel attempted to submit Dr. Kelikian's report into evidence but Respondent's objection to hearsay was sustained.

Additional physical therapy was ordered on July 28, 2016 by Dr. Lee. (PX1). On November 30, 2016, Petitioner underwent an additional MRI at the recommendation of Dr. Lee that showed mild plantar fasciitis and edema. (PX1).

On February 11, 2017, Petitioner began treating with Dr. Kelly May, D.P.M. (PX4). Dr. May noted a history of traumatic injury while working, as he was stuck in crouching position for hours. (PX1). Dr. May treated Petitioner's left foot with orthotics, meloxicam, a cortisone injection, physical therapy, and steroids though March of 2021. A seven-month gap is noted from August 2020 through March 2021. (PX4).

From May 2017 through April 2019, Petitioner sought the services of Body Bliss & Wellness Center by Chiropractor Ronald Berger. (Px 5). Treatment was provided for the feet, calves, hips, lumbar spine, thoracic spine, cervical spine and both shoulders.

On March 11, 2021, Dr. May referred Petitioner back to Dr. Lee for pain management at Petitioner's request. (PX4). Petitioner was last evaluated by Dr. Lee on April 14, 2021 still complaining of left heel pain. (PX1).

Testimony of Dr. Lee

Petitioner presented the testimony of Dr. Simon Lee, a board-certified orthopedic surgeon from Midwest Orthopedics at Rush. (PX13, P. 5). Ninety-five percent of his patients have foot and ankle conditions. (PX13, P. 5). Dr. Lee first evaluated Petitioner on March 24, 2016. (PX1, PX13, P. 5-6). Dr. Lee's initial history revealed Petitioner was a 37-year-old plumber complaining of a left heel and foot condition that began six months prior in October 2015 "where he felt at a particular day where he was doing a lot of squatting and crawling over pipes that he started noticing pain." (PX13, P. 6). Dr. Lee remarked that Petitioner continued working through it until he sought care from a podiatrist and had an injection, ultrasound treatments and therapy without improvement. (PX13, P. 6). Dr. Lee diagnosed plantar fasciitis or irritation of the band of tissue on the bottom of the foot that acts as a shock absorber in the arch of the foot. (PX13, P. 8). Dr. Lee reviewed the MRI results and noted that Petitioner's subjective complaints were consistent with the objective findings. (PX13, P. 5). Dr. Lee admitted that he had not previously reviewed any medical records other than his own and testified that such records would be helpful. (PX13, P. 41).

Dr. Lee testified that plantar neuritis, and specifically, Baxter's nerve entrapment, is nerve irritation associated with plantar fasciitis. (PX13, P. 13). Dr. Lee confirmed that Petitioner was taken off work due to a work-related injury from March 23, 2016 through June 5, 2015. (PX13, P. 15-18).

Dr. Lee confirmed that Petitioner's heel pain was a result of his work injury and was a chronic condition that was not going to spontaneously get better. (PX13, P. 30-31, 32). Dr. Lee testified that he recommended a surgical release of the plantar fascia. (PX13, P. 33-36). Dr. Lee confirmed that all of the treatment he rendered was reasonable and necessary to treat Petitioner's work-related condition. However, he admitted that chiropractic treatment was not reasonable or

necessary treatment. Dr. Lee noted that, at no time, did Petitioner exhibit signs of malingering or secondary gain. (PX13, P. 32).

Dr. Lee admitted that there is no greater incidence of plantar fasciitis for a plumber compared to other occupations that are on their feet all day, electricians, doctors, lawyers. (PX 13, P. 45). Dr. Lee confirmed that he released Petitioner back to work on June 1, 2016, without restrictions for a June 5, 2016, start date. (PX 13, P. 47). Dr. Lee confirmed that Petitioner appeared for his first treatment without a specific referral. (PX 13, P. 49).

Petitioner's Current Condition

Petitioner testified that he continues to experience left heel and foot pain constantly. He uses orthotics at all times, even while showering. He is no longer working as a plumber but is now working as a superintendent making less pay. He regularly uses over the counter pain medication. At this time, he is trying to put off the surgery recommended by Dr. Lee. He has not seen any doctors since his April 2021 visit to Dr. Lee.

CONCLUSIONS OF LAW

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

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

The phrase "in the course of employment" refers to the time, place, and circumstances of the injury. McAllister v. Illinois Workers' Compensation Comm'n, 2020 IL 124848, ¶ 34. A compensable injury occurs 'in the course of' employment when it is sustained while he performs reasonable activities in conjunction with his employment. Id. "The 'arising out of' component is primarily concerned with causal connection. To satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." Id. at ¶ 36.

Petitioner credibly testified that as a union plumber his duties as a working foreman required him to be on his feet, his knees and, specifically on October 20, 2015, in a squat position holding a valve fitting for numerous hours. Petitioner testified that he felt a sharp pain in his left foot when he came out of the squat position, went down the ladder and placed his foot on the floor. It is clear that Petitioner's acts were reasonably expected to be performed incident to his assigned duties. See McAllister at ¶ 46.

The Arbitrator finds that the accident did arise out of and in the course of Petitioner's employment by Respondent.

Issue E, whether timely notice of the accident was given to Respondent, the Arbitrator finds as follows:

Petitioner credibly stated that he notified his supervisor, John Reidy, about his injury the following day.

The Arbitrator finds that timely notice of the accident was given to Respondent.

Issue F, whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. International Harvester v. Industrial Com., 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982).

The Arbitrator finds the options of Dr. Lee to be credible and persuasive. Dr. Lee's initial history was similar to Petitioner's testimony at trial. Dr. Lee noted that in October 2015 Petitioner was doing a lot of squatting on a particular day and started noticing pain. Although Petitioner continued to work despite the pain, he ultimately sought care with a podiatrist. (See PX13, P. 6). Dr. Lee diagnosed Petitioner with plantar fasciitis which he related to Petitioner's work injury. Dr. Lee further testified that Petitioner's condition would not likely resolve on its own and may require surgical intervention in the future. At the time of hearing, Petitioner wanted to delay the need for surgery.

Based on the record as a whole, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the injury.

Issue J, whether the medical services that were provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

The "two-doctor rule" refers to Petitioner's choice of providers as described in Section 8(a) of the Act. Section 8(a) of the Act states a Respondent is responsible for "(1) all first aid and emergency treatment; plus (2) all medical, surgical and hospital services provided by the physician, surgeon or hospital initially chosen by the employee or by any other physician, consultant, expert, institution or other provider of services recommended by said initial service provider or any subsequent provider of medical services in the chain of referrals from said initial service provider; plus (3) all medical, surgical and hospital services provided by any second physician, surgeon or hospital subsequently chosen by the employee or by any other physician, consultant, expert, institution or other provider of services recommended by said second service provider or any subsequent provider of medical services in the chain of referrals from said second service provider…" 820 ILCS 305/8.

Petitioner first sought treatment on November 25, 2015 at the Chicagoland Foot and Ankle Clinic with Dr. Robert Sheffey, D.P.M. (PX3). In his April 11, 2016 note, Dr. Sheffey documents that

Petitioner already sought a second opinion (which was Dr. Lee). However, Dr. Sheffey refers Petitioner to a Dr. John Grady for surgical nerve decompression. Petitioner never saw Dr. Grady and continued treatment with Dr. Lee. It is evident that Dr. Lee is Petitioner's second choice of doctor even though a surgical referral came later.

The last known record from Dr. Sheffey is dated April 27, 2016. There is no record of Petitioner seeing a podiatrist until Dr. Kelly May, D.P.M. in February 2017. Dr. Lee's records do not contain a referral or notation that Petitioner should seek treatment with a podiatrist. The Arbitrator finds that Dr. May constitutes a 3rd choice of provider. **As a result, medical bills from Illinois Foot & Ankle/Dr. May (BCBS payment of $2,117.25) and Accelerated Open MRI (BCBS payment of $379.08) are denied.**

In May 2017, Petitioner sought treatment with Ronald Berger at Body Bliss & Wellness Center. No referral is found in any of the medical records. Additionally, Dr. Lee opined that such treatment was not reasonable and necessary. **As a result, the Arbitrator finds Petitioner's treatment with Ronald Berger at Body Bliss & Wellness Center to be unreasonable and unnecessary and said charges (BCBS payment of $3,064.00) are denied.**

The Arbitrator finds all other treatment to be reasonable and necessary and finds that Respondent has not paid for said treatment. As such, the Arbitrator orders Respondent to pay Petitioner directly for out-of-pocket expenses in the amount of $591.82 as well as the following outstanding medical services, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act:

- **Midwest Orthopaedics at Rush (BCBS payments of $1,476.46);**
- **Athletico (BCBS payments of $3,990.08);**
- **Chicagoland Foot & Ankle/ Dr. Sheffey (BCBS payments of $3,039.27); and**
- **Preferred Open MRI (BCBS payments of $500.82)**

See Perez v. Illinois Workers' Compensation Comm'n, 2018 IL App (2d) 170086WC, ¶ 17, 96 N.E.3d 524.

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

Dr. Lee advised Petitioner to stop working on March 24, 2016, and he continued to be off work per Dr. Lee until a June 1, 2016 note stated that Petitioner can return to work on June 6, 2016. (PX 1, p. 81).

The Arbitrator finds Respondent liable for 10 4/7 weeks of temporary total disability benefits March 23, 2016 through June 5, 2016 at a weekly rate of $1,313.33, which corresponds to $13,883.77 to be paid directly to Petitioner.

Respondent shall receive a credit for an advancement of temporary total disability benefits in the amount of $4,139.19.

<u>Issue L, the nature and extent of the injury, the Arbitrator finds as follows:</u>

In determining PPD benefits, Section 8.1b(b) of the Act directs the Commission to consider: "(i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records." 820 ILCS 305/8.1b(b); Con-Way Freight, Inc. v. Illinois Workers' Compensation Comm'n, 2016 IL App (1st) 152576WC, ¶ 22, 67 N.E.3d 959. "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b).

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

Under Section 8.1b(b)(ii), the occupation of the injured employee, the Arbitrator notes that Petitioner was a union plumber working in a heavy-duty industry. Although Petitioner no longer works as a plumber and works as a superintendent instead, Petitioner was returned to work full duty by his treating doctor. The Arbitrator therefore gives moderate weight to this factor to the benefit of Respondent.

Under Section 8.1b(b)(iii), the age of the employee at the time of the injury, the Arbitrator notes that Petitioner was 37 years old at the time of the accident, with significant work life left in his career. The Arbitrator gives moderate weight to this factor to the benefit of Petitioner.

Under Section 8.1b(b)(iv), the employee's future earning capacity, the Arbitrator notes that Petitioner was returned to work full duty but ended up changing jobs with Respondent and now earns less pay. The Arbitrator gives little weight to this factor to the benefit of Petitioner.

Under Section 8.1b(b)(v), evidence of disability corroborated by the treating medical records, the Arbitrator gives great weight to this factor to the benefit of Petitioner. Petitioner treated conservatively for plantar fasciitis, which included injections, physical therapy, medications but no surgery (although recommended). Petitioner was returned to his work without restrictions by his doctor. Petitioner testified that he continues to experience left heel and foot pain. He uses orthotics and over the counter pain medication.

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 5% of a foot pursuant to §8(e) of the Act which corresponds to 8.35 weeks of permanent partial disability benefits at a weekly rate of $755.22. See Ramon Alexis-Santiago v. Ron's Staffing, 2018 Ill. Wrk. Comp. LEXIS 804, 18 IWCC 652 (Ill. Workers' Comp. Bd. October 30, 2018); Gayelynn Lohman v. Caterpillar, Inc., 2014 Ill. Wrk. Comp. LEXIS 122, 14 IWCC 93 (Ill. Workers' Comp. Bd. February 10, 2014).

It is so ordered:

Arbitrator Rachael Sinnen

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC022249
Case Name	Mohammad Borini v. Starcon International, Inc.
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0508
Number of Pages of Decision	35
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Tyler Berberich
Respondent Attorney	Stuart Pellish

DATE FILED: 11/28/2023

/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 up	☒	None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MOHAMMAD BORINI,

Petitioner,

vs. NO: 19 WC 22249

STARCON INTERNATIONAL, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission modifies the Arbitrator's finding relative to the wage differential award. To qualify for a wage differential under section 8(d)(1) of the Act, a claimant must prove "(1) partial incapacity which prevents him from pursuing his 'usual and customary line of employment' and (2) an impairment of earnings." *Gallianetti v. Illinois Industrial Comm'n*, 315 Ill. App. 3d 721, 730, 734 N.E.2d 482, 248 Ill. Dec. 554 (2000). In making the calculation of a wage differential under section 8(d)(1) of the Act, the Commission must determine "the average amount which [the claimant] is able to earn in some suitable employment or business after the accident." In calculating this average amount, if the claimant is working at the time of the calculation, the claimant must prove his actual earnings for a substantial period after he returns to work, and the Commission may apply his then current average weekly wage to the calculation. See *Gallianetti*, 315 Ill. App. 3d at 730; see also, *Levato v. Workers' Compensation Comm'n*, 2014 IL App (1st) 130297WC, ¶29-¶30, 14 N.E.3d 1195, 383 Ill. Dec. 584.

The Petitioner was hired by Cheap Tobacco on May 3, 2021 earning $11.00 per hour and was still employed in this position as of October 3, 2022, the date of arbitration. The Petitioner's vocational expert Steven Blumenthal ("Mr. Blumenthal") reviewed the job details and testified that this was a good position for the Petitioner because it was within his restrictions and accurately reflected his earning potential. The Commission agrees with Mr. Blumenthal that this is a suitable position for the Petitioner. The Commission finds that $11.00 per hour represents Petitioner's actual earnings and, therefore, is the basis for his current average weekly wage. Accordingly, the Commission modifies the Arbitrator's Decision and finds that Petitioner is entitled to a wage differential award based on the difference between his pre-injury earnings of $1,080.36 and his post-injury earnings of $11.00 per hour, or $440.00 per week. Therefore, the Petitioner is entitled to a wage differential award of $426.91 per week, two thirds the difference between his pre and post injury wages.

The Commission next vacates the award of medical expenses in the amount of $2,089.00. The evidence establishes that all reasonable and necessary medical expenses have been satisfied pursuant to the Act. The outstanding medical expenses claimed by the Petitioner represent the fee schedule remainder which Petitioner is not entitled to receive pursuant to the Act.

The Commission next vacates, in part, and affirms, in part, the award of penalties. The Arbitrator awarded Petitioner §19(l) penalties of $6,888.61 for the unpaid wage differential benefits of $11,368.52, §19(k) penalties of $5,684.26 representing 50% of the total amount of the unpaid wage differential benefits and Section 16 penalties of $2,573.73 representing 20% of the unpaid wage differential.

Section 19(*l*) penalties are not applicable to PPD awards. Rather, section 19(*l*) penalties apply to the delayed payment of medical expenses (section 8(a)) and TTD benefits (section 8(b)). Penalties under section 19(*l*) are in the nature of a late fee and are "mandatory '[i]f the payment is late, for whatever reason, and the employer or its carrier cannot show adequate justification for the delay.'" *Jacobo v. Illinois Workers' Compensation Comm'n*, 2011 Il App (3d) 100807WC, ¶ 20, 959 N.E.2d 772, 355 Ill. Dec. 358 (quoting *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515, 702 N.E.2d 545, 552, 234 Ill. Dec. 205 (1998)). "The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness." *Id.* When benefits are withheld for 14 days or more, a rebuttable presumption of unreasonable delay exists. 820 ILCS 305/19(*l*). "The employer has the burden of justifying the delay, and the employer's justification for the delay is sufficient only if a reasonable person in the employer's position would have believed that the delay was justified." *Jacobo*, 2011 IL App (3d) 100807WC, ¶ 20, 959 N.E.2d at 777-78. "The Commission's evaluation of the reasonableness of the employer's delay is a question of fact that will not be disturbed unless it is contrary to the manifest weight of the evidence." *Id.*

The Arbitrator awarded §19(l) penalties based on the unpaid wage differential award pursuant to Section 8(d)1. As Section 19(l) penalties are for the nonpayment of medical expenses under Section 8(a) and nonpayment of TTD benefits under Section 8(b), the Commission vacates the award of 19(l) penalties. The Petitioner has argued for the imposition of penalties based on the unpaid portion of medical expenses totaling $2,089.00. Section 19(l) penalties are not applicable as the Commission has vacated the award of outstanding medical expenses.

The Commission affirms the Arbitrator's award of Section 19(k) penalties and attorneys' fees pursuant to Section 16. Section 19(k) provides, in pertinent part, that "where there has been any *unreasonable or vexatious delay* of payment or intentional underpayment of compensation then the Commission *may* award compensation additional to that otherwise payable under the Act equal to 50% of the amount payable at the time of such award." (Emphasis added.) 820 ILCS 305/19(k). The standard for awarding penalties and attorney fees under sections 19(k) and 16 of the Act 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 an award. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 514-15, 702 N.E.2d 545, 552, 234 Ill. Dec. 205 (1998). 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. *McMahan*, 183 Ill. 2d at 515, 702 N.E.2d at 552. Instead, section 19(k) and section 16 fees are "intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose." *McMahan*, 183 Ill. 2d at 515, 702 N.E.2d at 553. While section 19(*l*) penalties are mandatory, the imposition of penalties and attorney fees under section 19(k) and section 16 fees is discretionary. *Id*.

The Commission agrees with the Arbitrator's analysis that Respondent's various job offers were unreasonable and that the denial of the wage loss benefits was unreasonable and vexatious. The first job offer required the Petitioner to relocate to Tennessee while the other job offers were outside of Petitioner's permanent work restrictions and were offered at a rate of pay far more than that being offered in a stable labor market. The Respondent also delayed in providing the Petitioner the job description and failed to provide the Petitioner with any details of the accommodations. The Arbitrator's award of Section 19(k) penalties and attorneys' fees pursuant to Section 16 is appropriate as Respondent's actions were unreasonable and vexatious.

All else is affirmed and adopted.

Finally, the Respondent has submitted five questions for the Commission to answer pursuant to Section 19(e) of the Act.

1. If the wage loss award is affirmed, please specify the factual basis to conclude Respondent's job offer was not a valid offer of accommodated work.

Answer: The Arbitrator provided a detailed analysis in finding that Respondent's job offer was not valid. The Commission incorporates the Arbitrator's analysis as its response to question 1.

2. If the wage loss award is affirmed, does the Commission conclude as a matter of law such award must be consistent with the State's minimum wage law and local wage laws.

Answer: The Commission has found no case law that suggests that a wage differential award must be consistent with the State's minimum wage law and local wage laws. The issue of whether a claimant is entitled to a wage differential award is generally a question of fact for the Commission to determine. *Dawson v. Illinois Workers' Compensation Comm'n*, 382 Ill. App. 3d 581, 586, 888

N.E.2d 135, 320 Ill. Dec. 918 (2008). The Commission reviews all relevant, admissible evidence in determining a wage differential award.

3. If a valid job offer is made, does the Commission conclude as a matter of law it can ignore such job offer when awarding permanency?

Answer: The Commission has adopted the Arbitrator's finding that Respondent's job offer was not valid. However, the nature and extent of an injured employee's disability is a factual question, the resolution of which is peculiarly in the province of the Commission's expertise. *Illinois Forge, Inc. v. Industrial Comm'n*, 95 Ill. 2d 337, 343, 447 N.E.2d 1337, 69 Ill. Dec. 650 (1983); *Shockley v. Industrial Comm'n*, 75 Ill. 2d 189, 193, 387 N.E.2d 674, 25 Ill. Dec. 798 (1979). The Commission reviews all relevant, admissible evidence when determining permanency.

4. If the Commission affirms an award for penalties, does the Commission conclude penalties for unreasonable and vexatious conduct can be awarded when Petitioner is working full time and there is no showing by Petitioner he was experiencing of a lack of income.

Answer: The standard for awarding penalties and attorney fees under sections 19(k) and 16 of the Act 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 an award. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 514-15, 702 N.E.2d 545, 552, 234 Ill. Dec. 205 (1998). 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. *McMahan*, 183 Ill. 2d at 515, 702 N.E.2d at 552. Instead, section 19(k) and section 16 fees are "intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose." *McMahan*, 183 Ill. 2d at 515, 702 N.E.2d at 553. The imposition of penalties and attorney fees under section 19(k) and section 16 fees is discretionary. *Id*. The Commission reviews all relevant, admissible evidence in determining whether penalties are appropriate.

5. If the Commission affirms an award for penalties, why does the Commission conclude Respondent's reliance on the accommodated job offers were not reasonable conduct?

Answer: The Arbitrator provided a detailed analysis in finding that the Respondent's job offer was not valid. The Commission incorporates the Arbitrator's analysis as its response to question 5.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed December 2, 2022, is hereby modified as stated above and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $720.24 per week for a period of 59-3/7 weeks, October 21, 2019 through December 9, 2020, that being the period of temporary total incapacity for work under §8(b) of the Act. The Respondent is entitled to a credit of $43,743.42 for TTD benefits previously paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner maintenance benefits of $720.24 per week for a period of 20-4/7 weeks, December 10, 2020 through May 2, 2021, as provided in Section 8(a) of the Act. The Respondent is entitled to a credit of $20,516.02 for maintenance benefits previously paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits, commencing May 3, 2021, of $426.91 per week until the Petitioner reaches the age of 67 or 5 years from the date of the final award, whichever is later, because the injuries sustained caused a loss of earnings, as provided in 8(d)1 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of medical expenses in the amount of $2,089.00 is vacated. The Respondent is entitled to a credit for medical services previously paid pursuant to Section (8a) and 8.2 of the Act.

IT IS FURHTER ORDERED BY THE COMMISSION that the Respondent shall pay to Petitioner attorneys' fees of $2,573.73 as provided in Section 16 of the Act, and penalties of $5,684.26, as provided in Section 19(k) of the Act. The Commission vacates the award of Section 19(l) penalties.

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.

November 28, 2023

CAH/tdm
O: 10/19/23
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	19WC022249
Case Name	Mohammad Borini v. Starcon International, Inc.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	29
Decision Issued By	Joseph Amarilio, Arbitrator

Petitioner Attorney	Tyler Berberich
Respondent Attorney	Stuart Pellish

DATE FILED: 12/2/2022

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 29, 2022 4.55%

/s/ *Joseph Amarilio, Arbitrator*

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Mohammad Borini
Employee/Petitioner

Case # **19** WC **022249**

v.

Consolidated cases: **None**

Starcon International, Inc.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joseph Amarilio**, Arbitrator of the Commission, in the city of **Chicago**, on **October 3, 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 $**56,490.72**; the average weekly wage was $**1,080.36**.

On the date of accident, Petitioner was **38** years of age, ***single*** with **3** dependent children.

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

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

Respondent shall be given a credit of $**43,743.42** for TTD, $**0** for TPD, $**20,516.02** for maintenance, and $**0** for other benefits, for a total credit of $**64,259.44**. 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 $720.24/week for 59 3/7 weeks, commencing October 21, 2019 through December 9, 2020, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner maintenance benefits of $720.24/week for 20 4/7 weeks, commencing December 10, 2020 through May 2, 2021, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits, commencing May 3, 2021, of $346.67/week until Petitioner reaches age 67 or five years from the date of the final award, whichever is later, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

Respondent shall pay reasonable and necessary medical services in the amount of $2,089.00, as provided in Sections 8(a) and 8.2 of the Act. Respondent is entitled to credit for medical services previously paid pursuant to Sections 8(a) and 8.2 of the Act.

Respondent shall pay to Petitioner attorneys' fees of $2,573.70, as provided in Section 16 of the Act; and Penalties of $5,684.26, as provided in Section 19(k) of the Act; and $6,888.61, as provided in Section 19(l) 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.

/s/ *Joseph D. Amarilio* **DECEMBER 2, 2022**

____

Signature of Arbitrator JOSEPH D. AMARILIO

ATTACHMENT TO ARBITRATION DECISION

MOHAMMAD BORINI v. STARCON INTERNATIONAL, INC.
19 WC 022249

STATEMENT OF FACTS AND CONCLUSIONS OF LAW

I. PROCEDURAL HISTORY

Mr. Mohammad Borini filed an Application for Adjustment of Claim pursuant the Illinois Workers' Compensation Act ("Act") alleging that on May 29, 2019 he sustained accidental injuries that arose out of and in the course of his employment by Starcon International, Inc. Due to the illness of Honorable David Kane, Arbitrator in Chicago, this matter was reassigned to Arbitrator Joseph Amarilio pursuant to Commission procedure and proceeded to hearing on October 3, 2022 by agreement of the parties.

The parties jointly submitted a Request For Hearing Form wherein they stipulated that on May 29, 2019, Petitioner sustained accidental injuries that arose out of and in the course of his employment and that Respondent was given notice was given the same day. The parties further stipulated that Petitioner's current condition of ill-being is causally related to this injury and that his average weekly wage for the year proceeding the injury was $1,080.36; that Petitioner was 38 years-old at the time of the injury, married with three dependent children. The parties agreed that Petitioner was entitled to temporally totally disability benefits for the period of October 21, 2019 through December 9, 2020 and that Respondent paid TTD in the amount of $43,743.42. The parties agreed that Petitioner was entitled to maintenance benefits for the period of December 10, 2020 through May 2, 2021 and that Respondent paid $20, 516.02 in maintenance benefits.

The following three issues were disputed: 1. Whether Respondent is liable for alleged unpaid medical bills of Hinsdale Orthopedics in the amount of $2,089.00 or whether the bill has been paid in full

pursuant to the Act. 2. Whether the nature and extent of Petitioner's injury entitles him to wage differential benefits commencing on May 3, 2021 under Section 8(d) 1 or benefits under Section 8(d) 2; and, 3. Whether Petitioner is entitled to penalties under Section 19 (k) and Section 19(l) and attorneys' fees under Section 16 of the Act.

STATEMENT OF FACTS

Mr. Mohammad Borini (hereinafter "Petitioner") was employed by Starcon (hereinafter "Respondent") as an industrial mechanic on May 29, 2019 (Transcript of Proceedings on Arbitration ("Tx.") 9-10). As an industrial mechanic, Petitioner was required to lift gear boxes, motors, pumps, pipes, and other assorted heavy items (Tx. 10). Some of these items weighed up to 100 pounds. If anything exceeded 100 pounds, Petitioner would consider a team lift (Tx. 10-11). Petitioner's tool bag weighed 20 to 30 pounds (Tx. 12). The largest gear boxes that Petitioner would solo lift were approximately 70 to 80 pounds (Tx. 12-13). Petitioner is left-handed but was required to use both, using one and two-handed tools (Tx. 13). Due to the nature of his employment, he would have to occasionally manipulate tools while lying on his left or right shoulder and using just the corresponding arm and hand (Tx. 13-14). He used tools all day and had to be able to grip them tightly with both hands in order to use them effectively (Tx. 14).

On May 29, 2019, Petitioner was working on a seal pot (Tx. 15). The seal pot hung off of one pipe while another pipe supported it (Tx. 15). There is a small pump underneath the pot that Petitioner was trying to reach. While attempting to reach in, Petitioner's right hand got caught between the pipes and he heard and felt a crack in his wrist (Tx. 15-16). Petitioner continued trying to work but noticed that he lost all strength in his right forearm (Tx. 16-17).

On June 7, 2019, Petitioner visited Dr. Michael Foreit, a Family Medicine specialist, presenting with a history of a work injury consistent with his testimony (Petitioner's Exhibit 1

("Px."), 16). X-rays were obtained and he was released to work with a splint as tolerated (Px. 1, 16-18). Additional x-rays were completed by Dr. Stephen Messana, a radiologist, on June 12, 2019 that showed a chronic non-united scaphoid wrist fracture (Px. 1, 12). An MRI taken on June 24, 2019 showed a mildly displaced fracture involving the mid aspect of the scaphoid bone associated with an edema or contusion involving the fracture fragments (Px. 1, 6).

Thereafter, Petitioner began treatment with Dr. Leah Urbanosky at Hinsdale Orthopedics on July 15, 2019 (Px. 2, 32). She diagnosed a right scaphoid nonunion advanced collapse right wrist that was previously asymptomatic, with acute dorsiflexion and impaction injury while at work (Px. 2, 35). He was released to return to work with modified duty of no use of the right upper extremity (Px. 2, 35).

Petitioner underwent a CT scan at Adventist Hinsdale Hospital on July 18, 2019 which showed a displaced fracture in the middle third of the right wrist (Px. 3, 160). On July 24, 2019, Petitioner discussed treatment options in light of the diagnostic findings involving the possibility of a surgery versus a cortisone injection with Dr. Urbanosky. Dr. Urbanosky opined that surgery for someone his age would have the highest chance of a full duty return to work (Px. 2, 40). At an October 21, 2019 follow up visit, surgery was again discussed. At that time, Petitioner elected to move forward with the operation (Px. 2, 47). Petitioner underwent a right wrist scaphoid excision and 4 corner fusion surgery with radial styloidectomy on October 22, 2019 (Tx. 19; Px. 2, 47). He started occupational therapy on November 4, 2019 (Px. 2, 49). He continued with therapy and was kept off work.

On January 8, 2020, Petitioner had an office visit with Dr. Urbanosky who noted that it has been 11 weeks since his right wrist scaphoid excision with RS and 4-corner fusion (Px. 2,

57). Petitioner was kept off work, was referred to Dr. Marie Kirincic for pain management, and was referred for more occupational therapy (Px. 2, 57-59).

Petitioner again followed up with Dr. Urbanosky on March 18, 2020 to review the results of a CT test (Px. 2, 67). Based upon the results of that CT scan and his ongoing symptoms, Dr. Urbanosky recommended that Petitioner undergo a plate removal and debridement surgery (Px. 2, 70). Petitioner underwent the recommended plate removal and debridement surgery with Dr. Urbanosky on June 2, 2020 (Px. 2, 82; 87). Petitioner again followed up with Dr. Urbanosky on October 9, 2020 (Px. 2, 87). Dr. Urbanosky continued to hold him off work (Px. 2, 90).

On November 11, 2020, Petitioner a functional capacity evaluation (FCE) was recommended by Dr. Urbanosky (Px. 2, 92). Petitioner underwent the prescribed FCE on November 25, 2020 (Px. 4, 184). The FCE was determined to be valid and found that Petitioner demonstrated capabilities and functional tolerances within the medium physical demand level, which was below the heavy-duty requirements of his employment with Respondent (Px. 4, 186).

On December 9, 2020, Dr. Urbanosky released Petitioner with permanent modified duty restrictions of no lifting greater than five to ten pounds, light physical activity, no climbing, and occasional carrying (Px. 2, 101). She determined that Petitioner had reached maximum medical improvement (Px. 2, 101).

After Petitioner was released from care by Dr. Urbanosky, he began a job search based on his restrictions (Tx. 23). Petitioner kept track of the jobs he applied for in the form of job logs (Px. 6). He applied for jobs online from December 2020 through April 2021. In March of 2021, Petitioner met with vocational counselor, Steven Blumenthal. Mr. Blumenthal's opinions, as contained in his deposition testimony, are detailed below.

At arbitration, Petitioner testified about his education and work history. English is his second language. Petitioner, however, testified at trial without an interpreter. Petitioner completed high school in Jordan and has no additional education or formal training (Tx. 29). Petitioner has never trained on any computer system or software, including Microsoft Office (Tx. 29). When asked about his computer skills, Petitioner testified, "I mean, I know how to work the website. I don't have the skills outside of, you know, just looking up YouTube and Google, you know. Like Microsoft, I never messed up with that. Looking up something, that's about it" (Tx. 29).

Petitioner has never worked in a job that required the extensive use of computers (Tx. 30). Petitioner's only job training is on-the-job training (Px. 5, 203). Outside of working in a tire repair shop, Petitioner has no experience working with automobiles, as an automobile mechanic, in car servicing, doing oil changes, or in selling cars (Tx. 30). Petitioner worked at Texaco Gas Station as a mechanic replacing tires (balancing and mounting tires), working on brakes, and replacing suspension parts (tie rods, ball joints) (Px. 5, 204). From 2009 to 2014, Petitioner worked with Interstate Power Systems out of Grand Fork, North Dakota working as a tire technician replacing tires on the road, in the warehouse, and in the office; he performed basic data entry in this role (Px. 5, 204). Petitioner spent one additional year working at Ingredion working in the same role as he had with Respondent (Px. 5, 204). After 2015, Petitioner worked with Respondent until his injury (Px. 5, 204).

In May of 2021, Petitioner found new employment as a cashier at Cheap Tobacco in Indiana. His first day of work with Cheap Tobacco was May 3, 2021 (Tx. 25-26).

Petitioner's job duties at Cheap Tobacco include handling cigarettes, vapes, and other small items; accepting payment and making change; and running the credit card machine (Tx.

26). There is no heavy lifting, use of tools, and the job takes place almost entirely behind the counter (Tx. 26-27). When Petitioner has to complete tasks with his hands, he favors his left hand (Tx. 27). Petitioner testified that he is able to complete his job duties within his permanent physical restrictions (Tx. 27-28).

Petitioner testified that in June 24 of 2021, Respondent offered him a forklift driving job in Tennessee (Tx. 31). Petitioner has never lived or worked in Tennessee (Tx. 31). Petitioner currently resides in Tinley Park, Illinois, with his wife and children in the home that he owns (Tx. 32). Petitioner did not report to this job.

Petitioner was offered another forklift driving position by Respondent at their New Lenox location in September 2021. (Tx. 32). Petitioner is forklift certified and testified about the forklifts he was familiar with at Respondent's job sites (Tx. 32-33). Petitioner reviewed the physical demand analysis of a Starcon Forklift Operator which was prepared by Genex (Respondent's Exhibit (Rx.) 5) and identified multiple reasons that he was physical unable to perform this job. Petitioner pointed out that all of the controls and buttons for the forklift are on the right-hand side of the driver's cockpit (Tx. 34-35). Only one joystick was on the left-hand side (Tx. 35). Petitioner's restrictions would not allow him to work as a forklift operator due to the right-hand controls (Tx. 37). Petitioner's restrictions would also not allow him to engage in lifting up to 70 pounds or pushing and pulling up to 15 pounds, as required by forklift operator job description (Tx. 38, Rx. 5). The use of tools on the forklift would also be outside of Petitioner's restrictions (Tx. 38-39). Petitioner did not quit his job in September 2021 in order to try to work as a forklift driver because he knew the forklift driving position was outside of his permanent restrictions and he did not want to lose his current job (Tx. 39). Petitioner on cross

examination, testified there were no impediments for him to show up to Starcon at 6:00 AM, consistent with the two job letters offering him full time employment.

Petitioner has received no benefits from Respondent since September 2021, when he was offered the forklift driving position (Tx. 40).

At arbitration, Petitioner also testified concerning the current condition of his right hand. Petitioner explained that his fingers lock up on a day-to-day basis if he does not keep them moving (Tx. 35-36). He often has to massage his right hand to try to keep it from giving him pain (Tx. 36). When Petitioner moves his wrist, he testified that the bones rub together and make a noise (Tx. 36). His hand is more likely to lock up at work when he is counting money (Tx. 37). He feels like his hand has extremely limited function (Tx. 40). When the weather turns cold in the winter, his pain doubles (Tx. 40).

Petitioner intended to continue working as a mechanic were it not for his work accident (Tx. 39).

Respondent's Forensic Vocational Counselor Mary McMillin MA, CRC

At the request of Travelers Insurance, Vocational Counselor Mary McMillin MA, CRC, performed an on-site job analysis on April 13, 2022. She did not interview Petitioner. She subsequently authored a report on April 24, 2022 (Rx R5). Ms. McMillin indicated she reviewed the November 25, 2020 FCE and the December 9, 2020 restrictions from Dr. Urbanosky. Ms. McMillin indicated she believed there are limitations that would prevent Mr. Borini from working as an Equipment Operator (RX 5).

Ms. McMillin opined through verification from Human Resources and the General Manager, along with her own on-site observations, modifications would have been available for Mr. Borini had he shown up in response to the two job offers. Respondent Ex. 5. In her report of

April 24, 2022 Ms. McMillin noted she confirmed modifications would have been made available to Mr. Borini based on Dr. Urbanosky's December 9, 2020 restrictions of no lifting more than 5-10 pounds, no climbing of ladders and carrying on an occasional basis (Rx 5).

Evidence Deposition of Steven Blumenthal, M.S. CRC, CVE, LCPC - March 31, 2022

Steven Blumenthal, M.S. CRC, CVE, LCPC, is a vocational rehabilitation counselor with his own practice at Blumenthal & Associates, LLC (Px.7, 6). He is a certified rehabilitation counselor through the Commission on Rehabilitation Counselor Certification, a certified vocational evaluation testing specialist, and a licensed clinical professional counselor in the state of Illinois (Px.7, 6-7). As a certified rehabilitation counselor, he works with impaired individuals to determine if they would benefit from training and assist them with job readiness and job placement (Px.7, 7-8). Mr. Blumenthal has been in this role for 42 years (Px.7, 8).

Mr. Blumenthal first encountered Petitioner on March 15, 2021 to complete a vocational rehabilitation interview (Px.7, 9). Prior to their encounter, Mr. Blumenthal reviewed records from an appointment with Dr. Urbanosky on December 9, 2020 that placed Petitioner at maximum medical improvement and released him to work with restrictions of no lifting greater than 5 to 10 pounds, no climbing, and occasional carrying up to 10 pounds (Px.7, 10-11). Mr. Blumenthal also reviewed Dr. Wysocki's Section 12 addendum report from December 7, 2020, which indicated that Petitioner would be unlikely to return to work at his previous job position (Px.7, 11). Mr. Blumenthal also reviewed the November 25, 2020 FCE that gave Petitioner restrictions of occasionally lifting 25 pounds from floor to waist, frequently lifting 20 pounds from floor to waist, occasionally lifting 25 pounds from 12 inches to waist, occasionally lifting 25 pounds to the shoulder, frequently lifting 20 pounds to the shoulder, carrying 25 pounds for ten feet occasionally, and frequently carrying 15 pounds for 50 feet (Px.7, 11).

During Mr. Blumenthal's initial meeting with Petitioner, he reviewed Petitioner's educational background (Px.7, 15). Petitioner reported that he completed high school in Jordan and that he is able to speak, read, and write in Arabic (Px.7, 15). He is able to speak, read, and write in English, but is not proficient (Px.7, 15). He reported no military service, no apprenticeship training, and no work licenses; all of his work-related training was received on the job (Px.7, 16). Petitioner did not report owning a computer or completing any typing classes with no training on Microsoft Office (Px.7, 16).

Mr. Blumenthal also inquired about Petitioner's employment with Respondent (Px.7, 16). Petitioner worked with Respondent since 2015 in New Lennox, Illinois as an industrial mechanic (Px.7, 16-17). His job duties included performing mechanical repairs on conveyors, gear boxes, filters, steam lines, and dryers (Px.7, 16-17). These duties involved lifting and carrying over 100 pounds alone and carrying 40-to-50-pound toolboxes (Px.7, 17). His reported wage was $29.24 per hour (Px.7, 17).

Prior to his work with Respondent, Petitioner worked for Interstate Power Systems as a tire technician replacing tires on tractor-trailers (Px.7, 17-18). His additional job duties were to move in the shipping of old tires that needed to be retread, receive incoming tires, order tires in the computer system, and complete service calls on the road (Px.7, 18). He had to lift and carry over 100 pounds (Px.7, 18). From 2005 to 2009 Petitioner worked at a Texaco gas station as a mechanic in the shop replacing tires, balancing and mounting tires, working on brakes, and replacing suspension parts (Px.7, 18).

Mr. Blumenthal recommended that Petitioner undergo vocational testing (Px.7, 18).

Petitioner's first date of testing with March 19, 2021 with Lisa Byrne, who is a CRC, CVE, and PVE at The Eval Center in Oak Brook (Px.7, 18-19). Blumenthal reviewed the testing

records for analysis and decided to bring Petitioner in for additional testing and counseling on April 9, 2021 (Px.7, 18). The results of the testing showed that Petitioner tested at approximately the fifth grade level for vocabulary and too low to score for reading comprehension (Px.7, 23). He demonstrated word reading ability at the sixth grade level, spelling at the third grade level, math at the fifth grade level, and sentence reading comprehension at the seventh grade level (Px.7, 24). Petitioner scored at an average level in nonverbal problem-solving (Px.7, 25). Mr. Blumenthal also administered the Career Ability Placement Survey, in which Petitioner scored with an aptitude level which would allow him to complete the jobs of retail salesperson, unarmed security, or office skills with material written down to his grade performance (Px.7, 25-26). On the Oral Directions Test, which is used to determine someone's auditory discrimination and problem-solving ability, Petitioner scored well below average, the 5th percentile, likely due to English being his second language (Px.7, 26-27). Last, Mr. Blumenthal administered the Career Occupational Preference System, which asks for a self-identification of interests; Petitioner had a high interest in professional business occupations and the rest of the careers were either in the average or below average range (Px.7, 28).

Mr. Blumenthal also prepared a Transferrable Skills and Aptitude Analysis; it shows which skills can be carried from one occupation to another and which aptitudes the candidate has from past work in addition to those based on the results of the vocational testing (Px.7, 28-29). The results were retail sales attendant, unarmed security guard, and entry-level clerical office clerk (Px.7, 29).

Mr. Blumenthal opined that Petitioner had lost access to all of his previous lines of work due to his permanent restrictions, which is not disputed by the parties (Px.7, 33). Mr.

Blumenthal also opined that there was a wage loss based on Petitioner's prior wage of $29 per hour and his current earning capacity, which Respondent disputes (Px.7, 34-35).

Mr. Blumenthal reviewed the details of Petitioner's new job with Cheap Tobacco, full time job at $11.00 per hour. He testified that this job was within the realm of employment that he had recommended for Petitioner (Px.7, 39). Mr. Blumenthal noted that Petitioner could be making $13 per hour in Cook County in a similar position, but also noted that this job placement was consistent with his intellectual and physical abilities, therefore Petitioner did not require further vocational rehabilitation services (Px.7, 39).

Mr. Blumenthal also testified regarding Respondent's September 2021 job offer (Px.7, 40). The letter from Respondent offered Petitioner a job as a forklift operator paying $34.50 per hour and alleged the Respondent could accommodate Petitioner's restrictions based on his November 25, 2020 functional capacity evaluation, (Px.7 41). Mr. Blumenthal opined that despite Respondent's representation that Petitioner would be accommodated, the Dictionary of Occupational Titles disagreed, as Petitioner never demonstrated the ability to lift, carry, push, and pull up to 50 pounds on an occasional basis (Px.7, 42-43). No treater opined that Petitioner could meet the capabilities required by the United States government for a forklift operator (Px.7, 43-44). Additionally, even if Petitioner were capable of operating a forklift, the Illinois Department of Employment Security's wage data shows that in the Chicago metropolitan area as of 2020, a forklift operator would make between $15.11 and $18.46 per hour (Px.7, 45). Respondent's offer of $34.50 per hour to operate a forklift was clearly not in line with what other forklift drivers make. Mr. Blumenthal opined that there is no stable labor market in Illinois for forklift operators to make $34.50 per hour and that the job offer made by Respondent was not a valid job offer (Px.7, 46-47).

During cross examination, Mr. Blumenthal testified that a general offer to accommodate Petitioner in a position that he could not otherwise physically perform sets Petitioner up for failure and opens him up to being laid off from the accommodated job, which in the instant case does not exist in a stable labor market (Px.7, 67). Mr. Blumenthal additionally testified that it was reasonable for Petitioner to take the job at Cheap Tobacco, Inc., despite the $11 per hour rate of pay being slightly lower than what he could potentially earn due to the fact that this job could be performed within his restrictions and that it was a full-time position (Px.7, 124-125).

During redirect examination Blumenthal testified that it would be unreasonable for Petitioner to quit a job that is within his restrictions to accept a job with unknown job duties (Px.7, 143).

III. CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below. Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, the nature and extent of the accidental injuries sustained that arose out of and in the course of the employment. *820 ILCS 305/1(b)3(d)*. It is well established that the Act is a humane law of remedial nature and is to be liberally construed to affect the purpose of the Act - that the burdens of caring for the casualties of industry should be borne by industry and not by the individuals whose misfortunes arise out of the industry, nor by the public. *Shell Oil v. Industrial Comm'n,* 2 Ill.2nd 590, 603 (1954). Decisions of an Arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. *820 ILCS 305/1.1(e)*.

The Arbitrator, as the trier of fact in this case, has the responsibility to observe the witnesses testify, judge their credibility, and determine how much weight to afford their testimony and the

other evidence presented. *Walker v. Chicago Housing Authority*, 2015 IL App (1st) 133788, ¶ 47. Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his/her testimony. Where a claimant's testimony is inconsistent with his actual behavior and conduct, the Commission has held that an award may not stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972). It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. *O'Dette v. Industrial Commission,* 79 Ill.2d 249, 253 (1980); *Hosteny v. Workers' Compensation Commission,* 397 Ill. App. 3d 665, 674 (2009).

Credibility Findings: In the case at hand, the Arbitrator observed Petitioner during the hearing and finds him to be a credible witness. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable. The Arbitrator finds Petitioner's testimony to be straight forward, truthful, and consistent with the record as a whole.

Mr. Blumenthal was called to testify by Petitioner via an evidence deposition. Although the Arbitrator did not observe him testify, the Arbitrator found his testimony to be persuasive and consistent with the record as a whole.

I. On the issue of unpaid medical bills, (J), the Arbitrator hereby finds:

The issues of accident and causation are not in dispute. Petitioner's Exhibit 14 lists $2,089.00 in unpaid medical bills from Hinsdale Orthopedics from July 24, 2019 through August 20, 2020. Hinsdale Orthopedics treated Petitioner for his work injuries. Respondent introduced

no reports or testimony into evidence that dispute the reasonableness or necessity of any treatment that Petitioner underwent with his treating doctor. Respondent did, however, introduce Respondent's Group Exhibit 1, which it refers to Explanation of benefits without supporting testimony to explain the explanations. The Arbitrator finds that the explanation of benefits need explanation; the explanations are not clearly explained to this Arbitrator. Accordingly, the Arbitrator is not persuaded by this evidence.

Based upon all evidence, the Arbitrator hereby finds that Petitioner's medical treatment for his right wrist injury has been reasonable, necessary, and causally related to his May 29, 2019 work accident and orders that Respondent pay the unpaid medical bills in the amount of $2,089.00 pursuant to Sections 8(a) and 8.2 of the Act , or in the alternative hold the Petitioner harmless for said amount.

II. On the issue of the nature and extent of Petitioner's injuries, (L), the Arbitrator hereby finds:

After reviewing all evidence and testimony in this case, the Arbitrator hereby finds that Petitioner is entitled to a wage differential award pursuant to Section 8(d)(1) of the Act. Under section 8(d)(1), an impaired worker is entitled to a wage differential award when (1) he is "partially incapacitated from pursuing his usual and customary line of employment" and (2) there is a "difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some *suitable employment* or business after the accident." (Emphasis added.) 820 ILCS 305/8(d)(1) (West 2012). To qualify for wage loss benefits, the petitioner must show that the disability has caused both a partial incapacity that prevents him from pursuing his usual and customary line of employment and that

there has been an impairment of earnings. *Albrecht v. Industrial Commission,* 271 ILL.App.3d 756 (1st Dist. 1995).

In a claim, such as this one, where the parties do not dispute that the Petitioner is incapacitated from pursuing his usual and customary line of employment, "a percentage-of-the-person-as-a-whole award under Section 8(d)(2) would be appropriate *only* if [he] has suffered no loss in [his] "earning capacity," or having suffered a loss in "earning capacity," [he] elected to wave [his] right to an award under 8(d)(1). *Jackson Park Hospital v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 142431WC, ¶ 45 citing *Lenhart v. Illinois Workers' Compensation Comm'n,* 2015 IL App (3d) 130743.

Mr. Borini underwent a valid functional capacity evaluation and was given permanent restrictions by Dr. Urbanosky that prevent him from pursuing his customary line of employment as an industrial mechanic. There has been no evidence or testimony presented to dispute this fact. Further, at no time has Petitioner waived his right to a wage differential award. Therefore, the only question that remains in determining whether an award is due pursuant to Section 8(d)(1) is whether Petitioner has sustained a loss of "earning capacity."

Petitioner began work at Cheap Tobacco on June 16, 2021 earning $440.00 per week (Px. 9). Petitioner underwent several months of vocational services with Mr. Blumenthal prior to finding this position with Cheap Tobacco and no party disputes the fact that Petitioner's job with Cheap Tobacco falls within his physical restrictions. Mr. Blumenthal testified that it was reasonable for Petitioner to take the job at Cheap Tobacco due to the employer's willingness to accommodate his restrictions and the full-time nature of the position (Px.7, 124-125).

Petitioner's ability to earn is aptly shown by his current full-time employment, which is within his physical restrictions and represents a reasonable position for Petitioner according to

the unrebutted testimony of Mr. Blumenthal, who was the only vocational counselor to give an opinion in this case. Although Mr. Blumenthal testified that Petitioner's current employment is a reasonable position for him, he did state that Petitioner could earn $13.00 per hour at a similar job in Illinois.

Respondent argues that Petitioner is capable of earning more than the $13.00 per hour opined by Mr. Blumenthal on two grounds. First, Respondent contends that the forklift driving position it offered to Petitioner negates any loss of wages because the job that was offered paid more than Petitioner was making prior to his work injury. Respondent's Exhibit 3 is the job offer letter of September 17, 2021. The letter reads, "You will be working as a forklift operator at our Starcon fabrication facility in New Lenox, Illinois. Please note that your job duties in this role are all within your most current work modifications as outlined in the 11/25/2020 Functional Capacity Evaluation. Your pay will be $34.50 per hour, and your schedule will be Monday through Thursday 6:00 am to 4:30 pm with some overtime possible" (Rx. 3). Respondent's Exhibit 4 is the same letter dated November 2, 2021. Respondent did not provide a modified job description along with the offer.

Mr. Blumenthal reviewed Respondent's forklift driver job offer letters and cross-referenced those job titles with the Dictionary of Occupational Titles, which showed that Petitioner would need the ability to lift, carry, push, and pull up to 50 pounds in order to meet the requirements of a forklift operator (Px. 7, 42-43). He opined that those requirements are clearly outside of Petitioner's restrictions.

The Arbitrator has also reviewed the specific job requirements of the forklift driver position offered by Respondent. Those requirements are detailed in Petitioner's Exhibit 15, which is titled Physical Demands Analysis for an Equipment Operator. This is a document that

was produced by Genex, the vocational company hired by Respondent in this case. This document details that a forklift driver is required to load and unload anywhere from one to 70 pounds, up to 100 times per day. They are also required to push and pull 15 pounds frequently and frequently grasp tools, equipment and supplies with the right hand. (Px. 15). Petitioner testified that he is not capable of performing these tasks within his restrictions and it is clear from a review of his treating medical records that he is not able to perform these tasks. (Tx 38; Px. 4, 184; Px. 2, 101). Respondent offered no evidence or testimony to dispute the fact that Petitioner is physically unable to perform the full duties of the job Respondent offered him. All Respondent offered was a Genex report stating that Respondent would "accommodate" Petitioner as needed. Respondent failed to ever produce any evidence of what job duties it would expect Petitioner to perform. This vague representation that Respondent could accommodate Petitioner in a job he is clearly physically unable to perform does not constitute a valid offer of employment.

Mr. Blumenthal further testified that, even if Petitioner were able to perform the job offered by Respondent, a forklift operator in a stable labor market makes between $15.11 and $18.46 per hour, nowhere near the $34.50 per hour offered by Respondent (Px. 7, 45-47). He concluded that the job offer was not valid and that no stable labor market existed for forklift operators to make $34.50 per hour (Px. 7, 45-47). The reasoning of the appellate court in *Jackson Park* is instructive here. There, the court stated that "[i]f other employers would not hire the employee with [his] limitations at a comparable wage level, the post-injury wage cannot be considered an accurate reflection of the claimant's earning capacity. Denying such a claimant a wage differential award undermines the purpose of such awards, which is to compensate the injured worker for [his] reduced earning capacity. *Dawson,* 382 Ill. App. at 586." In the case at

bar, although Petitioner never accepted the forklift driver position with Respondent, if other employers would not hire Petitioner at a comparable wage within his restrictions, the job offered by Respondent cannot be considered an accurate reflection of the Petitioner's earning capacity.

Based on the professional vocational opinion of Steven Blumenthal, in addition to the obvious mismatch between Petitioner's permanent physical restrictions and the requirements of the forklift driver job as outlined by Respondent's own Genex report, it is clear that Petitioner is incapable of performing the job duties of a forklift driver. Further, even if he were capable of performing this job, Respondent has offered absolutely no evidence or testimony to indicate that other employers would hire Petitioner as a forklift driver within his permanent physical restrictions, nor has Respondent offered any evidence that Petitioner could work as a forklift driver for another employer at a wage anywhere near comparable to the wage they offered. Given that Respondent's own vocational counselor agrees that Petitioner is not able to perform the job they offered without accommodation (Rx. 5) and the fact that the wage of the offered position is inflated to approximately 200% of what forklift drivers in a stable labor market earn (Px. 7, 45-47), the Arbitrator can only conclude that this was a valid job offer, extended solely for the purpose of diminishing Petitioner's claim for a wage differential. Based on these facts, the Arbitrator finds that Respondent's offer of $34.50 per hour to work as a forklift driver cannot be considered an accurate reflection of Petitioner's earning capacity.

Respondent's second argument concerning Petitioner's earning capacity revolves around the Labor Market Survey from Genex dated July 14, 2021 through July 16, 2021 (Rx. 2). No vocational counselor testified regarding this survey or provided any professional conclusions based on this survey. Despite this, the Arbitrator reviewed this survey at length.

The preparation of this forensic document prepared for the purposes of litigation does not include an interview with Petitioner. The background information used to prepare this document was the FCE of November 25, 2020, Blumenthal's vocational reports from April 16 and April 29, 2021, Respondent's job offer letter for a position in Tennessee on June 24, 2021, and job advertisements from the internet (Rx. 2, 1). None of the treating physician medical records were reviewed by Genex. The Genex survey reviewed Petitioner's work history and alleged to be "predicated on the assumption that a worker who has performed the tasks of one or more occupations has demonstrated certain skills, aptitudes, and interests which are transferable to the same or similar occupations in the future" (Rx. 2, 1). There is no further explanation to support this conclusion made by the survey's drafter.

Based on Petitioner's work history and the materials provided, the analysis of transferable skills somehow determined that Petitioner has the skill of Automotive Repair Service Estimator (Rx. 2, 2). However, Petitioner testified that he has no experience performing automotive estimation of any kind, nor does he have any experience working as an automotive mechanic, in car servicing or selling or advising anyone about cars (Tr. 30).

The survey then details seven employment opportunities that its drafter opined Petitioner would be able to apply for and obtain. The first was for a service advisor/service consultant in a Kia dealership (Rx. 2, 2). The requirements included a general knowledge of vehicle mechanical operations and strong customer service skills (Rx. 2, 2). Petitioner testified that he does not have a general knowledge of vehicle mechanical operations nor was there any explanation to support that Petitioner enjoyed strong customer service skills especially in light of his limited English Language skills consistent with English as a second language when arriving to America as an adult (Tr. 30). The second job was for a service advisor at a BMW dealership (Rx. 2, 3). Again,

there is no evidence that he would be able to perform the duties listed, as he would not be able to explain the Service Technician's recommendations to a customer because he has no training as an automotive mechanic. The third role was another service advisor/writer position with essentially the same responsibilities and duties that Petitioner is not qualified for (Rx. 2, 3).

The fourth role was for a quick lane service advisor, which was another position that would require that Petitioner had experience as an automobile mechanic, which he does not (Rx. 2, 4). The last three jobs are all also service advisor roles which would require that Petitioner has experience as an automobile mechanic, or at least experience around automobile mechanics (Rx. 2, 4-6).

It appears to the Arbitrator that the entire labor market survey is based upon the incorrect assumption that Petitioner has skills and /or experience in automotive repairs or servicing. However, outside of his experience in tire installation and the brake and alignment work that went with tire installations, there is absolutely no evidence that Petitioner has any such experience. If the preparation of the report had included an interview with Petitioner to discuss his work history, it would have been obvious before performing this labor market survey that the positions detailed within do not reflect a stable labor market for Petitioner. Any reliance on this clearly erroneous survey to deny Petitioner the benefits he is due is unreasonable and the possible wages detailed by the survey cannot be considered an accurate reflection of Petitioner's earning capacity.

A review of all evidence and testimony exhibits that the best evidence of Petitioner's earning capacity is Petitioner's current employment and Mr. Blumenthal's unrebutted opinion that his current job is reasonable and accurately reflects his ability to earn (Px. 7, 39). After his initial meeting with Petitioner, Mr. Blumenthal prepared a Transferrable Skills and Aptitude

Analysis that opined Petitioner could seek positions as a retail sales attendant, an unarmed security guard, and an entry-level clerical office clerk (Px.7, 29). Petitioner then found a job as a retail sales attendant as Mr. Blumenthal has suggested. Even though it is possible he could earn $13 per hour in Cook County and Petitioner currently makes $11 per hour working in Indiana, Mr. Blumenthal testified that it was good for Petitioner to take the position at Cheap Tobacco because it fell within his restrictions and accurately reflected his earning potential (Px. 7, 39).

The overwhelming evidence proves that Petitioner has suffered a loss of earning capacity, and Mr. Blumenthal's opinions provide the most credible evidence regarding the reasonableness of Petitioner's current employment and his current earning capacity. The Arbitrator agrees with Mr. Blumenthal that although it is reasonable for Petitioner to continue his employment at Cheap Tobacco, he is capable of earning $13.00 per hour if he were employed in Illinois.

In the full performance of his duties as an industrial mechanic, Petitioner would currently be able to earn at least the $1,080.36 per week that he was earning pre-accident. At a suitable job within his permanent physical restrictions, Petitioner is now capable of earning $13.00 per hour, 40 hours per week, or $520.00 per week. The resulting wage loss is $560.36 per week.

Therefore, the Arbitrator hereby orders Respondent to pay wage differential benefits of $346.57 per week or $49.51 per day beginning on March 3, 2021 through October 3, 2022 representing 74-1/7th weeks or 519 days, as provided in Section 8(d)(1) of the Act.

III. On the issue of whether penalties or fees should be imposed on Respondent, (M), the Arbitrator hereby finds:

The Arbitrator is mindful that the Commission has awarded penalties and attorneys' fees for nonpayment or a delay in payment of wage differential benefits prior to an Arbitrator's

decision finding such entitlement. In *Diskin v. LynDen*, Inc., 96 IIC 0354, the Commission affirmed an Arbitrator's decision in which the Arbitrator awarded the claimant penalties under Section 19(k) for the employer's failure to pay the claimant benefits under Section 8(d)(l). In *Diskin*, the Arbitrator rejected the employer's contention that the Arbitrator could not award penalties because an "award" had not yet been issued. See also, *Barbara Diekelmann v. Ingalls Memorial Hospital*, 07 IWCC 1168, 02 WC 47909 (The Commission modified the Arbitration Decision holding that penalties cannot be awarded before an 8(d)1 award of benefits. The Commission not only held that penalties and fees can be awarded but it did). The Arbitrator finds that Petitioner is in this case is entitled to penalties/attorney's fees under sections 16, 19(k), and 19(l).

The Act provides an income stream to an injured worker, who is typically left without income while he is disabled. (*Avon Products, Inc. v. Industrial Com.* (1980), 82 Ill. 2d 297, 412 N.E.2d 468) The penalty sections attempt to prevent bad faith and unreasonable withholding of compensation benefits from employees. (*Board of Education v. Industrial Com.* (1982), 93 Ill. 2d 1, 442 N.E.2d 861.) If an employer acts in reliance upon objectively reasonable information, penalties are not usually imposed. (*O'Neal Brothers Construction Co. v. Industrial Com.* (1982), 93 Ill. 2d 30, 442 N.E.2d 895.) But the employer's withholding of compensation is unreasonable when the evidence that an employer has, or should reasonably have, in its possession discloses the absence of any substantial grounds for challenging liability. *Board of Education v. Industrial Com.* 93 Ill. 2d 1 (1982). The test is whether the employer's reliance was objectively reasonable under the circumstances. (*Consolidated Freightways, Inc. v. Industrial Com.* (1985), 136 Ill. App. 3d 630, 483 N.E.2d 652.)

After the Petitioner establishes his entitlement to benefits under the Act, the Respondent has the burden of demonstrating a reasonable belief that its denial of liability was justified under the circumstances, as required by *Continental Distributing Company v. Industrial Commission,* 98 Ill.2d 407 (1983), *Board of Education of the City of Chicago v. Industrial Commission,* (John F. Tully, Appellee) 93 Ill.2d 1 (1982) ("Tully" case). In *Tully*, the Illinois Supreme Court held that where a delay has occurred in payment of workers' compensation benefits, the employer bears the burden of showing that it had a reasonable belief to justify the delay. Thus, it is not good enough to merely assert honest believe that the employee's claim is invalid or that his award is not supported by the evidence; the employer's belief is "honest" only if the facts are such that a reasonable person in the employer's position would have believed the same. The question whether an employer's conduct justifies the imposition of penalties is a factual question and the employer's conduct is considered in terms of reasonableness. *The Board of Education of the City of Chicago v. Industrial* Commission, 93 Ill 2d 20(1982). Moreover, the Appellate Court has noted on multiple occasions that the burden of proof of the reasonableness of its conduct is upon the employer. *Consolidated Freightways, Inc. v. Industrial Commission,* 136 Ill.App.3d 630 (3rd Dist. 1985); accord, *Ford Motor Company v. Industrial Commission,* 140 Ill.App.3d 401 (1st Dist. 1986). Penalties were assessed in the case of *Consolidated Freightways, Inc. v. Industrial Commission,* 136 Ill.App.3d 630 (3d Dist. 1985) when the examining doctor for respondent Consolidated Freightways authorized an injured employee to return to work. Petitioner in this case was being treated by several other doctors, none of whom released him for work. Penalties were assessed against Consolidated Freightways because it was determined there was no reasonable or good-faith challenge to the liability to pay compensation.

Petitioner has filed multiple motions for penalties under sections 16, 19(k), and 19(l) (Px. 10).

As detailed in the sections above, the Arbitrator has found that Petitioner suffered has sustained a loss in earning capacity due to his permanent physical restrictions, which are undisputedly related to the work accident that is the subject of this claim.

On three occasions, Respondent attempted to diminish Petitioner's wage loss claim based upon unreasonable offers employment as a forklift driver making over $34.00 per hour. The first job offer that Respondent made to Petitioner would have had him relocate to Tennessee. It has been established that Petitioner has no connection to Tennessee. Petitioner is from Jordan and currently resides in Illinois. To offer him a job in a different state when he owns a home in Illinois with his family is unreasonable, at best.

The second and third job offers that Respondent made to Petitioner were for the forklift driving position discussed at length in the section above. Respondent made these offers of employment with the full knowledge that the job offered was outside of Petitioner's permanent physical restrictions and that Petitioner was already employed in a position within his permanent physical restrictions. Furthermore, there is absolutely no evidence that forklift drivers in a stable labor market earn anywhere near the hourly rates being offered by Respondent. It was wholly unreasonable and vexatious for Respondent to deny Petitioner's wage differential benefits based on these invalid and unreasonable job offers.

Petitioner additionally introduced evidence in the form of his counsel's communications with Respondent's counsel regarding the nonpayment of benefits (Px. 11-12). On September 30, 2021, Petitioner's counsel wrote concerning the forklift job being offered to Petitioner stating repeating a request for a copy of the forklift job description. Respondent has refused to give a

job description (Px. 12, 676). Petitioner's Exhibit 12 continues to log the numerous demands for payment of wage loss benefits after Respondent's job offers. Respondent refused to pay these benefits past September 20, 2021 (Rx. 8) or perform any actions necessary to defend their conduct. Respondent, 1) offered no persuasive vocational opinions to dispute the opinion of Mr. Blumenthal, 2) did not attempt to offer any details of the supposed accommodations they planned to make for Petitioner as a forklift driver, a position in which Petitioner would not have been able to operate the hand controls of the machine he was meant to drive, and, 3) offered no evidence that a stable labor market existed for Petitioner to make $34.50 per hour as a forklift driver. Respondent's failure to provide a detailed accommodating job description deprived Petitioner's treating physician and Petitioner's vocational counselor to review and confirm that Petitioner would be capable of performing the alleged accommodated job offer.

The Arbitrator concludes that the denial of wage loss benefits by Respondent in this case has been unreasonable and vexatious. Therefore, in calculating unpaid benefits due and owing, the Arbitrator is determining the amount of benefits due less the amount of benefits the parties stipulated has been paid. The Arbitrator finds that the that Petitioner was temporally totally disabled for the period of October 21, 2019 through December 9, 2020 representing 59-5/7th weeks at $720.24 per week for $42,802.83. The Arbitrator further finds that the period of maintenance and wage differential benefits due is 94-5/7th weeks at $346.57 for the period of December 10, 2020 through October 3, 2022 representing $32,825.13. The total TTD and wage differential benefits due is $75,627.96 less the total benefits paid in the amount of $64,259.44, leaving a deficit of benefits due in the amount $11,368.52

Based upon the above reasoning, the Arbitrator finds that Respondent liable for penalties under Section19(k) in the amount of $5,684.26 representing fifty percent of the total amount

wage differential benefits due in the amount of $11,368.52 to date of hearing and Section 16 attorney fees in the amount of $2,573.70 representing 20% of $11,368.52

In calculating Section 19(l) penalties, the Arbitrator notes that Petitioner is due wage differential benefits in the amount of $11,368.52. The sum of $11,368,51 divided by $49.51 per day (1/7th of $346.57 = $49.51) equals 229.62 days x $30.00/day equals $6,888.61. The Arbitrator finds pursuant to Section 19(l) of the Act, that Respondent is liable to pay the sum of $6,888.61 for the 229.62 days that the Respondent refused payment of weekly benefits.

Based on a complete review of the evidence, the Arbitrator concludes that Petitioner is entitled to penalties and attorneys' fees for Respondent's failure to pay wage differential benefits in the amount of $11,368,51. Respondent to pay Petitioner penalties under Section 19(l) in the amount of $6,888.61 and Section 19(k) in the amount of $5,684.26, as well as pay attorneys' fees in the amount of $2,573.70 pursuant to Section 16 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC024669
Case Name	Dyhema Ralston v. HCR Manor Care
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0509
Number of Pages of Decision	32
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Daron Romanek
Respondent Attorney	Daniel Flores

DATE FILED: 11/28/2023

/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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DYHEMA RALSTON,
Petitioner,

vs. NO: 16 WC 24669

HCR MANOR CARE,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, permanent partial disability, and penalties, 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 notes that Dr. Ghanayem prescribed no specific treatment to Petitioner nor was a specific recommended procedure pending at the time of hearing. Rather, Dr. Ghanayem testified that Petitioner may need an occasional refresher therapy program including an occasional injection and the use of non-narcotic medication, but at the time of hearing, no such treatments were pending or had been prescribed. As such, the Commission vacates the Arbitrator's award of prospective medical treatment as no specific treatment recommendation is pending or has been prescribed by Dr. Ghanayem.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed January 19, 2023, is hereby modified as stated above and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $1,143.35 per week for a period of 308-4/7 weeks, June 19, 2016 through May 20, 2022, 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 all outstanding reasonable and necessary medical services to the following providers pursuant to the medical fee schedule, as provided in Section 8(a) and 8.2 of the Act: Experience Chiropractic for thirty-three (33) chiropractic sessions, Swedish Covenant Medical Group (Dr. Laich), Weiss Memorial Hospital, Swedish Covenant Hospital, Northwestern Memorial Hospital, Loyola University Medical Center and the Erie Foster Avenue Health Center.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of prospective medical care is vacated.

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.

November 28, 2023

O: 11-16-23
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	16WC024669
Case Name	RALSTON, DYHEMA v. HCR MANOR CARE
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	29
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Daron Romanek
Respondent Attorney	Rich Lenkov

DATE FILED: 1/19/2023

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

/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)

Dyhema Ralston
Employee/Petitioner

v.

HCR Manor Care
Employer/Respondent

Case # **16** WC **024669**

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 **May 20, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to Respondent?

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

G. ☐ What were Petitioner's earnings?

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

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

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

K. ☒ Is Petitioner entitled to any prospective medical care?

L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other

FINDINGS

On the date of accident, **06/18/16**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**89,181.04**; the average weekly wage was $**1,715.02**.

On the date of accident, Petitioner was **35** years of age, ***single*** with **1** dependent children.

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

Respondent shall be given a credit of $**30,997.98** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**184,167.10** for other benefits, for a total credit of $**215,165.08**.

Respondent is entitled to a credit of $**184,167.10** under Section 8(j) of the Act.

ORDER

Credits

Respondent shall be given a credit of $**30,997.98** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**184,167.10** for short term and long term disability benefits pursuant to Section 8(j), for a total credit of $**215,165.08**. Respondent shall hold petitioner harmless from any claims by any providers of the short term and long term disability benefits for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Medical Benefits

Respondent shall pay reasonable and necessary medical services to the following providers pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act: Experience Chiropractic for thirty-three (33) chiropractic sessions, Swedish Covenant Medical Group (Dr. Laich), Weiss Memorial Hospital, Swedish Covenant Hospital, Northwestern Memorial Hospital, Loyola University Medical Center and the Erie Foster Avenue Health Center.

Respondent shall reimburse Equian for Petitioner's Medicaid coverage on behalf of Aetna Better Health of Illinois in the amount of: $1,118.02 for reasonable and necessary medical services paid by Aetna Better Health of Illinois on Petitioner's behalf and Respondent is to hold Petitioner harmless.

Respondent shall reimburse the Illinois Department of Healthcare and Family Services in the amount of: $30.47 for reasonable and necessary medical services paid by the Illinois Department of Healthcare and Family Services on Petitioner's behalf and Respondent is to hold Petitioner harmless.

Temporary Total Disability Benefits

Respondent shall pay Petitioner temporary total disability benefits of **$1,143.35/week for 308 4/7 weeks** commencing on June 19, 2016 through May 20, 2022, as provided in Section 8(b) of the Act. Respondent shall pay Petitioner temporary total disability benefits that have accrued from June 19, 2016 through May 20, 2022, and shall pay the remainder of the award, if any, in weekly payments.

Prospective Medical Benefits

Respondent shall pay for Petitioner's prosepective medical care for the medical treatment of Petitioner's lumbar spine as provided in Sections 8(a) and 8.2 of the Act.

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

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

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

____ **JANUARY 19, 2023**

Signature of Arbitrator

ICArbDec19(b)

Dyhema Ralston vs. HCR Manor Care
16 WC 024669

FINDINGS OF FACT

Petitioner testified that on Saturday, June 18, 2016, she provided a patient with hospice care in the patient's home and that while Petitioner used a draw sheet to reposition the patient who weighed 180-200 pounds, Petitioner felt a sharp pain in her back immediately after she used the draw sheet to reposition this patient by herself. The pain in Petitioner's back continued to worsen throughout the day. (Transcript, hereinafter referred to as "T", pp. 9-11, 91-92; Px 1, pp. 101-103; Px 3, pp. 3, 10, 15, 21, 32, 49, 55, 83, 88, 94, 105, 106, 119, 129, 134, 139, 149, 177, 187, 192, 207, 223, 239 and 244; Px 4, pp. 18, 24, 29 and 34; Px.5, pp. 229-230, 244-245 and 256-257; Px 6, p. 1; Px 9, pp. 6-7 and 11; Px 11, pp. 6-7, 11; Rx. 1, p. 1, Rx. 2, p. 1; Rx. 3, pp. 9 and 41-42, Respondent's dep. exh. no. 2, p. 1, Respondent's dep. exh. no. 3, p. 1)

Petitioner finished up her workday on June 18, 2016 and tried to work on Sunday, June 19, 2016, but testified she could not complete her shift because her pain was too intense. (T, pp. 11 and 68; Px 3, p. 239). Petitioner called her backup and informed her backup that she could not continue to work and needed to leave. (T, p. 11)

Petitioner first sought treatment on June 20, 2016 at Experience Chiropractic with Dr. David Warman. (T, pp. 12 and 56) Dr. Warman documented sharp and aching lumbar discomfort. (Px 2, p. 1). Dr. Warman stated that Petitioner "…will be out of work for a minimum of 10 days. We will evaluate her work status in 10 days." (Px.2 p. 1). Petitioner had not sought treatment with any chiropractor prior to June 18, 2016. (T, p. 56)

Petitioner continued to treat with Dr. Warman on June 22, 23, 27, 2016 and 28. (T, p. 12; Px. 2, pp. 2-5) On June 28, 2016 Dr. Warman noted that Petitioner was "…expected to be able to return to light duty work on 07/14/2016." (T, p. 12, Px 2, p. 5)

Petitioner filed for a leave of absence from Respondent on July 10, 2016 because of a "Workers' compensation absence that also qualifies as a serious health condition" and "For the [Petitioner's] own work- related serious health condition that makes the [Petitioner] unable to perform the functions of the [Petitioner's] position." (T, pp. 25-25; Px 1 pp. 106-109)

Petitioner's treatment with Dr. Warman continued on June 29, 30, July 5, 6, 7, 11, and July 12. (T, p. 13; Px 2, pp. 6-12) Petitioner reported to Dr. Warman on July 14, 2016 that her tolerance of walking and sitting had improved, but she could not sit for more than 20 minutes without severe pain and sitting down made her back spasm and it hurt to get up. (T, p. 13; Px 2, p. 13). Petitioner also explained that she

could not straighten her right leg without feeling pain in her lower back when seated. (T, p. 13; Px 2, p. 13). Dr. Warman advised Petitioner to "…continue to limit activity and should not return to work until August 1." (Px 2, p. 13) Petitioner testified that the plan while she treated with Dr. Warman called for an evaluation every 2-3 weeks as to whether or not Petitioner could return to work. (T, p. 14)

Petitioner continued to treat with Dr. Warman on July 18, 19, 20, 21, 25, 26, 27, 28, and August 1. (T, p. 14; Px. 2, pp. 15-32). On August 1, 2016 Dr. Warman noted that Petitioner "…should not return to work until August 14th. [Petitioner] is still unable to sit for prolonged periods of time and sitting irritates her back. She should still avoid bending, twisting and lifting anything over 5 lbs." (Px 2, p. 31)

Petitioner continued to treat with Dr. Warman on August 2, 3, 8, 9, 10, 11, and 15. (T, p. 15; Px 2, pp. 33-44). On August 15, 2016 Petitioner felt improvement, but her lower back remained sore. (T, p. 15, Px 2, p. 44). As of August 15, 2016, Petitioner could not sit for prolonged periods of time and sitting continued to irritate her back. (T, p. 16; Px 2, p. 44). Dr. Warman stated on August 15, 2016 that Petitioner "…should not return to work until September 1st." (Px 2, p. 44)

Recurrent treatment with Dr. Warman continued. (T, p. 16; Px 2, pp. 45-56) Petitioner reported to Dr. Warman on September 1, 2016 that sitting still caused her lower back to flare up. (T, p. 16; Px 2, p. 56). Dr. Warman concluded on September 1, 2016 that Petitioner "…should not return to work until September 14th." (Px 2, p. 56) Petitioner reported to Dr. Warman on September 14, 2016 that she felt more sore and she limped when she walked. (T, p. 17; Px 2, p. 66). Also, as of September 14, 2016, Petitioner remained unable to sit for prolonged periods of time and sitting still irritated her back. (T, 17; Px 2, p. 66) Dr. Warman stated on September 21, 2016 that Petitioner "…should not return to work until October 1st." (Px 2, p. 71)

On October 3, 2016 Petitioner informed Dr. Warman that she felt no pain in her leg on October 3, 2016 and she felt more mobile over that particular weekend. (T, p. 18; Px 2, p. 83). Dr. Warman noted on October 3, 2016 that Petitioner "…should not return to work until October 14th." (Px 2, p. 83)

Petitioner testified that on October 4, 2016 Respondent stopped paying Petitioner her temporary total disability benefits. (T, p. 19; Px 22; see also Rx 8, p. 1 which shows TTD paid through October 3, 2016)

Petitioner continued to treat with Dr. Warman on October 4, 5, 6, 10, 11 and 12. (T, p. 19; Px 2, pp. 85-94) Petitioner informed Dr. Warman on October 11, 2016 that she continued to improve and her right leg pain did not come back. (T, p. 19, Px 2, p. 93). Dr. Warman still did not want Petitioner to return to work until October 14, 2016 because Petitioner remained "…unable to sit for prolonged periods of time and sitting [irritated] her back." (Px 2, p. 95). Dr. Warman also continued to advise Petitioner that "She should still avoid bending, twisting and lifting anything over 10 lbs." (Px 2, p. 95)

Respondent sent Petitioner to Dr. Wehner on October 12, 2016 for a Section 12 exam. (T, p. 20; Rx 1 and Rx 3, Respondent's dep. ex. no. 2)

Petitioner returned to Dr. Warman on October 13, 2016 and she stated that she felt better, could squat down without pain and could sit for over an hour without the pain or limping coming back. (T, pp. 20-21; Px 2, p. 97). On October 13, 2016, Dr. Warman returned Petitioner to work with restrictions of: lifting no more than fifteen (15) pounds, avoiding repetitive lifting and squatting and Petitioner should be allowed to get up and walk every thirty (30) to forty-five (45) minutes. (T, p. 21; Px 2, p. 97)

Petitioner testified that she could not return to work for Respondent as a hospice nurse with these restrictions. (T, p. 21)

After Petitioner explained to Dr. Warman that Respondent wanted her to return to full-time work without restrictions, Dr. Warman opined on October 18, 2016 that "This is not advised as [Petitioner] is likely to re-injure herself when lifting patients and doing other activities without easing back into her normal work activities that caused the initial injury." (Px 2, p. 98)

Petitioner testified that she had a telephone conversation with Respondent's office manager/human resources designee, Tawanda Evans, on October 13, 2016 or October 14, 2016. (T, pp. 21 and 71-79). During this telephone conversation that only included Petitioner and Tawanda Evans, Tawanda Evans informed Petitioner that Petitioner exhausted her 3 months leave of absence and that Petitioner was eligible to return to full duty work. (T, pp. 22 and 76-77; Rx 6).

Petitioner informed Tawanda Evans during this telephone conversation that Dr. Warman stated that Petitioner could not return to full duty and Dr. Warman wanted Petitioner to treat more so Petitioner would not return to work and re-injure herself. (T, p. 22 and 77-78; Px 2, pp. 97-98). Tawanda Evans testified that Petitioner stated that she could not perform at the capacity expected by Respondent, so Petitioner would provide Respondent with a resignation letter. (T, p. 22; Rx 6)

The letter Respondent's office manager/human resources designee signed and sent to Petitioner and that is dated October 14, 2016 asked Petitioner to "Please sign, date and return this letter as acknowledgement of its receipt." (Rx. 6). Petitioner did not sign and return this letter. (T, p. 24). The letter Tawanda Evans signed and dated and sent to Petitioner on October 14, 2016 also stated that Petitioner "…would provide [her] resignation letter." (Rx 6). Petitioner testified she never provided Respondent with a resignation letter and never resigned. (T, pp. 24-25; <u>see</u> <u>also</u> Px 1 which does not include a resignation letter from Petitioner)

Petitioner saw Dr. Warman for the final time on October 18, 2016. (T, p. 26; Px 2, p. 98)

After October 18, 2016, the next treatment Petitioner sought was with her primary care provider, Dr. Mark Simon, at Erie Foster Avenue Health Center. (T, p. 26). Petitioner first saw Dr. Simon on November 18, 2016. (T, p. 26; Px 3, pp. 243-247). Petitioner explained she injured her back while lifting a patient at work on June 18, 2016. (T, p. 26; Px 3, p. 244) Dr. Simon ordered a lumbar MRI for Petitioner and then noted that "…when we get the results[,] we can decide if we will consult a surgeon or physical therapy." (Px 3, p. 246). This represented the first time a MRI of Petitioner's lumbar spine had been ordered since the date Petitioner suffered her injuries, June 18, 2016. (T, p. 27)

The MRI occurred on December 23, 2016. (T, p. 27; Px 3 pp. 248-249). The impression from Petitioner's lumbar spine MRI done without contrast was: 1. Right herniation L5 with underlying bulge narrowing the foramina. 2. Central herniation L3-4 and L5-S1. (Px 3, p. 249)

Dr. Simon wanted Petitioner to begin physical therapy as of January 5, 2017, but Petitioner could not do this because the health insurance Petitioner was getting through Public Aid was not quite ready. (T, p. 27)

When Petitioner returned to see Dr. Simon on April 17, 2017, Dr. Simon referred Petitioner to neurosurgery for an initial consultation and physical therapy for an initial consultation. (T, pp. 27-28; Px 3 pp. 238-242)

The neurosurgeon Dr. Simon referred Petitioner to was Dr. Daniel Laich. (T, p. 28, Px 3, p. 288) Petitioner saw Dr. Laich on August 10, 2017. (T, p. 28; Px 4, pp. 34-40). Dr. Laich characterized Petitioner's injuries on August 10, 2017 as degenerative disc disease (L3-4, L4-5, L5-S1), L3-4 left herniated nucleus pulposus with annular tear, L4-5 diffuse contained herniated nucleus pulposus, L5-S1 disc dessication, mild neural foraminal stenosis at: L3-4 left, L4-5 left and L4-5 left and L4-5 right neural foraminal stenosis. (Px 4, p. 34 and 37). Dr. Laich instructed Petitioner to remain off work. (T, p. 28; Px 4, p. 39). He also wanted Petitioner to receive facet injections and to begin physical therapy. (T, p. 28; Px 4, p. 39). Dr. Laich referred Petitioner to Dr. Brian Chung at Northwestern Memorial Hospital for facet injections. (Px.5, pp. 232, 246 and 260)

Petitioner went to the Pain Clinic at Northwestern Memorial Hospital on September 13, 2017. (T, pp. 28-29; Px. 5, pp. 255-265). The records of the Pain Clinic at Northwestern Memorial Hospital indicate Petitioner's had degenerative disc disease with dehydration, small left paracentral herniated nucleus pulposus at L3-4 resulting in mild foraminal narrowing, L4-5 diffuse disc bulge due to height loss, L4-5 mild facet disease, L5-S1 lesser disk and facet disease, overall mild bilateral foraminal narrowing L4-5, primarily mild left L3-4, minimal L5-S1. (Px 5, p. 259).

The recommendation was to have an epidural steroid injection to target lower back and radicular lumbar pain. (Px 5, p. 260)

Petitioner returned to see Dr. Laich on September 21, 2017. (T, p. 29; Px 4, pp. 29-33). Dr. Laich noted Petitioner had not started physical therapy because she had been placed on a waiting list and Petitioner had a scheduled epidural steroid injection at Northwestern Memorial Hospital on September 26, 2017. (T, p. 29; Px 4, p. 29). Petitioner reported that she had lumbar back pain radiating to her right leg, left leg pain and bilateral foot numbness that started 2 weeks ago. (Px 4, p. 29). Petitioner reported feeling depressed. (Px 4, p. 29). Dr. Laich characterized Petitioner's work status as "Currently not working for medical reasons." (Px 4, p. 29). The plan was to continue with a psychiatrist/psychologist, start physical therapy, and receive injections as scheduled. (Px 4, p. 32)

On September 26, 2017, Dr. Brian Chung provided Petitioner with her first lumbar epidural steroid injection on the right side at L4-5 at Northwestern Memorial Hospital. (T, p. 243-254, 293-295)

Petitioner began physical therapy at Weiss Memorial Hospital on October 12, 2017. (T, pp. 29-30). Petitioner's physical therapy concluded on December 12, 2017 for a total of 12 sessions. (T, p. 30; Px 7, pp. 4-30). Petitioner received all of this physical therapy at Weiss. (T, p. 30). Petitioner testified that PT improved the condition of her lumbar spine a little bit. (T, p. 30)

On November 9, 2017 Dr. Laich wanted Petitioner to continue with physical therapy 2-3 times a week for 6 weeks and to follow-up with Dr. Chung for further injections. (T, pp. 30-31; Px 4, p. 27). Dr. Laich kept Petitioner off of work on November 9, 2017. (T, p. 31; Px 4, p. 27)

When Petitioner returned to see Dr. Laich on January 5, 2018, Petitioner reported that her back pain had improved minimally. (T, p. 31; Px 4, p. 18). Dr. Laich characterized Petitioner's condition as multi-level L3-S1 degenerative disease with annular tears and facet disease. (Px 4, p. 18). Dr. Laich referred Petitioner for aquatic therapy 2-3 times per week for 12 weeks. (T, p. 31; Px 4, p. 22)

On December 12, 2018 Petitioner had her seat belt on and her vehicle was struck from behind in a car accident. (T, pp. 31-32). This collision did not cause the airbag to deploy. (Px 10, p. 28; Rx 5, p. 30). Petitioner went to the emergency room at St. Francis Hospital in Evanston and reported twinges of low back pain. (T, p. 32; Px 10, p. 5; Rx 5, p. 10). Petitioner was discharged from the emergency room with a diagnosis of: 1. Strain lumbar region, initial encounter. 2. Injury due to motor vehicle accident, initial encounter. 3. Contusion of left lower extremity, initial encounter (Px 10, pp. 7-8; Rx 5, p. 12)

Petitioner testified she went to the emergency room after the motor vehicle collision as a precautionary measure because of her work injury. (T, p. 32; Px 10, p. 28; Rx 5, p. 30).

Petitioner received her second injection on February 13, 2018 from Dr. Chung at Northwestern Memorial Hospital. (T, 33). On February 13, 2018 Dr. Chung provided Petitioner with lumbar epidural steroid injection at the L4-5 left paramedian. (Px 5, pp. 228-242 and 289)

Petitioner returned to Dr. Laich on April 11, 2018 and Dr. Laich wanted Petitioner to continue with land-based physical therapy and aqua physical therapy. (T, p. 33; Px 4, p. 17). Dr. Laich kept Petitioner off work on April 11, 2018. (T, p. 33; Px 4, p. 12). On April 11, 2018 Dr. Laich noted that Petitioner "…is disabled secondary to [an] injury on June 18, 2016." (Px 4, p. 12). Dr. Laich's assessments for Petitioner on April 11, 2018: 1. Lumbar degenerative disc disease. 2. Herniated nucleus pulposus, lumbar. 3. Facet joint disease of lumbosacral region. 4. Low back pain. (Px 4, p. 17)

On May 3, 2018, pursuant to a referral from the Erie Foster Avenue Health Center, Petitioner saw Dr. Ghanayem's Advanced Practice Nurse, Dorota Pietrowski. (T, p. 33; Px 3, pp. 227 and 290; Px 6, pp. 1-2). Nurse Pietrowski recommended an updated MRI of Petitioner's lumbar spine, without contrast, and then Petitioner would see Dr. Ghanayem upon completion of the MRI. (Px 6, p. 2)

When Petitioner returned to see Dr. Laich on May 24, 2018, Petitioner reported she continued to experience lumbar back pain. (T, pp. 33-34; Px 4, p. 6). Petitioner also reported that land and aquatic physical therapy improved her lower back pain. (T, p. 34; Px 4, p. 6). Dr. Laich advised Petitioner to continue with physical therapy and continued to keep Petitioner off work. (T, p. 34; Px 4, p. 11). Dr. Laich noted that if the treatment he has prescribed thus far for Petitioner fails, then consideration needs to be given to a "…left L4-5 micro/foraminotomy." (Px 4, p. 11)

Petitioner had an MRI at Loyola University Medical Center on May 29, 2018. (T, p. 34; Px 6, pp. 3-5). The impression from this MRI was stable multi-level degenerative changes of the lumbar spine most advanced at L4-L5. (Px 6, p. 4)

Petitioner saw Dr. Ghanayem on June 11, 2018. (T, p. 34; Px6, p. 6). Dr. Ghanayem reported that Petitioner's June 11, 2018 MRI revealed "…degenerative changes at three levels at L3-L4, L4-L5 and L5-S1…[and]…varying degrees of disc bulging." (Px 6, p. 6). Dr. Ghanayem's plan for Petitioner on June 11, 2018 did not include "…any surgical intervention on three levels of disk disease." (Px 6, p. 6). Dr. Ghanayem advised Petitioner to "…continue with conservative care and anti-inflammatories for pain." (Px 6, p. 6). Dr. Ghanayem also advised Petitioner "…to continue with her treating physician." (Px 6, p. 6)

Petitioner's last session of physical therapy at Swedish Covenant Hospital occurred on July 2, 2018. (T, pp. 34-35; Px 9, pp. 114-115). Petitioner received 23 sessions aqua physical therapy and land-based physical therapy that began on March 7, 2018 and concluded on July 2, 2018. (T, pp. 34-35; Px 9, pp. 49-115). Petitioner testified that this physical therapy helped her lower back pain, but Petitioner continued to have limitations in terms of how she could move. (T, p. 35).

Petitioner saw Dr. Laich for the final time on July 12, 2018. (T, p. 35). Dr. Laich classified Petitioner as "…a disabled nurse at Manor Care Heartland Hospice (since June 2016)." (Px 4, p. 1). As for Petitioner's work status, Dr. Laich stated that Petitioner was "Currently not working for medical reasons." (Px 4, p. 1). Dr. Laich's assessment was: 1. Lumbar back pain. 2. Lumbar radiculopathy. 3. Herniated nucleus pulposus, lumbar. 4. Facet joint disease of lumbosacral region. (Px 4, p. 5)

On June 25, 2018 Dr. Chung provided Petitioner with a lumbar epidural steroid injection on the left side at L4-L5. (Px 5, p. 213)

Petitioner was evaluated for additional land-based physical therapy at Swedish Covenant Hospital on September 28, 2018. (T, p. 36; Px 9, p. 7). Petitioner's next sessions of physical therapy at Swedish Covenant Hospital began on October 4, 2018. (T, p. 36; Px 9, p. 11) As of November 15, 2018, Petitioner completed 12 sessions of physical therapy and reported improvment but still had pain with certain movements and prolonged standing. (T, p. 37; Px 9, p. 40)

On January 10, 2019 Dr. Chung provided Petitioner lumbar epidural steroid injection on the left side at L5-S1. (Px 5, p. 191)

Petitioner testified that these injections took the edge off of her lumbar spine pain and these injections provided Petitioner with some, but not a lot of pain relief. (T, p. 38). Some of these injections provided Petitioner with more pain relief than other injections. (T, p. 38)

On February 13, 2019 Petitioner's doctor at the Erie Foster Avenue Health Center, Dr. Jessie Castro, sent Petitioner home with a home exercise program that included stretches. (T, p. 38; Px3, p. 183). While Petitioner treated for her lumbar spine at the Erie Foster Avenue Health Center, Petitioner received osteopathic manipulation treatments (hereinafter referred to as "OMT" treatments) for Petitioner's lower back. (T, pp. 38-39; Px 3, pp. 183, 186, 196 and 201)

Petitioner told Dr. Castro on March 6, 2019 that she could not increase her activity level due to leg pain. (T, p. 39; Px 3, p. 166). Dr. Castro noted on March 6, 2019 that Petitioner could not "…focus on the back pain while her leg hurts." (Px 3, p. 166). Petitioner reported to Dr. Castro on March 6, 2019 that OMT treatments were slowly helping her to be able to do daily living activities without significant pain or discomfort. (Px 3, p. 166)

Petitioner told Dr. Castro March 27, 2019 that she continued to have some problems sitting up in bed after sleeping and still felt impacted by pain in her back throughout the day, but Petitioner felt she could do more during the day before Petitioner needed to rest her back. (T, p. 39; Px 3, p. 157). Dr. Castro noted that Petitioner seemed "…to be responding well to the OMT treatments." (Px 3, p. 159)

On June 4, 2019 Dr. Chung provided Petitioner with a left-sided transforaminal injection at L5. (Px 5, p. 157)

Petitioner informed Dr. Castro on July 17, 2019 that she had right leg pain in which she felt electric-like shocks. (T, p. 39; Px 3, p. 138). Petitioner told Dr. Castro that her fifth injection on June 4, 2019 alleviated her pain significantly. (T, p. 40; Px 3, p. 138)

On November 6, 2019 Dr. Chung provided Petitioner with a left-sided lumbar transforaminal epidural steroid injection at L5. (Px 5, p. 134)

On February 3, 2020 Petitioner described for Dr. Castro a "catch" in her right buttock, but Petitioner felt the primary pain in her right, lateral knee. (Px 3, p. 82). Petitioner explained that her right, lateral knee hurt most when she walked and felt "heavy." (Px 3, p. 82)

Petitioner testified that she told Dr. Castro on March 6, 2020 that the pain in her lumbar spine became exacerbated with sneezing, laughing and coughing. (T, p. 40; Px 3, p. 70)

On October 21, 2020 Dr. Chung provided Petitioner with a lumbar/sacral transforaminal epidural steroid injection at L5-S1. (Px 5, p. 80)

Petitioner had physical therapy at Weiss Memorial Hospital that began on December 17, 2020 and concluded on February 24, 2021. (T, p. 40; Px 8). Dr. Castro referred Petitioner to Weiss Memorial Hospital for these particular sessions of physical therapy. (Px 8, p. 57). Petitioner received 11 physical therapy sessions in total. (Px 8, pp. 1-50)

When Petitioner saw Dr. Castro at the Erie Foster Avenue Health Center on April 9, 2021 she explained that her back pain remained exacerbated by twisting, sneezing and standing for more than 20 minutes. (T, p. 41; Px 3, p. 8). Dr. Castro noted that Petitioner also reported paresthesia of her right anterior and posterior thigh. (Px 3, p. 8)

On June 8, 2021 Dr. Chung provided Petitioner with a right lumbar/sacral transforaminal epidural steroid injection at L5. (Px 5, p. 44)

Petitioner returned to see Dr. Ghanayem on September 23, 2021 and Dr. Ghanayem advised Petitioner to remain off work as a hospice nurse. (T, p. 41; Px 6, p. 7). Dr.

Ghanayem noted that Petitioner continued "…to have ongoing symptoms related to her lower back…". (Px 6, p. 7). Dr. Ghanayem discussed Petitioner's need for additional care on September 23, 2021 and stated that "…additional maintenance care as I have indicated in the past would be appropriate." (Px 6, p. 7). And, Dr. Ghanayem addressed Petitioner's work status on September 23, 2021 when he stated that "Given that [Petitioner] has not had a job offer to return back to light duty, she [should] remain off work at this time from her old job as a hospice nurse." (Px 6, p. 7)

On November 23, 2021 Dr. Chung provided Petitioner with a right lumbar/sacral transforaminal epidural steroid injection at L5. (Px 5, p. 10). Dr. Chung noted on November 23, 2021 that Petitioner reported right foot pain that she felt when she stood and put pressure on the foot itself. (Px 5, p. 10). Petitioner also told Dr. Chung on November 23, 2021 that she had newer, relatively isolated left foot pain. (T, p. 42; Px 5, p. 10)

Petitioner testified that on February 7, 2022 she saw Dr. Igor at Swedish Covenant Hospital for left foot pain. (T, p. 42)

Petitioner also testified that she saw her doctor at Erie Foster Avenue Health Center on March 7, 2022 for her continued lower back, lumbar spine pain. (T, p. 42-43)

During the time Petitioner treated at Erie Foster Avenue Health Center, Petitioner continued to receive OMT treatments for her lower back, lumbar spine. (T, pp. 38-39; Rx 3, pp. 72, 82, 99, 114, 123, 128, 133, 155, 157, 159, 166, 171, 176, 186, 196 and 201)

Petitioner further testified that she received her tenth injection from Dr. Chung at Northwestern Memorial Hospital on April 19, 2022. (T, p. 42-43)

While Petitioner treated at Erie Foster Avenue Health Center between June 6, 2018 and February 1, 2019, Petitioner also treated for depression. (T, pp. 42-43; Px 3, pp. 186, 201, 212, 215 and 222). Petitioner never treated for depression before June 18, 2016. (T, p. 43)

Petitioner reported major depression after her June 18, 2016 work accident to Dr. Agtuca at Erie Foster Avenue Health Center on: June 6, 2018, October 1, 2018, October 15, 2018 and February 1, 2019. (Px 3, pp. 186, 212, 215 and 212). Dr. Agtuca noted on January 16, 2019 that Petitioner felt despondent over the length of time the condition of her lumbar spine has affected her life. (Px 3, p. 201)

When Petitioner stopped receiving her TTD benefits, Petitioner applied for short-term and long-term disability benefits from Met Life. (T, p. 48; Px 22; Rx 8, p. 1). The disability coverage that Petitioner received from Met Life was a benefit that Petitioner received through her employment with Respondent. (T, p.48; Px 1, p. 110)

Today, Petitioner continues to receive $2,833.34 a month from Met Life, which is $708.34 a week from Met Life. (T, pp. 48-50; Px 29). It took a while for Petitioner to receive disability benefits because an appeal had to be filed on Petitioner's behalf with Met Life. (T, p. 49)

As of the day of trial, Petitioner reports constant low back pain radiating down into both of her legs. (T, p. 50). Petitioner's low back pain increases with activity. (T, p. 50). Petitioner still limits herself in terms of what she lifts and what she does. (T, pp. 50-51) Petitioner limits herself by not going to the store herself. (T, p. 51). Petitioner has her daughter carry heavier things. (T, p. 50). Petitioner's mother moved back to Chicago from California and Petitioner's mother comes to Petitioner's home to provide assistance. (T, p. 51). Sitting causes Petitioner increased back pain. (T, p. 51) Petitioner walks, but not too far because the more Petitioner walks, the more Petitioner's lower back pain increases. (T, pp. 51-52). Petitioner wakes up multiple times a night with pain. (T, p. 52).
Petitioner continues to have limitations with standing and sitting. (T, p. 52)

Petitioner testified that today she takes: Naproxen, Gabapentin and Flerxeril for her back pain. (T, p. 52)

Petitioner testified that she was not sure if she was in a car accident on December 29, 1998. (T, pp. 57-58)

Petitioner was involved in a car accident around February, 2016 and after this accident in February, 2016 Petitioner went to Employee Health to be checked out and Petitioner felt fine. (T, p. 58)

Petitioner did not recall being in a car accident on December 14, 2016.
None of these motor vehicle accidents (December 29, 1998, February, 2016 and December 14, 2016 – that Petitioner did not recall) resulted in any back treatment of any kind for Petitioner. (T, p. 65)

Prior to June 18, 2016 Petitioner does not recall experiencing any lumbar pain. (T, p. 60; see also Px 1, p. 101). Petitioner still has low back pain and her activity level depends on the amount of pain she is experiencing. (T, pp. 60-61). Petitioner does not want to be in pain, so Petitioner tapers her activities to minimize her pain. (T, pp. 60-61). There is not a date when Petitioner does not experience back pain. (T, p. 61). Petitioner's pain does decrease, but there is not a day when Petitioner does not feel back pain. (T, p. 61)

Petitioner testified that she was perfectly healthy and perfectly normal before June 18, 2016 because Petitioner held 2 jobs (with Respondent and Pediatric Services of America) that required her to work 90 hours a week and Petitioner served as the head of her household. (T, pp. 65-66)

Petitioner is not currently working. (T, p. 62). Petitioner has not held any positions of any kind since her June 18, 2016 work accident. (T, p. 62; see also Rx 8, p. 1). Petitioner stopped working for Respondent and Pediatric Services of America after June 18, 2016. (T, pp. 67-68). After Petitioner tried to work on June 19, 2016, Petitioner has never worked again. (T, p. 68; Rx 8, p. 1). Petitioner is currently receiving long-term disability benefits. (T, p. 63; Px 29)

Petitioner did not receive an offer from Respondent to return to light duty work once Dr. Wehner released Petitioner to full duty work. (T, p. 63). The only offer that Petitioner received from Respondent was a return to full duty work. (T, pp. 63-64; Rx 6)

Tawanda Evans testified that she currently works for Mauer Senior Care, formerly known as HCR Manor Care, as the office manager/human resources designee. (T, p. 71). On June 18, 2016 Tawanda Evans worked in Westmont for Respondent as office manager/human resources designee. (T, p. 71 and 73) One function of her job is to oversee workplace injuries. (T, pp. 72-73)

Ms. Evans testified that Petitioner worked for Respondent as a hospice nurse and as a hospice nurse, Petitioner went to patients' homes and provided hospice care by herself without any help. (T, pp. 81 and 86). As a hospice nurse, Petitioner would be required to move very large human beings. (T, pp. 81 and 93-94). According to Ms. Evans, Petitioner's job was heavy duty. (T, pp. 81-82 and 86). The only job Petitioner worked for Respondent was as a hospice nurse. (T, pp. 89-90). Ms. Evans testified that he only job Petitioner would have worked for Respondent after the October 14, 2016 return to work letter (Rx 6) was as a hospice nurse. (T, p. 90)

Tawanda Evans remembers having numerous conversations with Petitioner about Petitioner's injury. (T, p. 76). She sent the October 14, 2016 to inform Petitioner that she reached her 3 months leave of absence and Petitioner was eligible to return to work "…without light restrictions." (T, pp. 76-77, 87-88; Rx 6; see also, Px 1, pp. 106-109). Ms. Evans testified that during her phone conversation with Petitioner on October 14, 2016, Petitioner expressed that she would be unable to perform her job at the capacity expected by Respondent, so Petitioner indicated she would provide a resignation letter. (T, p. 77-78; Rx 6)

Tawanda Evans never received a resignation letter from Petitioner. (T, p. 89; see also, Px 1) Petitioner never returned to a full duty position with Respondent. (T, p. 79)

The letter Tawanda Evans wrote and sent to Petitioner on October 14, 2016 (Rx 6) is not contained in Petitioner's Exhibit No. 1 that is Petitioner's one hundred and twenty-one (121) page employment file from Respondent. (T, pp. 82-84). The materials contained in Petitioner's Exhibit No. 1 were sent by Respondent to Petitioner's attorney in response to a subpoena received by Respondent via certified mail on July 20, 2018. (Px 1 – see the copied green card)

CONCLUSIONS OF LAW

Arbitrator's Credibility Assessment

The Arbitrator had an opportunity to observe Petitioner's demeanor at trial and to listen to her testimony. The Arbitrator finds that Petitioner was credible insofar as she was very candid in explaining the circumstances surrounding her accident. Further, Petitioner was credible in her testimony regarding her medical treatment. The Arbitrator further finds that Petitioner testified consistently with her medical records.

Moreover, with respect to the Petitioner's credibility, the Arbitrator notes that Tawanda Evans, Respondent's office manager/human resources designee, testified that Petitioner did her job well for Respondent and Tawanda Evans did not remember any disciplinary issues or disciplinary problems during the time Petitioner worked for Respondent. (T, p. 87).

The Arbitrator has also reviewed Petitioner's employment file subpoenaed from Respondent. (Px 1). During the entire time Petitioner worked for Respondent as a hospice nurse (Petitioner was licensed by the State of Illinois as a registered professional nurse) Petitioner met all of her requisite objectives and successfully performed her job. (Px 1, pp. 51, 69-70 and 77). The Arbitrator notes that during the entire time Respondent employed Petitioner, Respondent never reprimanded Petitioner in any way. (Px 1)

The credibility of other witnesses is discussed below.

ISSUE (F) Is Petitioner's current condition of ill-being causally related to the injury?

After having reviewed Petitioner's May 29, 2018 lumbar MRI and examining Petitioner on June 11, 2018, Dr. Ghanayem opined that he believed Petitioner "…at least aggravated her lumbar disk disease and may have in fact sustained an annular tear/disk herniation from the work injury itself." (Px 6, pp. 3-6; Px 11, dep. exh. no. 5, p. 1)

Dr. Ghanayem testified during his January 15, 2020 deposition that Petitioner re-positioning a patient on June 18, 2016 who weighed 180-200 pounds by lifting a draw sheet by herself is a mechanism of injury that correlates to the injuries to Petitioner's lumbar spine. (Px 11, p. 11)

According to Dr. Laich, the neurosurgeon who treated Petitioner on six (6) occasions beginning on August 10, 2017 and concluding on July 12, 2018, Petitioner suffered a

herniated nucleus pulposus in her lumbar spine that was causally related to her June 18, 2016 injury. (Px 4, pp. 1, 5, 10, 12, 17, 37 and 39)

The doctors and medical personnel who treated Petitioner at the Lavin Anesthesiology Pain Medicine Center at Northwestern Memorial Hospital characterized the injuries to Petitioner's lumbar spine as: multi-level degenerative disc disease, with dehydration greater at L3-4 than L4-5; small left paracentral herniated nucleus pulposus at L3-4 resulting in mild neuroforaminal narrowing; L4-5 diffuse disk bulge due to height loss; L4-5 mild facet disease; L5-S1 lesser disk and fact disease; overall mild bilateral foraminal narrowing L4-5, primarily mild left L3-4, minimal L5-S1. (Px 5, pp. 232, 246 and 259)

According to the following doctors who treated Petitioner at Erie Foster Avenue Health Center: Dr. Simon, Dr. Castro, Dr. Zasadny, Dr. Wyszomirski, Dr. Attele, Dr. Mainter, Dr. Beck, Dr. Hockley, Dr. Saunders and Dr. Agtuca between November 18, 2016 and April 21, 2021, Petitioner suffered a work- related accident involving patient care while lifting a patient on Jun 18, 2016. (Px 3, pp. 3, 10, 15, 21, 37, 49, 55, 83, 88, 94, 105, 119, 129, 134, 149, 153, 177, 187, 191-192, 207, 215, 222-223, 292, 294 and 298)

In a **MetLife** "**Attending Physician Statement Group Disability Income Claims**" form dated May 15, 2017, Dr. Simon was asked "Is your patient's condition work-related?" Dr. Simon's response was an "X" in the "Yes" box. (Px 3, p. 292)

In a **MetLife** "**Attending Physician Statement**" dated April 9, 2021, Dr. Castro was asked "Is your patient's condition work-related?" Dr. Castro's response was an "X" in the "Yes" box. (Px 3, p. 298)

On October 12, 2016 Dr. Wehner noted in her report subsequent to examining Petitioner on that date pursuant to Section Twelve (12) of the Act, Dr. Wehner concluded that Petitioner had what "…would be consistent with a soft tissue injury." (Rx 1, p. 2; Rx 3, Respondent's dep. ex. 2, p. 2) Dr. Wehner also noted that "Lifting a draw sheet with a patient would be a competent cause of a soft tissue lumbar strain…" (Rx. 1, pp. 2-3; Rx 3, Respondent's dep. ex. no 2, pp. 2-3; Rx 3, pp. 41-42) Dr. Wehner testified during her deposition that on June 18, 2016 Petitioner suffered a soft tissue injury because Petitioner had some low back pain, no leg pain and a normal clinical exam. (Rx 3, pp. 13-14) Dr. Wehner opined during her deposition that Petitioner's soft tissue lumbar strain would be causally related to Petitioner's June 18, 2016 work accident because "…lifting a draw sheet would be a competent cause of a soft tissue lumbar strain." (Rx 3, p. 15)

Dr. Wehner noted in her addendum Section Twelve (12) report dated March 24, 2020 that she continued "…to render a diagnosis of low back pain consistent with a soft tissue injury or a sprain." (Rx 2, p. 9; Rx 3, Respondent's dep. exh. no. 3, p. 9)

Dr. Wehner further noted in her addendum Section 12 report that there was "…no medical reason to believe that [Petitioner's] ongoing complaints…were specifically related to her work activities on June 18, 201[6]." (Rx 2, p. 10; Rx 3, Respondent's dep. exh. no. 3, p. 10)

Dr. Wehner testified that Petitioner's ongoing pain complaints were not causally related to Petitioner's June 18, 2016 accident because Petitioner had a lumbar strain with pain complaints that increased dramatically and did not respond well to physical therapy or injection treatment and that did not make sense medically. (Rx 3, pp. 25-27)

Dr. Wehner discussed Petitioner's December 23, 2016 lumbar MRI done at the MRI Lincoln Imaging Center. (Px 3, pp. 248-249; Rx 3, Petitioner's dep. exh. no. 3). Dr. Wehner concluded that this MRI showed "mild degenerative changes" and calling these herniations is not appropriate or accurate because these are not focal herniations, but diffuse disc bulges. (Rx 2, pp. 2-3; Rx 3, p. 75; Rx 3, Respondent's dep. exh. no. 3, pp. 2-3) Dr. Wehner criticized the findings of the radiologist, Dr. Eugene Pai, for Petitioner's December 23, 2016 MRI. (T, p. 76; Px 3, pp. 248-249). Dr. Pai's impression of Petitioner's December 23, 2016 MRI: 1. Right herniation L5 with underlying bulge narrowing the foramina. 2. Central herniation L3-4 & L5-S1. (T, p. 76; Px 3, p. 249) Dr. Wehner labelled Dr. Pai's impression of Petitioner's December 23, 2016 MRI films "…an inconsistent report." (T, pp. 76-77).

Dr. Wehner explained that there are several other physicians at MRI Lincoln Imaging Center reading MRI films and with previous MRIs she has called those other physicians up and told the other physicians they have "…overcalled it and they've changed it." (T, p. 77). After these phone calls, the other physicians at MRI Lincoln Imaging Center have changed their reports and sent the changed reports back to Dr. Wehner stating that there was no clinical significance to the finding Dr. Wehner questioned. (T, pp. 77-78) Dr. Wehner did not call MRI Lincoln Imaging Center up to question Dr. Pai's findings in Petitioner's December 23, 2016 lumbar MRI report. (T, p. 78)

Dr. Wehner noted in her initial Section Twelve (12) report that Petitioner had no initial report of any leg pain, some intermittent reports of some leg pain, with no formal neurologic exam done. (Rx 1, p. 2; Rx 3, Respondent's dep. ex. no. 2, p. 2)

The Arbitrator notes that the claim by Dr. Wehner that Petitioner had no initial report of leg pain and only some intermittent reports of some leg pain is simply not true. Petitioner's records from Experience Chiropractic (Px 2) contain reports of right leg pain on the following dates subsequent to June 18, 2016: July 7, 2016, July 11, 2016, July 14, 2016, July 25, 2016, July 26, 2016, August 1, 2016, August 2, 2016, August 8, 2016, August 9, 2016, August 10, 2016, August 11, 2016, August 15, 2016, August 16, 2016, August 17, 2016, August 24, 2016, August 31, 2016, September 27, 2016 and September 28, 2016. (Px 2, pp. 10-11, 13, 23, 25, 31, 33, 37-38, 40, 42, 44-46, 50, 54, 77 and 79; Rx 3, pp. 47-70, Petitioner's dep. ex. no. 1 to Rx 3) The

Arbitrator also notes that in the questionnaire Petitioner filled out for Dr. Wehner on October 12, 2016 immediately prior to seeing Dr. Wehner, on page four (4) and in response to question number nine (9), Petitioner wrote "Lower back pain – tingling with pain in right leg, sharp at times." (Rx 3, p. 71; Petitioner's dep. ex. no. 2, p. 4 to Rx 3)

Subsequent to examining Petitioner on October 12, 2016, Dr. Wehner concluded that Petitioner's clinical exam showed "…some self-limiting behavior in bending, but is otherwise normal." (Rx 1, p. 3; Rx 3, Respondent's dep. exh. no. 2, p. 3) Dr. Wehner testified that Petitioner engaged in mild self-limiting behavior because when Dr. Wehner asked Petitioner to bend forward, Petitioner had some mild limitation. (Rx 3, p. 16)

Dr. Ghanayem noted on June 12, 2019 that he "…found no self-limiting behaviors during [his] examination or by [N]urse Pietrowski." (Px 11, Petitioner's dep. exh. no. 5, p.1). Dr. Ghanayem also noted that he "…found no evidence of symptom magnification or malingering when [he] saw [Petitioner,] nor did [N]urse Pietrowski. (Px 11, Petitioner's dep. exh. no. 5, p. 1) Dr. Ghanayem testified that neither he nor Nurse Pietrowski saw Petitioner engaging in any self-limiting behavior. (Px 11, p. 20). Dr. Ghanayem went on to testify that he did not see symptom magnification from Petitioner. (Px 11, p. 21)

On August 10, 2017, Dr. Laich's recommended course of treatment for Petitioner consisted of: staged facet injections as needed, pending clinical response, physical therapy and weight loss. (Px 4, p. 39; Rx 3, p. 85).

Dr. Wehner admitted that the treatment Dr. Laich recommended for Petitioner on August 10, 2017 would not be the course of treatment one would recommend for a lumbar strain or soft tissue injury. (Rx 3, pp. 85-86) Dr. Wehner also admitted that the injections Petitioner received from Dr. Chung at Northwestern Memorial Hospital on September 26, 2017, February 13, 2018 and June 25, 2018 would not be the treatment one would prescribe for a lumbar strain or soft tissue injury. (Rx 3, pp. 87, 89 and 93-94; Px 5, pp. 213, 241 and 252)

Dr. Ghanayem expressed his disagreement with how Dr. Wehner characterized Petitioner's injury. Dr. Ghanayem testified that Dr. Wehner's characterization of Petitioner's injury as "…a soft tissue injury is a mischaracterization of [Petitioner's] injury." (Px 11, pp. 15-16). Dr. Ghanayem explained that Petitioner does not have a soft tissue injury because "…there's a disc injury to the L3-4 level with the annular tear and small protrusion there or [a] bulge. And there is an aggravation of underlying disc degeneration." (Px 11, p. 16)

Dr. Ghanayem further expressed his disagreement with Dr. Wehner's characterization of Petitioner's injury when he explained that Petitioner injured more than just a muscle or tendon because "There is actually [a] disc injury and disc aggravation." (Px 11, p. 16). And, Dr. Ghanayem continued to opine during his

deposition that Petitioner "…may have in fact sustained an annular tear/disc herniation from the work injury itself." (Px 11, p. 16, dep. exh. no. 5, p. 1)

After reviewing Dr. Wehner's deposition transcript (Rx 3), Dr. Ghanayem further explained why he disagreed with Dr. Wehner's characterization of the injuries Petitioner suffered to her lumbar spine that the June 18, 2016 caused. Dr. Ghanayem framed the critical issue in this case when he stated on July 20, 2020 that "The Fundamental issue as I see it in this case, really comes down to how one interprets [Petitioner's] lumbar MRI scan." (Px 12, p. 2; Px 13, p. 1).

Dr. Ghanayem pointed out that "If the arbitrator or court decides that Dr. Wehner is indeed correct, and there are no clinically relevant problems on [Petitioner's] lumbar MRI scan, then Dr. Laich, Advance Practice Nurse Pietrowski and myself are basically wrong. (Px 12, p. 2; Px 13, p. 1). Dr. Ghanayem went on to state that "If Dr. Wehner's interpretation of the MRI scan is adopted by the Commission, then this is nothing more than a soft tissue injury requiring a brief course of nonoperative care, which can include physical therapy and chiropractic care, and then a return back to regular work activities after a defined period of time." (Px 12, p. 2; Px 13, p. 1)

Dr. Ghanayem concluded on July 20, 2020 that "…if the arbitrator or industrial commission adopts the professional opinions of Dr. Laich, who is a board certified neurosurgeon; Advance Practice Nurse Pietrowski, who recently served as President of the National Association of Orthopaedic Nurses' certifying board; and myself and then truly believes that there is a structural entity that was injured/aggravated in [Petitioner'] back, then the opinions that we have adopted should carry the day." (Px 12, p. 2; Px 13, p. 1)

The Arbitrator notes that during direct and cross examination, Petitioner discussed motor vehicle accidents that occurred on: December 29, 2018, February, 2016, December 14, 2016 and February 12, 2018. (T, pp. 32 and 57-60). The only records offered into the evidence about any of these motor vehicle accidents came from St. Francis Hospital for the February 12, 2018 motor vehicle accident. (Px 10; Rx 5). Petitioner testified that the February 12, 2018 motor vehicle accident did not in any way change or alter the condition of Petitioner's back. (T, p. 32).

Dr. Wehner testified that she never had any records of any kind to review with respect to Petitioner's February 12, 2018 motor vehicle accident. (Rx 3, pp. 22 and 88). Dr. Wehner did not have a specific opinion as to whether or not the February 12, 2018 motor vehicle accident had any bearing on or changed any of the opinions Dr. Wehner expressed on October 12, 2016, nor did Dr. Wehner know whether or not Petitioner's February 12, 2018 motor vehicle accident damaged or altered the condition of Petitioner's lumbar spine in any way. (Rx 2, p. 9; Rx 3, p. 88, Respondent's dep. exh, no. 3, p. 9)

Based upon there being no evidence that any of these motor vehicle accidents in any way changed or altered the condition of Petitioner's lumbar spine, including, but not

limited to, the motor vehicle accident of February 12, 2018, the Arbitrator finds that none of these motor vehicle accidents had any effect on the issue of whether or not Petitioner's current condition of ill-being is causally related to the injury.

Petitioner testified that prior to June 18, 2016 she had no problems with her: lumbar spine, feet, legs; and, she never treated for depression before her June 18, 2016 work accident. (T, pp. 43 and 54-55; Px 1, p. 101). "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, 63, 442 N.E.2d, 908 at 911 (1982)

The Arbitrator finds the opinions of: Dr. Ghanayem, Dr. Laich, Dr. Simon, Dr. Castro and the remaining doctors previously set forth from the Erie Foster Avenue Health Center to be far more credible and persuasive than Dr. Wehner's opinion because of the abundant evidence set forth herein which proved that Petitioner suffered structural injuries to her lumbar spine that were caused by Petitioner's June 18, 2016 work accident.

In light of the foregoing, the Arbitrator concludes that Petitioner's current condition of ill-being for her: lumbar spine, feet, legs and depression are causally related to her June 18, 2016 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 Arbitrator incorporates the findings of fact and conclusions of law as though fully set forth herein and relies on same in concluding that Petitioner has proven by a preponderance of the evidence that the medical services that were provided to Petitioner were reasonable and necessary.

Dr. Wehner noted and testified that Petitioner required no additional treatment of any kind after she saw Petitioner pursuant to Section 12 on October 12, 2016. (Rx 2, p. 10; Rx 3, p. 25; Respondent's dep. ex. no. 3, p. 10)

The Arbitrator initially notes that Respondent paid none of Petitioner's medical bills. (Rx 8, p. 2). Respondent paid Review Med L.P. (Rx 8, p. 2) to review Petitioner's records and bills from Experience Chiropractic (Px 2 and Px 15), but Respondent did not offer into evidence the review that Review Med L.P. did of Petitioner's bills and records from Experience Chiropractic. Instead, Petitioner offered into evidence the review that Review Med L.P. did of Petitioner's bills and records from Experience Chiropractic. (Px 14)

Dr. Khalid Yousuf, on behalf of Review Med L.P., reviewed Petitioner's bills and records from Experience Chiropractic, as well as Dr. Wehner's October 12, 2016

Section 12 report, and on October 30, 2016 Dr. Yousuf concluded "…that 20 visits of chiropractic therapy over a two-month period would be more than adequate to help [Petitioner] return to a home exercise program and then return to full duty." (Px 14, pp. 4 and 110-112)

Dr. Wehner reviewed the Review Med, L.P. documentation (Px 14) which discussed Petitioner's Experience Chiropractic records for medical necessity and Dr. Wehner disagreed with Dr. Yousuf's conclusion that twenty (20) chiropractic visits would have been reasonable and necessary. (Rx 3, pp. 20, 27-28, 43 and 74). Instead, Dr. Wehner opined that 6 to 12 chiropractic visits at Experience Chiropractic would have been reasonable and necessary. (Rx 3, pp. 27-28, 42-43 and 74)

Dr. Ghanayem testified that thirty 30-36) chiropractic visits is what Dr. Ghanayem would consider reasonable, necessary and causally connected to Petitioner's June 18, 2016 work injury. (Px 11, pp. 12 and 18-19)

After reviewing the opinions of Dr. Ghanayem, Dr. Wehner and Dr. Yousuf, of Review Med, L.P., the Arbitrator finds the opinion of Dr. Ghanayem to be persuasive and concludes that 33 chiropractic visits are reasonable, necessary and causally connected to Petitioner's June 18, 2016 work injury. Accordingly, Respondent is to pay Experience Chiropractic pursuant to Sections 8(a) and 8.2 of the Act for Petitioner's 33 chiropractic visits that began on June 20, 2016 and concluded on August 22, 2016. (Px 15)

Dr. Ghanayem testified on January 15, 2020 that the care Petitioner received at the Erie Foster Avenue Health Center on November 18, 2016 and April 7, 2017 was reasonable, necessary and causally connected to Petitioner's June 18, 2016 work injury. (Px 11, pp. 12-13; see also, Px 30)

Dr. Ghanayem testified that Petitioner's lumbar MRI of December 23, 2016 done at MRI Lincoln Imaging Center (Px 3, pp. 248-249) was reasonable, necessary and causally connected to Petitioner's June 18, 2016 work injury. (Px 11, p. 13)

Dr. Ghanayem testified that the neurosurgical care Petitioner received from Dr. Laich beginning on August 10, 2017 and concluding on July 12, 2018 was reasonable, necessary and causally connected to Petitioner's June 18, 2016 work injury. (Px 11, pp. 13-14; Px 16)

Dr. Ghanayem testified that the injections Petitioner received from Dr. Chung at Northwestern Memorial Hospital on September 26, 2017, February 13, 2018 and January 10, 2019 were reasonable, necessary and causally connected to Petitioner's June 18, 2016 work injury. (Px 11, pp. 14, 25-26; Px 18)

Dr. Ghanayem testified that the 12 sessions of physical therapy Petitioner received at Weiss Memorial Hospital beginning on October 12, 2017 and concluding on

December 12, 2017 were reasonable, necessary and causally connected to Petitioner's June 18, 2016 work injury. (Px 11, p. 14; Px 20)

Dr. Ghanayem testified that the 33 sessions of physical therapy Petitioner received at Swedish Covenant Hospital beginning on March 7, 2018 and concluding on November 15, 2018 were reasonable, necessary and causally connected to Petitioner's June 18, 2016 work injury. (Px 11, p. 14; Px 17)

Dr. Ghanayem testified that the examinations Petitioner received from him and Advanced Practice Nurse Dorota Pietrowski at Loyola University Medical Center on May 3, 2018 and June 11, 2018, along with the lumbar MRI Petitioner received at Loyola University Medical Center on May 29, 2018, were reasonable, necessary and causally connected to Petitioner's June 18, 2016 work injury. (Px 11, p. 15; Px 19)

Dr. Ghanayem testified that when one has a chronic condition, like Petitioner, then "…an occasional injection would be appropriate, the use of nonnarcotic medication…Motrin style anti-inflammatories can be helpful." (Px 11, pp. 24-25). Dr. Ghanayem also explained that for Petitioner's "…type of problem sometimes [Petitioner will] need like little refresher therapy programs every now and then." (Px 11, p. 24)

Dr. Ghanayem opined on July 20, 2020 that "The treatment that we have recommended relative to [Petitioner's] lumbar disk problem that was aggravated/caused by a competent cause of a low back injury, has been very conventional and conservative: Chiropractic care as we have talked about in the past for a pre-determined period of time, physical therapy, use of nonnarcotic medication and occasional injections." (Px 12, p. 2; Px 13, p. 1)

Dr. Ghanayem's opinion that Petitioner continues to require additional treatment that included injections and therapy programs has remained unaltered because on September 23, 2021 Dr. Ghanayem noted that Petitioner's exam remained unchanged and his impression was "…that [Petitioner] continues to have ongoing symptoms related to her lower back and additional maintenance care as I have indicated in the past would be appropriate." (Px 6, p. 7)

The Arbitrator notes that the following bills all contain zero balances: Swedish Covenant Medical Group – Dr. Laich (Px 16), Swedish Covenant Hospital (Px 17), Northwestern Memorial Hospital (Px 18), Loyola University Medical Center (Px 19), Weiss Memorial Hospital – 10/12/17 – 12/12/17 (Px 20) and Weiss Memorial Hospital – 12/17/20 – 02/24/21 (Px 21)

Based upon Dr. Ghanayem's opinions and testimony, the Arbitrator finds that all of the bills set forth in the above paragraph (Px 16, Px 17, Px 18, Px 19, Px 20 and Px 21) are reasonable, necessary and causally connected to Petitioner's June 18, 2016 work injury. In the event that any of these bills have any unpaid balances, then Respondent is to hold Petitioner harmless from any claims made by the medical

providers listed in this paragraph and to pay any unpaid balances pursuant to the fee schedule and Sections 8(a) and 8.2 of the Act.

Petitioner testified that her medical bills either have been paid or will be paid through the Illinois Department of Healthcare and Family Services or Petitioner's insurance coverage through Blue Cross Blue Shield Community or Aetna. (T, pp. 44-45). Petitioner's insurance through Blue Cross Blue Shield Community and Aetna is Medicaid Insurance. (T, p.45)

The Arbitrator notes that the bills contained in Px 30 from the Erie Foster Avenue Health Center do not contain zero balances. The Arbitrator notes the difficulty Petitioner's counsel experienced while trying to subpoena and retrieve Petitioner's medical bills and medical records from Erie Foster Avenue Health Center. (Px 30, pp. 1-9). Based upon Petitioner's testimony that her medical bills (with the exception of the bills from Experience Chiropractic) have been paid or will be paid by Medicaid, the Arbitrator concludes that Petitioner's bills from the Erie Foster Avenue Health Center either have been paid or will be paid by Medicaid.

The Arbitrator further concludes based upon Dr. Ghanayem's opinions and testimony that Petitioner's bills from the Erie Foster Avenue Health Center are reasonable, necessary and causally connected to Petitioner's June 18, 2016 work injury; and, if any of Petitioner's bills from the Erie Foster Avenue Health Center have any unpaid balances, then Respondent is to hold Petitioner harmless from any claims made by the Erie Foster Avenue Health Center and to pay any unpaid balances pursuant to the fee schedule and Sections 8(a) and 8.2 of the Act.

Based upon this finding that Petitioner's medical bills contained in Px 16, Px 17, Px 18, Px 19, Px 20, Px 21 and Px 30 are reasonable, necessary and causally connected to Petitioner's June 18, 2016 work injury, if any of the following entities: Meridian Medicaid, Blue Cross Community ICP, Blue Cross Medicaid, Aetna Medicaid, Aetna Better Health of Illinois, Aetna Better Health FHP, Medicaid Managed Care, Medicaid Replacement Insurance and the Illinois Department of Healthcare and Family Services seek reimbursement for any of Petitioner's above referenced medical bills that are reasonable, necessary and causally related to Petitioner's June 18, 2016 work accident, then Respondent is to reimburse any of these entities and to hold Petitioner harmless from any claims by any of the aforesaid entities listed in this paragraph in the event that any of these entities seek reimbursement.

The Arbitrator has reviewed Petitioner's Exhibit No. 27 dated November 24, 2021, which is a subrogation document from Equian for Petitioner's Medicaid coverage on behalf of Aetna Better Health of Illinois. The Arbitrator notes that all of the entries contained in Px 27 are charges for medical services that the Arbitrator has found are reasonable, necessary and causally related to Petitioner's June 18, 2016 work accident. Based upon this finding, Respondent is to reimburse Equian in the amount of $1,118.02.

The Arbitrator has reviewed Petitioner's Exhibit No. 28 (Illinois Department of Healthcare and Family Services ledger of payments made on Petitioner's behalf beginning on June 1, 2016 and concluding on December 3, 2020). The Arbitrator notes that no payments were made to any of the medical providers listed on page two (2) and concluding on page eighteen (18). The Arbitrator further notes payments were made beginning on page nineteen (19) and concluding on page twenty-six (26) in the amount of: $30.47 for Petitioner's prescription medication. The Arbitrator finds that the charges for prescription medication contained in Exhibit No. 28 are reasonable, necessary and causally related to Petitioner's June 18, 2016 work accident. Based upon this finding, Respondent is to reimburse the Illinois Department of Healthcare and Family Services in the amount of: $30.47.

ISSUE (K) Is Petitioner entitled to any prospective medical care?

The Arbitrator incorporates the findings of fact and conclusions of law as though set forth herein and relies on same in concluding that Petitioner has proven by a preponderance of the evidence that Petitioner should be awarded prospective medical care pursuant to Section 8(a) of the Act.

Dr. Wehner opined that Petitioner reached maximum medical improvement (MMI) on October 12, 2016. (Rx 1, p. 3; Rx 3, Respondent's dep. exh. no. 2, p. 3)

Dr. Ghanayem never placed Petitioner at MMI. Dr. Ghanayem testified that Petitioner has a chronic condition that requires physical therapy, injections and non-narcotic medication. (Px 11, pp. 24-25)

On May 15, 2017 Dr. Simon stated that Petitioner had not reached maximum medical improvement. (Px 3, p. 293)

On September 23, 2021, Dr. Ghanayen stated that Petitioner requires additional care. (Px 6, p. 7)

The Arbitrator notes that Petitioner has not stopped treating, with her treatment beginning on June 20, 2016 and Petitioner's treatment continuing with her most recent spinal injection occurring at Northwestern Memorial Hospital on April 19, 2022. (T, p. 43)

The Arbitrator further notes that since Petitioner's June 18, 2016 work injury, only one doctor has placed Petitioner at MMI, Dr. Wehner. Dr. Ghanayem, Dr. Laich, Dr. Castro and Dr. Simon never placed Petitioner at MMI.

The Arbitrator relies on Dr. Ghanayem's opinion that the condition of Petitioner's lumbar spine requires more treatment that includes physical therapy, injections and non-narcotic medication, as well as Petitioner's credible testimony that Petitioner continues to experience on-going symptoms because of the condition in her lumbar spine. (T, pp. 50-55 and 60-62)

Accordingly, the Arbitrator concludes that Respondent shall pay for Petitioner's prospective medical care for the medical treatment of Petitioner's lumbar spine as provided in Sections 8(a) and 8.2 of the Act.

ISSUE (L) What temporary benefits are in dispute?

The Arbitrator incorporates the findings of fact and conclusions of law as though fully set forth herein and relies on same in concluding that Petitioner has proven by a preponderance of the evidence that Petitioner should be awarded temporary total disability benefits.

Petitioner testified that after trying to work on June 19, 2016, Petitioner never worked again for Respondent and Pediatric Services of America, Inc. (T, pp. 11, 62-63, 67-68; Rx 8, p. 1)

On October 12, 2016 Dr. Wehner opined that Petitioner was "…medically capable of returning to work at full duty without restrictions." (Rx 1, p. 3; Rx 3, Respondent's dep. ex. no. 2, p. 3)

According to Petitioner and Tawanda Evans, Petitioner never resigned her position as a hospice nurse working for Respondent. (T, pp. 22-25, 89; Px 1; Rx 6)

The only offer ever made by Respondent to Petitioner on October 14, 2016 was a return to full duty work as a hospice nurse and this offer was based upon Dr. Wehner's opinion contained in her initial Section 12 report. (T, pp. 24-25, 76-77, 79 and 84-88; Rx 1; Rx 6)

According to Tawanda Evans, the only job that Petitioner would have worked for Respondent after October 14, 2016 was as a hospice nurse. (T, p. 90). Tawanda Evans testified that as a hospice nurse, Petitioner would have been required to move human beings, sometimes very large human beings, and that is heavy labor. (T, pp. 81-82, 86 and 93-94)

On October 18, 2016 Dr. Warman stated that Petitioner's "…employer wants her to return to full time work without restrictions. This [is] not advised as [Petitioner] is likely to re-injure herself when lifting patients and doing other activities without easing back into her normal work activities that caused the initial injury." (Px. 2, p. 98)

On May 15, 2017, in the MetLife "Attending Physician Statement Group Disability Income Claims" form, Dr. Mark Simon was asked "Have you advised your patient when they can return to work?" (Px 3, p. 294). Dr. Simon responded to this question by placing an "X" in the "No" box. (Px 3, p. 294). And, in explaining and clarifying this answer, Dr. Simon stated that "We are awaiting physical therapy…authorization." (Px 3, p. 294). Also, in response to the question of "List

any restrictions to work or activity. (Please be as specific as possible.)," Dr. Simon wrote "Needs surgical opinion. Cannot sit/stand/bend/walk for more than a few minutes." (Px 3, p. 294)

Dr. Laich kept Petitioner off work on: August 10, 2017, September 21, 2017, November 9, 2017, January 5, 2018, April 11, 2018, May 24, 2018 and July 12, 2018. (Px 4, pp. 1, 6, 11-12, 24, 27, 29, 34 and 39)

On June 12, 2019 Dr. Ghanayem noted that "As far as work is concerned, having [Petitioner] off for 6-8 weeks would have been medically reasonable followed by return to light duty consisting of no more that 10 pounds of lifting with no repetitive bending and stooping would have been appropriate." (Px 11, Petitioner's dep. ex. no. 5, p. 1). Dr. Ghanayem went on to opine on June 12, 2019 that Petitioner "…could return back to work, but would require restrictions. I think it would be helpful at this point to obtain a functional capacity evaluation to define those restrictions with greater detail." (Px 11, Petitioner's dep. ex. no. 5, p. 2). Dr. Ghanayem opined on June 12, 2019 that he did not believe Petitioner could "…return back to work at regular duty as a hospice nurse." (Px 11, Petitioner's dep. ex. no. 5, p. 2)

Dr. Ghanayem testified during his deposition on January 15, 2020 that it was his understanding that light duty did not exist for hospice nurses and full duty would not be appropriate for Petitioner, so if there is no light duty available, then Petitioner cannot return to work. (Px 11, pp. 17-21). Dr Ghanayem further explained that if there is no light duty work for Petitioner, then Petitioner cannot return to work because a hospice nurse is not a light duty job. (Px 11, p. 21)

On April 9, 2021, in the MetLife Disability Claims "Attending Physician Statement," Dr. Jessie Castro was asked "Have you advised your patient when they can return to work?' (Px 3, p. 300). Dr. Castro responded to this question by placing an "X" in the "No" box. (Px 3, p. 300). And, Dr. Castro explained this response by stating that Petitioner "…has issues with [activities of daily living]…would need retraining for a new career." (Px 3, p. 300). The next question asked Dr. Castro to "List any restrictions to work or activity. (Please be as specific as possible.)." (Px 3, p. 300). Dr. Castro answered this question by stating that he restricted Petitioner from: "Heavy lifting, excessive twisting/bending, heavy physical labor…standing for whole shifts, moving people, physically engaging people." (Px 3, p. 300)

Dr. Ghanayem noted on September 23, 2021 that "Given that [Petitioner] has not had a job offer to return back to work at light duty, she [should] remain off work at this time from her old job as a hospice nurse." (Px 6, p. 7)

The Arbitrator notes that since Dr. Wehner returned Petitioner to full duty work as of October 12, 2016, subsequent to October 12, 2016, Dr. Simon, Dr. Laich, Dr. Castro and Dr. Ghanayem never returned Petitioner to full duty work. Dr. Simon, Dr. Laich and Dr. Castro never returned Petitioner to work. And, Dr. Castro opined that

Petitioner required retraining because she could no longer work as a hospice nurse. Dr. Ghanayem opined on multiple occasions that Petitioner could not return to work as a hospice nurse and could not return to work without restrictions.

An employee is temporarily totally incapacitated from the time the injury incapacitates the employee from work until such time as the employee is as far recovered or restored as the permanent character of the injury will permit. Thus, once an injured employee's physical condition stabilizes, the employee is no longer eligible for temporary total disability benefits. *Joyce Manis v. The Industrial Commission*, 595 N.E.2d 158, 160 230 Ill.App.3d (1992); citing *Hayden v. Industrial Commission*, 574 N.E.2d 99, 214 Ill.App.3d 749, 754 (1991).

According to Dr. Ghanayem on September 23, 2021, Petitioner's condition had not stabilized because Petitioner continued to have ongoing symptoms in her back, her exam remained unchanged and she could not return to work as hospice nurse. (Px 6, p, 7). Additionally, Petitioner's treatment continues because her condition has not stabilized and she had her last spinal injection at Northwestern Memorial Hospital on April 19, 2022. (T, p. 43). Moreover, ten (10) spinal injections between September 26, 2017 and April 19, 2022 clearly demonstrate that Petitioner's spinal condition has yet to stabilize.

The Arbitrator notes that Petitioner's counsel requested from Respondent's counsel on April 6, 2020 that Respondent pay all of the TTD benefits Petitioner was owed since her June 18, 2016 injury date. (Px 23). Respondent continued to rely on Dr. Wehner's opinion that Petitioner could return to full duty work as of October 12, 2016 and Respondent refused to pay Petitioner the TTD benefits owed to her since Respondent last paid Petitioner TTD benefits on October 3, 2016. (Rx 8, p. 1)

The Arbitrator finds that Respondent's reliance on Dr. Wehner's October 12, 2016 opinion that Petitioner could return to full duty work was misplaced. The Arbitrator finds the opinions of: Dr. Ghanayem, Dr. Laich, Dr. Castro and Dr. Simon to be far more persuasive that Petitioner could not work and was incapable of returning to work as a hospice nurse. Therefore, the Arbitrator awards 308 4/7 weeks of TTD benefits beginning on June 19, 2016 and concluding on May 20, 2022.

Respondent stopped paying Petitioner's TTD benefits on October 4, 2016. (Px 22). Beginning on June 20, 2016 and concluding on October 3, 2016, Respondent paid Petitioner TTD benefits that totalled: $30,997.98. (Rx 8, p. 1). Respondent has a credit of: $30,997.98 against TTD benefits owed to Petitioner.

Petitioner testified that she currently receives non-occupational indemnity disability benefits from Met Life in the amount of: $2,833.74 a month, or $708.34 a week and these disability benefits from Met Life are not taxed. (T, pp. 48-49; Px 29). After an appeal and a significant passage of time to receive disability benefits from Met Life, Petitioner began to receive these benefits on November 2, 2018 and continues to receive these benefits today. (T, pp. 48-50; Px 29).

These disability benefits that Petitioner receives from Met Life are a benefit Petitioner received because of her employment with Respondent. (Px 1, p. 110). Accordingly, Respondent has an additional credit of: $184,167.10 against TTD benefits owed to Petitioner and since this is a credit pursuant to Section 8(j) of the Act, Respondent shall hold Petitioner harmless from any reimbursement claims made by Met Life.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	12WC013640
Case Name	Mark Couch v. State of Illinois - Illinois Youth Center - St. Charles
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0510
Number of Pages of Decision	8
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Drew Dierkes

DATE FILED: 11/28/2023

/s/Christopher Harris, Commissioner

Signature

DISSENT: /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

MARK COUCH,

Petitioner,

vs. NO: 12 WC 13640

STATE OF ILLINOIS,
ILLINOIS YOUTH CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed February 3, 2023, is hereby affirmed and adopted.

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

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

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

November 28, 2023

CAH/tdm
O: 11-16-23
052

/s/ *Marc Parker*
Marc Parker

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

DISSENT

I respectfully dissent from the Majority as I believe the evidence does not support an award of 45% MAW. While I agree with the analysis of the first four factors of Section 8.1b, I disagree with the Arbitrator's analysis of the fifth factor. The analysis fails to address Dr. Sinha's August 26, 2015 examination—the last formal treatment Petitioner received relating to this incident. Dr. Sinha noted that Petitioner appeared stable, and no psychiatric complaints were expressed. Dr. Sinha's examination revealed no signs of cognitive difficulty or anxiety. In fact, Petitioner stated that he stopped all medication 1 year prior. He was doing well and was working as a part-time bus driver, and he was working as an umpire. Dr. Sinha recommended Petitioner continue to stay off all medication and the case was closed. The record establishes that the Petitioner has not had any significant medical treatment since this appointment. Because of this, I find the evidence favors a reduction in the permanent partial disability award. I would award Petitioner 10% MAW.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	12WC013640
Case Name	Mark Couch v. Illinois Youth Center
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	5
Decision Issued By	Gerald Granada, Arbitrator

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Drew Dierkes

DATE FILED: 2/3/2023

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

/s/*Gerald Granada, Arbitrator*
Signature

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

February 3, 2023

/s/ *Michele Kowalski*

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MARK COUCH
Employee/Petitioner

v.

ILLINOIS YOUTH CENTER
Employer/Respondent

Case # **12** WC **13640**

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 **1/18/23**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **12/13/11**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**80,244**; the average weekly wage was $**1,543.14**.

On the date of accident, Petitioner was **53** years of age, ***married*** with **2** dependent children.

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

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

ORDER

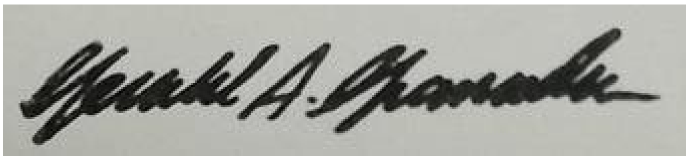
Respondent shall pay any outstanding, related, reasonable and necessary medical expenses as set forth in Petitioner's exhibits subject to the Fee Schedule, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $1,028.76/week for 8 weeks, commencing 4/8/14 through 6/3/14 for unpaid TTD, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $695.78/week for 225 weeks, because the injuries sustained caused the 45% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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



FEBRUARY 3, 2023

Signature of Arbitrator **Gerald Granada**

FINDINGS OF FACT

This case involves Petitioner Mark Couch, who alleges to have sustained injuries while working for the State of Illinois / Illinois Youth Center (IYC) on December 13, 2011. Respondent disputes Petitioner's claim, with the issues being: 1) causation; 2) medical expenses; 3) TTD; and 4) nature and extent.

Petitioner worked as a dean for students at the IYC. IYC is a juvenile offender prison which houses the worst young offenders. Petitioner worked 26 years for Respondent. On December 13, 2011, he was walking in a stairwell with three new students when one of the student inmates attacked Petitioner and struck him in the mouth and left side of the head without warning. Petitioner never returned to IYC for work after the attack. He treated with a number of professionals for his injuries through 2015, including Dr. Sinha (psychiatrist), Dr. Bhatia (neurologist), Dr. Rest (psychologist) and providers at Rehabilitation Institute of Chicago and Marionjoy. The collective diagnoses for these providers included post-concussion syndrome, PTSD, depression, anxiety, cognitive disorder. See Sinha (PX1 p.9, 22-24); Bhatia (PX3 p.9-12); Rest (PX2 p.3, 16). All the treaters causally related these diagnoses to the December 13, 2011 attack. Dr. Sinha and Dr. Rest advised that he could not return to work for the Respondent. Petitioner's treatment following this incident has included physical therapy, speech therapy, occupational therapy, medication, and continued psychiatric treatment.

Petitioner was paid from the time he was off work until April 2014. In April 2014, he received communications that he was required to return to work and if he did not, he would be forced to retire. None of Petitioner's treating doctors released him to return to work in his previous job. Petitioner opted to retire as of June 3, 2014. Following his retirement, Petitioner worked as a bus driver for a different employer.

Petitioner underwent an IME with psychiatrist Alexander Obolsky - who testified via evidence deposition on June 30, 2014. (RX 5) Dr. Obolsky opined that Petitioner sustained a mild traumatic brain injury and confirmed Petitioner's anxiety and depressive disorder. He could not causally relate the anxiety and depression because he believed Petitioner was exaggerating his symptoms and misattributing the causation of those symptoms. Dr. Obolosky opined that Petitioner was at psychiatric MMI at least three months after the accident and was able to return to full duty work. He did not believe the Petitioner suffered PTSD because he believed the assault Petitioner described was not an objectively stressful event. He further opined that Petitioner's current condition of mental ill-being was not causally related to the December 13, 2011 work incident.

Petitioner testified that since the assault, he has not been the same person. He described himself as becoming less socially active as he prefers to be alone. He has issues with memory and finding correct words when speaking. On the alleged accident date, Petitioner was assaulted by a young black man and since the incident, has been afraid of young black men, despite having worked with them for over 26 years before the assault. Watching the violence in the news affects his condition. He has had bouts of anxiety and depression for which he has taken medication to help stabilize those conditions.

CONCLUSIONS OF LAW

1. Regarding the issue of causation, the Arbitrator finds that the Petitioner has met his burden of proof. This finding is supported by the Petitioner's unrebutted testimony and the medical evidence from his treating physicians which all show that following his undisputed December 13, 2011 assault at work, he was diagnosed with post-concussion syndrome, PTSD, depression, anxiety, and cognitive disorder. All of Petitioner's treating physicians have causally connected these conditions to Petitioner's December 13, 2011 work incident. The

Arbitrator is not persuaded by the opinions of the IME Dr. Obolsky, particularly his opinion that the Petitioner's assault in a stairwell by a criminal offender was not a stressful event. As such, the Arbitrator concludes that the Petitioner's current condition of ill-being is causally related to his December 13, 2011 accident.

2. Regarding the issue of medical expenses, the Arbitrator finds that the Petitioner's medical expenses stemming from his December 13, 2011 accident have been reasonable and necessary in addressing his work-related conditions. Therefore, Respondent shall pay such expenses as set forth in the Petitioner's exhibits subject to the fee schedule. This includes the outstanding balances of $100.00 in Petitioner's Exhibit 3, $1,775.00 in Petitioner's Exhibit 4, and $802.26 in Petitioner's Exhibit 8.

3. Regarding the issue of TTD, the Arbitrator finds that the Petitioner was temporarily totally disabled from December 14, 2011 through the date of his retirement on June 3, 2014. During this time, Petitioner's treaters had indicated Petitioner should not return to his job with Respondent. TTD was cut off on April 7, 2014 following the Dr. Obolsky IME indicating Petitioner was at MMI and could return to work full duty. Following Petitioner's retirement in June, 2014, he obtained employment elsewhere. The parties have stipulated that Petitioner was paid TTD or other compensatory benefits through April 7, 2014. Therefore, Respondent shall pay TTD for the remaining period of April 8, 2014 through June 3, 2014.

4. Regarding the issue of the nature and extent of the Petitioner's injuries, the Arbitrator applies the factors set forth in Section 8.1b of the Act and notes the following: **(i)** no impairment rating was submitted into evidence and the Arbitrator gives no weight to this factor; **(ii)** Petitioner was a dean of students who arguably was not able to return to this job and opted for retirement after which he took lesser paying work - a factor to which the Arbitrator gives significant weight; **(iii)** Petitioner was 53 years old at the time of injury - a factor to which the Arbitrator gives some weight; **(iv)** there was evidence of future earnings being impacted due to this injury given the question of whether Petitioner could have returned to this job or other suitable employment and the Arbitrator gives considerable weight to this factor; **(v)** there was evidence of disability which show that the Petitioner sustained a traumatic brain injury, post-concussion syndrome, PTSD, depression, anxiety, and cognitive disorder which required a significant amount of mental health and cognitive treatment including therapy and various medications, and from which Petitioner still receives psychiatric treatment, and from which Petitioner has lost his former occupation - the Arbitrator gives great weight to this factor. Based on the factors above, the Arbitrator concludes the injuries sustained by Petitioner caused a 45% loss of use of the person as a result of the December 13, 2011 work incident.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC007266
Case Name	Clinton Hinkle v. State of Illinois - Lawrence Correctional Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0511
Number of Pages of Decision	12
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Mary Massa, Todd Schroader
Respondent Attorney	Shannon Rieckenberg

DATE FILED: 11/30/2023

/s/Marc Parker, 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 JEFFERSON)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Clinton Hinkle,

Petitioner,

vs. NO: 22 WC 7266

State of Illinois, Lawrence
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 the nature and extent of Petitioner's 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 July 12, 2023, is hereby affirmed and adopted.

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

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

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

November 30, 2023
MP:yl
o 11/16/23
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	22WC007266
Case Name	Clinton Hinkle v. State of Illinois/Lawrence Correctional Center
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Todd Schroader
Respondent Attorney	Shannon Rieckenberg

DATE FILED: 7/12/2023

THE INTEREST RATE FOR THE WEEK OF JULY 11, 2023 5.27%

/s/ *Linda Cantrell, Arbitrator*

Signature

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

July 12, 2023

/s/ *Michele Kowalski*

Michele Kowalski, Secretary
Illinois Workers' Compensation

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

CLINTON HINKLE
Employee/Petitioner

Case # **22** WC **007266**

v.

Consolidated cases: ______

STATE OF ILLINOIS/LAWRENCE CORRECTIONAL CENTER
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **5/18/23**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **1/19/22**, 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 $**$59,909.67**; the average weekly wage was $**$1,152.11**.

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

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

Respondent ***has or will pay*** all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**24,159.16 in extended benefits paid, plus five service-connected days paid from 1/25/22 through 1/29/22,** for a total credit of $**24,159.16, plus five service-connected days paid, as stipulated by the parties.**

Respondent is entitled to a credit of $**TBD and any and all paid** under Section 8(j) of the Act, pursuant to the stipulation of the parties.

ORDER

Pursuant to the stipulation of the parties, Respondent shall pay Petitioner's causally related medical expenses contained in Petitioner's Group Exhibit 3, directly to the medical providers and pursuant to the Illinois medical fee schedule or PPO agreement, whichever is less, under Sections 8(a) and 8.2 of the Act. The parties stipulated that Respondent shall receive credit for any and all medical expenses previously paid and credit for any and all medical expenses paid through its group medical plan, pursuant to Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $**768.07**/week for **22** weeks commencing **1/25/22 through 6/27/22,** as provided in Section 8(b) of the Act. Pursuant to the stipulation of the parties, Respondent shall receive credit for five service-connected days paid from 1/25/22 through 1/29/22, and $24,159.16 in extended benefits paid.

Respondent shall pay Petitioner permanent partial disability benefits of $**691.27**/week for **25.625** weeks, because the injuries sustained caused permanent partial disability to the extent of **12.5%** loss of use of his right hand (205-week level), pursuant to Section 8(e) of the Act. Respondent shall further pay **2** weeks of disfigurement to Petitioner's left forehead at the PPD rate of $**691.27**/week, as provided in Section 8(c) of the Act.

Respondent shall pay Petitioner compensation that has accrued from 6/13/22 through 5/18/23, 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.

____ **JULY 12, 2023**

Arbitrator Linda J. Cantrell

**STATE OF ILLINOIS)
) SS
 COUNTY OF JEFFERSON)**

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

CLINTON HINKLE,)
)
Employee/Petitioner,)
)
v.) Case No.: 22-WC-007266
)
STATE OF ILLINOIS/LAWRENCE)
CORRECTIONAL CENTER,)
)
Employer/Respondent.)

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Mt. Vernon on May 18, 2023 on all issues. On 3/18/22, Petitioner filed an Application for Adjustment of Claim alleging injuries to his right hand as a result of an inmate assault on 1/19/22. (AX2) The parties stipulated that Petitioner sustained accidental injuries on 1/19/22 that arose out of and in the course of his employment with Respondent, and that Petitioner's current condition of ill-being is causally connected to the work injury.

Respondent stipulated to liability for Petitioner's causally related medical expenses contained in Petitioner's Group Exhibit 3. The parties stipulated that Respondent shall pay said medical expenses directly to the medical providers pursuant to the Illinois medical fee schedule or PPO agreement, whichever is less. The parties stipulated that Respondent shall receive credit for any and all medical bills paid through its group medical plan, under Section 8(j) of the Act, and credit for any and all medical expenses previously paid. The parties further stipulated that Respondent shall receive credit for five service-connected days paid from 1/25/22 through 1/29/22, and $24,159.16 in extended benefits paid.

The issues in dispute are temporary total disability benefits and the nature and extent of Petitioner's injuries.

TESTIMONY

Petitioner was 41 years old, single, with one dependent child at the time of accident. On 1/19/22, Petitioner was employed by Respondent as a Correctional Officer and was performing duties as a Wing Officer. Petitioner testified that on that date he informed the inmates on the wing of the shower schedule which angered one inmate. When the inmate's cell door was opened for COVID-19 testing, the inmate came out and struck Petitioner in the left upper forehead.

Petitioner ducked his head down and the inmate continued to punch him in the top of his head. Respondent's staff came to assist Petitioner at which time there was a struggle, and his right hand struck the cell door handle. Petitioner testified he is right hand dominant.

Petitioner completed his work shift and presented to the emergency room at Clay County Hospital for treatment. The abrasions on his forehead were cleaned, he was prescribed medication, and his right hand was splinted. Petitioner was referred for an orthopedic evaluation.

Petitioner treated with an orthopedist at Wabash General Hospital. He testified that at his visit on 5/23/22 he still had weakness, tingling, and numbness in his right hand and it did not feel like it was healing. At his next visit in June 2022, he was released to return to work, and he had no complaints at that time.

Petitioner testified that he still has numbness, tingling, and pain in his right hand. He has decreased grip strength and difficulty starting his lawn mower. He constantly relies on his left hand with lifting. Petitioner testified that he does not feel comfortable using his right hand in a self-defense situation at work because he is not 100%. He has difficulty balling his fist and has numbness from the palm of his wrist to his ring and small fingers. Petitioner testified he has decreased mobility in his hand in cold weather and increased numbness and pain. Petitioner has been released to full duty work and he continues to work as a correctional officer. He has worked for IDOC for over six years.

On cross-examination, Petitioner testified he did not require further treatment for his forehead abrasions. He understood his injury to be a "boxer's fracture", which was a fracture at the base of his right ring finger closest to his palm. Petitioner has not sought additional medical treatment since June 2022. He testified that he has passed a performance evaluation since returning to work in June 2022. Petitioner stated that since he returned to work, he has only worked in the POD and has not performed any duties as a wing officer. He takes Ibuprofen and Tylenol on a daily basis for the symptoms in his right hand. The Arbitrator noted a slight raised bump on the left side of Petitioner's forehead where he was struck by the inmate.

MEDICAL HISTORY

On 1/19/22, Petitioner presented to the Clay County Hospital emergency room and reported a consistent history of injury. (PX1) Petitioner sustained a 1.5 cm abrasion to his left forehead that was cleaned and bandaged. A CT scan of Petitioner's head and cervical spine were performed that were negative. X-rays of his right hand revealed an acute nondisplaced transverse fracture of the distal aspect of the fourth metacarpal bone, with mild lateral angulation of the fracture fragment. Petitioner right hand was splinted, and he was prescribed antibiotics and pain medication. He was referred to an orthopedic surgeon and no work restrictions were prescribed.

On 1/25/22, Petitioner was examined by Julia Corwin, PA-C at Wabash General Hospital. (PX2) It was noted Petitioner had tingling, swelling, and numbness in his right hand and he was right hand dominant. Petitioner had pain in his 3rd, 4th, and 5th knuckles that radiated to his fingers, hand, wrist, and forearm. He reported he stopped taking Tramadol a couple of days after the accident. A review of the prior x-rays showed a nondisplaced fracture of the head of 4th

metacarpal with slight Palmer tilt and subtle lucency that could indicate fracture at the base of the 4th metacarpal. A repeat x-ray was performed that revealed an acute minimally impacted transverse fracture at the neck of the 4th metacarpal with slight Palmer tilt and without significant malalignment. Petitioner was referred to occupational therapy to be fitted for a custom splint and he was placed off work.

On 2/1/22, a repeat x-ray was performed that revealed the fracture was stable without evidence of significant healing. PA-C Corwin recommended that Petitioner wear the splint at all times, limit the use of his right hand, and elevation. She recommended Ibuprofen and Tylenol as needed and continued Petitioner off work. (PX2, p. 54)

On 2/14/22, x-rays showed minimal, if any, periosteal reaction at the fracture site. (PX2, p. 50) Petitioner reported cramping in his elbow and forearm. He was instructed to continue wearing the custom splint.

On 3/7/22, x-rays revealed the fracture was healing with increased periosteal new bone formation. (PX2, p. 44) Petitioner reported he wore the splint continuously except when performing gentle range of motion exercises. He was able to make three-fourths of a fist and had slight decrease in extension of the ring finger and mild pain with finger abduction and adduction. Petitioner was allowed to remove the splint for showering and at rest for short periods. He was continued off work.

On 3/28/22, x-rays revealed progressed healing. Petitioner rated his pain 4/10. PA-C Corwin noted Petitioner still lacked a couple degrees full extension of the ring finger but was able to resist extension of the finger. Petitioner stated he was improving and continued to perform home exercises. He was instructed to continue wearing the splint with activity and while out of the house. Petitioner expressed concern that his FMLA was running out and PA-C Corwin noted he would not be ready to return to work by 4/13/22. (PX2, p. 36)

Petitioner underwent physical therapy and occupational therapy at Wabash General Hospital. (PX2, p. 23-32)

On 4/25/22, x-rays revealed progressive healing of the fracture. (PX2, p. 7) Petitioner reported he had been leaving the splint off most of the time at home. He denied pain but felt he did not have strength back in his hand. Physical examination revealed tenderness in the palmar aspect of the 4th metacarpal head and mild decrease in full extension of the ring finger with full flexion. PA–C Corwin recommended transitioning out of the splint with light activity and gradual progression to normal activity as tolerated. She ordered formal physical and occupational therapy. Petitioner was continued off work.

On 5/23/22, x-rays showed further interval healing. Petitioner continued to have swelling and some pain. He reported some numbness and tingling in his hand that went into his wrist. Petitioner complained that his hand was still very weak. (PX2, p. 12) Physical examination revealed limited wrist flexion/extension active range of motion, mild decreased full extension of the ring finger, and limited thumb extension. He was able to make a full fist and resist extension of his fingers with weakness noted at the ring finger. Due to concern for weakness and decreased

use of his hand, PA-C Corwin recommended an MRI to rule out ligament or tendon injury. She recommended continued therapy and continued Petitioner off work.

On 6/2/22, PA-C Corwin continued Petitioner off work pending approval of the MRI. On 6/13/22, PA-C Corwin noted Petitioner's symptoms improved and he had been attending formal therapy until a recent work injury to his left arm. He felt he would have been close to returning to work for his right hand injury but for his left arm injury. She noted the MRI revealed a very slight angulated fracture at the head neck junction of the 4th metacarpal, with no evidence of ligament or tendon injury. Petitioner felt he was close to being able to return to full duty work with his right hand. PA-C Corwin released Petitioner to return to work without restrictions beginning 6/27/22.

CONCLUSIONS OF LAW

Issue (K): What temporary benefits are in dispute? (TTD)

Petitioner claims entitlement to temporary total disability benefits from 1/20/22 through 6/27/22. Respondent alleges that Petitioner is entitled to TTD benefits from 1/25/22 through 6/27/22.

Although Petitioner sought emergent medical treatment at Clay County Hospital on 1/19/22, he was not placed off work upon discharge. Petitioner began treating with PA-C Julia Corwin at Wabash General Hospital on 1/25/22 who placed him off work through 6/26/22. The parties stipulated that Petitioner is entitled to TTD benefits through 6/27/22.

Therefore, Respondent shall pay Petitioner temporary total disability benefits from 1/25/22 through 6/27/22, representing 22 weeks, at the TTD rate of $768.07/week, as provided in Section 8(b) of the Act. Pursuant to the stipulation of the parties, Respondent shall receive credit for five service-connected days paid from 1/25/22 through 1/29/22, and $24,159.16 in extended benefits paid.

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

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

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

(ii) **Occupation**: Petitioner was released to return to work without restrictions and returned to his pre-accident employment as a Correctional Officer with Respondent. Although Petitioner testified he has only worked in the POD/Control Room since

returning to work, there is no evidence that the change in his job position was the result of his work injuries. Petitioner testified he is concerned with his ability to defend himself in the event of an altercation with inmates. He has approximately 17 years until he can retire with the IDOC. The Arbitrator places some weight on this factor.

(iii) **Age**: Petitioner was 41 years old at the time of accident. 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 some weight on this factor.

(iv) **Earning Capacity**: There is no direct evidence of reduced earning capacity contained in the record. Petitioner returned to work without restrictions as a Correctional Officer. The Arbitrator places some weight on this factor.

(v) **Disability**: As a result of the undisputed work accident, Petitioner sustained a 1.5 cm abrasion to his left forehead that was cleaned and bandaged. Petitioner did not require sutures and received no additional treatment. The Arbitrator observed a slight bump on Petitioner's forehead at the site of the healed abrasion. Petitioner was diagnosed with a nondisplaced transverse fracture of the head of the fourth right metacarpal. Petitioner is right hand dominant. He underwent splinting, physical therapy, occupational therapy, and was placed off work for five months. He was released at MMI without restrictions on 6/13/22.

Petitioner testified he still has numbness, tingling, and pain in his right hand. He has decreased grip strength and relies on his left hand when lifting heavy objects. Petitioner testified he does not feel comfortable using his right hand in a self-defense situation at work because he is not 100%. He has difficulty balling his fist and has numbness from the palm of his wrist to his ring and small fingers. Cold weather increases his symptoms. Petitioner has passed a performance evaluation since returning to work in June 2022. He takes Ibuprofen and Tylenol on a daily basis. 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 12.5% loss of use of his right hand, pursuant to Section 8(e) of the Act, and 2 weeks of disfigurement to Petitioner's left forehead, as provided in Section 8(c) of the Act.

Respondent shall pay Petitioner compensation that has accrued from 6/13/22 through 5/18/23, and shall pay the remainder of the award, if any, in weekly payments.

Arbitrator Linda J. Cantrell DATED:

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC031030
Case Name	Timothy McCarthy v. NCP Corporation
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0512
Number of Pages of Decision	16
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Russell Haugen
Respondent Attorney	Martin T. Spiegel

DATE FILED: 11/30/2023

/s/*Marc Parker, 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 WILL)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Timothy McCarthy,

Petitioner,

vs. No. 18 WC 031030

NCR Corporation,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) and §8(a) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary disability, prospective medical care, and law of the case, and being advised of the facts and law, affirms the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the following modifications. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission,* 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Arbitrator awarded the following prospective care to Petitioner: treatment recommended by Dr. Darwish related to Petitioner's lumbar spine condition; treatment recommended by Dr. Alden related to Petitioner's right hip and right knee conditions; and treatment recommended by Dr. Ho related to Petitioner's right foot condition.

The Commission now modifies the prospective care award to specify the prospective treatment being awarded. For Petitioner's right foot hallux rigidus condition, we award a carbon fiber footplate (Morton's extension), a corticosteroid injection, and/or surgery (cheilectomy or right first metatarsophalangeal fusion), as recommended by Dr. Ho. For Petitioner's right knee condition, we award an MRI, as recommended by Dr. Alden. For Petitioner's right hip condition,

we award arthroscopic surgery for acetabular labral debridement, as recommended by Dr. Alden. For Petitioner's low back condition, we award physical therapy as recommended by Dr. Darwish. Finally, we award a functional capacity evaluation, as recommended by Dr. Darwish.

All else in the Arbitration Decision is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 22, 2023, is hereby affirmed with the changes indicated above.

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

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

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

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

November 30, 2023

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o-11/16/23
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/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC031030
Case Name	Timothy McCarthy v. NCP Corporation
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Roma Dalal, Arbitrator

Petitioner Attorney	Russell Haugen
Respondent Attorney	Martin Spiegel

DATE FILED: 3/22/2023

THE INTEREST RATE FOR THE WEEK OF MARCH 21, 2023 4.62%

/s/Roma Dalal, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Timothy McCarthy
Employee/Petitioner
v.
NCR Corporation
Employer/Respondent

Case # **18** WC **31030**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Roma Dalal**, Arbitrator of the Commission, in the city of **Joliet**, on **February 8, 2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to Respondent?

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

G. ☐ What were Petitioner's earnings?

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

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

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

K. ☒ Is Petitioner entitled to any prospective medical care?

L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☒ Other **Law of the case**

FINDINGS

On the date of accident, **6/28/18**, 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 $**46,623.20**; the average weekly wage was $**896.60**.

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

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

ORDER

- Respondent shall pay Petitioner temporary total disability benefits of $597.73 per week for 30 4/7 weeks, commencing July 10, 2022 through February 8, 2023 as provided in Section 8(a) of the Act.

- Respondent shall authorize and pay for the treatment recommended by Dr. Darwish as it relates to Petitioner's lumbar spine condition of ill-being.

- Respondent shall authorize and pay for the treatment recommended by Dr. Alden as it relates to Petitioner's right hip and right knee conditions of ill-being.

- Respondent shall authorize and pay for the treatment recommended by Dr. Ho as it relates to Petitioner's right foot condition of ill-being.

- Respondent shall pay reasonable, necessary, and causally related medical services incurred in the care and treatment of Petitioner's lumbar spine, right hip, right knee, and right foot pursuant to Sections 8 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.

MARCH 22, 2023

C0STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Timothy McCarthy,)
)
Petitioner,)
)
v.)
) Case No. 18 WC 31030
NCR Corporation,)
)
)
Respondent.)

PROCEDURAL HISTORY

This matter was previously tried on a 19(b) on July 13, 2020 with Arbitrator, now Commissioner, Doherty. (PX1). Petitioner testified he sustained an accidental injury on June 28, 2018 when he slipped out of his truck. Petitioner testified he landed on his right leg and right buttock and had immediate pain. Petitioner presented to the ER with concerns for right hip pain. (PX1, p.8). Petitioner eventually treated for ankle pain and was seen by Dr. Ho on August 16, 2018. Petitioner complained of right ankle and foot pain, with some stiffness in his great toe. (PX1, p.9). Petitioner was diagnosed with right leg inflammation and right Achilles equines contracture. Petitioner continued voicing complaints of right leg pain radiating to the right knee and hip. Eventually Petitioner was referred for back pain due to the continued radiating complaints. (PX1, p.4). The Arbitrator found an accident was sustained on June 28, 2018 when he was exiting his work truck parked in a Walmart parking lot feeling pain in his right buttock and right foot. (PX1, p.12). The Arbitrator noted Petitioner developed right hip and leg pain within the week and noted Petitioner slipped and landed on his leg a little hard and hurt it. (PX1, p.12). Per the 19(b) decision, Arbitrator, now Commissioner, Doherty found the low back condition was causally related to the June 28, 2018 decision. It was noted that complaints of right leg, right knee, right ankle, and right hip were symptoms of the lumbar condition which were causally related to the accident. The Arbitrator adopted the opinions of Dr. Darwish in regards to Petitioner's condition and symptoms. (PX1, p.13). The Arbitrator found Respondent shall pay the reasonable, necessary, and causally related medical expenses for treatment to Petitioner's back, right leg, and right foot. Id. at 13. In addition, further treatment in regards to a L5-S1 surgery was awarded. Petitioner did not exceed his choice of physicians. (PX1).

On July 20, 2021, the Illinois Workers' Compensation Commission affirmed the Arbitrator's decision. (PX1).

The rule of the law of the case is a rule of practice, based upon sound policy that, where an issue is once litigated and decided, that should be the end of the matter and the unreversed decision of a question of law or fact made during the course of litigation settles that question for all subsequent stages of the

suit. Irizarry v. Industrial Comm'n, 337 Ill.App.3d 598, 606 (2nd Dist. 2003) (citing McDonald's Corp. v. Vittorio Ricci Chicago, Inc., 125 Ill.App.3d 1083, 1086-1087 (1st Dist. 1984). The law of the case doctrine is applicable to issues litigated before the Illinois Workers' Compensation Commission. Ming Auto Body/Ming of Decatur, Inc. v. Industrial Comm'n, 387 Ill.App3d 244, 252 (1st Dist. 2008). 2018 Ill. Wrk. Comp. LEXIS 583, *16-17, 18 IWCC 449.

Thus, the findings of fact and conclusions of law from the above proceeding in this case are binding, and herein adopted and incorporated by reference.

ISSUES IN DISPUTE

The Parties proceeded to trial hearing on February 8, 2023 in Joliet, Illinois before Arbitrator Roma Dalal on Petitioner's 19(b) Hearing. Issues in dispute include causation, disputed medical, TTD benefits, prospective medical, and law of the case. (Arb. Ex.1, T.4).

FINDINGS OF FACT

Petitioner testified following the 19(b) decision he proceed with a lumbar fusion surgery on September 17, 2021 with Dr. Darwish at Hinsdale Orthopaedics. (T.8-9). Following the surgery, he continued to follow up with Dr. Darwish's office and was getting paid workers' compensation. (T.9). Petitioner testified he continued to treat with Dr. Ho regarding the right foot. Petitioner was also referred to Dr. Alden at Hinsdale to address his right hip and right knee. (T.9-10).

Petitioner testified he was paid workers' compensation benefits which stopped on July 10, 2022. (T.11). Petitioner testified he did sustain any new injuries or new accidents to his right hip, right knee, and right foot since June 28, 2018. (T.11-12).

Petitioner testified the medical records reflect Dr. Alden has recommended right hip surgery and a right knee MRI, and he wants to proceed with the same. (T.12). In addition, Petitioner testified he wanted to proceed with the right foot surgery and FCE for this back. (T.13).

Petitioner testified he has pain in his hip every day. He further noted it was painful to set his foot on the floor without any shoes. Without a shoe he cannot walk with his right foot. (T.14). Prior to this accident, his job entailed picking up 60-pound boxes of weight out of his truck. Now he cannot even push that weight with his hand. (T.15). Petitioner testified he cannot pick anything more than a can of pop off the ground and is unable to lift cases of the ground. (T.15). He complains of pain in his right leg. (T.15). Lastly, he noted he is unbalanced. (T.16).

On Cross-Examination, Petitioner noted he did not remember if he had the right big toe complaints during the original hearing. (T.18). Petitioner testified his back surgery relieved the pain in his back. (T.19). He noted after the surgery the symptoms did not go away in his right leg, hip, knee, or foot. (T.19). He further noted he had not seen Dr. Darwish since July 21 and could not recall if Dr. Darwish provided him with specific restrictions on his activities. (T.26). Petitioner noted he is only seeking an FCE for his low back. (T.30).

Medical Summary

On August 9, 2021, Petitioner presented to Dr. Ashraf Darwish at Hinsdale Orthopedic. Petitioner continued with complaints of low back pain and bilateral lower extremities with the right being worse than the left. Petitioner was diagnosed with a herniated lumbar disk with lumbar radiculopathy. Dr. Darwish recommended a L5-S1 transforaminal lumbar interbody fusion with posterior instrumentation and the use of allograft bone. Dr. Darwish recommended a new MRI for surgical planning purposes and Petitioner was to remain off work. (PX4, p.9-12). Petitioner returned on September 3, 2021 to discuss the pre-surgical procedures with Ms. Lauren Reineke, PAC. Petitioner was recommended surgery again. Id. at 14-17. On September 14, 2021, Petitioner underwent the repeat lumbar MRI. Id. at 18-19.

On September 17, 2021 Petitioner underwent a L5-S1 transforaminal lumbar interbody fusion with pedicle screw instrumentation and a L5-S1 decompression laminectomy. Petitioner's pre-operative and post-operative diagnoses were lumbar radiculopathy, lumbar stenosis, and lumbar spondylosis. (PX4, p.20-21).

Following the lumbar surgery, Petitioner received wound care and home health physical therapy through Addus Home Health. Petitioner received this treatment from September 18, 2021 through September 29, 2021. During this time, he completed six sessions of home health physical therapy to assist him with his mobility without an assistive device. (PX6).

Petitioner returned to Hinsdale Orthopaedics on October 1, 2021. Petitioner presented in a lumbar support back brace with mild low back pain. He noted significant improvement in his pain symptoms. Petitioner was to continue to wear the lumbar brace and not lift anything over 15 pounds. He was to return and remained off work. (PX4, p.22-25). In an October 8, 2021 follow up with Dr. Darwish, Petitioner noted concerns of right foot pain and tingling. He reported since the pain in his right buttock and right leg subsided, he continued to experience pain in his right foot. He reported the work injury he landed on his big toe and hurt ever since. The Doctor examined his right foot and noted the pain could potentially be from nerve damage over the years. Petitioner was prescribed gabapentin and insisted on an evaluation by a foot doctor. Dr. Darwish referred him to Dr. Ho. From a lumbar spine standpoint, he was doing well. He was to remain off of work. (PX4, p.26-29).

Petitioner presented to Dr. Bryant Ho on October 13, 2021 for right foot pain. Dr. Ho diagnosed Petitioner with right hallux rigidus. He noted Petitioner's symptoms were for his right hallux rigidus. Petitioner was recommended surgery consisting of a right cheilectomy. (PX4, p.30-31).

Petitioner returned to Hinsdale Orthopedics on October 26, 2021 for his lumbar spine. Petitioner's right-sided radicular symptoms had completely diminished. He now complained of right foot and toe pain. Petitioner noted some knee and lateral hip pain as well. He was to use a cane as needed. Petitioner was given medication and was to return in six weeks. Petitioner remained off work. (PX4, p.32-35).

On November 18, 2021 Petitioner was evaluated at Hinsdale Orthopedics by Dr. Alden and Lawrence Kocen, PAC for his right hip. The Doctor noted Petitioner may have a labral tear and recommended an MRI arthrogram. (PX4, p.36-38).

On November 22, 2021 Petitioner presented to Dr. Armen Kelikian for a Section 12 examination. Dr. Kelikian reviewed Petitioner's history and examined Petitioner. Dr. Kelikian opined that the fall did not exacerbate or cause his hallux rigidus because there was no record of great toe complaints until October 2021. Most of his problems were seen to be related to his lumbar spine. As far as his toe goes, treatment choice would be a stiff-soled shoe Morton's extension and a cortisone injection. Dr. Kelikian noted he did not have any records prior to October 13, 2021.(RX1).

On December 2, 2021 Petitioner presented to Larry Kocen, PAC, for right knee pain. Petitioner noted he felt his right knee may give away with activity. Petitioner's right knee demonstrated a positive McMurray test of the medial compartment. Petitioner was to undergo a right MRI of the knee. (PX4, p.39-41). Petitioner followed up with Dr. Darwish on December 9, 2021 for his lumbar spine. Petitioner continued to complain of severe low back pain and right lateral thigh and knee pain. Petitioner was making great progress after his fusion surgery. He was to begin lifting over twenty pounds and progress activities as tolerated. He was to continue with core strengthening. Dr. Darwish recommended physical therapy, but Petitioner was afraid it would make his right knee worse. Petitioner was to return in two months and remain off work. Id. at 42-44.

Petitioner returned to Lawrence Kocen, PAC, on February 9, 2022 for his right hip. Petitioner noted his pain was a 7 out of 10. Petitioner was still recommended an MRI of the right hip. It was noted physical therapy would exacerbate his symptoms. Petitioner remained off of work. (PX4, p.46-49).

On February 16, 2022 Petitioner returned to Hinsdale Orthopedics for his back. Petitioner was five months post fusion surgery. Physical therapy was recommended, however Dr. Alden's team wanted to hold off of for the same. Petitioner was to remain off work and return in two months. (PX4, p.50-53).

On February 18, 2022, Petitioner underwent an MRI arthrogram of his right hip which revealed a focal anterior and anterosuperior labral tear with undersurface fraying along the superolateral acetabularlabrum. (PX4, p.54).

Petitioner returned on February 23, 2022 for his right hip. Petitioner continued to have a symptomatic right hip that affected his ability to stand and walk comfortably. Petitioner was advised he had lateral tears within the hip that were contributing to his pain. Petitioner was recommended to move forward with a hip arthroscopy for an acetabular labral debridement. Petitioner was again recommended to undergo an MRI of his right knee. Petitioner remained off work. (PX4, p.56-59).

Petitioner followed up with Dr. Darwish on April 21, 2022 for his lumbar spine. Petitioner stated he was horrible with no improvement. Petitioner was to follow up with Dr. Alden for his hip and knee and Dr. Ho for his foot. Petitioner was to return in six weeks. (PX5, p.4-7).

Petitioner presented to Dr. Sampat for a Section 12 examination on June 3, 2022. Dr. Sampat went over Petitioner's medical history and reviewed medical records. On Examination, Petitioner had a normal gait and was able to walk on heels and toes without difficulty. Dr. Sampat diagnosed him with postop fusion at L5-S1 He opined Petitioner reached maximum medical improvement in regards to his low back. He noted there was no evidence of neurological deficits, Petitioner was able to walk without any assistive devices and was not taking any pain medications. Dr. Sampat opined Petitioner was able to return to work full duty without any restrictions. (RX2).

Petitioner returned to Dr. Darwish on June 9, 2022. He noted he underwent an IME with severe increase in pain since then. Petitioner remained off work. Petitioner was recommended therapy for his spine. He was to return in six weeks. (PX5 at 8-11). In a July 11, 2022 follow up with Dr. Darwish. Petitioner still was unable to complete physical therapy due to his right hip. Petitioner was to undergo a FCE and return after the same. Id. at 11-15.

Petitioner returned to Dr. Darwish on July 21, 2022. Petitioner noted he was worse with a stabbing pain. Petitioner was recommended a functional capacity evaluation and was to return after the same. Petitioner remained off work. (PX5, p.22-27).

On September 2, 2022, Dr. Bryant Ho authored a narrative report. (PX2). Dr. Ho noted Petitioner had a history of slipping out of his truck on June 28, 2018 which resulted in pain to his right lower extremity including his distal leg and great toe. Petitioner presented for an initial evaluation with Dr. Ho on August 15, 2018. At that time, there was suspicion of an occult fracture of Petitioner's right leg, however, Petitioner's MRI of the tibia demonstrated no acute fracture. They started with physical therapy but had further workup for radiating leg pain and was referred to Dr. Darwish for his lumbar spine. Petitioner returned to Dr. Ho on October 13, 2021. At that time, Petitioner continued to report pain and stiffness in his right great toe that began during his initial injury that still had not resolved. Petitioner denied any great toe pain prior to his June 28, 2018 work injury. Dr. Ho's diagnosis was right hallux rigidus which required surgery consisting of a right cheilectomy. Dr. Ho opined the hallux rigidus is directly related to the work injury as Petitioner was asymptomatic in his great toe prior to work injury and subsequently developed pain that had not resolved. Dr. Ho explained Petitioner's work injury either aggravated the hallux rigidus or caused the development of acute hallux rigidus. Dr. Ho recommended Petitioner proceed with a right cheilectomy or a right first MTP fusion. These opinions were offered within a reasonable degree of orthopedic, medical, and surgical certainty. (PX2).

On September 30, 2022, Dr. Ashraf Darwish authored a narrative report. Dr. Darwish indicated at that last appointment Petitioner noted he was worse. He noted he did not believe Petitioner was able to work without restrictions. He noted Petitioner was 12 months out from his fusion and did not take any pain medication. Petitioner's recent radiographs demonstrated L5-S1 lumbar interbody fusion with cage and hardware in good position. Based on the same, Dr. Darwish wanted Petitioner to undergo a functional capacity exam prior to returning to work. Dr. Darwish also noted Petitioner had not completed physical therapy as Dr. Allen was treating him for his right hip and recommended Petitioner not complete therapy and undergo a right hip arthroscopy. Dr. Darwish opined Petitioner had improvement in pain and function after surgery but could not determine his ability to return to work without a functional capacity exam. (PX3).

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his/her testimony. Where a claimant's testimony is inconsistent with his/her actual behavior and conduct, the

Commission has held that an award cannot stand. McDonald v. Industrial Commission, 39 Ill. 2d 396 (1968); Swift v. Industrial Commission, 52 Ill. 2d 490 (1972).

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

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds him to be a credible witness. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable. The Arbitrator finds Petitioner's testimony to be straight forward, truthful, and consistent with the record as a whole.

With regard to (O), with respect to the Law of the Case, the Arbitrator finds as follows:

As indicated above, this matter was tried on a 19(b) hearing. The decision was issued on August 11, 2020. Arbitrator, now Commissioner, Doherty found Petitioner had sustained an accidental injury arising out of and in the course of his employment, was entitled to back TTD benefits, outstanding medical bills and authorized medical care by Dr. Darwish. It was found that Petitioner's current condition of ill being with respect to his low back was causally related to the work injury and further noting that the complaints of right leg, right knee, right ankle, and right hip pain are symptoms of the lumbar condition. Respondent appealed that decision to the Commission would subsequently confirm, on July 20, 2021, the decision of Arbitrator Doherty in all respects.

Under the law-of-the-case doctrine, the unreversed decision of a question of law or fact made during the course of litigation settles that question for all subsequent stages of the suit. Miller v. Lockport Realty Group, Inc., 377 Ill. App. 3d 369, 374, 878 N.E.2d 171, 315 Ill. Dec. 945 (2007). This court has held that principles underlying the law-of-the-case doctrine should be applied to matters resolved in proceedings before the Commission. Irizarry v. Industrial Comm'n, 337 Ill. App. 3d 598, 786 N.E.2d 218, 271 Ill. Dec. 960 (2003). Weyer v. Ill. Workers' Comp. Comm'n, 387 Ill. App. 3d 297, 307, 900 N.E.2d 360, 368-369, 2008 Ill. App. LEXIS 1257, *22, 326 Ill. Dec. 724, 732-733

Considering all of the above, the totality of this record, the facts involved herein and the law applicable herein, the Arbitrator finds the law of the case does not apply. Within the first 19(b), Petitioner injured his right lower extremity. Petitioner initially treated for his right ankle with complaints of toe pain. Petitioner also complained of right hip pain. The treatment then became focused on Petitioner's back. The first arbitration hearing addressed claimant's entitlement to TTD benefits, treatment, and causation to Petitioner's back only. There was no causation finding regarding Petitioner's right foot, knee, or hip. The second arbitration in the instant case involves different legal and factual issues and thus the law of the case doctrine does not prohibit the litigation of these new issues. Therefore, the law of the case doctrine does not apply here.

With regard to (F), whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

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

In the instant case, Petitioner is claiming his lumbar spine, right hip, right knee, and right foot are all causally related to his work accident of June 28, 2018. The Arbitrator will address each body part.

Lumbar Spine

The Commission found Petitioner's lumbar condition was causally related to the June 28, 2018 accident. Following the Commission Decision, Petitioner underwent surgery in the form of a L5-S1 lumbar interbody fusion by Dr. Darwish on September 17, 2021. Petitioner continues to complain of low back pain. Petitioner did not sustain any type of new injury or trauma to his lumbar spine since the initial work accident. In addition, the medical records do not indicate any type of new injury or new trauma to Petitioner's lumbar spine. Dr. Darwish opined Petitioner continues to have pain and radicular symptoms following the lumbar fusion which may need a course of physical therapy and an FCE.

Accordingly, based on the preponderance of the credible evidence, including Petitioner's testimony and the medical records and reports, the Arbitrator finds Petitioner's current condition of ill-being in his lumbar spine is causally related to the June 28, 2018 work accident.

Right Hip

The Arbitrator Petitioner sustained a compensable work accident and had right hip complaints since the initial Emergency room visit on July 5, 2018. (PX1, p.8). Petitioner continued to have hip complaints from the outset. Petitioner continued to voice hip complaints on July 25, 2018 and July 27, 2018. Petitioner also complained of shooting pain into the right hip when he was evaluated by Dr. Ho and Illinoi Orthopedic Institute. (PX1, p.9).

Petitioner testified he did not have any right hip complaints prior to the work accident and was able to perform all of his job duties for Respondent. Petitioner testified he has had ongoing pain in his right hip since the work accident. Petitioner further testified that he did not sustain any type of new injury or trauma to the right hip since the work accident. Following the lumbar surgery, Petitioner's back complaints were initially relieved, but he continued to have right hip pain. Petitioner underwent an MRI of the right hip on February 18, 2022, which revealed a labral tear. The Arbitrator notes that in the setting

of a lumbar spine condition, with radicular complaints into an individual's lower extremities, hip pathology can be overlooked. Moreover, Respondent did not offer any opinions or evidence to dispute a causal connection between Petitioner's right hip condition of ill-being and the work accident.

Accordingly, based on the evidence set forth, including Petitioner's testimony, the medical records, and reports, and based upon the chain of events supported by the record, the Arbitrator finds Petitioner's current condition of ill being in regards to his right hip is causally related to the June 28, 2018 work accident.

Right Foot

In the instant case, the Arbitrator finds Petitioner's current condition of ill-being is causally related to his work accident. Petitioner testified he never had any foot problems and never missed any time from work due to the same. Petitioner was working full duty and subsequently felt pain in his right foot/toe after June 28, 2018 work injury. The chain of events presented in this case show Petitioner's right foot became symptomatic after his work accident. Petitioner began complaining of right foot and ankle pain as of July 25, 2018. He eventually was referred to Dr. Ho who noted Petitioner had stiffness in his great toe. There is no evidence whatsoever that prior to Petitioner's work accident, he received any medical treatment for these body parts. The record does not reflect Petitioner had ever taken time off work due to his right foot. No evidence was introduced about Petitioner's pre-accident work performance not being satisfactory. There was no mention Petitioner requested any accommodation because of his foot.

In addition, the Arbitrator reviewed the medical opinions from both physicians. The Arbitrator finds that Dr. Ho opined Petitioner was diagnosed with a right hallux which was directly related to the work injury as Petitioner was asymptomatic prior to the same. Dr. Ho explained Petitioner's work injury either aggravated the hallux rigidus or caused the development of acute hallux rigidus.

In contrast, Dr. Kelikian opined Petitioner's fall did not exacerbate or cause his hallux rigidus because there was no record of great toe complaints until October 2021. The Arbitrator notes Dr. Kelikian did not review the initial medical records documenting right foot pain as well as stiffness in his great toe. As such, the Arbitrator places more weight on Dr. Ho's opinions.

Therefore, the Arbitrator finds Petitioner's current condition of ill-being in regards to his right foot is causally related to the June 28, 2018 work accident.

Right Knee

The Arbitrator notes Petitioner first reported right leg pain on July 5, 2018. Petitioner noted radiating leg pain to his knee on October 4, 2019 and underwent an MRI of the right knee on May 2, 2019 which revealed no tears and mild degeneration.

Petitioner testified he has had ongoing right knee pain since the work accident and has not sustained any new injury. In addition, Respondent did not offer any opinions or evidence to dispute a causal connection between Petitioner's right hip condition of ill-being and the work accident.

Accordingly, based on the evidence set forth, including Petitioner's testimony, the medical records, and reports, and based upon the chain of events supported by the record, the Arbitrator finds that Petitioner's current condition of ill being in his right knee is causally related to the June 28, 2018 work accident.

With regard to (J), whether medical services that were provided to Petitioner were reasonable and necessary, the Arbitrator finds the following:

The Arbitrator incorporates by reference the above Findings of Fact and refers to them by reference herein. The medical records entered into evidence demonstrate Petitioner sustained injuries to his lumbar spine, right hip, right knee, and right foot. Based on the record in its entirety, the Arbitrator finds Petitioner's treatment to be reasonable and necessary. Based on the Arbitrator's findings on the issue of causation, the Arbitrator further finds that Respondent shall pay Petitioner the reasonable, necessary, and causally related medical expenses, incurred in the care and treatment of Petitioner's lumbar spine, right hip, right knee, and right foot pursuant to Sections 8 and 8.2 of the Act.

The Arbitrator orders Respondent to pay Petitioner all other reasonable and necessary medical expenses incurred in connection with the care and treatment of his causally related condition pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid.

With respect to Issue (K) whether Petitioner is entitled to any prospective medical care, the Arbitrator finds the follows:

The Arbitrator incorporates by reference the above Findings of Fact and refers to them by reference herein.

Regarding the issue of whether the Petitioner is entitled to any prospective medical care, following consideration of the testimony and evidence presented, the same is incorporated by reference, it is found that Petitioner's condition is causally related to his work accident and has not stabilized or otherwise reached MMI. Dr. Darwish opined Petitioner may need physical therapy and also needs an FCE. In addition, Dr. Ho has recommended right foot surgery. Lastly, Dr. Alden has recommended right hip surgery and a right knee MRI. The Arbitrator agrees Petitioner needs additional medical care. Based on the same. the Arbitrator finds that Petitioner is entitled to prospective medical care as recommended by his treating physicians with reliance on Petitioner's medical records and his testimony. For the reasons stated above, Respondent shall authorize and pay for this and such other reasonable medical treatment pursuant to the statutory fee schedule.

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

To prove entitlement to TTD benefits, a claimant must establish not only that he did not work, but that he was unable to work. Sharwarko v. Illinois Workers' Compensation Comm'n, 2015 IL App (1st) 131733WC. An employee is temporarily totally disabled from the time that an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. Archer Daniels Midland Co. v. Industrial Comm'n, 138 Ill. 2d 107, 118 (1990). Once an injured employee's physical condition stabilizes or he has reached MMI, he is no longer eligible for temporary total disability benefits. Archer Daniels Midland Co., 138 Ill. 2d at 118. A claimant reaches

MMI when he is as far recovered or restored as the permanent character of his injury will permit. Nascote Industries v. Industrial Comm'n, 353 Ill. App. 3d 1067, 1072 (2004). Factors to be considered in determining whether a claimant has reached MMI include whether he has been released to return to work, medical evidence, testimony concerning the claimant's injury, the extent of his injury, and whether the injury has stabilized. Nascote Industries, 353 Ill. App. 3d at 1072. The period of time during which a claimant is temporarily and totally disabled is a question of fact to be determined by the Commission, and its resolution of the issue will not be disturbed on appeal unless it is against the manifest weight of the evidence. Archer Daniels Midland, 138 Ill. 2d at 119-20.

Petitioner is claiming TTD benefits beginning on July 10, 2022 through February 8, 2023. Petitioner was placed off work and has not been released to full duty by any of his treating physicians. Petitioner has also testified he has not worked in any capacity since before the Arbitrator hearing.

Based on the Arbitrator's findings on the issue of causal connection and the credible medical records and reports, TTD benefits are awarded at a rate of $597.73 per week for 30 4/7 weeks, commencing July 10, 2022 through February 8, 2023 as provided in §8(b) of the Act. Respondent shall receive credit for amounts paid.