ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC032834
Case Name	Hector Del Bosque v. Employco USA
Consolidated Cases	
Proceeding Type	Remand From the Appellate Court for the First District. Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0426
Number of Pages of Decision	4
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Steven Seidman
Respondent Attorney	Matthew Rokusek

DATE FILED: 10/2/2023

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

HECTOR DEL BOSQUE,
Petitioner,
vs. 18 WC 32834
EMPLOYCO USA,
Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Appellate Court for the First District, dated April 21, 2023.

On March 11, 2020, a hearing on Arbitration was held and a Decision was issued on May 12, 2020. The Arbitrator found Petitioner met his burden of proof in regard to accident and causal connection and awarded medical expenses, prospective medical care and temporary total disability benefits based on an average weekly wage of $505.07.

The parties filed Cross-Reviews of the Arbitration Decision. The Petitioner filed its Review on the issues of benefit rates and wage calculations and the Respondent reviewed the Arbitration Decision with respect to the issues of accident, causation, temporary total disability benefits, medical expenses and prospective medical treatment.

On July 12, 2021, the Commission issued a Decision and Opinion on Review. The Commission modified the Arbitrator's award and increased the average weekly wage from $505.07 to $1,894.00. In reviewing Rx5, the Commission found that Petitioner worked 24 hours and 8 double-time hours. His rate of pay was $47.35. As the only testimony that was in evidence were 8-hour workdays, and this evidence was unrebutted, it appeared that Petitioner earned $1,136.40 of regular pay for the equivalent of 3 days' work over the 3-week period of time. Applying the weeks and parts analysis, that would be the equivalent of 3/5 weeks for a correct average weekly wage of $1,894.00. Based on that analysis, Petitioner was awarded temporary disability benefits at a rate of $1,262.67 per week.

The Commission also modified the Arbitration Decision with respect to the duration of the award of temporary total disability benefits. The Arbitrator had awarded temporary total disability benefits for the period beginning October 23, 2018 through November 4, 2018. However, as the Commission found there was no evidence in the record corroborating lost time for this period, the Commission vacated the Arbitrator's award of temporary total disability benefits for the aforementioned period. Additionally, the Commission modified the Arbitrator's award of temporary total disability for the period beginning November 20, 2018 to December 26, 2018 to the period beginning November 26, 2018 through January 7, 2019. Respondent filed an appeal of the Commission's Decision to the Circuit Court of Cook County.

On May 18, 2022, the Circuit Court of Cook County issued an Order confirming the Decision of the Commission. The Respondent further appealed the Order of the Circuit Court to the Appellate Court.

On April 21, 2023, The Appellate Court of Illinois, First District, issued an Order remanding the instant case with specific instruction. Based on the Order of April 21, 2023, the Commission modifies the calculation of the average weekly wage and finds the average weekly wage is $505.07. Additionally, the Commission vacates the portion of the award for temporary total disability benefits based on an average weekly wage of $1,894.00 with a corresponding temporary total disability rate of $1,262.67, and recalculates the award based on an average weekly wage of $505.07 and temporary total disability rate of $336.71. 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 Respondent shall pay to the Petitioner the sum of $336.71 per week for a period of 6 1/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $27,812.18 in medical bills as they pertain to the back and left ankle only, and $31,848.93 in related benefits from Petitioner's significant other's Blue Cross/Blue Shield of Illinois policy, only as they pertain to the back and left ankle, for medical expenses under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $61,830.00. 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.

October 2, 2023

/s/ *Maria E. Portela*

MEP/dmm

O: 092623

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/s/ *Amylee H. Simonovich*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC000969
Case Name	Gozetta Hill v. Restaurant Depot
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0427
Number of Pages of Decision	13
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Adam Rosner
Respondent Attorney	Bradley Lichtman

DATE FILED: 10/2/2023

/s/Marc Parker, Commissioner

Signature

4STATE 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

Gozetta Hill,

Petitioner,

vs. No. 22 WC 000969

Restaurant Depot,

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, notice, and temporary total disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the following changes.

In finding that Petitioner failed to prove accident, notice, and temporary total disability, the Arbitrator gave two diametrically opposed descriptions of Petitioner's credibility. The Arbitrator first stated:

> "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."

However, the very next paragraph of the Arbitration Decision stated:

> "In the case at hand, the Arbitrator observed Petitioner during the hearing and found her testimony to be inconsistent. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and found material contradictions that would deem the witness unreliable."

The Commission strikes both of those paragraphs from the Arbitration Decision. However, upon our review of all the issues, facts, and evidence in the record, we find Petitioner's credibility was lacking, and we affirm the Arbitrator's findings that Petitioner did not prove accident or temporary total disability.

Petitioner's testimony was inconsistent and contradictory. She gave different versions of the position she was in, when she was allegedly struck by a freezer door. She testified that right after her accident she had told her manager, Mr. De La Fuente, that she was injured; then admitted she had not. She testified that on December 21, 2021, Dr. Bayran did not ask her how she was injured at work; then testified that he did.

Petitioner provided no testimony that she experienced any pain at the time the freezer door allegedly hit her. She sought no medical attention that day; completed her shift, and worked thereafter until she was terminated on January 10, 2022. Although Petitioner claims that on December 21, 2021, she told Dr. Bayran she sustained injuries from a work accident, Dr. Bayran's records document no such history, and instead report that the symptoms she complained of that day were causally related to a motor vehicle accident on November 21, 2019.

We do disagree with the Arbitrator's finding that Respondent did not receive timely notice of Petitioner's alleged accident. Respondent's witness, Mr. De La Fuente, testified that on January 19, 2022, Respondent received notice that Petitioner was making a claim for a work accident. However, given our finding that Petitioner failed to prove Accident, we find the issue of Notice to be moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that, with the changes noted above, the Decision of the Arbitrator filed January 4, 2023, 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.

The bond requirement in §19(f) of the Act is only applicable when the Commission has entered an award for the payment of money. Therefore, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

October 2, 2023

/s/ *Marc Parker*
Marc Parker

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

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

MP/mcp
o-08/24/23
068

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC000969
Case Name	Gozetta Hill v. Restaurant Depot
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Antara Nath Rivera, Arbitrator

Petitioner Attorney	Adam Rosner
Respondent Attorney	Bradley Lichtman

DATE FILED: 1/4/2023

THE INTEREST RATE FOR THE WEEK OF DECEMBER 28, 2022 4.60%

/s/Antara Nath Rivera, Arbitrator

Signature

STATE OF ILLINOIS)	☐ Injured Workers' Benefit Fund (§4(d))
)SS.	☐ Rate Adjustment Fund (§8(g))
COUNTY OF Cook)	☐ Second Injury Fund (§8(e)18)
	☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Gozetta Hill
Employee/Petitioner

v.

Restaurant Depot
Employer/Respondent

Case # **22** WC **000969**

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 **October 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 accident date, **December 17, 2021**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident ***was not*** given to Respondent.

In the year preceding the injury, Petitioner's average weekly wage was $**1,005.36**

On the date of accident, Petitioner was **54** years of age, **single** with **0** dependent children.

Respondent's payment, or non-payment, of reasonable and necessary charges for all reasonable and necessary medical services is not at issue at this time.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and **$0** for medical, 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 is not liable for the payment of TTD benefits, as provided in Section 8(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

ICArbDec19(b)

January 4, 2023

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

GOZETTA HILL,	)	
	)	
Petitioner,	)	
v.	)	
	)	Case No. 22 WC 000969
RESTAURANT DEPOT,	)	
	)	
Respondent.	)	

This matter proceeded to hearing on October 28, 2022, in Chicago, Illinois before Arbitrator Antara Nath Rivera on Gozetta Hill's ("Petitioner") Request for Hearing. Issues in dispute include whether the accident arose out of and in the course of Petitioner's employment, whether timely notice was given, and whether Petitioner is entitled to temporary total disability ("TTD") benefits. (Arbitrator's Exhibit "AX" 1)

STATEMENT OF FACTS

Petitioner testified that she began working Restaurant Depot ("Respondent") November 2021 at the Alsip, Illinois location. (Transcript "T" 14; 36) Petitioner testified that Respondent is a factory that sells bulk frozen food for restaurants. (T 15-16) Petitioner testified that her job duty was to load the freezer with frozen foods like pizza puffs, shrimps, etc. that are stored in freezers. (T 17) Petitioner testified that the foods came on pallets and that she would lift the food, by hand, from the pallets into the freezer. (T 17-18) Petitioner testified that each box weighed about 50 pounds. (T 17) Petitioner testified that each freezer had an individual door, which was clear and slightly larger than a beverage cooler at a gas station, which would open towards a person as they entered the freezer. (T 18-19) Petitioner testified that the door was very heavy. (T 19) Petitioner testified that the door automatically closed behind her. (T 19-20)

Petitioner testified that on December 17, 2021, Petitioner's manager brought out a pallet of pizza puffs for Petitioner to load into the freezer. (T 20) Petitioner testified that she lifted a pizza puff box into the freezer when the freezer door closed and hit her in the back. (T 20-21)

Petitioner testified that she was looking for her floor manager when she saw "Omar[1]." (T 21) Petitioner testified that Mr. De La Fuente was her floor manager. (T 35) Petitioner testified that she "addressed that to him." (T 21; 43) Petitioner testified that he asked her if she could proceed doing her work. (T 21; 43; 87) Petitioner testified that she did not fill out an accident report or waiver, nor was she

[1] Petitioner did not mention Omar's last name during her direct examination. Petitioner identified Omar after he testified and introduced himself as Omar De La Fuente. He will, hereinafter, be referred to as Mr. De La Fuente.

asked if she needed medical treatment. *Id*. Petitioner testified that she continued to work that day and continued to work until she was terminated in January 2022. (T 22)

Petitioner testified, on cross examination, that she never received trained on what to do if there was a work accident or never given any paperwork regarding reporting an accident. (T 28) Petitioner testified that the accident happened around 1:00pm-2:00pm. (T 33) Petitioner testified that the door closed "very fast." (T 34) Petitioner testified that she was "kneeling down putting the pizza puff boxes at the freezer. *Id*. Petitioner testified that she was inside the freezer when the incident happened. (T 35) Petitioner further testified that she was "sitting on the curb of the freezer" when the accident occurred. (T 35) Petitioner testified that after the door hit her, she kneeled down and "tried to get back up." (T 43) Petitioner testified that no one witnessed this accident. (T 35)

Petitioner testified that the next time she worked was December 19, 2021. (T 37) Petitioner testified that she worked a full shift that day. Petitioner testified that she also worked a full shift on December 20, 2021, but was off December 21, 2021, and December 22, 2021. Petitioner also worked the following dates after the accident: December 23, 2021; December 24, 2021; December 27, 2021; December 28, 2021; and December 30, 2021. (T 43-45; Respondent's Exhibit "RX" 2-9) Petitioner testified that she did not work in the first week in January 2022 due to the "Delta Flu." (T 50) Petitioner testified that she did not have any other conversations with anyone at Respondent, regarding this accident, other than Mr. De La Fuente. (T 45)

On rebuttal, Petitioner identified Mr. De La Fuente and testified that he was her supervisor and the person she told about her accident. (T 87) Petitioner testified that Mr. De La Fuente was on a forklift when she told him and when he asked if she could keep working. *Id*. Petitioner testified that she replied "yes." (T 89) Petitioner testified that she did not ask for medical treatment. *Id*. Petitioner testified that she did not tell Mr. De La Fuente that she was injured. (T 90) Petitioner testified that she continued to work for financial reasons. (T 89)

On December 21, 2021, Petitioner presented to Dr. Neema Bayran, M.D., at The Pain Center of Illinois. (Petitioner's Exhibit "PX" 1; T 22) Petitioner testified that the December 21, 2021, an appointment was already scheduled before the work accident occurred, as a follow up for lumbar injections Petitioner received as a result of pre-existing cervical and lumbar injuries. (T 40) Petitioner testified that she did not fill out new paperwork with Dr. Bayran because she was already treating with her. (T. 24) Petitioner testified that she reported the incident on this day and told her what happened on December 17, 2021. *Id*. There are no notes in the medical records to indicate as such. (T. 24; PX 1 at 1-4)

On February 1, 2022, Petitioner presented to Dr. Bayran. (PX 1 at 5-8) Petitioner reported a work related injury which occurred after her first injection in December 2021. *Id*. Petitioner reported that "she was picking up 24 boxes to load and then into the freezer, when she injured her back after she was

speaking one of the boxes." (PX 1 at 5) The notes indicated that Petitioner stated that she reported this incident to her supervisor, but was told to continue working. *Id*. Petitioner reported that she continued to work until December 29, 2021, when she stopped working due to her pain. *Id*. Petitioner reported continued pain in her lower back into her posterior thighs. *Id*. Dr. Bayran noted that there were no new injuries that occurred later in December 2021 and took her off work until her next visit. (PX 1 at 8)

Petitioner testified that she told Dr. Bayran, during the December 21, 2021, and the February 1, 2022, visits that the freezer door hit her in the back. (TX 42) Petitioner testified that her last days at work with Respondent were December 24, 2021, December 30, 2021, and January 10, 2022. (T 45-47) Petitioner further testified that she has not worked for any other company since being terminated on January 10, 2022. (T 26)

Testimony of Omar De La Fuente

Mr. De La Fuente testified that he has worked for Respondent for eight years. (T 53) Mr. De La Fuente testified that he is currently an assistant branch manager for the Griffith, Indiana facility and was transferred there in April 2022. (T 53-54) Mr. De La Fuente testified that on December 17, 2021, he was an assistant branch manager at the Alsip location. (T 54) Mr. De La Fuente testified that Respondent is "like a Sam's Club" for "ma and pa restaurants." *Id*. Mr. De La Fuente testified that there is always an assistant manager at the store and two senior managers. (T 55-56) Mr. De La Fuente testified that each shift has about 30 employees. (T 56)

Mr. De La Fuente testified that Respondent has a protocol for work accidents and injuries during onboarding training sessions for employees. *Id*. Mr. De La Fuente testified that the training included safety videos as well as an explanation of the process for employees on how to report a work accident. *Id*. Mr. De La Fuente testified that, for assistant branch managers, the protocol was to ask if they were okay, ask if the employee wanted to fill out a report, give the employee the packet to fill out, take pictures of the employee or product involved. (T 57) Mr. De La Fuente testified that accidents at Respondent are rare and that he would remember an accident if one would occur. *Id*. (T 57-58)

Mr. De La Fuente testified that on December 17, 2021, he was assigned to the Alsip location. (T 58) Mr. De La Fuente testified that he started work at 9:00am and closed the shift. *Id*. Mr. De La Fuente testified that he knows Petitioner. (T 58-59) Mr. De La Fuente testified that her title was freezer stocker and that her job duty was to stock shelves. (T 59) Mr. De La Fuente testified that Petitioner worked on December 17, 2021. *Id*. Mr. De La Fuente testified that her shift was from 10:00am to 6:00pm. *Id*. Mr. De La Fuente testified that Petitioner worked the whole shift. *Id*. Mr. De La Fuente testified that Petitioner did not report a work accident to him during her shift. (T 60) Mr. De La Fuente testified that according to Petitioner's timecards for December 17, 2021, Petitioner worked from 9:55am until 3:30pm when she took her lunch. (T 63; RX B) Mr. De La Fuente further testified that Petitioner came back from lunch at 4:00pm, took her break at 5:15pm, and punched out at 5:55pm. *Id*. Mr. De La Fuente testified that she

worked December 19, worked from 6:55am to 3:31pm. (T 63-64; RX B) Mr. De La Fuente testified that Petitioner worked on December 20, December 23, December 24, December 27, December 28, and December 30. (T 64-70; RX B) Mr. De La Fuente testified that Petitioner worked on January 10, 2022, from 9:58am to 3:00pm. (T 70; RX B) Mr. De La Fuente testified that Respondent was notified of Petitioner's accident on January 19, 2022. (T 71)

Mr. De La Fuente testified that the freezer doors open up when it is pulled towards the person. (T 73) Mr. De La Fuente testified that the doors close slowly and that the doors stop at the doorway. (T 74-75) He further testified that there is a hinge at the bottom left of the door that slows the door from closing quickly. (T 75)

On cross examination, Mr. De La Fuente testified that he did not recall anything specific about Petitioner other than her calling off often for illness. (T 80) He reiterated that Petitioner did not report an injury to him on December 17, 2021, or any time while she was working for Respondent. (T 60; 82-83)

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.

In the case at hand, the Arbitrator observed Petitioner during the hearing and found her testimony to be inconsistent. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and found material contradictions that would deem the witness unreliable.

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

The Arbitrator finds that Petitioner failed to prove that an accident occurred that arose out of and in the course of Petitioner's employment by Respondent on December 17, 2021. The Arbitrator notes Petitioner's testimony with respect to the manner in which the accident occurred to be inconsistent with witness testimony as well as inconsistent with medical records.

It is settled law that the burden of proof is upon Petitioner to prove his case by a preponderance of the evidence, "and even though there is evidence in the record which, if undisputed, would sustain a finding for the claimant, such evidence is not sufficient if, upon consideration of all the testimony and circumstances shown in the record, it appears that the manifest weight of the evidence is against such a finding." *Corn Products Refining Co. vs. Industrial Commission*, 6 Ill.2d 439, 443 (1955). Furthermore, it is well established in Illinois "that it is the peculiar province of the Industrial Commission to determine the credibility of witnesses, to weigh the testimony, and to determine the weight to be given to the evidence." *Dunker vs. Industrial Commission*, 126 Ill.App.3d 349, 352.

The Arbitrator notes that Petitioner testified that she lifted a pizza puff box into the freezer when the freezer door closed and hit her in the back. (T 20-21) The Arbitrator notes that Petitioner testified that the door closed "very fast." (T 34) Petitioner testified that she was "kneeling down putting the pizza puff boxes at the freezer. *Id*. The Arbitrator notes that Petitioner testified that she was inside the freezer when the incident happened. (T 35) Petitioner further testified that she was "sitting on the curb of the freezer" when the accident occurred. (T 35) Petitioner testified that after the door hit her, she kneeled down and "tried to get back up." (T 43) The Arbitrator finds this testimony to be inconsistent.

The Arbitrator also notes that in the medical records from February 1, 2022, Petitioner reported that "she was picking up 24 boxes to load and then into the freezer, when she injured her back after she was speaking one of the boxes." (PX 1 at 5) The Arbitrator notes that while the term "speaking" may be a Scrivener's error, there was no mention of a door. Furthermore, the Arbitrator notes that Petitioner presented to Dr. Bayran, on December 21, 2021, for an appointment that was already scheduled, prior to

the work accident occurred, as a follow up for unrelated and pre-existing cervical and lumbar injuries. (T 40) The Arbitrator notes that there was no mention of any work accident in the December 21, 2021, report. The Arbitrator also notes that Petitioner did not seek any immediate medical attention for a work accident nor did she present any evidence of physical symptoms, past or current, immediately following the December 17, 2021, accident.

The Arbitrator notes that Mr. De La Fuente credibly testified that the freezer doors close slowly and that the doors stop at the doorway. (T 74-75) He further testified that there is a hinge at the bottom left of the door that slows the door from closing quickly. (T 75)

Based on the Petitioner's inconsistent testimony, along with the uncontroverted medical records and Mr. De La Fuente's testimony, the Arbitrator finds that Petitioner failed to prove that an accident arose out of and in the course of Petitioner's employment by Respondent.

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

The Arbitrator finds that Petitioner failed to meet her burden of proof that she provided timely notice of a work-related accident to Respondent. The Arbitrator notes that Petitioner testified that, she "addressed that to him" referring to Mr. De La Fuente. (T 21) The Arbitrator also notes that Petitioner testified that she continued to work and informed Mr. De La Fuente of such. (T 21; 43; 87) The Arbitrator notes that Petitioner testified that she did not tell Mr. De La Fuente that she was injured. (T 90) The Arbitrator notes that Petitioner also testified that she did not have any other conversations with anyone at Respondent, regarding this accident, other than Mr. De La Fuente. (T 45) The Arbitrator notes that Mr. De La Fuente testified that Petitioner did not tell him of an accident. (T 60; 82-83)

As such the Arbitrator finds that Petitioner failed to prove that that she gave timely notice of the accident to Respondent.

WITH RESPECT TO ISSUE (L), WHETHER PETITIONER IS ENTITLED TO ANY TEMPORARY TOTAL DISABILITY BENEFITS, THE ARBITRATOR FINDS AS FOLLOWS:

As the Arbitrator found that Petitioner failed to prove that an accident arose out of her employment with Respondent, Respondent is not liable for the payment of TTD benefits, as provided in Section 8(b) of the Act.

It is so ordered:

Arbitrator Antara Nath Rivera

January 4, 2023

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC036525
Case Name	Sylvia Brown-Hood v. Loyola University of Chicago
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0428
Number of Pages of Decision	18
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Scott Barber
Respondent Attorney	John Bergin

DATE FILED: 10/4/2023

/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 (Causation, Medical Expenses, Nature & Extent)	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Sylvia Brown-Hood,

Petitioner,

vs. NO: 18 WC 36525

Loyola University of Chicago,

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, and nature and extent, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below. The Commission otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Findings of Fact

In the interest of efficiency, the Commission primarily relies on the Arbitrator's recitation of facts. It is undisputed that on February 7, 2018, Petitioner experienced pain in her low back while lifting a box of papers. Petitioner denied experiencing any low back pain or pain radiating into her legs before this work accident.

Medical Treatment

After visiting the emergency department, Petitioner began treatment with her primary care physician, Dr. Kalluri. Petitioner began physical therapy on April 17, 2018. Petitioner rated her pain at 6/10 and described it as constant, aching, and sharp. Prolonged standing, walking, and sometimes sitting aggravated her pain. The therapist wrote that Petitioner's right lumbar rotation was normal and her left rotation was normal with reproduction of pain. Straight leg raise was positive on the right. The therapist noted that there were significant restrictions felt in the soft tissue on the right. A week later Petitioner rated her pain at 4/10 and reported it was in the right low back and intermittent.

Petitioner rated her pain at 2-3/10 at the beginning of her April 26, 2010, therapy session.

On May 1, 2018, Petitioner reported that her pain had improved since starting physical therapy. The therapist wrote that Petitioner could walk farther distances with less pain. On May 3, 2018, Petitioner rated her pain at 4/10 and reported it had worsened because she was on her feet a lot at work. On May 8, 2018, she rated her pain at 8/10 and reported it worsened because she walked 10,000 steps due to a graduation when she normally only walked 3,000 steps. Two days later, Petitioner rated her pain at 4/10. She reported her pain had improved and she was 60% better. On May 15, 2018, Petitioner rated her pain at 0-2/10. She reported that her pain had improved and that she was 80% better.

On May 17, 2018, Petitioner rated her pain at 0/10 at the beginning of her physical therapy session and reported she was 90% better. The therapist wrote that Petitioner met the short term goals of reporting pain at 3/10 with tolerating prolonged sitting, standing, and walking, and demonstrating fair lumbar core/postural strength for performing occupational duties. Petitioner met the long term goal of reporting pain at 0/10 with tolerating prolonged sitting, standing, and walking. She had not yet met the long term goals of demonstrating good lumbar core/postural strength for performing occupational duties, improving her straight leg raise, and decreasing neural tension to improve her ability to perform activities of daily living (ADLs). The therapist wrote:

> Patient['s] back pain is significantly better. She has better motion and core strength. She is able to tolerate walking further distances. She still gets mild pain with laying [sic] supine and has positive SLR…

(PX 3).

When Petitioner returned to Dr. Kalluri on May 19, 2018, the doctor's examination was once again normal. Petitioner reported physical therapy was helping. She was to continue physical therapy for an additional four weeks. Petitioner rated her pain at 0-2/10 on May 22, 2018, at physical therapy and reported her pain had improved. The therapist wrote that Petitioner had good tolerance with walking and strengthening, her soft tissue was more compliant, and that Petitioner was progressing well. Two days later, Petitioner rated her pain at 2/10 and said it worsened after sitting in her car too long. The therapist wrote that Petitioner's walking tolerance had significantly improved since she started physical therapy. On May 29, 2018, Petitioner rated her pain at 2/10 and reported it worsened after sitting in a chair too long the previous day.

On June 5, 2018, Petitioner rated her pain at 2/10 and complained of pulling in the right calf. On June 12, 2018, Petitioner rated her pain at 2/10. She reported the pulling in the calf had improved and complained of slight tenderness in the center of her back with pressure. The therapist wrote that Petitioner had better tolerance with walking and anticipated discharge at the next session. On June 14, 2018, Petitioner was discharged from physical therapy. She rated her pain at 0/10 at the beginning of the session. Petitioner reported that she was 90+% better. Petitioner met the long-term goals of reporting pain at 0/10 with tolerated prolonged sitting, standing, and walking, and improving straight leg raise to improve her ability to perform ADLs. She had not met the long term goal of demonstrating good lumbar core/postural strength for performing occupational duties.

Petitioner denied that she was nearly 100% improved when she completed her initial course

of physical therapy in June 2018. She testified that the results of her initial course of physical therapy were "…enough for me to take what I learned there to continue to do the exercises and what have you to keep myself going a little bit." (Tr. at 11).

Regarding whether her symptoms improved during her initial course of physical therapy, Petitioner testified:

> I began to feel stronger and better, but at the end of each session, she would give me a 15-minute massage and a heating pad. So when I left out of there, of course, it was different than the way I walked in.

(Tr. at 25). Under further examination, Petitioner testified that during her initial course of physical therapy, the therapist gave her a form to complete regarding her pain at the end of each session. She testified that she felt better when she completed the form because the therapist ended each session with a heating pad and a massage. Petitioner testified that each session provided only a temporary reduction in her pain. She testified that when she went home and sat for a long period, her muscles would stiffen and her pain returned.

Petitioner agreed that by the time she was discharged from physical therapy in June 2018, her symptoms had improved. Petitioner denied undergoing any treatment relating to her lumbar condition between her discharge from physical therapy on June 14, 2018, and her annual physical on August 11, 2018. When Dr. Kalluri examined Petitioner on August 11, 2018, the examination was normal; however, the doctor referred Petitioner to Dr. Dasari for further treatment.

Dr. Dasari examined Petitioner on September 5, 2018. Petitioner complained of pain in the low back and left leg. Petitioner reported her low back pain started on February 8, 2018, while lifting a box of paper at work. She described her pain as bilateral, intermittent, and aching with radiation to the left leg. Petitioner also reported tingling/numbness in the left foot. Petitioner denied her prior course of physical therapy greatly improved her symptoms and rated her pain at 6/10. Dr. Dasari interpreted the lumbar MRI as showing mild bilateral SI joint arthritis with mild disc bulges at L3-L4, L4-L5, and L5-S1. He diagnosed lumbar radiculopathy and intervertebral disc degeneration. Petitioner was to restart physical therapy.

Petitioner began a new course of physical therapy on September 10, 2018. She rated her pain at 4-5/10 at rest and at 10/10 with activity. During the next few sessions, she reported some improvement. Petitioner was discharged from physical therapy on November 5, 2018. The therapist wrote that while Petitioner reported occasional tightness and low back pain, she also reported that she was performing at her prior level of function. Petitioner reported pain at rest at 0/10 and with activity at 4-5/10. Petitioner met the long-term goals of decreasing her pain score to 1-2/10 with sustained standing, and increasing her lumbar flexion range of motion to no restriction to allow her to perform ADLs such as putting her shoes and socks on. Petitioner did not meet the goals of increasing strength in the bilateral legs to 5/5 to help with lifting from the floor, and decreasing her modified Oswestry score to 20% from walking long distances.

On December 7, 2018, Petitioner reported to NP Smith that she was unable to stand for more than 15 minutes without pain. She reported she could sit for an hour without pain and rated

her pain at 4/10. Petitioner underwent left L4 and L5 transforaminal ESIs on February 18, 2019. On March 4, 2019, Petitioner reported a 50% improvement in pain after the recent lumbar injections. She reported her ADLs had improved over the prior two weeks and she was able decrease and/or stop using her pain medications. Petitioner rated her pain at 3/10. Petitioner was to follow up as needed and continue her home exercise program.

Expert Opinion

Dr. Wehner examined Petitioner at Respondent's request on September 4, 2018. (RX 1). Petitioner complained of pain rating 7-8/10 in her low back even after taking her prescribed muscle relaxant and ibuprofen the morning of the examination. Petitioner denied right leg pain but complained of pain in the left thigh and her left calf down to the instep. She also complained of intermittent numbness and tingling in the left first, second, and third toes.

Petitioner weighed 324 pounds. Dr. Wehner wrote that Petitioner's gait was slow, but normal, and there was no paraspinal spasm or scoliosis. The doctor wrote that while Petitioner reported most of her pain was at L4, there was no pain with axial compression or axial rotation. Petitioner's bilateral hip range of motion was painless and bilateral straight leg raise was negative. Dr. Wehner wrote that Petitioner's examination was normal regarding straight leg raising, reflex testing, and motor strength.

Dr. Wehner diagnosed Petitioner with low back pain consistent with a sprain or soft tissue injury. She opined that the lumbar MRI did not reveal any acute disc herniation, disc injury, bone injury, or ligamentous injury. She wrote that there were no positive Waddell findings; however, there were also no objective findings supporting Petitioner's subjective complaints. Dr. Wehner opined that Petitioner's complaints were not causally related to the work injury. She opined:

> …A soft tissue sprain from February 7, 2018 should have healed within 6 weeks. Ongoing pain complaints are no longer explained by the date of injury…or the clinical exam or the radiographic findings. The therapy notes clearly document the resolution of symptomatology with the usual time and therapy. Therefore, there is no medical etiology to explain her present pain complaints today based on an injury of February 7, 2018.

(RX 1). Dr. Wehner opined that no further treatment was necessary.

Conclusions of Law

Petitioner bears the burden of proving every element of her case by a preponderance of the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). After carefully considering the totality of the evidence, the Commission modifies the Arbitrator's finding that Petitioner's current condition is causally related to the February 7, 2018, work accident. Additionally, the Commission modifies the Arbitrator's award of medical expenses. The Commission also modifies the Arbitrator's permanency award. Finally, the Commission corrects certain errors in the Arbitration Decision.

Causal Connection

The Arbitrator concluded that Petitioner's current condition of ill-being is causally related to the February 7, 2018, work accident. In reaching this conclusion, the Arbitrator determined that the opinions of Respondent's Section 12 examiner were less credible than that of Petitioner's treating doctor. However, the Commission views the evidence much differently. After considering the evidence, the Commission finds the credible evidence shows Petitioner's lumbar condition was causally related to the February 7, 2018, work accident only through June 14, 2018.

Petitioner's testimony regarding her ongoing symptoms and treatment often conflicted with the credible evidence. Petitioner denied that she received any lasting benefit from her first course of physical therapy. Furthermore, Petitioner denied that she reported in June 2018 her symptoms were over 90% improved when she was discharged from physical therapy. However, the Commission finds the medical records contradict Petitioner's testimony regarding these key issues.

Petitioner began her first course of physical therapy on April 17, 2018, and was discharged on June 14, 2018. Contrary to her testimony, the physical therapy records show that Petitioner reported consistent improvement in her symptoms throughout this course of physical therapy. By May 15, 2018, Petitioner told the therapist that her symptoms had improved so much that she was 80% better. Two days later, she reported her symptoms were 90% improved. The therapist determined Petitioner had met all her short-term goals and met the long term goal of reporting no pain with prolonged sitting, standing, and walking.

The therapist discharged Petitioner from physical therapy on June 14, 2018, due to her progress. On that day, Petitioner rated her pain at 0/10 at the beginning of her session and reported her symptoms had improved over 90% with physical therapy. The therapist determined Petitioner also met the long term goals of improving her straight leg raise and her ability to perform ADLs. Despite Petitioner's testimony that she received no real or lasting benefit from this first course of physical therapy, Petitioner did not seek any additional treatment for her symptoms for almost two months. When Petitioner saw Dr. Kalluri in August 2018 for her annual physical, Dr. Kalluri yet again documented a normal examination. After considering the evidence, the Commission finds the reports and assessments contained in the physical therapy records credibly document Petitioner's symptoms and progress.

In direct contrast to Petitioner's documented condition on June 14, 2018, Petitioner's complaints had inexplicably drastically changed by early September 2018. Most notably, during Dr. Wehner's September 4, 2018, Section 12 examination, Petitioner rated her low back pain at 7-8/10 after taking both a muscle relaxer and prescription strength ibuprofen that day. Petitioner also complained—for the first time—of numbness and tingling in some of her left toes. Despite Petitioner's report of severe pain, her physical examination was normal, with no paraspinal spasm, no pain with axial compression or rotation, painless hip range of motion, negative bilateral straight leg raise, and normal reflex testing and motor strength. After considering certain medical records, Petitioner's normal examination, and Petitioner's reported history and symptoms, Dr. Wehner opined that Petitioner sustained a lumbar sprain that resolved by June 14, 2018. She opined that there was no medical explanation for Petitioner's ongoing complaints regarding the work accident. Furthermore, Dr. Wehner opined that Petitioner required no further treatment related to the work

accident.

The Commission finds the opinions of Dr. Wehner most credible regarding the causal connection of Petitioner's ongoing lumbar condition and complaints to the February 7, 2018, work accident. Unlike Dr. Dasari, Dr. Wehner reviewed records regarding Petitioner's initial course of physical therapy. Thus, Dr. Wehner's opinions were based on her more complete and accurate knowledge of the progression of Petitioner's condition. Dr. Wehner's opinion that Petitioner's complaints and treatment after June 14, 2018, were not related to the work accident is also supported the lack of objective findings supporting Petitioner's subjective complaints. It is notable that Dr. Kalluri also repeatedly documented normal physical examinations despite Petitioner's continued complaints.

There is no evidence that Dr. Dasari reviewed any of the records related to that first course of physical therapy. There is also no evidence that he reviewed Dr. Kalluri's records or the emergency room records. Instead, his opinion that Petitioner's lumbar condition was causally related to the work accident relies on the history Petitioner provided. Unfortunately, that history gave Dr. Dasari the inaccurate impression that Petitioner received very little benefit from her initial course of physical therapy. Thus, Dr. Dasari lacked information that is critical to the determination of the continued causal connection of Petitioner's lumbar condition to the February 7, 2018, work accident.

For these reasons, the Commission finds Petitioner's current condition of ill-being regarding her lumbar condition is not related to the February 7, 2018, work accident. The Commission further finds her lumbar condition was causally related to the work accident through June 14, 2018.

Medical Expenses

As the Commission finds Petitioner's condition of ill-being regarding her lumbar spine after June 14, 2018, 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 through June 14, 2018, was reasonable, necessary, and causally related to the work accident. Therefore, Respondent shall pay reasonable and necessary medical charges incurred through June 14, 2018. The Commission finds Respondent is not liable for medical expenses incurred after June 14, 2018.

Nature and Extent

Due to its finding that Petitioner's lumbar condition was causally related to the February 7, 2018, work accident through June 14, 2018, the Commission must modify the award of permanent partial disability. The Arbitrator concluded Petitioner sustained a 5% loss of the whole person due to the work accident. The Commission generally agrees with the Arbitrator's analysis of the first four factors pursuant to Section 8.1b(b) of the Act. However, the Commission modifies the Arbitrator's analysis of the fifth factor.

As Petitioner's condition of ill-being after June 14, 2018, was not causally related to the

work accident, the credible evidence shows her injury resolved with minimal conservative treatment. The credible evidence also reveals that Petitioner sustained a lumbar sprain due to her work accident. By June 14, 2018, Petitioner's treatment included only medications and a course of physical therapy. The credible evidence further shows that on June 14, 2018, Petitioner rated her pain at 0/10 and could sit, stand, and walk for prolonged periods without experiencing pain. While Petitioner subsequently underwent a second course of physical therapy and received multiple lumbar injections, that treatment was not causally related to the work accident. For the foregoing reasons, the Commission finds the credible evidence shows Petitioner sustained a 2.5% loss of the whole person as a result of the February 7, 2018, work accident.

Additional Modifications

The Commission makes the following additional modifications to the Decision of the Arbitrator. On page one (1) of the Arbitration Decision, the Arbitrator wrote: "She completed a Report of Workplace Injury form on March 27, 2019 when HR sent it to her via email." The Commission modifies this sentence to read as follows:

> Petitioner completed a Report of Workplace Injury once she received the form from HR.

On page four (4) of the Arbitration Decision, the Arbitrator wrote: "Symptoms may resolve after physical therapy, but that does not mean symptoms never return and if they do return a few months later, that they are not still related to the initial injury." The Commission strikes this sentence in its entirety from the Arbitration Decision. Finally, the parties stipulated that Petitioner was married on the date of accident; however, on the Arbitration Decision Form, the Arbitrator mistakenly marked that Petitioner was **single**. The Commission modifies this sentence on the Arbitration Decision Form to read as follows:

> On the date of accident, Petitioner was 45 years of age, **married** with 0 dependent children.

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 4, 2022, is modified as stated herein.

IT IS FURTHER ORDERED that Petitioner's current condition of ill-being is not causally related to the February 7, 2018, work accident. Petitioner's condition of ill-being was causally related to the work accident through June 14, 2018.

IT IS FURTHER ORDERED that Respondent shall pay reasonable and necessary medical charges incurred through June 14, 2018, pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner the sum of $480.00/week for a period of 12.5 weeks, because the work accident caused Petitioner to sustain a 2.5% loss of the person as a whole pursuant to Section 8(d)2 of the Act.

IT IS FURTHER ORDERED that Respondent shall receive credit for all amounts paid to or on behalf of Petitioner on account of the February 7, 2018, work injury pursuant to stipulation by the parties.

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 $6,200.00. 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.

October 4, 2023

o: 8/15/23
AHS/jds
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/s/ *Amylee H. Simonovich*
Amylee H. Simonovich

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC036525
Case Name	BROWN-HOOD, SYLVIA v. LOYOLA UNIVERSITY OF CHICAGO
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Nina Mariano, Arbitrator

Petitioner Attorney	Scott Barber
Respondent Attorney	John Bergin

DATE FILED: 4/4/2022

THE INTEREST RATE FOR THE WEEK OF MARCH 29, 2022 1.05%

/s/Nina Mariano, 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

Sylvia Brown-Hood
Employee/Petitioner

v.

Loyola University of Chicago
Employer/Respondent

Case # **18WC036525**

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 Nina Mariano** , Arbitrator of the Commission, in the city of **Chicago** on **December 14, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

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

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

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

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

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

In the year preceding the injury, Petitioner earned $**41,600.00**; the average weekly wage was $**800.00**.

On the date of accident, Petitioner was **45** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$0** for TTD, $**0** for TPD, $**0** for maintenance, and **$0** for credit against permanency, 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 permanent partial disability benefits of $480.00/week for 25 weeks, because the injuries sustained on February 7, 2018, caused **5% loss of use of man as a whole**, as provided in Section 8(d)2 of the Act.

Respondent shall pay to the Petitioner reasonable, related, and necessary medical services as provided in Sections 8(a) and 8.2 of the Act, to be paid pursuant to the Fee Schedule. Further, as stipulated by parties, Respondent shall be credited for all payments made.

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 4, 2022

Signature of Arbitrator Nina Mariano

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

SYLVIA BROWN-HOOD,	)	
	)	
PETITIONER,	)	
	)	
v.	)	
	)	CASE NO. 18 WC 036525
LOYOLA UNIVERSITY OF CHICAGO,	)	
	)	
	)	
RESPONDENT.	)	

FINDINGS OF FACT

This matter proceeded to hearing on December 14, 2021 in Chicago, Illinois before Arbitrator Nina Mariano on Petitioner's Request for Hearing. The issues in dispute are causal connection, reasonable and necessary medical expenses and nature and extent of the injury. Arbitrator's Exhibit "Ax" 1.

Petitioner testified she worked for the Respondent for 25 years. (TR 7) On the date of the accident she was employed in the graduate school office where she did orientation, graduation, campus tours, retreats, conferences, workshops and anything that needed to be done. *Id.* On February 7, 2018, she was lifting a box of paper and felt pain in her low back. *Id.* She reported the injury to Dean Jessica Horowitz, who was present on the day of the accident, and had directed her to lift the box. (TR 29) She completed a Report of Workplace Injury form on March 27, 2019 when HR sent it to her via email. (TR 7-8, 28-29; PX 2)

Petitioner testified she presented to the emergency department of Community Hospital on February 8, 2018 the day following the lifting injury. (TR 8) The emergency department records demonstrate she arrived at approximately 8:00 pm. (PX 3 p.6) The emergency room records indicate she complained of 9/10 pain radiating down her left leg for three days. (PX 3 p.6) Petitioner denied saying "three days" to the nurse and stated that the note was not accurate. (TR 8) Further, she testified the emergency room record was incorrect when it indicated "no recent trauma or injury" as she told them she was hurt at work. (TR 21-23)

Petitioner presented to her primary care physician, Dr. Kameswari Kalluri, on February 13, 2018, who prescribed methylprednisolone and told her to follow up. (PX 4 p.77) She followed up with Dr. Kalluri through August 11, 2018 who prescribed pain medications and a referral to pain management. (PX 4 pp. 88-99) The pain medications made her sleepy and a little loopy but it did take the pain away temporarily. (TR 11-12)

During the time she treated with Dr. Kalluri, she also underwent a physical therapy routine at Community Health Care. (TR 10; PX 3 pp.15-65) She reported her back pain started after lifting and twisting with a box at work and testified that the person taking the history from her had gotten it right. (TR 33; PX 3 p.15) After 16 sessions of physical therapy, she reported that her pain was 0/10 and that she had improved 90% plus better. (TR 26) This physical therapy ended on approximately June 14, 2018. (TR 24)

Petitioner testified that she received no treatment between June 14, 2018 and August 11, 2018. (TR 27)

Petitioner attended a Section 12 exam at the request of Respondent on September 4, 2018. (RX 1)

Petitioner presented to Midwest Interventional Pain on September 5, 2018 and reported that her pain started after a lifting incident at work (PX 5 p.102) She testified they provided injections on October 15, 2018, and again on February 18, 2019. (TR 12-13; PX 5 pp.123-127) After the second injection she had a lot of soreness, but the pain was a four or five. (TR 13) Dr. Satish Dasari opined the Petitioner's injury was caused by the work accident. (PX 5 pp.102-104)

She presented to ATI for physical therapy on September 10, 2018. (TR 13) The Referral Intake Form shows an injury on February 8, 2018. (PX 6 p.168) ATI gave her yoga exercises and used two different machines to stretch and loosen up muscles so she could function. (TR14) She testified that at the end of each session she felt pretty good because the sessions would end with a massage and heating pads on her back, but then when she would go home or about her business and she would stiffen up again. *Id*. She was discharged from ATI on November 5, 2018. (TR 14; PX 6 p.238)

Petitioner testified that she currently exercises with a personal trainer at LA Fitness at the recommendation of Dr. Kalluri. (TR 16) At the end of her treatment, Dr. Kalluri was prescribing Norco, Ibuprofen, Cyclobenzaprine and Gabepentin which Petitioner continued taking off and on until April or May of 2020, and after that, she only took muscle relaxers and Motrin. (TR 17)

Petitioner is currently employed at Roseland Hospital where she is a recruiter. (TR 18). The Respondent terminated her employment six months after her work injury. *Id.* Her job duties at Roseland Hospital include setting up interviews and downloading resumes. (TR 19)

On cross examination, Petitioner was questioned about a note in Dr. Kalluri's records, dated February 7, 2018, indicating that she told her office that she had pain radiating from the left buttocks down the left side of the leg and that she had been taking Motrin, approximately four a day. (TR 21-23) She testified she remembers she called Dr. Kalluri's office on the morning of February 7, 2018 at 10:41 am on her way home from work. *Id.* She testified that she let her office know about the pain she was experiencing and was told to go to the emergency room. *Id.* She denied telling them she was taking 800 milligrams of Motrin because Dr. Kalluri's office is the doctor who prescribed the Motrin so there would be no other way she could have been taking them prior. *Id.* She testified that Dr. Kalluri's entry was incorrect, but did not have an

explanation as to how or why. *Id.* She testified she never had low back pain or pain radiating into her legs prior to February 7, 2018. (TR 20)

Respondent introduced into evidence the Section 12 report of Julie Wehner, M.D., which indicated an exam date of September 4, 2018. Petitioner reported To Dr. Wehner a history of the accident and course of care of her treatment that was consistent with her testimony at trial. On the date of the examination, Petitioner reported her pain level to be a "7-8/10." (RX 1)

Dr. Wehner performed a clinical examination which exhibited no neurological deficits. Petitioner reported pain at approximately the L4 area, but there was no pain with axial compression or axial rotation. *Id.* Dr. Wehner reviewed the MRI of the lumbar spine showing mild disc bulges and facet arthropathy without any central or foraminal stenosis and believed it to be in the range of normal. *Id.* Dr. Wehner opined the diagnosis to be low back pain consistent with a sprain or soft tissue injury. *Id.*

Dr. Wehner reviewed the physical therapy notes from Community Health Care and noted that they clearly document the resolution of symptomology within the "usual time" and treatment to date was reasonable and necessary. Dr. Wehner found no medical etiology to explain the present pain complaints based on the injury of February 7, 2018. Dr. Wehner further opined that the Petitioner does not need any further diagnostic or therapeutic intervention or any further work restrictions. "There is no permanent partial disability expected for a lumbar strain with no objective findings." (RX1, p.4).

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).

Arbitrator finds that Petitioner testified credibly at trial regarding the accident, her course of care and treatment and improvement of her symptoms.

F. Is Petitioner's current condition of ill-being caused by the accident?

To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980), including that there is some causal relationship between his employment and his injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989).

Based upon the evidence presented at trial, including medical opinions, and witness testimony, the Arbitrator finds that Petitioner established a causal connection between the work-related accident of February 7, 2018, and her current condition of ill- being regarding the lumbar spine.

It is undisputed the Petitioner was at work on February 7, 2018, and in the presence of another employee, injured her back when she was lifting a box. Reporting of the injury is also not in dispute.

A mention in Dr. Kalluri's records regarding notes of a phone call with Petitioner indicating she was already taking Motrin on the day of the accident, which her office then prescribed, and a three day history of complaints in the emergency department records, which Petitioner denies giving, are not enough to overcome Petitioner's direct testimony that she had no low back pain prior to the February 7, 2018 accident. There are many instances of consistent histories in the medical records. The Arbitrator finds that Petitioner testified credibly regarding the accident and her complaints. Further, she immediately reported the incident to her employer.

While Dr. Dasari opined that Petitioner's condition of ill-being was caused by the work accident, Respondent's Section 12 Examiner also opined that based on the medical records, her condition prior to the exam was consistent with a back strain and that the treatment she had undergone to date was reasonable and necessary. Dr. Wehner reviewed the medical records and did not provide any opinions regarding prior conditions. Arbitrator finds the above causal connection opinions credible.

The Arbitrator does not find Dr. Wehner's opinion that continuing complaints at the time of the exam were no longer related to the work accident credible. Symptoms may resolve after physical therapy, but that does not mean symptoms never return and if they do return a few months later, that they are not still related to the initial injury.

Therefore, Arbitrator finds causal connection between Petitioner's current condition of ill being and the work accident of February 7, 2018.

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

Under Section 8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or

cure the effects of a claimant's injury. The claimant has the burden of proving that the medical services were necessary, and the expenses incurred were reasonable. City of Chicago v. Illinois Workers' Compensation Commission, 409 Ill. App. 3d 258, 267 (1st Dist., 2011).

Arbitrator finds that services provided to the Petitioner were reasonable and necessary and relieved Petitioner of the effects of her work related injury.

The Respondent has not yet paid all appropriate charges for reasonable and necessary medical services. Respondent shall pay for the care provided by Midwest Interventional Spine Specialists, ATI Physical Therapy, Community Hospital and Community Health Care pursuant to the Fee Schedule, less any amount already paid, as stipulated to by the parties.

In support of the Arbitrator's decision with respect to "L", what is the nature and extent of the injury, the Arbitrator finds:

Pursuant to Section 8.1(b) of the Act, the following factors are to be considered in determining the level of permanent disability for accidental injuries occurring on or after September 1, 2011: (i) reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employees' future earning capacity; (v) evidence of disability corroborated by the treating medical 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. 820 ILCS 305/8.1b(b).

With regard to Subsection (i) of Section 8.1(b), 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, Arbitrator gives no weight to this factor.

With regard to Subsection (ii) of Section 8.1(b), the occupation of the employee, the Arbitrator notes Petitioner currently works in a similar capacity as she did with the Respondent, although it is for another employer since she was terminated by Respondent after her work injury. Petitioner has a full duty work release. There was no testimony or evidence presented regarding the physical nature of her current position. Therefore, Arbitrator gives moderate weight to this factor.

With regard to Subsection (iii) of Section 8.1(b), the age of the employee, Arbitrator notes Petitioner was 45 years old at the time of the accident. This exposes her to at least 15 more years of active employment before reaching normal retirement age. Therefore, Arbitrator gives moderate weight to this factor.

With regard to Subsection (iv) of Section 8.1(b), Petitioner's future earning capacity, Arbitrator notes that Petitioner returned to work with no restrictions and is currently employed in a new position for a different employer. There is no evidence of any impact on her future earning capacity. Therefore, Arbitrator gives no weight to this factor.

With respect to Subsection (v) of Section 8.1(b), evidence of disability corroborated by treating medical records, Arbitrator considers that Petitioner underwent conservative care including physical therapy, injections, and medications, which alleviated the effects of her injury. Petitioner testified to medications prescribed by Dr. Kalluri at her last office visit and testified vaguely to only taking muscle relaxers and Motrin after April or May of 2020, but did not identify when or how often she continues to take them. She testified she now exercises with a trainer at the suggestion of Dr. Kalluri. She did not testify to any other lasting effects from her injury. Arbitrator did observe Petitioner change positions between sitting and standing while testifying. Therefore, Arbitrator gives moderate weight to this factor.

After considering the above five factors and the entirety of the evidence, the Arbitrator awards Petitioner 5% loss use of MAW, representing 25 weeks of benefits.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC033591
Case Name	Brett Wininger v. Continental Tire North America
Consolidated Cases	
Proceeding Type	8(a)/19(h) Petition
Decision Type	Commission Decision
Commission Decision Number	23IWCC0429
Number of Pages of Decision	5
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	James Keefe Jr

DATE FILED: 10/4/2023

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Brett Wininger,

Petitioner,

vs. No. 19 WC 033591

Continental Tire North America,

Respondent.

DECISION AND OPINION ON REVIEW PURSUANT TO §8(a)

This matter comes before the Commission on Petitioner's §8(a) Petition, seeking additional medical expenses and prospective medical care for his low back condition. In her January 27, 2020, nature and extent decision, the Arbitrator awarded Petitioner permanent partial disability of 20% person as a whole under §8(d)2 of the Act. On April 13, 2023, Petitioner filed a Petition for Prospective Medical Care pursuant to §8(a) of the Act. A hearing on that Petition was held before Commissioner Parker on September 15, 2023. Petitioner seeks medical benefits under §8(a) for his post-arbitration treatment and prospective medical care, including the spinal fusion at L5-S1 and disc replacement surgery at L4-5 and L3-4 recommended by Dr. Matthew Gornet.

Findings of Fact:

At the time of his original accident on March 23, 2018, Petitioner was a high table operator at Continental Tire. On that day, he sustained an injury to his low back. The accident was accepted, and Petitioner's April 17, 2018, MRI showed a large extruded fragment at L5-S1 which was causing severe nerve compression, an annular central tear on the left at L3-4 and a left paracentral protrusion at L4-5 with a fragment to the left. On June 13, 2018, Dr. Matthew Gornet, Petitioner's treating physician, performed a laminotomy and microdiscectomy at L5-S1 on the left.

Petitioner experienced dramatic improvement following the surgery but continued to complain of intermittent left leg pain. Dr. Gornet prescribed Cyclobenzaprine and on January 17, 2019, returned Petitioner to work at maximum medical improvement with no restrictions. Petitioner returned to Dr. Gornet's office on October 14, 2019, with symptoms of back, buttock, and left leg pain. The doctor opined that Petitioner might require future treatment, but it would be a large undertaking that would probably involve three levels of treatment. Petitioner was not a candidate for additional surgery at that time, as he weighed 400 pounds.

At arbitration on January 9, 2020, Petitioner testified that he still had low back and left leg pain. He was taking 800 mg of ibuprofen three times per day and utilizing Biofreeze. Despite this, his activities were restricted by his pain. The Arbitrator considered his complaints and restrictions and awarded 20% loss of his body as a whole. Neither party sought review of the Arbitrator's January 27, 2020, award.

On June 18, 2020, Petitioner reported to Dr. Gornet's physician's assistant that he was working full duty but was miserable, because his low back pain extended down into his buttocks and left leg. The PA advised Petitioner to continue his weight loss efforts and to seek re-evaluation when his weight dropped below 300 pounds. Petitioner saw Dr. Gornet on December 13, 2021, and the doctor ordered a new MRI and instructed him to continue losing weight. The March 14, 2022, MRI showed central disc pathology and annular tears at L3-4, L4-5, and L5-S1. Epidural steroid injections were performed by Dr. Blake in October and November 2022. At Petitioner's follow up appointment on November 14, 2022, Dr. Gornet noted that Petitioner's symptoms continued and the injections had provided only temporary relief. He recommended spinal fusion at L5-S1 and disc replacement at L4-5 and L3-4. On February 16, 2023, Dr. Gornet noted that Petitioner's weight was down to 189 pounds, making him eligible for the recommended surgery. However, the doctor noted that some of Petitioner's leg symptoms might never go away.

Respondent refused to approve the recommended surgery, relying on a §12 examination performed by Dr. R. Peter Mirkin on December 28, 2022. Dr. Mirkin opined Petitioner had a "new" disc protrusion at L4-5. He believed Petitioner's current pathology and symptomatology were not present in 2018 and Petitioner had done well for years after his 2018 surgery. However, he agreed that Petitioner needed another discectomy at L4-5 at the time of his exam. That surgery would be unrelated to Petitioner's work accident.

Dr. Gornet reviewed Dr. Mirkin's report and observed that Respondent's examiner had ignored Petitioner's post-operative back, buttock and left leg pain. Dr. Mirkin had also failed to acknowledge that Dr. Gornet had considered and rejected the possibility of additional surgery years before due to Petitioner's weight. Dr. Gornet believed Petitioner's disc injuries had progressed since the prior surgery. The April 17, 2018, MRI documented the structural issues at all three levels pre-existed the prior surgery but could not be addressed due to his weight. With his recent weight loss, Petitioner has become eligible for the surgery he has needed since 2018.

At the September 15, 2023, review hearing, Petitioner admitted that his condition improved following his microdiscectomy. However, after he returned to work, his condition progressively worsened until Dr. Gornet ordered him off work on August 26, 2022. Petitioner's symptoms continue to worsen; he has numbness and tingling in his left leg, left hip pain, and trouble walking. He wants to have the recommended surgery.

Conclusions of Law:

Pursuant to §8(a) of the Act, Petitioner is entitled to any and all necessary care to cure or relieve the effects of his work-related injuries. 820 ILCS 305/8(a). Upon establishment of a causal nexus between the injury and Petitioner's current condition of ill-being, Respondent is liable for all medical care reasonably required to diagnose, relieve, or cure the effects of the Petitioner's work injuries. *Plantation Mfg. Co. v. Industrial Comm'n,* 294 Ill. App. 3d 705, 709 (2d Dist. 1997). An employer's liability for medical services under §8(a) of the Act is continuous so long as the services are required to relieve the injured employee from the effects of the injury. *Efengee Elec. Supply Co. v. Industrial Comm'n,* 36 Ill. 2d 450, 453 (1967).

Dr. Gornet testified in his deposition on July 20, 2023, that Petitioner's current complaints and need for surgery at L5-S1, L3-4, and L4-5 are causally related to his March 24, 2018, work accident. According to Dr. Gornet, Petitioner has had symptoms emanating from these three levels since the accident. The doctor had noted in 2019 prior to arbitration that Petitioner might eventually need surgery at all three levels. Dr. Gornet testified that the original MRI clearly shows a central disc pathology at L3-4 with a high-intensity signal consistent with an annular tear, a disc herniation to the left at L4-5, and a large herniation at L5-S1. Petitioner's current status is merely a continuation of deterioration from the time of his accident.

Dr. Gornet's opinions are supported by diagnostic testing and medical records and are more persuasive than Dr. Mirkin's. The Commission concludes that Petitioner's current condition of ill-being and his need for surgery are causally related to his work accident of March 24, 2018.

Petitioner offered into evidence (PX3) medical bills incurred since the Arbitration hearing, totaling $10,121.24. Respondent had no objection to any of the bills offered into evidence. The Commission finds that the evidence in the record sufficiently supports a finding that those expenses were reasonably required to diagnose, relieve, and cure the effects of Petitioner's injuries from his March 24, 2018, work accident. The Commission further finds that the surgery recommended by Dr. Gornet is reasonable and necessary.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's §8(a) Petition is granted to the extent discussed above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the reasonable and necessary medical bills related to the care provided for Petitioner's post-arbitration lumbar spine condition, described in Petitioner's Exhibit #3, pursuant to §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the prospective medical care sought by Petitioner is granted, including the three-level surgery recommended by Dr. Gornet and all reasonable and necessary attendant medical care.

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 $10,200.00. 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.

October 4, 2023

mp/dak
r-9/15/23
068

/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC012386
Case Name	Carol Sneed v. Illinois Youth Center - Harrisburg
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0430
Number of Pages of Decision	10
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	James Keefe Jr
Respondent Attorney	Aaron Wright

DATE FILED: 10/5/2023

/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

CAROL SNEED,

Petitioner,

vs. NO: 21 WC 12386

ILLINOIS YOUTH CENTER HARRISBURG,

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 issue of 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 November 9, 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.

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.

October 5, 2023
o090523
AHS/ldm
051

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC012386
Case Name	Carol Sneed v. Illinois Youth Center - Harrisburg
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	James Keefe, Jr.
Respondent Attorney	Aaron Wright

DATE FILED: 11/9/2022

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 9, 2022 4.48%

/s/ William Gallagher, Arbitrator
Signature

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

November 9, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Carol Sneed
Employee/Petitioner

v.

Illinois Youth Center, Harrisburg
Employer/Respondent

Case # 21 WC 12386

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 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

FINDINGS

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

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

On this date, Petitioner did 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 $81,432.00; the average weekly wage was $1,566.00.

On the date of accident, Petitioner was 48 years of age, married with 1 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 $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 amounts paid under Section 8(j) of the Act.

ORDER

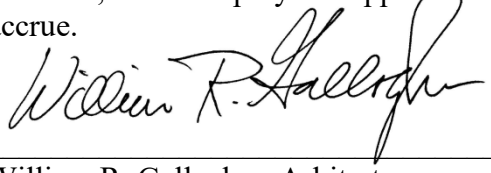
Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 7, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold 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, the diagnostic arthroscopy on Petitioner's left knee, as recommended by Dr. Richard Morgan.

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

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

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



NOVEMBER 9, 2022

William R. Gallagher, Arbitrator
ICArbDec19(b)

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment by Respondent on February 10, 2021. According to the Application, Petitioner "Fell on ice during course of employment" and sustained an injury to her "Multiple/Back/Left knee" (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills as well as prospective medical treatment. The prospective medical treatment sought by Petitioner was a diagnostic arthroscopy as recommended by Dr. Richard Morgan, an orthopedic surgeon. Respondent disputed liability on the basis of causal relationship as well as whether the recommended treatment was medically reasonable and necessary (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a Juvenile Justice Specialist. Petitioner's job consisted primarily of maintaining the grounds inside the facility. In the summer, Petitioner mowed the yard and, in the winter, Petitioner was responsible for snow removal, spreading salt, etc. On February 10, 2021, there was an ice storm and the parking lot at the facility was covered with ice.

On February 10, 2021, Petitioner was in the process of exiting her work vehicle when she sustained a slip/fall on the ice covered parking lot. When Petitioner fell, she twisted her left knee and landed on her left knee and side. Following the accident, Petitioner experienced pain in her left knee and low back.

Petitioner testified she did not have any low back problems prior to the accident. However, Petitioner testified she had a prior left knee problem for which she required medical treatment from Dr. Richard Morgan, an orthopedic surgeon.

The medical records for Petitioner's prior left knee medical treatment were received into evidence at trial. Dr. Morgan evaluated Petitioner on December 8, 2016, for Petitioner's left knee pain. On January 25, 2017, Dr. Morgan performed arthroscopic surgery which consisted of a resection of the parapatellar plica. Following surgery, Petitioner continued to be treated by Dr. Morgan and received physical therapy. When she saw Dr. Morgan on April 21, 2017, she was doing well and Dr. Morgan released her to return to work (Petitioner's Exhibit 4).

Subsequent to the accident of February 10, 2021, Petitioner was seen by Dr. James Alexander, her family physician. Dr. Alexander ordered an MRI scan of Petitioner's left knee.

The MRI scan was performed on March 12, 2021. According to the radiologist, the MRI revealed no meniscal tears or ligamentous injury, mild osteoarthritis in the patellofemoral compartment, and mild soft tissue edema anterior to the patella which could be due to soft tissue injury (Petitioner's Exhibit 1).

Dr. Morgan evaluated Petitioner on May 27, 2021, and he reviewed the MRI scan. Dr. Morgan's interpretation of the MRI was consistent with that of the radiologist. Petitioner complained of medial left knee pain. At that time, Dr. Morgan administered a steroid injection into Petitioner's left knee. He recommended Petitioner undergo viscoelastic injections (Petitioner's Exhibit 2).

Dr. Morgan subsequently saw Petitioner on July 12, August 12, and August 19, 2021. On those occasions, he administered viscoelastic injections into Petitioner's left knee (Petitioner's Exhibit 2). Petitioner testified she experienced temporary relief after the first two injections, but no relief after the third injection.

Petitioner was seen by Dr. Morgan on November 18, 2021. At that time, Petitioner continued to complain of left knee pain which Dr. Morgan noted was in the retropatellar area. Dr. Morgan opined Petitioner had failed viscoelastic therapy and recommended Petitioner undergo diagnostic arthroscopy to determine the source of her symptoms (Petitioner's Exhibit 2).

Dr. Morgan last saw Petitioner on September 13, 2022. At that time, he renewed his recommendation Petitioner undergo a diagnostic arthroscopy; however, he also opined Petitioner might require a Fulkerson osteotomy (Petitioner's Exhibit 2).

In regard to her low back, Petitioner was treated by Dr. Richard Kube, an orthopedic surgeon, from March 24, 2021, through July 28, 2021. Dr. Kube performed SI joint injections on the left SI joint and right SI joint on April 21, 2021, and June 16, 2021, respectively. When Petitioner was last seen by Dr. Kube on July 28, 2021, she advised her low back symptoms had resolved (Petitioner's Exhibit 5).

At the direction of Respondent, Petitioner was examined by Dr. Timothy Farley, an orthopedic surgeon, on June 7, 2022. In connection with his examination of Petitioner, Dr. Farley reviewed medical records and diagnostic studies provided to him by Respondent. When seen by Dr. Farley, Petitioner complained of left knee pain subsequent to the accident of February 10, 2021. Petitioner informed Dr. Farley of her prior knee arthroscopy of 2016, but she had been released to return to work and was pain free up until the accident of February 10, 2021 (Respondent's Exhibit 2).

On examination, Dr. Farley noted some mild crepitus, but the range of motion of the left knee was full. He reviewed the MRI of March 12, 2021, and he opined it revealed mild osteoarthritis which he indicated was pre-existing and not related to the accident of February 10, 2021. He opined that the x-ray and MRI performed on Petitioner following the accident of February 10, 2021, were medically reasonable and necessary, but not the treatment she received afterward. Dr. Farley also opined no further medical treatment was necessary (Respondent's Exhibit 2).

Dr. Morgan was deposed on August 19, 2022, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Morgan's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Specifically, Dr. Morgan testified he previously treated Petitioner for a left knee problem and performed a plica resection on January 25, 2017, but Petitioner's left knee symptoms subsequently resolved. He testified the MRI of March 13, 2021, revealed some tissue edema in the patellofemoral compartment which he opined was consistent with a soft tissue injury (Petitioner's Exhibit 3; pp 9-10).

Dr. Morgan described the viscoelastic injections form a laminate over the damaged structures of the knee, but that Petitioner still had symptoms after undergoing three of them. He recommended Petitioner undergo a diagnostic arthroscopy to determine the source of Petitioner's ongoing

symptoms. He testified this was medically reasonable and necessary and causally related to the accident of February 10, 2021 (Petitioner's Exhibit 3; pp 11-13).

On cross-examination, Dr. Morgan was interrogated about the arthritic changes in Petitioner's left knee. While he could not say whether the changes were related to age or trauma, he testified there were no arthritic changes in Petitioner's left knee at the time he performed the plica resection surgery four years prior (Petitioner's Exhibit 3; pp 16-17).

Dr. Farley was deposed on September 27, 2022, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Farley's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Specifically, he testified Petitioner had subjective left knee pain with underlying mild patellofemoral arthritis, which he opined was not related to the accident of February 10, 2021. He also testified no further medical treatment, including a diagnostic arthroscopy, was medically necessary following the MRI scan of March 12, 2021 (Respondent's Exhibit 3; pp 14-16).

On cross-examination, Dr. Farley agreed Petitioner's current complaints of left knee pain were limited to the patellofemoral portion of the knee. He also agreed Petitioner informed him that her left knee pain had not resolved since February 10, 2021 (Respondent's Exhibit 3; pp 20, 24).

At trial, Petitioner testified she continues to experience left knee pain. She wants to proceed with the treatment recommended by Dr. Morgan.

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 February 10, 2021.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained a work-related accident on February 10, 2021.

In regard to Petitioner's low back condition, Petitioner's testimony she had no prior low back problem was unrebutted.

In regard to Petitioner's left knee condition, Petitioner previously underwent left knee surgery performed by Dr. Morgan on January 25, 2017, which consisted of a plica resection. Petitioner recovered from that surgery and was released to return to work in April, 2017.

Petitioner's testimony she had no ongoing complaints in respect to her left knee subsequent to April, 2017, was unrebutted.

Dr. Morgan treated Petitioner for her left knee symptom subsequent to the accident of February 10, 2021, and he noted her left knee symptoms were limited to the patellofemoral portion of Petitioner's left knee.

Dr. Morgan administered three viscoelastic injections into Petitioner's left knee, but Petitioner has continued to have left knee symptoms. To determine the source of Petitioner's ongoing symptoms, Dr. Morgan has recommended Petitioner undergo diagnostic arthroscopy.

Petitioner has mild osteoarthritic changes in her left knee which Dr. Morgan noted were not present when he performed the plica resection surgery in 2017.

Respondent's Section 12 examiner, Dr. Farley, has opined Petitioner's left knee subjective complaints and arthritis are not related to the accident of February 10, 2021; however, he agreed Petitioner's left knee pain is in the patellofemoral portion of the left knee and Petitioner has had ongoing left knee symptoms since February 10, 2021.

Based upon the preceding, the Arbitrator finds the opinion of Dr. Morgan to be more persuasive than that of Dr. Farley in regard to causal relationship.

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

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 7, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given 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, the diagnostic arthroscopy as recommended by Dr. Richard Morgan.

William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC003721
Case Name	Brandon Burch v. Fresh Express
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0431
Number of Pages of Decision	47
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	James Hardy
Respondent Attorney	James Toomey

DATE FILED: 10/5/2023

/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

BRANDON BURCH,

Petitioner,

vs. NO: 21 WC 03721

FRESH EXPRESS,

Respondent.

DECISION AND OPINION ON REVIEW

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that 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 $2500.00. 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.

October 5, 2023
o092623
AHS/ldm
051

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC003721
Case Name	Brandon Burch v. Fresh Express
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	45
Decision Issued By	David Kane, Arbitrator

Petitioner Attorney	James Hardy
Respondent Attorney	James Toomey

DATE FILED: 9/29/2022

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 27, 2022 3.85%

/s/ David Kane, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Brandon Burch
Employee/Petitioner

v.

Fresh Express
Employer/Respondent

Case # **21** WC **003721**

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 **David Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **August 22, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **01/15/2021**, 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 $**34,320.00**; the average weekly wage was $**660.00**.

On the date of accident, Petitioner was **32** years of age, ***single*** with **4** 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

Based on the lack of causal relationship, the Arbitrator denies prospective medical in this matter.

Respondent shall pay reasonable and necessary medical services of **$2,433.50**, subject to Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$440.00**/week for **0** weeks, 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.

SEPTEMBER 29, 2022

David A. Kane

Signature of Arbitrator

ICArbDec19(b)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BRANDON BURCH,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 21 WC 03721
	)	
FRESH EXPRESS,	)	
	)	
Respondent.	)	

FINDINGS OF FACTS AND CONCLUSION OF LAW

A. Petitioner's Testimony

On August 22, 2022, Petitioner testified that he was employed by Fresh Express as a forklift driver on January 15, 2021. T. 7. He testified that on January 15, 2021, his forklift was struck by another forklift in the evening. T. 9. He testified that he was rammed while standing up on his standup forklift by a co-worker. T. 9. He testified that the co-worker, Jose, was a temporary worker employed through a temp agency, and that Jose was driving a sit-down forklift. T. 10. Petitioner testified that a sit-down forklift is larger than a standup forklift. T. 12.

Petitioner testified that he saw Jose coming toward him but did not believe he would go through with striking his forklift. He testified that Jose struck the left side of his forklift and his body went forward toward the controls. T. 12–13.

Petitioner testified that he experienced a sharp pain on the right side

of his low back, first noticing it two or three minutes after being struck. T. 13–14. Petitioner testified that before the incident, he and several employees were having a conversation about Jose being late from lunch, but he did not remember the potential witness' names. T. 15.

Petitioner testified that he wrote the statement about the issue with Jose being late. He testified that he wrote the statement earlier in the day. T. 17–18. He testified that he wrote a statement about the forklift incident a couple days later. T. 18. Petitioner testified that he did not believe he came into work the following day because he was in so much pain. T. 19.

Petitioner then testified that he could not tell the safety guy about what occurred on January 15, 2021 because he was not there, so he had to wait to tell the safety person. T. 19. He testified that he told the assistant that worked under the safety person on the date of incident. T. 20.

Petitioner testified that he did not treat until February 1, 2021, as he was not in too much pain to interfere with work, but that the pain progressed as the days went on. T. 21. He testified that the safety person accommodating him told him he could take as many breaks as he needed. T. 21–22. He testified that when his boss did not want him to take any more breaks, he went to the hospital. T. 22.

Petitioner testified that his last day at Fresh Express was the day he brought his off work note from the hospital on February 3, 2021. He testified he was sent home because he could not stand that many hours on a forklift. T. 23.

On questioning from the Arbitrator, Petitioner testified that he did not examine his forklift after the incident. T. 23–24. While he testified he did not

look to see if it was dented, he testified it had a big yellow mark from the other forklift. T. 24. Petitioner testified that Fresh Express sent him a letter terminating him, but then claimed he never got it and he probably lost it. T. 25.

Petitioner testified that he underwent a CT scan of the lumbar spine by Dr. Jared Kalina because he had metal from a gunshot wound in his back. T. 25–26. Petitioner testified that he currently experiences sharp pains on his right side toward the back, which affects his right leg. T. 29. He testified that the pain is from his low back to the top of his thigh and that it comes down by his knee. T. 29. He testified that bending, lifting, moving too fast, and sitting too long makes him uncomfortable, and that he gets tired if he walks a certain amount of time. T. 30. Petitioner testified that he last saw Dr. Kalina on August 9, 2022. He testified that he is still off work. T. 32.

On cross-examination, Petitioner testified that the shift he worked covered from roughly 3:00 p.m. to 12:00 a.m., and even longer sometimes. T. 35. He testified that Jose jumped into the conversation on January 15, 2021, and within 45 seconds to one minute, his forklift came into contact with Petitioner's forklift. T. 36. He testified that Jose's forks went under his forklift but did not lift it. T. 36–37. He estimated that Jose's forklift was about 6 to 8 feet away from Petitioner's before he drove forward and struck Petitioner's forklift. T. 37. He confirmed that Jose’s forklift was stopped before he accelerated. T. 37. He testified that the impact between the forklifts was medium/heavy. T. 38.

Petitioner testified that Logan was the Safety Manager and that Logan had an assistant. He testified that Logan's assistance allowed him to sit

down. T. 38–39.

Petitioner read aloud his January 15, 2021 statement. T. 39–40. Petitioner testified that he wrote two statements, and that RX10 was about another situation he had. T. 40-41. Petitioner testified that he asked to leave and was told he could not leave. T. 41–42. He testified that he complained about a disagreement with Jose to the Safety Manager because he thought it was an unsafe situation and was going to escalate. T. 42. He testified that the assistant was like an intern. T. 43.

Petitioner then read aloud RX11, which was his statement dated January 19, 2022. Petitioner testified that he has had little “tweaks” in his low back before January 15, 2021. T. 45. He testified that when he was shot, he had a wound near his behind. He also testified that he had a gunshot wound to his left arm and to his left side. T. 45–46.

Petitioner reviewed RX6, his timecard printout and went home earlier than when his shift normally ended on January 15, 2021. T. 47–48. He confirmed that he worked on January 16, 2021. T. 48–50.

Petitioner testified that he did not know the basis for his termination with Fresh Express. T. 51. He testified that he had an altercation with his mom about rent, so he moved in with his kids' mother for a couple days. T. 51–52. He then testified that he had not reconciled with his mom, but instead was bouncing from house to house. T. 52. Petitioner testified he did not recall being cited for insubordination for refusing to voice in products on a forklift on January 27, 2021. T. 52.

Petitioner testified that he did not jump out of the way of a forklift as stated in the CDH Hospital record. T. 53–54. When asked if he told PA

Merryweather whether he always had some back pain after being shot, he testified that he might have some type of back pain. “You know it wasn't nothing – – it was just little pains, but that’s it. Like, nothing major." T. 54–55. Petitioner testified that he started having pain down his right leg when he attempted to get off the forklift on January 15, 2021. T. 55–56. He testified that he would take issue if the CDH record indicated he denied any pain going down his legs. T. 56.

Petitioner testified that he became familiar with Dr. Kalina via attorney referral. T. 57. Petitioner confirmed that Jose's forklift never came into contact with Petitioner's body. T. 57–60.

Petitioner denied that he had tingling and numbness in his right front thigh, he testified that his numbness was right back side of his leg, not the front. T. 60. He testified that he did not report a prior history of back pain to Dr. Kalina, as he did not consider anything serious if it was not surgery. T. 60

Petitioner testified that Cyclobenzaprine 7.5 mg provided him some relief but that it could be stronger. T. 62–63. He testified that the Diclofenac solution did not provide him any relief. T. 64.

Petitioner testified that the first epidural injection he received by Dr. Kalina provided him relief for a day or two. T. 64–65. He testified that the second injection provided a couple of days of relief, and the third injection did not provide any relief.

Petitioner testified that he requested funds from the Paycheck Protection Program in the amount of $20,833.00 in March 2021. He denied that he received any money, indicating that he had been denied for the loan.

He also testified that he did not receive any money even after an indication that Cross River Bank approved loan number 7942468604 on March 24, 2021. T. 67. He testified that he did not have a construction business. T. 68.

Petitioner denied ever being convicted of a felony or a misdemeanor involving dishonesty. T. 68. He testified that he guesses he was convicted of possession of cannabis, which was a Class IV felony at the time in August 2012. T. 68–69. He testified that he was also convicted of a Class IV felony for possession of a controlled substance in December 2012. He additionally testified that he was convicted of domestic battery in November 2018 in Kane County. T. 69.

Petitioner testified that his “tweaks" in his back before the forklift incident on January 15, 2021 were sporadic. He testified that he did not go to the hospital until his back was hurting. T. 70. Petitioner testified that he did not recall whether he was requesting pain pills while incarcerated in Cook County jail in October 2012. T. 70.

Petitioner testified that he did not recall going to CDH Hospital on September 17, 2015, but indicated that there was a chance he “woke up tight” or something. T. 71. He then read aloud the History of Present Illness paragraph including a reference to chronic low back pain from suffering a gunshot wound six years ago as well as severe pain the night prior in his low back radiating down his right leg. T. 71–72. Petitioner denied that the radiation referenced in 2015 was similar to what he was describing at the hearing, indicating pain on the back and right side of his leg. T. 72.

Petitioner testified that he was not sure if he presented to Advocate

Sherman Hospital on December 12, 2018. He confirmed that Respondent's Exhibit 3 referenced his name and a complaint of low back pain. T. 73.

Petitioner subsequently confirmed that RX2, the CDH Hospital records, referenced back pain on January 28, 2020. T. 73–74. He also confirmed that he presented to CDH Hospital for low back pain that was chronic on July 1, 2020. T. 74.

When asked if he denied having prior low back pain or complaints to Dr. Carl Graf, Respondent's Section 12 examiner, Petitioner testified that he told Dr. Graf he did not have back pain this severe. T. 75. Petitioner confirmed that he was the subject on the video surveillance on RX15B. T. 76.

On redirect examination, Petitioner testified that he never had a follow-up with a spine specialist prior to January 15, 2021. T. 77. He also testified that he did not have any surgery recommendations before January 15, 2021. T. 77–78.

B. Testimony of Enrique Rodriguez

Respondent called Enrique Rodriguez, who testified that he was employed as a forklift driver for Fresh Express. T. 79. He testified that he voiced the product and wrapped, then put product away as part of his duties. T. 79–80. Mr. Rodriguez testified that Petitioner worked at Fresh Express. He testified that he recalled an incident between Petitioner and Jose Bravo on January 15, 2021. P. 80. He testified that Mr. Bravo and Mr. Burch were in front of Line 18 and they were exchanging words in an argument. T. 80. Mr. Rodriguez testified that they were about 6 feet away from each other, while Mr. Rodriguez was approximately 15 feet away. T. 81. He testified

that Petitioner and Mr. Bravo were arguing about who was lazy and who was working more. T. 81. He testified that this incident took place after lunch. T. 81.

Mr. Rodriguez testified that he subsequently heard a forklift bang, but he did not witness the actual collision. T. 82. He testified that he saw the two forklifts were connected but then were apart by that time. T. 82. Mr. Rodriguez testified the rear and of the sit-down forklift of Mr. Bravo had come into contact with Petitioner's forklift. He testified that the forks were not underneath Petitioner's forklift. T. 82–83.

Mr. Rodriguez testified that Mr. Bravo did not display any pain behavior after the collision. T. 84. He also testified that Petitioner did not demonstrate any pain behavior after the collision. T. 84–85.

Mr. Rodriguez testified that the forklifts at Fresh Express are speed limited or governed to approximately 6 mi./h. T. 85. He testified that the two forklifts were stationary before the collision took place.

On cross-examination, Mr. Rodriguez testified that he had a fairly good knowledge of the forklifts used at Fresh Express. T. 87. He testified that stand up and sit-down forklifts were all set at the same speed. T. 87. He testified that he did not perform maintenance on the machines and could not testify if the governors were operating properly. T. 87. Instead, Mr. Rodriguez testified that the speed was due to an OSHA rule at T. 88.

On redirect, Mr. Rodriguez testified that he drives the same forklift every day, but that his forklift has never not been speed limited. T. 88–89. On recross, Mr. Rodriguez testified that he believed the forklifts weighed about 15,000 pounds. T. 89–90.

C. Testimony of Logan Yniguez

Mr. Logan Yniguez testified that he was employed by Fresh Express as Safety Manager. T. 92. As of January 15, 2021, he testified that he was employed as a safety technician. T. 92–93. He testified that his job duties as safety technician was to work the afternoon shift and enforce safety policies and procedures, assist in training, and assist in inspections. T. 93. He testified that he was typically notified of any accidents whether or not an injury occurred in his capacity as safety technician. T. 93.

He testified that after learning of an accident, he made sure that incident reports were created and that the incident was investigated. He testified that he attempted to find the root cause of the accident and correct it in his investigation. T. 93–94.

Mr. Yniguez testified that he first became aware of an incident involving Petitioner and forklifts on January 19, 2021. T. 94. He testified that he obtained a statement from Petitioner. Mr. Yniguez testified that there was no reference to a forklift accident in a preliminary statement dated January 15, 2021 which was provided to Human Resources. T. 95. Mr. Yniguez also identified RX11, which was Petitioner's handwritten statement dated January 19, 2021. T. 96. Mr. Yniguez testified that when a forklift motor vehicle accident occurs, the accident needs to be reported the day of for an investigation and a drug and alcohol screening for both employees. T. 97.

Mr. Yniguez testified that he prepared RX12, which is a Supervisor Incident Report. He testified that the incident took place by wrappers 4 and 5. He testified that he inserted a statement in the report: "Brandon did not mention the forklifts making contact until today, the 19th of January." T. 98–

99.

Mr. Yniguez testified that he looked at the camera footage but there was no video of the incident. He testified that he spoke with Mr. Bravo, who is no longer an employee of the temp agency supplying Fresh Express. T. 99.

Mr. Yniguez testified that on January 19, 2021, he offered ice and rest to Petitioner and also indicated that he could go to the clinic. T. 99–100. He testified that Petitioner advised he would ice his back and take breaks. T. 100. Mr. Yniguez testified that Petitioner never made complaints regarding back pain to him prior to January 15, 2021.

Mr. Yniguez testified that he offered medical treatment to Petitioner on January 29, 2021, as Petitioner was complaining of low back pain and indicated it was hard to work. He testified that he offered this medical treatment in the presence of Adrian Solis, the Labor Coordinator. He testified that Petitioner declined medical treatment because he did not wish to be drug and alcohol screened. T. 100–101.

The Arbitrator asked Mr. Yniguez where Line 18 is located, and Mr. Yniguez testified that Line 18 was the same general area as wrappers 4 and 5. He testified that Line 18 was across from the wrappers. T. 104–105.

Mr. Yniguez testified that the two statements from Petitioner were the only two statements Petitioner provided relative to an incident with Mr. Bravo. T. 106. He testified that he knew Petitioner and Mr. Bravo did not like each other. T. 106-107.

Mr. Yniguez testified that he was not present at Fresh Express on January 15, 2021. T. 107. He testified that Mr. Burch presented with an off

work note from Northwestern Medicine CDH Hospital on February 3, 2021. T. 107. He testified that Petitioner was sent home after an hour by his supervisor. T. 107–108. Mr. Yniguez testified that Petitioner was terminated from Fresh Express for job abandonment.

Mr. Yniguez testified that forklifts at Fresh Express are speed limited to 6 mph and that the speed limitation applied to stand up and sit-down forklifts. T. 108.

On cross-examination, Mr. Yniguez testified that the Safety Manager reported to the National Safety Manager. T. 109. On questioning by the Arbitrator, Mr. Yniguez testified that there was no intern present on January 15, 2021. He also testified that he did not believe there were any interns in the HR department on January 15, 2021. T. 110. He testified that seven or eight individuals work in the HR department at the Streamwood facility. T. 110.

Mr. Yniguez testified that Petitioner was fired for job abandonment, as Petitioner's supervisor indicated that he had given him a job task which Petitioner refused to do. T. 111. Mr. Yniguez testified that he has not seen any termination letter. He testified that HR would send a termination letter T. 111–112.

Mr. Yniguez testified that he did not perform maintenance on forklifts, as there was a company called Crown that Fresh Express contracted with. T. 112–113. Mr. Yniguez testified that if he was on duty that he might learn of a forklift going 30 miles an hour across the floor of the warehouse. He testified that he would contact the maintenance company to deal with that issue. T. 114. He testified that he would rely on the employee to report a

forklift moving too quickly. T. 114–115.

On redirect examination, Mr. Yniguez testified that the rough weight of the forklifts were approximately 7,000 pounds. T. 115.

D. Deposition Testimony of Dr. Jared Kalina

On January 20, 2022, the parties conducted the evidence deposition of Dr. Jared Kalina. Dr. Kalina testified that he was a pain management physician who completed his Osteopathic Medicine Degree at Midwestern University in Downers Grove and completed his residency at Advocate Illinois Masonic Medical Center. PX5 p. 7-8. He testified that he completed a Pain Medicine Fellowship at University of California-Davis. PX5 p. 7.

Dr. Kalina testified that he first examined Petitioner on February 6, 2021, when Petitioner reported that another employee on a seated forklift struck or ran into his back and his forklift on the left side. PX5 p. 8. Dr. Kalina conducted an examination and diagnosed lumbar radiculopathy, low back pain, and muscle spasms. PX5 p. 9. He dispensed a back brace and prescribed Mobic, Fexmid, and Rabeprazole. He testified that he additionally ordered a CT of the low back. PX5 p. 9.

Dr. Kalina testified that he reviewed the CT of the lumbar spine on February 17, 2021. He testified that he reviewed the images as well as the report and interpreted a large disc protrusion at L3–4 resulting in spinal stenosis and foraminal stenosis, as well as a large disc extrusion at L4–5. He additionally interpreted a broad-based protrusion at L5–S1. PX5 p. 10–11.

Dr. Kalina testified that Petitioner was struggling to obtain a claim number and there was a delay in obtaining physical therapy. He testified

that he maintained an off-duty status for Petitioner. PX5 p. 12.

Dr. Kalina testified that on June 22, 2021, he converted the medications from oral anti-inflammatories to a topical agent. PX5 p. 14–15. He testified that on October 20, 2021, he performed an L4-5 intralaminar epidural steroid injection. PX5 p. 16–17.

Dr. Kalina testified that Petitioner reported significant relief early after the epidural steroid injection, but that the pain began to return approximately one week later. PX5 p. 17. He testified that he recommended a repeat epidural steroid injection for additive benefits. PX5 p. 17–18.

Dr. Kalina testified that he performed the second epidural steroid injection on January 7, 2022. He testified that this injection was a repeat of the October 20, 2021 injection. PX5 p. 18.

Dr. Kalina testified that he believed that Petitioner's being struck by a forklift to the left low back, which jerked him and within his forklift would result in disc pathology as seen on the CT scan. He testified that the findings on the imaging, which he initially claimed was an MRI, was just not typical of Petitioner's age group. He opined that the mechanical trauma which occurred on the date of injury resulted in a disc extrusion and protrusions. PX5 p. 20.

Dr. Kalina testified that the epidural steroid injections were reasonable and necessary treatment. He further testified that if Petitioner did not improve, the standard would be to move toward surgical opinion at that point. PX5 p. 20–21. Dr. Kalina testified that if two epidurals did not lend to significant relief for a good duration of time, such as a month, he would be unlikely to proceed with a third injection, as it would scientifically not make

sense. PX 5p. 21–22.

On cross-examination, Dr. Kalina testified that he did not review the emergency room report from Northwestern Medicine Central DuPage Hospital. PX5 p. 28. He testified that he did not review any imaging other than the CT scan from Bright Light Medical Imaging, nor did he review any physical therapy reports. PX5 p. 28. He confirmed that he did not know exactly how many sessions of physical therapy were completed. PX5 p. 28–29.

Dr. Kalina testified that Petitioner denied any prior history of low back pain before the forklift incident. PX5 p. 30. Dr. Kalina admitted that he did not note the location of the abdominal scar from a prior gunshot wound. He also admitted that he did not have an independent recollection of where Petitioner's scar from the gunshot wound existed. PX5 p. 30–31. He testified that if he suspected symptom amplification, he would perform Waddell testing, but that Petitioner did not seem like he was amplifying so there was no reason to perform Waddell testing. PX5 p. 32.

Dr. Kalina testified that he used a dosage of 7.5 mg of Mobic because he did not like to start with the strongest dose of any medication. He testified that he dispensed all non-scheduled drugs from his office. PX5 p. 33–34. He testified that he was unsure as to whether the 7.5 mg dosage was more expensive than a 10 mg dosage. He testified that he prescribed brand-name Mobic and indicated that there was not a reason he did not prescribe the generic. PX5 p. 34-35.

Dr. Kalina testified that he prescribed 7.5 mg of brand name Fexmid, a generic Cyclobenzaprine could provide the same efficacy. PX5 p. 35–36.

He admitted there was a financial benefit to dispensing medications over Petitioner's attorney's objection. PX5 p. 36.

Dr. Kalina testified that he could not tell the age of the protrusions and extrusion on the CT scan of the lumbar spine. PX5 p. 37. He testified that he would defer to the radiologist as to his interpretation of facet inflammation on the CT scan. PX5 p. 38.

Dr. Kalina testified that he performed drug testing on Petitioner because he wanted to assess whether he was on an opioid. He testified that he also wished to verify that the patient was not using illicit drugs or drugs not prescribed by himself. He testified that he would also use the drug testing to make sure the patient was taking the medications that were prescribed. PX5 p. 42–43. Dr. Kalina admitted that on the Pactox report dated July 16, 2021, he did not request a test for Fexmid or any street drugs. PX5 p. 43–44. He testified that it took him 35 minutes to review the Pactox reports and medical treatment records on July 28, 2021. PX5 p. 44–45. He testified that the drug testing on September 14, 2021 was the same as the previous drug test. PX5 p. 45–46.

Dr. Kalina testified that his opinion was that the spinal stenosis was caused by the accident of January 2021. PX5 p. 47. He also testified that the only plausible cause of an extruded disc was a mechanical traumatic injury. PX5 p. 48. He testified that hypothetically, that a fall from one to two stories could cause an extruded disc. He also testified that lifting incidents could cause an extruded disc. He did testified that he did not believe that a gunshot wound would result in an extruded disc unless the bullet grazed a disc and disrupted the wall of the disc. He further testified that a motor

vehicle accident could cause an extruded disc. PX5 p. 48–49. He testified that it was very unlikely that an extruded disc could occur due to degenerative changes in the body with a 33-year-old. PX5 p. 49.

Dr. Kalina testified that his opinion as to causation would not change if the impact was at a speed less than 5 mph, as a forklift striking flesh and bone would cause some issues. PX5 p. 50–51. He testified that he indicated in his report that the forklift struck Petitioner's body. He testified that his opinions would not change even if the forklift did not come into direct contact with Petitioner's body. PX5 p. 51. Dr. Kalina further testified that he was not opining that Petitioner sustained a soft tissue injury that aggravated a pre-existing stenosis or extrusion. He testified that there was no prior imaging to compare the CT scan to in this case. PX5 p. 52. He confirmed that he did not review x-rays of the lumbar spine from September 17, 2015 or an x-ray from the lumbar spine from July 21, 2020. PX5 p. 52–53.

E. Deposition Testimony of Dr. Carl Graf

On February 2, 2022, the parties participated in the evidence deposition of Dr. Carl Graf. Dr. Graf testified that he was licensed to practice medicine in Illinois and Wisconsin. He testified that he completed medical school at Loyola University in Chicago and then completed an Orthopedic Surgery Residency at University of Illinois. RX1 p. 5. He testified that he then completed a combined Neurosurgical Spine and Orthopedic Spine Surgery Fellowship in Indianapolis. RX1 p. 5-6. He testified that he was Board-Certified as an orthopedic surgeon as well as on the American Board of Independent Medical Evaluators. RX1 p. 6. He testified that less than 10% of his total practice was devoted to independent medical examinations

as well as narrative reports for his own patients.

Dr. Graf testified that he performed a Section 12 examination on Petitioner on September 7, 2021, and that Respondent arranged the appointment. RX1 p. 7. He testified that Petitioner reported that he was standing in a forklift and was about to lift a pallet when a co-worker had words with him, and the co-worker rammed the forklift into the back of Petitioner's forklift. RX1 p. 9. He testified that Petitioner reported initially refusing treatment and then reporting to his supervisor the following day that he had pain. RX1 p. 9.

Dr. Graf testified that Petitioner reported variable low back pain rated at 7-8/10 with some pain on the right anterior side of the right leg. He also reported some pain on the left side which was less severe. RX1 p. 10.

Dr. Graf testified that Petitioner was wearing a lumbar brace, which was removed. He appreciated a neutral alignment and noted no muscle spasm. Petitioner complained of pain to light one finger palpation throughout the back which he rated at 7-8/10. He noted normal gait, a positive straight leg raise test on the right, as well as some nonorganic pain symptoms. RX1 p. 10–11. Dr. Graf testified that with regard to nonorganic pain signs, Petitioner demonstrated pain on light one finger touch, in addition to pain in the low back to simulated axial rotation. RX1 p. 12–13. He also noted that Petitioner reported low back pain with simulated axial compression. RX1 p. 13. Petitioner additionally reported pain out of proportion to the evaluation given his pain disability questionnaire. RX1 p. 13.

Dr. Graf testified that he reviewed various radiology studies, including x-rays of the lumbar spine from September 17, 2015; July 21, 2020; February

1, 2021; as well as a CT scan of the lumbar spine from February 12, 2021. He testified that he reviewed the actual images as well as the radiology reports. RX1 p. 14–15. Dr. Graf testified that the September 17, 2015 lumbar x-ray showed mild disc degeneration at L4-5 and L5–S1, with noted bullet fragments. He testified that the findings on the July 21, 2020 x-ray were the same. He testified that he noted essentially the same findings on the February 1, 2021 x-ray of the lumbar spine again noting mild disc degeneration at L4–5 and L5–S1 and evidence of bullet fragments with no evidence of an acute fracture or instability. RX1 p. 15.

With regard to the February 12, 2021 CT scan, Dr. Graf interpreted a partial left L5 chronic pars defect as well as degenerative changes at L4–5 and L5–S1. He appreciated a broad-based disc herniation at L4–5 and a small central disc bulge at L5-S1. RX1 p. 15–16.

Dr. Graf testified that Petitioner denied any prior low back complaints before the alleged accident. RX1 p. 16. He testified that a physician could not assess the age of a disc herniation using CT imaging. He testified that the CT scan does not show bone marrow edema or edema and soft tissues. RX1 p. 16.

Dr. Graf testified that he reviewed some video surveillance of Petitioner, which showed him pushing a garbage can with a normal reciprocal gait on August 12, 2021. RX1 p. 17. He testified that he also viewed Petitioner forward flex into a vehicle on September 3, 2021 to grab items in plastic bag and walking back up the stairs into the house and back down again. RX1 p. 17. He further testified that Petitioner appeared to have gone for a walk that he appeared to stretch his back and continued walking

when another individual picked him up. Dr. Graf testified that the individual in the videos walked easily and that demonstration was inconsistent with someone who rated himself in the extreme pain and disability category. RX1 p. 17–18.

Dr. Graf testified that Petitioner's representation of the history of injury was inconsistent with the medical treatment records. He noted that Petitioner reported to the emergency room physician that he jumped quickly out of the way of a forklift backing up on him. RX1 p. 18. He also testified that Petitioner reported to Dr. Kalina that he was struck on the left side and was whipped/jerked suddenly. RX1 p. 18–19.

Dr. Graf testified that Petitioner had a lumbar disc herniation at L4–5, but that he was unable to causally relate the diagnosis with the claimed forklift injury. RX1 p. 19–20. He noted the delay in initial treatment as Petitioner reported severe complaints of pain, and he further noted that Petitioner's history differed in the medical treatment records. RX1 p. 19–20. He testified that since he did not believe the herniated disc was caused by the claimed work injury, he did not believe reasonable and necessity of care and return to work were applicable. RX1 p. 20.

Dr. Graf testified that he subsequently authored an addendum report dated January 26, 2022. He testified that he reviewed additional medical treatment records as well as Dr. Kalina's evidence deposition transcript. He testified that he disagreed with Dr. Kalina relative to his reading of the CT scan as he believed there was a broad-based central disc herniation at L4–5, not a large, extruded disc. RX1 p. 21–22.

Dr. Graf testified that he reviewed the drug testing and since there was

no documentation of any medication, there were no substances found. RX1 p. 22–23. He testified that he reviewed drug test results on occasion in his practice, but that the review would take maybe a minute. He testified that he felt it was strange that Dr. Kalina spent 35 minutes reviewing a toxicology report. RX1 p. 23.

Dr. Graf further testified that Dr. Kalina's history of accident that another employee ran into Petitioner's back and his forklift on the left side was not consistent with the history Petitioner provided him. RX1 p. 23–24. He indicated this was also inconsistent with the history he provided to the emergency department on February 1, 2021. Dr. Graf testified that he would expect immediate onset of back pain if the traumatic injury were to cause a disc herniation. RX1 p. 24. He concluded that despite reviewing the additional medical records and deposition testimony, his opinions did not change. RX1 p. 24.

Dr. Graf testified that he disagreed with Dr. Kalina's interpretation of the lumbar spine CT. He testified that he saw only a disc herniation at L4–5 and a small disc bulge at L5–S1, as well as that a CT scan could not demonstrate facet inflammation. RX1 p. 25.

On cross-examination, Dr. Graf testified that the initial emergency room note referenced a prior gunshot wound where he always had some pain in his back, but that it was increased after jumping out of the way of a forklift. RX1 p. 28–29. He testified that there was no evidence indicating Petitioner had difficulty performing his work duties in the medical history he was provided. RX1 p. 29.

F. Medical Evidence After January 15, 2021

On February 1, 2021, Petitioner presented to Northwestern Medicine Central DuPage Hospital's emergency Department complaining of bilateral lower back pain. He reported that about a week ago a forklift backed up into him and he jumped quickly out of the way, but denied any significant pain at the time. He reported gradually worsening pain since then which was sharp and non-radiating. He admitted to a remote gunshot wound to the right lower back and had some pain around that area as well. PX1 p. 5. PA-C Joseph Merryweather conducted an examination, noting scar tissue from a gunshot wound in the low back, but no significant midline lumbar tenderness to palpation, no overlying edema or ecchymosis, full range of motion of the lumbar spine with mild pain, and 5/5 strength of the bilateral lower extremities. He ordered an x-ray of the lumbar spine which was compared with a July 1, 2020 x-ray. The radiologist concluded the study showed a normal lumbar spine with no significant disc space narrowing or no significant degenerative changes. PA Merryweather discharged Petitioner with a diagnosis of acute bilateral low back pain without sciatica. He prescribed Lidocaine 5% patches, Ibuprofen 600 mg, and Cyclobenzaprine 10 mg. PX1 p. 8.

The Arbitrator notes that in an earlier intake, Nurse Jane Carlson documented a history from Petitioner that he was hit on the back by a forklift. PX1 p. 9.

On February 6, 2021, Petitioner presented to Dr. Jared Kalina of Kalina Pain Management. He reported that on January 22, 2021 while on his standup forklift, another employee on a seated forklift struck his left side. PX3 p. 2. Dr. Kalina indicated that Petitioner completed his shift and returned

home, but woke up with extreme low back pain on the next morning with radiation into his right leg. He indicated that Petitioner reported never dealing with any significant low back pain. PX3 p. 2. He complained of sharp low back pain right worse than left with tingling and numbness into the right anterior and lateral thigh. RX3 p. 2.

On examination, Dr. Kalina reported discrete focal tenderness in a palpable taut band of skeletal muscle at the PSIS region and gluteal region, which produced both referred regional pain and a local twitch response on either side. On similar findings of the right lumbar paraspinal muscles. Dr. Kalina further documented ipsilateral low back pain on facet loading and a positive straight leg raise on the right. PX3 p. 3-4. Dr. Kalina diagnosed lumbar radiculopathy, low back pain, and muscle spasm. He dispensed an LSO brace and prescribed Ibuprofen 800 mg, Mobic 7.5 mg, Rabeprazole 20 mg, and Fexmid 7.5 mg. He ordered a CT of the lumbar spine due to the existence of metal fragments from the gunshot wound and ordered Petitioner off work. PX3 p. 5.

On February 12, 2021, Petitioner presented to Bright Light Medical Imaging for a CT of the lumbar spine without contrast. The radiologist interpreted mild grade 1 retrolisthesis of L3 on L4 with trace retrolisthesis of L4 on L5. The radiologist appreciated a small nondisplaced left L5 pars defect. He interpreted a broad-based central posterior disc extrusion at L4-5 with disc material displaced 8 mm posterior to the disc space and spanning 14 mm craniocaudal with effacement and compression of the ventral thecal sac contributing to moderate central canal stenosis. The radiologist also noted moderate left and mild to moderate right foraminal stenosis. The

radiologist further interpreted an L3–4 broad-based central posterior disc protrusion measuring 6.5 mm AP superimposed on the L3 retrolisthesis with resultant effacement and compression of the ventral thecal sac contributing to mild to moderate central canal stenosis and mild to moderate right and mild left foraminal encroachment. The radiologist further interpreted a central posterior disc protrusion at L5–S1 measuring 4.5 mm AP when combined with facet and ligamentum flavum hypertrophy and callus formation about to the left L5 chronic pars defect contributed to moderate left and mild to moderate right foraminal stenosis. PX4 p. 2-4.

Petitioner returned to Dr. Kalina on February 17, 2021, complaining of daily severe pain and trouble with cooking and cleaning. PX3 p. 7. Dr. Kalina reviewed the CT scan and Dr. Kalina added Cymbalta and continued to recommend physical therapy. He maintained an off-work status. PX3 p. 10.

On March 22, 2021, Petitioner returned to Dr. Kalina, reporting that he had been unable to start formal physical therapy. Dr. Kalina recommended continued use of medications and requested that physical therapy be authorized. PX3 p. 13. On April 19, 2021, Dr. Kalina again indicated that Petitioner was a candidate for physical therapy and a possible lumbar epidural steroid injection for a diagnosis of spinal stenosis. PX3 p. 14–16.

On May 25, 2021, Dr. Kalina discontinued Mobic and recommended topical Diclofenac. He indicated he would refer Petitioner to another therapy clinic and that the delay in authorization of therapy was not humane. PX3 p. 17–18. On June 22, 2021, Dr. Kalina refilled the pain regimen and maintained an off-duty status. PX3 p. 20–23.

On a July 16, 2021 follow-up, Dr. Kalina recommended lumbar epidural

steroid injection. He indicated that physical therapy was difficult with pain complaints and was still not approved. PX3 p. 24–26. He also took a urine toxicology sample and submitted it for testing.

The Arbitrator notes the drug test did not test for the medications Petitioner was being prescribed by Dr. Kalina other than Duloxetine, which is Cymbalta, and that there was no evidence of the usage of Cymbalta in the sample. Additionally, the drug testing results did not test for any street drugs. PX3 p. 92–94.

On July 22, 2021, Petitioner presented to Dr. Slawomir Soja, a doctor of naprapathy. Dr. Soja made no reference to any pertinent past medical history. The Arbitrator notes that PX2 and PX6 p. 6 indicate that Petitioner only underwent one session of therapy.

On September 7, 2021, Petitioner returned to Dr. Kalina, complaining of a sharp and achy back pain with tingling to his thighs. Dr. Kalina indicated that physical therapy had stopped due to pain. He again recommended a lumbar epidural steroid injection. PX3 p. 31–32.

Petitioner returned to Dr. Kalina on September 14, 2021. Dr. Kalina again recommended a lumbar epidural steroid injection. PX3 p. 34–37. Dr. Kalina again ordered a drug test on September 14, 2021 and no drugs were found that were actually tested. PX3 p. 87–91. Once again, Petitioner did not have any evidence of Duloxetine in his system. Dr. Kalina reviewed the toxicology results on September 23, 2021, again indicating that it took him 35 minutes to review the test results and Petitioner's medical chart. PX3 p. 38–40.

Petitioner returned to Dr. Kalina on October 14, 2021. Dr. Kalina

reviewed the IME from Dr. Graf and referenced “varying stories" as the basis for no causation opinion. PX3 p. 43. Dr. Kalina indicated that Petitioner was obviously injured working on his forklift and that the only plausible cause of an extruded disc in someone so young was a mechanical traumatic injury. He refilled Petitioner's pain medications. PX3 p. 43–46.

On October 20, 2021, Dr. Kalina performed an interlaminar lumbar epidural injection at the L4–5. PX3 p. 41–42. The Arbitrator notes that despite Dr. Kalina's testimony that he could not recall how Petitioner came under his care, and Petitioner's testimony at the hearing that his lawyer referred him to Dr. Kalina, on the operative report for the epidural injection, Dr. Kalina indicated that Petitioner was referred for pain management by his workers’ compensation insurance company. PX3 p. 41–42.

Petitioner returned to Dr. Kalina on November 15, 2021, reporting significant relief after the lumbar epidural steroid injection that his pain began to return after one week. He reported 35% continued relief of his back pain and 50% continued relief of his leg pain. Dr. Kalina recommended an additional lumbar epidural steroid injection. PX3 p. 47–50.

On January 7, 2022, Dr. Kalina administered a second interlaminar epidural steroid injection with fluoroscopic guidance at the L4-5 level. PX3 p. 51–53. When Petitioner returned to Dr. Kalina on January 13, 2022, he reported that the last injection provided 40% reduction of back and 60% reduction of leg pain. Dr. Kalina opined that Petitioner was a candidate for a third lumbar epidural steroid injection and maintained an off-duty status. PX3 p. 54–57.

Dr. Kalina performed the third interlaminar epidural steroid injection on

February 18, 2022. PX3 p. 58–60. Petitioner returned to Dr. Kalina on February 25, 2022, reporting short-term relief. The Arbitrator notes that Dr. Kalina's report of short-term relief is not consistent with Petitioner's testimony on August 22, 2022. Dr. Kalina testified that Petitioner required a surgical opinion in this matter and referred him to Dr. Joseph Brindes, an orthopedic surgeon. PX3 p. 61–64.

Petitioner returned to Dr. Kalina on March 25, 2022, indicating that he was awaiting authorization for a surgical consultation with Dr. Brindise. Dr. Kalina began prescribing Hydrocodone 5/325 mg one tablet three times daily in addition to the Fexmid, Cymbalta, Lidocaine cream, and Diclofenac drops. PX3 p. 65. He also maintained an off-duty status. PX3 p. 65–69.

On April 25, 2022, Petitioner reported to Dr. Kalina that he continued to have severe low back flareups with burning into his right leg and that he continued to await authorization for a spinal surgery consultation. PX3 p. 70-74.

In addition to the medical bills for emergency care, the CT scan from Bright Light Medical Imaging, and Dr. Kalina's charges, the Arbitrator reviewed a bill from Persistent Toxicology billing which referenced five urine drug test screens. The Arbitrator notes that each of these drug tests were $3,905.00, and the medical treatment records only reference the first two drug screens. The total balance is $19,525.00 for drug tests which did not test for illicit drugs or most of these drugs for which Petitioner was prescribed by Dr. Kalina. Additionally, the Arbitrator reviewed a bill for medications from Persistent Med totaling $50,708.21. These medication charges only cover prescriptions up through January 17, 2022.

G. Medical Evidence Prior to January 15, 2021

On September 17, 2015, Petitioner presented to Dr. Paul Faine at Northwestern Medicine CDH Hospital's emergency department complaining of back pain. He reported aching right lower back pain which had been intense and severe over the last 24 hours, radiation down the right leg. He reported being shot in 2009 and had a piece of bullet fragment in his back. He reported radiation to the right buttock and right upper leg. RX2 p. 158.

On examination, Dr. Faine appreciated decreased range of motion and tenderness to the right paravertebral with pain and spasm. RX2 p. 159. He ordered an x-ray of the lumbar spine which was interpreted as showing no fracture or acute change. RX2 p. 160. The radiologist interpreted the lumbar x-ray as showing mild lateral curvature of the lumbar spine, convex to the left. He further appreciated small metal fragments in the soft tissues of the lower back on the right. He noted mild narrowing of the L4–5 interspace and otherwise normal alignment of the lumbar vertebral bodies with no evidence of fracture. RX2 p. 166.

Dr. Faine diagnosed right-sided sciatica and prescribed Flexeril 10 mg, Diclofenac 75 mg, Hydrocodone 10/325 mg, and a Medrol dose pack. He indicated that Petitioner felt significantly better after a Toradol injection, Valium, Dexamethasone and Dilaudid. RX2 p. 160.

On December 12, 2018, Petitioner presented to Advocate Sherman Hospital's Physician Immediate Care Center, complaining of lower back pain since a gunshot wound over two years ago. He reported that his pain was worse today. He denied a recent injury but indicated that his pain usually occurred when he did a lot of bending and lifting. The examining physician

ordered x-rays of the lumbar spine and diagnosed lumbosacral strain. The interpreting radiologist appreciated mild facet arthropathy at L5–S1 as well as surgical clips the from a previous cholecystectomy and radiopaque artifacts in the paraspinal soft tissues on the right. RX3.

On January 28, 2020, Petitioner presented to Northwestern Medicine Central DuPage Hospital's emergency department and was evaluated by Dr. Ankur Dhawan. He reported a history of chronic back pain and that he still had bullets in him from gunshot wounds four years earlier. He reported chronic low back pain which was exacerbated in the last two days. He had not attempted taking any medication for pain. RX2 p. 086. Dr. Dhawan appreciated a steady gait and a negative straight leg raise bilaterally. He administered a Toradol injection and a Lidocaine pain patch. He prescribed Flexeril and Norco for home and recommended a follow-up with a primary care doctor. RX2 p. 089. Petitioner reported to Vanessa Lopez, RN on the same visit that his current pain started yesterday and that he had intermittent pain complaints since gunshot wounds depending on weather and other certain factors. RX2 p. 090.

On July 1, 2020, Petitioner presented to Northwestern Medicine Emergency Medicine CDH Hospital. He reported chronic lower back pain and indicated he had been shot years ago and he still had a bullet in his body. He reported running out of his pain meds two months ago and that the emergency room doctor had previously given him medication. RX2 p. 049. He reported to Rebecca Bruce, PA-C that he had intermittent low back pain and he worked as a forklift driver and may have aggravated his back a couple of days ago. He reported that he did not have a primary care provider

which was why he returned to the emergency department. RX2 p. 052. PA Bruce conducted an examination and noted back pain. She appreciated positive lumbar paraspinal tenderness and 5/5 strength. RX2 p. 053–054. She prescribed Norco ordered an x-ray. She also provided an off work note for a couple of days. RX2 p. 054.

The radiologist interpreting the x-ray performed a comparison with a prior radiograph dated September 17, 2015. The radiologist noted subtle retrolisthesis of L3 on L4 with mild preferential disc space loss at L5–S1 and to a lesser extent L4–5. The radiologist also appreciated mild additional preferential lower lumbosacral facet hypertrophy from L4 to S1. The radiologist noted small scattered presumed metallic density foreign bodies consistent with the reported history of a gunshot wound. RX2 p. 055.

The Arbitrator also reviewed Respondent's Exhibit 4, records from Cermak Health Services of Cook County. On October 31, 2012, Petitioner reported really bad neck and low back pain from his of bullet wounds again on October 31, 2012. On the health service request form, it appears that Petitioner wrote, “I need pain pills really bad. ASAP." RX4 p. 133. Petitioner again filled out a health service request form which also appears to be dated October 31, 2012 referencing neck and back pain. He reported he needed pain meds and was hurting a lot and hand wrote, “I need to talk to someone ASAP please." RX4 p. 135. Petitioner again prepared a health service request form indicating back pain where he was shot and also indicated he felt depressed and was not sleeping, and that his meds were useless. This form was stamped November 10, 2012. RX4 p. 143. Petitioner also complained that he could not keep jumping up and down from the top bunk

as it hurt his back. RX4 p. 160.

On December 11, 2012, Petitioner was evaluated by Christopher Stadnicki, PAC where he complained of intermittent low back pain due to gunshot wound to which increased from jumping off and on his bed bunk. PA Stadnicki documented positive lower cervical tenderness to palpation at bullet site, with questionable mild right lower paraspinal muscle tenderness to palpation at healed scar site. He ordered an x-ray of the cervical spine noting metallic density and degenerative changes at C4–5. RX4 p. 168–173.

H. Other Evidence

The Arbitrator reviewed RX5, which was a utilization review report for Diclofenac 1.5% and Lidocaine 5%. The physician advisor, Lisa M. Gill, DO, concluded that neither medication was medically necessary if the Arbitrator notes that Dr. Gill attempted to participate in a peer-to-peer call with Dr. Kalina but did not receive a return on her messages. RX5.

The Arbitrator also reviewed RX6, which were time logs for Petitioner. The Arbitrator notes that Petitioner worked from 3:22 p.m. until 9:10 p.m. on January 15, 2021. Despite claiming that he did not work the following day on direct examination, the Arbitrator notes that Petitioner worked 8.5 hours on January 16, 2021, and nearly worked 8.5 hours on Monday, January 18, 2021. Petitioner did work a shorter period of time on January 20, 2021, though there was no testimony as to why he only worked 3.1 hours. RX6.

The Arbitrator also reviewed evidence of three convictions for felonies involving Petitioner. The Arbitrator notes that on cross-examination questioning, Petitioner initially denied that he had been convicted of a felony or a misdemeanor involving dishonesty. He subsequently admitted to being

convicted of a felony for possession of 10 to 30 grams of cannabis in case number 12 CR 1410601. RX7. He also admitted to being convicted for possession of a controlled substance in case 12 CR 2021702, with a plea of guilty and a credit for time served. RX8. Petitioner also admitted to a felony conviction in Kane County in case 18–CF–001144 for domestic battery. RX 9.

The Arbitrator reviewed Respondent's Exhibit 10, a January 15, 2021 statement from Petitioner, which states:

> Today there was a verbal altercation with myself & another employee. The entire situation started b/c I made a comment about him taking a hr and half lunch break. This has been going on for about & week. Today I really got fed up. We exchanged words & it got heated. I want to remove myself for the day before it escalade [*sic*] into something else if possible I can speak with someone on Monday. Thanks, Brandon Burch

RX 10. The Arbitrator notes that there is no reference to a collision between forklifts in this statement, nor is there any reference to back pain as a consequence.

The Arbitrator reviewed Petitioner's second statement dated January 19, 2021 which is signed by Petitioner and states in pertinent part:

> I've written a statement about a situation that occurred on Friday Jan 15th 2021. As told before me & Jose had a disagreement about work. Words we're [*sic*] exchanged & he got real upset & as I was just standing on my forklift he ran into

> it. When I seen him approaching my parked forklift I assumed he was going to stop. In result I've been having back pain. I've been waiting on someone to speak to me about the situation & no one has! The entire incident took place at 6:40–6:43 p.m. After that I went home & start getting pains on & off. No apology or nothing! Thank you, Brandon Burch

RX 11.

The Arbitrator further reviewed the Supervisor Incident Report which Logan Yniguez testified he prepared. RX 12. The report indicated the event took place by wrapper four and five in the pack out. Under Employees Description/Statement of the event, the report indicates, “I was parked on my forklift, when Jose Bravo struck against the side of my forklift near wrappers four and five." RX 12. On the second page of the document, it appears Petitioner circled the low back region as the injured area. Mr. Yniguez indicated in his comments on the event, “Brandon did not mention the forklifts making contact until today, the 19th of January." RX. 12. Both Petitioner and Mr. Yniguez as well as another individual appear to have signed the document. RX 12.

The Arbitrator viewed the surveillance report from the Robison Group dated September 8, 2021 as well as 7 minutes and 18 seconds of surveillance video. RX15 A and B. The Arbitrator notes that on August 12, 2021 at approximately 7:09 a.m., Petitioner appears to push a garbage container and take off rubber gloves, placing it into the garbage container. He then walks away with a normal gait. RX15 B. On September 3, 2021, the Arbitrator notes two women walking into a house at 19:03 at the same

time, an individual appears to be Petitioner walking down the stairs and bends over to the passenger side of a red sedan. This view is obscured by bushes. At 19:04, he is seen carrying several plastic bags and walking up the stairs going into the house. At 19:04, he walks out from the house again and appears to have a cigarette in his left hand. He is using his cellular phone and walks away. He walks down the driveway and at 19:05 begins to walk down the street. He then turns around twice while walking down the street, presumably as he appeared to notice the investigator surveilling him, then began to attempt to speak on the phone at 19:06. At 19:14, Petitioner is still seen walking on the side of the road and looks back. At 19:14, he stops and bends on either side of the torso to presumably stretch his back. Then walks a couple more steps and get down onto his hands. He gets up and continues to slowly walk and touches his low back with his left hand. He looks back again at 19:15 on two occasions then crosses the street and gets into the passenger side of a black Chevy sedan. The sedan drives away at 19:16.

CONCLUSIONS OF LAW

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

After reviewing the testimony of Petitioner, Mr. Rodriguez, and Mr. Yniguez, as well as the factual evidence provided at trial, the Arbitrator concludes that Petitioner proved that he sustained accidental injuries arising out of and in the course of his employment with Fresh Express on January 15, 2021. There is no question based on the testimony that two forklifts came into contact with each other. Mr. Rodriguez testified that he heard a loud bang which he attributed to the two forklifts coming into contact with each other. Furthermore, Petitioner also testified that the two forklifts came into contact with each other. The question as to which part of Mr. Bravo's forklift struck Petitioner's forklift deals more with Petitioner's credibility, as indicated below.

Additionally, even though it appears the forklift collision was an intentional act, the Arbitrator concludes that Petitioner was not the aggressor and that the basis for the intentional act was related to Petitioner's employment, as Petitioner testified that he was complaining about Mr. Bravo's long break, and Mr. Rodriguez corroborated that the two were arguing over who was lazier.

As a consequence of the foregoing, the Arbitrator concludes that Petitioner met his burden of proof that an accidental injury occurred which arose out of and in the course of his employment with Fresh Express.

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

After review of the testimony of the fact witnesses, the testimony of Dr. Kalina and of Dr. Graf, and review of the evidence presented at hearing, the Arbitrator concludes that Petitioner failed to meet his burden that his current condition of ill-being was related to the accident of January 15, 2021.

The Arbitrator concludes that Petitioner's testimony was simply not credible. This is based on numerous inconsistencies within the record. Preliminarily, the Arbitrator notes a discrepancy as to whether the front or back of Mr. Bravo's forklift came into contact with Petitioner's forklift. Mr. Rodriguez testified that the rear part of Mr. Bravo's forklift struck Petitioner's forklift, whereas Petitioner testified that the front of the forklift came into contact with his forklift. The medical records reference the back of the forklift being struck, and Dr. Kalina indicated that Mr. Burch himself was struck by Mr. Bravo’s forklift.

The next inconsistency revolves around the existence of two statements. Petitioner testified that he preliminarily wrote a statement regarding disagreements with Mr. Bravo and requested to leave work early. He claimed that this first statement, RX10, was written and provided to Human Resources prior to the forklift collision. That being said, Petitioner testified that he then provided oral notice of the forklift collision to an intern in the Safety Department and worked his whole shift. On cross-examination, Petitioner admitted that he left before the completion of his whole shift, which he attributed to an onset of back pain.

By contrast, Mr. Yniguez testified that in the event of a forklift collision, an investigation would proceed immediately and the drivers of the forklifts would be immediately tested for drugs or alcohol. The Arbitrator finds Mr.

Yniguez' testimony, which infers that Petitioner did not report a forklift collision on January 15, 2021, to be the more likely scenario. The Arbitrator also finds Mr. Yniguez' testimony that there was no intern in the Safety Department or an intern in the Human Resources Department to be more credible.

Petitioner's testimony relative to the significance of his pain complaints on the date of accident is also inconsistent. Petitioner testified that he was in so much pain after the forklift collision that he did not work on the following day, January 16, 2021. Petitioner's subsequent testimony that he did not seek medical treatment until February 1, 2021 because his pain was not hindering his ability to work is simply inconsistent with an accident which he alleges caused a large disc herniation at the L4-5 level. T. 21-22.

On cross-examination, Petitioner confirmed that RX6 showed that he indeed worked a full shift on January 16, 2021, and no statement relative to a motor vehicle collision was even prepared until January 19, 2021. RX 12.

With regard to Petitioner's testimony that he had no back pain other than occasional "tweaks" prior to the forklift collision on January 15, 2021, the Arbitrator does not find Petitioner's testimony credible. The medical records show that Petitioner admitted to chronic low back pain and presented for back complaints to several emergency departments starting on September 17, 2015.

Additionally, the Arbitrator notes that the Cermak Health records reference Petitioner's request for pain medication while incarcerated at Cook County Hospital in 2012 due to chronic neck and back pain which Petitioner attributed to gunshot wounds. RX4. The Arbitrator notes that the CDH

Hospital records referenced right lower extremity radicular complaints, which are consistent with Petitioner's complaints to Dr. Kalina. RX2. In fact, the Arbitrator notes that x-rays of the lumbar spine indicate metal fragments in the paravertebral tissues on the right side of the lower lumbar spine. RX 3.

With regard to medical causation, the Arbitrator concludes that the testimony of Dr. Graf is more persuasive than the testimony of Dr. Kalina. The Arbitrator notes that Dr. Kalina had access to less information as it pertains to Petitioner's medical history. Initially, Dr. Kalina relied upon Petitioner's representation that he had no prior back injury. The Arbitrator finds it puzzling that Dr. Kalina did not reference a gunshot wound to the right low back during his examination.

By contrast, Dr. Graf reviewed x-rays of the lumbar spine on September 17, 2015; July 21, 2020; and February 1, 2021. He noted that these three x-rays were very similar, and that all showed evidence of bullet fragments. Dr. Graf further had an opportunity to review the emergency room record from Northwestern Medicine CDH Hospital and referenced Petitioner's representation that he always had some pain in his back from a prior gunshot wound. The Arbitrator notes that Dr. Kalina did not review the emergency room record.

The Arbitrator further finds that Dr. Kalina's understanding of the mechanism of injury is inconsistent with Petitioner's testimony at trial. He testified that Mr. Bravo's forklift struck Petitioner's person, so it would cause damage regardless of the speed of the forklift. Petitioner was clear at trial that the forklift did not come into contact with his body; however, he did appear to tell Nurse Carlson at CDH that a forklift struck his back. This leads

the Arbitrator to question the veracity of Petitioner's numerous statements.

The Arbitrator notes that the emergency room examination findings on February 1, 2021 indicated scar tissue from a gunshot wound to the low back but no significant midline lumbar tenderness to palpation, no overlying edema or ecchymosis, and full range of motion of the lumbar spine with mild pain. PX1 p. 8.

The Arbitrator also finds Dr. Graf's testimony that Petitioner did indeed have an L4–5 disc herniation, but he could not attribute the condition to the work accident of January 15, 2021, to be credible. Dr. Graf's reference of inconsistent histories of accident, in addition to the delay in seeking treatment, leads to the more likely conclusion that Petitioner had the L4–5 disc herniation prior to the collision on January 15, 2021. The initial emergency room record, which makes no reference to radicular complaints and full range of motion of the lumbar spine, points to a conclusion that Petitioner sustained a lumbar strain or contusion at most as a consequence of the January 15, 2021 accident.

Furthermore, the Arbitrator reviewed the video surveillance and report, RX 15 A and B, and concludes that Petitioner's presentation on surveillance was very different than how he presented to Dr. Kalina and Dr. Graf. Petitioner demonstrated fluid movement and no pain behavior until he clearly saw an individual observing him on September 3, 2021. RX15B.

Finally, the Arbitrator notes that Petitioner's credibility was impeached based upon three prior criminal convictions within the past 10 years (Illinois Rule of Evidence 609). Petitioner's lack of veracity as to his criminal history prior to being presented with evidence of the convictions leads the Arbitrator

to question his veracity in other areas of his testimony. The Arbitrator also questions Petitioner's veracity over the procurement of a PPP loan. The Arbitrator notes that no evidence was actually submitted relative to the loan, but that Petitioner admitted to applying for a Paycheck Protection Program loan. Given this loan request was made after the accident, the Arbitrator questions whether Petitioner represented he had another business.

While these individual inconsistencies might be explained away, the accumulation of all of the inconsistencies call into question Petitioner's credibility in his testimony. The Arbitrator concludes that Petitioner has failed to meet his burden to prove that his current condition of ill-being relative to his lumbar spine is causally related to the accident of January 15, 2021.

J: WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?

Based upon the testimony at hearing, the deposition testimony of Dr. Kalina and Dr. Graf, and the evidence submitted at trial, the Arbitrator concludes that the medical services rendered to Petitioner were not reasonable and necessary.

Preliminarily, as the Arbitrator concluded that Petitioner's condition of ill-being was not causally related to the accident, the Arbitrator concludes that the treatment rendered by Dr. Kalina was also unrelated. Petitioner only sought treatment on one date prior to his purported termination from Fresh Express, namely the Northwestern Medicine CDH emergency room visit on February 1, 2021. The Arbitrator believes this emergency room visit is

reasonable and necessary treatment.

Dr. Kalina's dispensing of numerous pain medications and compound creams does not appear to be reasonable and necessary. The Arbitrator notes that the creams prescribed by Dr. Kalina were non-certified by utilization review. RX5. There was no testimony from Dr. Kalina regarding Petitioner that an appeal was ever attempted relative to the non-certified compound creams.

Moreover, Petitioner's own testimony regarding the usage of 7.5 mg dosage of Fexmid or Cyclobenzaprine was that the medication could have had a stronger dosage. Dr. Kalina in his evidence deposition acknowledged that generic Cyclobenzaprine would have worked as well as name brand Fexmid, and that there was a 10 mg dosage. The resultant charges for the medications provided are clearly excessive.

Further, the Arbitrator finds that the drug testing provided to Mr. Burch were neither reasonable or necessary charges. The Arbitrator questions why Dr. Kalina would indicate that he would be testing Petitioner for drugs that were not prescribed, drugs that were prescribed, and illicit drugs when Dr. Kalina did not actually test for illicit drugs or any of the drugs he had prescribed outside of Cymbalta. Moreover, Petitioner did not have any Cymbalta within his testing. These drug tests simply appear to be a way to run up medical bills.

The Arbitrator concludes that Respondent has paid none of the medical treatment in this matter and orders Respondent to pay the medical bill from Northwestern CDH Hospital for a date of service of February 1, 2021 pursuant to Sections 8(a) and 8.2 of the Act.

K: IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?

After reviewing the testimony of the fact witnesses, the testimonies of Dr. Kalina and Dr. Graf, and the evidence presented at trial, the Arbitrator concludes that Petitioner is not entitled to any prospective medical care. For the reasons set forth in Sections F and J above, the Arbitrator concludes that Petitioner sustained nothing more than a contusion or lumbar strain as a consequence of the forklift collision on January 15, 2021. Petitioner's ongoing low back complaints are instead related to his long-standing sequalae of gunshot wounds.

L: IS PETITIONER ENTITLED TO TTD BENEFITS?

After reviewing the testimony of the fact witnesses, the testimonies of Dr. Kalina and Dr. Graf, and the evidence presented at trial, the Arbitrator concludes that Petitioner has not proven entitlement to temporary total disability. The Arbitrator notes that Petitioner was taken off work for two days by the physician's assistant at CDH Hospital, including February 1, 2021 and February 2, 2021. Petitioner thereafter returned to Fresh Express on February 3, 2021. There is a dispute over why Petitioner was terminated but Petitioner testified that he had never actually received his termination letter. Petitioner did admit that he never provided another off work note to Fresh Express. As Petitioner's ongoing complaints are unrelated to the forklift collision of January 15, 2021, the Arbitrator notes that the three-day waiting period had not been exhausted for temporary total disability, and as a consequence, Petitioner is not entitled to TTD.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC035575
Case Name	Maricela Thorne v. Card Dynamix LLC
Consolidated Cases	
Proceeding Type	Remand
Decision Type	Commission Decision
Commission Decision Number	23IWCC0432
Number of Pages of Decision	3
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Kenneth Smith

DATE FILED: 10/10/2023

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARICELA THORNE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	13 WC 035575
	)	
CARD DYNAMIX, LLC,	)	
	)	
Respondent.	)	

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Circuit Court for the Twelfth Judicial Circuit, Will County, Illinois in an order dated April 20, 2023.

On October 12, 2017, a hearing on Arbitration was held and a decision issued on November 14, 2017, wherein Petitioner was awarded medical expenses and prospective medical treatment as well as permanency.

Following the Arbitration decision, the Respondent ceased payment of medical benefits and requested an independent medical examination of the Petitioner. Petitioner filed an 8(a) Petition seeking payment for ongoing treatment as well as a Petition for Penalties and Attorney's Fees.

On August 12, 2022, the Commission issued an Order and Opinion on Petition Pursuant to Section 8(a) of the Act, with Commissioner Doerries dissenting, following hearings on July 28, 2021 and March 2, 2022. The Commission ordered payment of the medical expenses related to prospective medical treatment specifically delineated in the 2017 Arbitration Decision as well as Section 19(k) penalties and Section 16 attorney's fees. The Commission made no determination as to whether the medical bills of Dr. Kalina or any of the providers to whom Dr. Kalina referred Petitioner should be awarded and also determined that the Respondent was entitled to schedule a Section 12 exam. This appeal ensued.

On April 20, 2023, the Circuit Court of Will County remanded the instant case with specific instruction to award all Petitioner's medical bills presented in the 8(a) hearing and to assess 19(k) penalties for the entire amount of unpaid medical bills and attorneys' fees. Based on said Order,

the Commission awards the following outstanding medical expenses pursuant to §8(a) of the Act, subject to the fee schedule in §8.2 of the Act:

Provider	Amount
Persistent Med	$103,261.89
Persistent Toxicology	$ 23,430.00
CM Healthcare Solutions	$ 19,840.46
Specialty Pharmaceutical	$ 27,347.04
Prescription Partners	$ 5,776.37
Vital Medical Group	$ 41,800.00
Anci-Bill, LLC	$ 9,505.56
Advanced Ambulatory Care	$ 12,670.00
Kalina Pain Institute	$ 19,271.02
Bright Light Medical Imaging	$ 2,700.00
Mark Sokolowski, MD	$ 1,690.00
Total:	**$267,292.34**

All outstanding medical bills are subject to penalties pursuant to §19(k). Accordingly, the Commission awards penalties pursuant to §19(k) based on the full amount of the unpaid medical bills ($267,292.34 x 50%) in the amount of $133,646.17.

Finally, with respect to attorney's fees pursuant to Section 16, the Commission awards attorney's fees in the amount of $80,187.70 ($267,292.34 = full amount of medical bill award + $133,646.17 = Section 19(k) penalties, x 20%).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Respondent pay Petitioner $267,292.34 for the outstanding medical bills identified in Px2, Px3, Px4 and Px6-Px15 pursuant to §8(a) of the Act, subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay Petitioner $133,646.17 pursuant to Section 19(k).

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay $80,187.70 in attorney's fees to Petitioner's attorney pursuant to Section 16.

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.

/s/ *Maria E. Portela*

OCTOBER 10, 2023

/s/ *Amylee H. Simonovich*

MEP/dmm

O: 92623

49

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC012709
Case Name	Karim Khulmi v. Professional Security
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	23IWCC0433
Number of Pages of Decision	16
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Jason Marker
Respondent Attorney	Miles Cahill

DATE FILED: 10/10/2023

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KARIM KHULMI,

Petitioner,

vs. NO: 17 WC 012709

PROFESSIONAL SECURITY,

Respondent.

DECISION AND OPINION ON REVIEW

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

In the Findings of Fact section, we make the following changes:

1. First paragraph on Page 1: correct to reflect that this decision is related to the April 1, 2017 accident under 17 WC 012709 (not the March 14, 2017 accident under 17 WC 012710).

2. Page 1, paragraph 4: change "On March 20, 2017" to "On March 17, 2017". The Commission notes that, although this decision is about the April 1, 2017 accident, the Findings of Fact are almost identical to the decision in the March 14, 2017 case and a similar clerical error exists relating to that medical treatment. The Arbitrator wrote,

"On March 20, 2017, Petitioner went to the VNA clinic because they were cheaper, and he had no health insurance." The date of this visit is hereby changed to March 17, 2017, as supported by the medical records. *Px8, T.262*.

3. Page 2: correct the decision to clarify that Petitioner went to Presence Mercy Emergency Room on April 11, 2017, as reflected by the medical records (*Px13, T.1347*), and went to Rush Copley on April 20, 2017.

4. Pages 2 and 4: replace the citations to "Rx10," which does not exist, with "Px10" in four places.

5. Page 5, last paragraph, second to last sentence: change "1018" to "2018".

6. Page 6, first paragraph, sentence 5: correct to indicate that Dr. Durkin recommended surgery for the "left" knee instead of the "right" knee.

7. Page 6, first paragraph, last sentence: strike the finding that "Dr. Durkin continued to recommend the MAKO TKA surgery..." because there is no current prescription or recommendation in evidence for this surgery from Dr. Durkin.

8. Page 6, paragraph 2, sentence 7: change to read "X-rays of the feet were ordered and showed an oblique line fracture through the left medial sesamoid consistent with a fracture of unknown acuity. (PX16)."

In the Conclusions of Law section, we make the following corrections:

1. Page 7, Conclusions of Law #3, in the sentence beginning with, "Petitioner also sustained injuries to…": replace "right heel" with "left foot".

2. Page 8, Conclusions of Law #5, last sentence: change to "This would include the proposed surgery to Petitioner's right elbow as recommended by Dr. Urbanosky, the neuropsychological testing for concussion, and treatment to his knees." The Commission vacates the award of left total knee arthroplasty because there is no current prescription or recommendation in evidence for this surgery from Dr. Durkin.

3. Page 8, Conclusions of Law #6, last sentence: strike the phrase "and ongoing until Petitioner reaches MMI."

In the Order section, we make the following changes:

1. Modify the TTD award by striking "and Respondent shall continue to pay TTD and/or TPD" because the Act does not give the Arbitrator authority to award future temporary total disability benefits.

2. Modify the medical award to delete the sentence beginning with, "The award is broken down in attached Medical Award Summary…" because no such summary was attached to the Decision nor was it in evidence.

3. Modify the medical award from a specific dollar amount ($50,282.32) to an award of "medical expenses in evidence related to Petitioner's conditions of ill-being that have been found herein to be causally related to his work accident." The Commission notes that we were unable to determine how the Arbitrator arrived at the specific amount that was awarded.

4. Modify the medical award by striking the sentence beginning with, "Respondent shall hold Petitioner harmless…" since Respondent is being ordered to pay the medical expenses directly to Petitioner.

5. Modify to include the award for prospective medical treatment.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $341.33 per week for a period of 237-5/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the medical expenses in evidence related to Petitioner's conditions of ill-being that have been found herein to be causally related to his work accident for medical expenses under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay for prospective pain management for Petitioner's neck and back, treatment for his depression and anxiety, surgery to Petitioner's right elbow as recommended by Dr. Urbanosky, the neuropsychological testing for concussion, and treatment for Petitioner's knees for medical expenses under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that 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.

/s/ *Maria E. Portela*

OCTOBER 10, 2023

SE/

/s/ *Amylee H. Simonovich*

O: 8/15/23

49

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC012709
Case Name	KHULMI, KARIM v. PROFESSIONAL SECURITY
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Gerald Granada, Arbitrator

Petitioner Attorney	Jason Marker
Respondent Attorney	Miles Cahill

DATE FILED: 5/3/2022

THE INTEREST RATE FOR THE WEEK OF MAY 3, 2022 1.42%

/s/Gerald Granada, Arbitrator

Signature

23IWC0433

STATE OF ILLINOIS)
)SS.
COUNTY OF **DU PAGE**)

☐ 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)

Karim Khulmi
Employee/Petitioner

v.

Professional Security
Employer/Respondent

Case # **17** WC **012709**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Wheaton**, on **11/8/21, 12/30/21, 1/20/22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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, **4/1/17**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**18,432.00;** ; the average weekly wage was $**512.00**.

On the date of accident, Petitioner was **40** 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

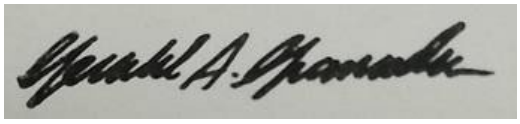
Respondent shall pay Petitioner temporary total disability benefits of **$341.33/ week** for **237 and 5/7** weeks, commencing **4/20/2017** through date of trial - **11/8/21**, and Respondent shall continue to pay TTD and/or TPD as provided in Section 8(b) of the Act, because Petitioner's disability is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.

Respondent shall pay reasonable and necessary medical services directly to the Petitioner of **$50,282.32** which amounts to payment at the fee schedule rate for unpaid bills and/or the accepted group health rate for any payments made, as provided in Sections 8(a) and 8.2 of the Act. The award is broken down in attached Medical Award Summary, which itemizes dates of service for each bill and corresponding amounts owed. Respondent shall hold Petitioner harmless for any claims or reimbursement from any health insurance provider/ and shall provide payment information to Petitioner relative to any credit due. 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.

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 Gerald Granada**

MAY 3, 2022

FINDINGS OF FACT

This case involves Petitioner Karim Khulmi who alleges to have sustained injuries while working for the Respondent Professional Security on March 14, 2017 (17WC012710) and on April 1, 2017 (17WC012709). This decision will be on the March 14, 2017 claim under 17WC012710. The issues in dispute in both cases are: 1) accident; 2) notice; 3) causation; 4) medical expenses; 5) TTD; and 6) prospective medical treatment. Petitioner testified via a Farsi interpreter. The original hearing of this matter was held in Wheaton on November 8, 2021. On December 30, 2021 and January 2021 proofs were re-opened and closed to supplement exhibits that were missing pages.

Petitioner worked for Respondent as a security guard at the Fox Valley Mall in Aurora, IL, where his work hours were from 11:00 pm to 7:00 am. There was no night supervisor on his shift but there was another dispatch employee who worked with him named Mr. Birdsong, who was in his 70's or 80's. Petitioner would communicate with Mr. Birdsong via a radio. Petitioner's job duties required walking the Fox Valley Mall many times a day, in addition to writing out reports of his findings. Petitioner testified that prior to his accidents, he never injured his head, back, arms, feet, nor did he have memory problems or forgetfulness. He was able to walk without problem and do all aspects of his job before the work accidents.

March 14, 2017 Accident (17WC012710)

On March 14, 2017, there was a construction company working in the mall, making a new store. Near the end of his shift, dispatch (Mr. Birdsong) told Petitioner to open the ceiling roof hatch for construction workers. Petitioner went to open the roof hatch in Dock D, which required him to climb a tall ladder. While coming down, he was about five or six feet up when he slipped and fell. He stated his feet hit hard and he felt pain in his feet and back. He reported the incident in person to Mr. Birdsong in the office. Mr. Birdsong advised he would tell the managers about his fall. There was nobody else to notify as there was no supervisor that day on night shift. Petitioner eventually contacted his supervisor Mr. Pond and explained what happened. Mr. Pond promised to talk to the Respondent's owner Brandon Newberry, but Petitioner never received any assistance from either Mr. Pond or Mr. Newberry.

On March 20, 2017, Petitioner went to the VNA clinic because they were cheaper, and he had no health insurance. Medical records that day indicate a history of "fall 3 days ago from a roof approximately 1 floor high (10 feet) when his foot slipped and he fell laying down on the floor. States he hit the right side of his head, right back, right shoulder and right hip and right leg hit on the floor. He is having pain in the right shoulder, lower back, and right knee. Has had headache, dizziness, vision changes, right sided chest pain". (PX 8).

Petitioner was able to return to work following this incident. He testified that he and took Ibuprofen and Tylenol for the pain in his head, feet and back.

April 1, 2017 Accident (17WC012709)

On April 1, 2017, Petitioner was working his usual shift for Respondent. On that day, an alarm had been activated and he was told a theft was in progress. The police were called and around 3:00 a.m., and dispatch (Mr. Birdsong) asked him to go open the door at entrance "3" to let the police in. He met four or five police officers and they patrolled the area together. They found the door that was sounding the

alarm but not the thief and the police left. A copy of the police report from that day was entered into evidence and showed police "m[e]t security at entrance 3" at 3:28 a.m. and "alarm 2nd floor motion" was noted at 3:52 a.m. (PX 4).

Petitioner continued to patrol the area after the police left based upon their recommendation and he found the ceiling roof hatch in Dock D was open. He called dispatch and was told to close it. At this time, the construction company continued to be working. After communicating to dispatch, Petitioner climbed up the same ladder and when he got to the top, the roof hatch was open and so he closed it. As he was coming down, he slipped about half-way down, in the middle of it, about 10-14 feet up. His feet slipped and he started falling and put his right hand out and grabbed a rung to catch himself. He couldn't bear his weight and he continued falling. As he continued to fall, his body turned and twisted so that his back was to the ladder. He continued to fall all the way to the ground, where there was a railing before the stairs go down. After falling to the ground, he struck his right side against the railing with his right leg and right arm and was then bounced off the railing to the door at the end of the vestibule to the left, where he struck his head on the door. He lost consciousness for 3 to 5 minutes.

When he awoke, he was on the ground by the door and noticed blood coming from his nose. He was able to get up and go to the bathroom to clean up and dust off his clothes. He washed his face and hands and then notified dispatch. He then went to the office to talk to Mr. Birdsong. He told him he closed the roof hatch and fell coming down the ladder and that he was in a lot of pain in his back, shoulder, head and feet. Mr. Newberry - the Respondent's owner was on vacation and there was no other shift supervisor working that day. Mr. Birdsong tried calling another supervisor, Mr. Pond that day three times in front of Petitioner, but he did not answer. Petitioner remained in the office for the remainder of his shift that day. He was able to drive himself home, where he felt pain in his head, right arm, neck, back, feet and knees. He iced his forehead and took pain medication. Later that day, Petitioner attempted to see his primary care physician, Dr. Sayeed, but was turned away because of no insurance.

On April 20, 2017, Petitioner went to Rush Copley in Aurora. Petitioner did not see a doctor until that date because he had just received his Medicaid health insurance card. The records from that day state: "patient reports that on April 1, he was at work. He went up to the roof to check to make certain that everything was closed. He was descending the ladder when he slipped and fell and was able to catch himself. He continued to descend, slipped again, upon landing at the base of the ladder, he hit the guard rail and the left forehead hit the door. Reports loss of consciousness for a couple minutes, bloody left nose, headache. Since then, with continued headache, right neck and shoulder pain. He has taken ibuprofen without significant relief." (RX 10, 355). X-rays of the cervical spine and right shoulder were performed as was a CT of the brain which showed no hemorrhage. He was given pain mediation and muscle relaxers and referred for an MRI of the right shoulder and follow up with an orthopedic at Castle Orthopedics as well as his primary care doctor. (PX 10).

On April 21, 2017, Petitioner went to VNA Clinic, whose records from that visit indicate: "works as a security officer, was on the roof and fell April 1st, approximately 10-12 feet – Knocked out – does not know how long – woke up – and per pt eyes were black. Patient was in the ER yesterday at Copley negative CT per pt. States that he has had short term memory loss since first fall. Is A&O x 3. Has difficulty concentrating." He was told to go to the ER and make an appointment for DM check and labs.

After going to the Hospital and the VNA, Petitioner attempted to talk to Respondent's owner, Mr. Brandon Newberry, but could not talk to him because he was on vacation. Petitioner then tried speaking

to Mr. Pond while Mr. Newberry was out, but Mr. Pond never responded to him. Petitioner eventually met with Mr. Newberry in the office, and he told him about both his first and second accidents, his issues with no insurance, his complaints of pain, and he asked if he could provide a doctor to help him. Petitioner testified that he was told to go home and come back when he gets better. Petitioner testified that Mr. Newberry did not direct him to any medical provider. Petitioner has been off work per his doctors since his second accident and was neither provided any chance to return to work or any benefits while he has been off work.

Treatment for post-concussion

On May 17, 2017, Petitioner followed up with his primary care doctor Dr. Quadir, who noted that Petitioner reported: "he fell at his work on April 1. He was climbing a ladder leading to the roof of a building. He suffered a concussion. He has right shoulder pain. Back pain. Pain in both knees. He was seen by orthopedics. He is scheduled for an MRI of the right shoulder. He is getting physical therapy for his neck, back and knees. He has not been able to go to work since April 1." (PX 9, 102). He complained of bloody nose, headaches, and dizziness in addition to pain in the right arm, knees, feet and back and neck. He was having bloody noses a few times a week and his dizziness was making it hard for him to sleep. He was given an off work note that day and referred to a neurologist – Dr. Siddiq. (PX 9).

On September 28, 2017, Petitioner saw neurologist, Dr. Siddiq on referral by Dr. Quadir. Dr. Siddiq's records indicate Petitioner reporting frequent headaches and memory loss. After exam, Dr. Siddiq diagnosed post-concussion syndrome and recommended an MRI of the brain and medication for headache. (PX 18, 34). In his follow up visits with Dr. Siddiq, Petitioner reported complaints of insomnia, headaches, poor memory, and difficulty concentrating for which he was diagnosed with post-concussion syndrome, depression, and anxiety. Dr. Siddiq prescribed Midrin, Zoloft, Xanax and ordered Petitioner off work. On June 27, 2018, Petitioner underwent an MRI of the brain at Rush Copley Hospital. On July 27, 2018, Dr. Siddiq noted the MRI was negative and recommended neuropsychological testing. (PX 10, 23). He continued to see Dr. Siddiq thereafter and his medications were adjusted. On February 14, 2019, Petitioner went to Presence Mercy Hospital with complaints of headache, chest pain, and nosebleed, for which a CT of the head was performed that showed no evidence of acute hemorrhage.

On February 25, 2019, Dr. Siddiq provided a referral for speech therapy and recommended continued medications. (PX 10, 16). Petitioner underwent speech therapy at Presence Mercy Medical Center from March through August of 2019. (PX 14). On January 29, 2020, Petitioner last saw Dr. Siddiq, who noted that Petitioner has poor memory, poor ability to function, is unable to focus and concentrate and follow directions, unable to perform job, and is unable to interact with other people. Dr. Siddiq noted that even a simple job is difficult for Petitioner to perform. (PX 18). Dr. Siddiq also noted that Petitioner never had the recommended neuropsych testing and that Dr. Kirincic oversees all his medications.

From June 1, 2019 through September 11, 2019, Petitioner attended therapy with a psychologist at Aurora Community Health Center for his anxiety and depression at the recommendation of Dr. Quadir. His therapy records show he was diagnosed with major depressive disorder, anxiety disorder, and history of head injury from fall at work in 2017. (PX 20). He continued this treatment up to the time of trial and he continues to take prescribe medications, which are referenced on petitioner's prescription ledger from Naperville Pharmacy. (PX 7).

Treatment for the right arm/hand

On April 26, 2017, Petitioner saw Dr. Saleem at Castle Orthopedics for his shoulder pain. He provided a history of accident from April 1, 2017 that was consistent with the history he gave at Rush and at the VNA Clinic. Dr. Saleem took Petitioner off work and ordered an MRI performed on June 6, 2017. (PX 12, 124). On June 8, 2017, Dr. Saleem performed an ultrasound-guided injection into Petitioner's shoulder. (PX 12, 92). A second injection was performed on June 13, 2017. (PX 12 91). On that date, Dr. Saleem diagnosed him with a partial supraspinatus tear and partial subscapularis tear as well as degenerative labral tearing. On October 17, 2017, Dr. Saleem performed a right shoulder rotator cuff repair, subacromial decompression, distal clavicle resection, debridement of labrum and open biceps tenodesis. (RX 10, 254). Dr. Saleem wrote a note "To Whom It May Concern" on October 27, 2017, stating "this surgery was felt to be the result of the injury that he sustained as described above…at work". (PX 12, 78).

After surgery, Petitioner underwent physical therapy at Presence Mercy through February 2019. (PX 13). However, he continued to have issues with numbness in the right hand and fingers, and pain in the right elbow. (R 114). The records from this provider indicate that since surgery, Petitioner has been having pain in the shoulder, on the side of the neck and even occasional pain radiating down the arm. On July 12, 2018, Dr. Saleem's assessment was right elbow severe ulnar neuropathy with weakness in the FDP. He ordered an EMG and referred Petitioner to his partner, Dr. Tueting for evaluation. Petitioner remained off work. On July 12, 2018, Petitioner underwent an EMG that showed moderate to severe cubital tunnel syndrome and carpal tunnel syndrome. (PX 12, 41)

On July 16, 2018, Petitioner saw Dr. Tueting, who reviewed the EMG and recommended an MRI of the elbow. Dr. Tueting noted that Petitioner's right hand pain symptoms began when he had an injury on April 1, 2017. The August 15, 2018 MRI showed a chronic medial epicondyle fracture and a partial tear of the MCL. (RX 10, 134) On November 13, 2018, Dr. Tueting performed surgery involving a carpal tunnel release, an ulnar tunnel release, and ulnar nerve decompression elbow/cubital tunnel release. (RX 10, 38). Petitioner underwent post-surgical physical therapy, but continued to complain of numbness in his small, middle and ring fingers. Petitioner's last visit with Castle Orthopedics was on January 22, 2019 following his complaints of having to wait for two hours at the doctor's office. He then followed up his medical treatment with Dr. Urbanosky.

Petitioner first saw Dr. Urbanosky on May 20, 2019. Her notes indicate he complained of pain in the right elbow, wrist and small finger following his November 3, 2018 surgery. Petitioner complained that he was unable to flex his right small finger and had increased pain. (PX 16) Dr. Urbanosky recommended an EMG and kept Petitioner off work. On August 1, 2019, Dr. Urbanosky reviewed the EMG and noted it showed a lesion in the ulnar nerve. After a few months of trying medication without improvement, on December 13, 2019, Dr. Urbanosky recommended a surgical revision including ulnar nerve exploration, decompression, anterior intrafascial transposition and placement of a nerve protector. Her last record of August 17, 2020 reiterated her surgical recommendation and off work restrictions and noted Petitioner wished to proceed with surgery. (PX 16).

Treatment for the Neck and Back / Pain Management

After his initial hospital and PCP follow up visit, Petitioner saw Dr. Mark Lorenz at Hinsdale Orthopedics upon referral from his PCP. At his first visit on July 13, 2017, he presented "for evaluation of neck and lumbar back pain after work related injury on April 1, 2017. He works as a security officer, was on a ladder to close to the roof, when he fell off the ladder." (PX 16). He also complained of pain "across his cervical spine with radiation of pain extending into his right shoulder to the right elbow with associated numbness and weakness." (PX 16). Dr. Lorenz ordered MRI's on that day and kept Petitioner off work. MRI's of the spine were performed at Imaging Centers of America on March 17, 2018. (PX 16). Dr. Lorenz reviewed the lumbar MRI and his impression was aggravation of L5-S1 with no significant disc herniation. He noted there was nothing surgical to offer and he referred Petitioner to Dr. Kirincic for pain management. (PX 16).

Mr. Khulmi testified Dr. Kirincic now oversees all of his medications as his pain doctor and he continues to see her. He first saw Dr. Kirincic on April 26, 2018. On that day, she performed acupuncture and trigger point injections into the "TL, PS, gluts, and R trap." She recommended he do PT and kept him off work. (PX 16). From May of 2018 through February of 2020, Dr. Kirincic performed acupuncture and/or additional trigger point injections on nearly every visit – every few months. She also tried various medications for his pain. In 2019, she diagnosed him with opioid dependency in addition to his other conditions. The last time Mr. Khulmi saw Dr. Kirincic before trial was on July 27, 2021, and she noted he had continued pain in his knees, right elbow, feet and back. She noted he was seeing a psychiatrist for memory issues still and also had a social housekeeper at his home. She provided him with an updated off work note. She reviewed his medications and provided refills. (PX 16). A prescription ledger was admitted into evidence showing all prescriptions Mr. Khulmi was taking and overseen by Dr. Kirincic. (PX 7).

Treatment for the Knees

On June 29, 2017, Mr. Khulmi saw Dr. Belich at Loyola for his knees upon referral from his PCP. (PX 15, 3). Records indicates he "comes in with a history of falling off a roof on 4/1/17…he states he works as a security officer." He complained of pain in both knees and upon exam, there was tenderness in the medial and lateral joint lines. He diagnosed Petitioner with bilateral knee sprains and recommended an MRI and returning to his primary care. (PX 15). Petitioner only saw Dr. Belich once because Dr. Lorenz then referred him to Dr. Durkin in his office for treatment of his knees. (R 109).

Petitioner first saw Dr. Durkin on July 17, 2017. Records indicate "he fell off from a ladder at work and landed on concrete on April 1, 2017. Patient reports he fell 12 feet." X-rays were performed showing no fractures. MRI's of the knees were ordered and he was unable to work. (PX 16). He had an MRI of the knees at Imaging Centers of America on March 19, 2018. He returned to Dr. Durkin and he found they showed on the left – a radial tear of the medial meniscus, and on the right – osteoarthritis. (PX 16). He had done PT and thus, a left knee injection was recommended and performed. He ordered Mr. Khulmi to wear a left knee brace. On March 29, 2018, he had an injection into the left knee. On April 24, 1018, Dr. Durkin performed bilateral Gel One injections. He noted the Gel One injections could be administered every six months.

On September 4, 2018, Dr. Durkin administered a left knee cortisone injection. On September 7, 2018, Dr. Durkin's performed another Gel One injection into the left knee. On November 20, 2018, he noted Petitioner was still using a cane. A Gel one injection was administered into the right knee. On February 1, 2019, Dr. Durkin recommended surgery for the right knee, in the form of an MAKO total knee arthroplasty. On March 14, 2019, he underwent another cortisone injection into the left knee. On June 7, 2019, he had bilateral cortisone injections. On December 6, 2019, and August 11, 2020, Dr. Durkin administered Gel One injections into both knees. On August 2, 2021, the least time he saw Dr. Durkin before trial, a Gel One injection was administered into the left knee and he was to remain off work. Dr. Durkin continued to recommend the MAKO TKA surgery and Petitioner testified he would like to proceed with the surgery.

Treatment for the Feet

Mr. Khulmi was referred by Dr. Kirincic to Dr. Ho at Hinsdale Orthopedics for his foot pain. He first saw Dr. Ho on June 4, 2018. (PX 16). Notes from that day indicate he presented with bilateral heel pain and that "an injury occurred when he fell from a ladder on 4/1/17…he reports that when he fell, he landed directly on both of his feet and heels. He tried to catch himself with his arm but was unsuccessful. Since that time, he has had conservative treatment including PT. He continues to report pain in both heels worse with activity." (PX 16). X-rays of the heels were ordered and showed a fracture in the right heel. (PX 16). Dr. Ho then ordered an MRI of the left ankle, which was done at Rush Copley on August 24, 2018, and showed partial thickness tears of the peroneus longus and brevis tenons, tendinosis of the tibialis posterior tendon, edema within the deep fibers of the deltoid ligament suggestive of a grade 2 sprain. (PX 10, 80). Dr. Ho reviewed the MRI findings and recommended plantar injections into both feet, which were performed on October 18, 2018. He had a second round of plantar injections two weeks later. At that time, Dr. Ho recommended plantar fascia stretches in the morning, soft orthotic full-length inserts, achilles stretches daily, avoid barefoot walking, and follow up as needed.

Independent Medical Exams

Petitioner saw two physicians at the request of the Respondent. He was sent to Dr. Sagerman for the right arm/hand and Dr. Kramer for his neurologic symptoms. He saw Dr. Sagerman two times on June 28, 2018, and July 9, 2021. His reports were introduced into evidence. (RX 1 & 2). The first report of June 28, 2018, indicates Petitioner reported "numbness and tingling in his right small finger with weakness which began after surgery." (RX 1, 2). Dr. Sagerman opined the "right shoulder condition was aggravated as a result of the work accidents precipitating the need for treatment." (RX 1, 7). He opined all treatment was reasonable and necessary, including the shoulder surgery. He opined Petitioner was "nearing MMI" but also recommended more therapy and an EMG to evaluate his symptoms of right hand. (RX 1, 6).

Dr. Sagerman's second report from July 9, 2021, indicates Petitioner had surgery to the elbow and hand and "sensation in the hand had improved, but he felt pain in the right shoulder down his arm and it felt like "needles" in the right ring and small fingers. (RX 2, 2). Dr. Sagerman performed his own x-rays and opined, "Radiographically, there was an ununited bone fragment suggesting prior fracture. Based upon the medical records following the work incident, there is no indication of any trauma to the right elbow which would account for the elbow findings. I do not see any evidence to support a causal connection for the right elbow condition." (RX 2, 5). He opined Petitioner had reached MMI, but he also opined more

medical treatment was needed including a "follow up EMG, and if a showing of cubital tunnel, then he was a candidate for revision cubital tunnel release and excision of the ununited bone fragment and ulnar nerve transposition." (RX 2, 5).

Dr. Kramer, neurologist, agreed Petitioner suffered a concussion with subsequent headaches. However, he stated in his July 22, 2021, report that "the majority of his symptoms today do not relate to that injury from a neurologic perspective. There are significant psychiatric and psychological issues." He felt Petitioner showed evidence of medication dependency but noted all of his treatment had been reasonable and medically necessary. He found Petitioner had reached MMI with respect to the head injury as of the date of his report. (RX 3, 5).

CONCLUSIONS OF LAW

1. With regard to the issue of the Petitioner's April 1, 2017 accident, 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. Petitioner testified that he sustained a fall from a ladder on that day. This history is corroborated in all the medical records. Respondent offered no evidence to rebut Petitioner on this issue. Therefore, the Arbitrator concludes that the Petitioner sustained an accident arising out of and in the course of his employment on April 1, 2017.

2. With regard to the issue of Notice of Petitioner's April 1, 2017 accident, 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 that he informed the Respondent's dispatch person – Mr. Birdsong about his accident on the day it happened. Petitioner also informed his supervisor and the owner of the company soon after. Respondent offered no evidence or testimony to rebut Petitioner on this issue. Therefore, the Arbitrator concludes that the Petitioner provided timely notice of April 1, 2017 accident to Respondent.

3. 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 preponderance of the medical evidence. Petitioner testified that he fell approximately 10-12 feet from a ladder. During that fall, he grabbed a ladder rung with his right arm and held on for some time before losing his grip and landing on the ground with his feet, bouncing off a railing with the right side of his body and then striking his head. The medical evidence shows he had subsequent treatment for his head, neck/back, right arm, both knees and both feet. Petitioner denied having injured any of those body parts prior to his work accidents. Petitioner sustained a right rotator cuff and labral tear for which he underwent surgery and which Dr. Saleem opined was work-related. Petitioner sustained right hand and elbow injuries that include a fracture, partial tear of the MCL, carpal tunnel, and cubital tunnel for which Petitioner underwent surgery – Petitioner's treating doctors note these problems arose following his April 1, 2017 accident. He sustained an aggravation of a pre-existing cervical and lumbar condition that resulted in pain and required conservative treatment with Dr. Lorenz and Dr. Kirincic. Petitioner sustained trauma to his knees, that resulted in a meniscal tear in the left knee. Petitioner also sustained injuries to both feet, including a fracture in his right heel and torn tendons in his left ankle for which he underwent conservative treatment, including injections. Petitioner also sustained trauma to his head that has resulted in continued complaints of headaches, memory loss, confusion, anxiety, depression and speech impairment for which Petitioner has continued to take medication and has undergone therapy for his anxiety, depression and speech issues that have manifested from his post-concussion syndrome as diagnosed by his treating physicians. The Arbitrator notes that the Respondent disputes the issue of

causation based on the opinions of the IME physicians – who have indicated Petitioner should be at MMI. Dr. Sagerman noted that Petitioner's right shoulder condition was causally related, but specifically found that the Petitioner's hand and elbow condition are not causally related because there was no evidence of any trauma to either the hand and elbow. Dr. Kramer found that the Petitioner did suffer a concussion, but that the majority of his neurological symptoms are not related to the accident, but are "psychiatric or psychological issues." The Arbitrator finds persuasive the opinions of Petitioner's treating physicians on this issue, given the totality of the evidence. Accordingly, the Arbitrator concludes that the Petitioner's current condition of ill-being is causally connected to his April 1, 2017 accident.

4. Consistent with the Arbitrator's findings above, the Arbitrator further finds that the Petitioner's medical treatment relating to his April 1, 2017 work accident has been reasonable and necessary in addressing his various work-related conditions. As such, the Arbitrator awards the Petitioner any and all medical expenses related to the April 1, 2017 accident subject to the fee schedule.

5. Based on the Arbitrator's findings above, the Arbitrator further finds that the Petitioner's request for prospective medical care relating to his April 1, 2017 accident is reasonable and necessary. Therefore, Respondent shall authorize and pay for the continued treatment of Petitioner's injuries to his right arm/elbow, his knees, his pain management for his neck and back, for his post-concussion syndrome, and for his depression and anxiety. This would including the proposed surgeries to Petitioner's right elbow and his knees and the neuropsych testing for concussion.

6. With regard to the issue of TTD, the Arbitrator finds that the Petitioner was temporarily totally disabled as a result of his April 1, 2017 work accident from April 20, 2017 through November 8, 2021 (the last hearing date). The medical evidence shows that the Petitioner was taken completely off work during this time period. Furthermore, the medical evidence shows that the Petitioner was still receiving medical treatment at the time of the hearing and therefore has not reached MMI. Accordingly, the Respondent shall pay Petitioner TTD for the aforementioned time periods, and ongoing until Petitioner reaches MMI.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC012710
Case Name	Karim Khulmi v. Professional Security
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	23IWCC0434
Number of Pages of Decision	13
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Jason Marker
Respondent Attorney	Miles Cahill

DATE FILED: 10/10/2023

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KARIM KHULMI,

Petitioner,

vs. NO: 17 WC 012710

PROFESSIONAL SECURITY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, notice, temporary total disability and 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, but makes changes and clerical corrections 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 makes the following changes to the Decision:

1. Order section, first sentence, after the word "clinic": insert "on March 17, 2017" and strike "following his March 14, 2017 accident, but prior to his April 1, 2017 accident."

2. Page 1, paragraph 4: change "On March 20, 2017" to "On March 17, 2017".

3. Page 2: correct the decision to clarify that Petitioner went to Presence Mercy Emergency Room on April 11, 2017, as reflected by the medical records (*Px13, T.1347*), and went to Rush Copley on April 20, 2017.

4. Page 2, paragraph 3: strike "Petitioner did not see a doctor until that date because he had just received his Medicaid health insurance card."

5. Page 5, last paragraph, 2nd to last sentence: change "1018" to "2018".

6. Page 6, first paragraph, sentence 5: correct to indicate that Dr. Durkin recommended surgery for the "left" knee instead of the "right" knee.

7. Page 6, paragraph 2, sentence 7: change to read "X-rays of the feet were ordered and showed an oblique line fracture through the left medial sesamoid consistent with a fracture of unknown acuity. (PX16)."

8. Page 7, Conclusions of Law #4: after "VNA" insert "on March 17, 2017".

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 3, 2022 is hereby affirmed and adopted with the corrections noted above.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

/s/ *Maria E. Portela*

OCTOBER 10,2023

/s/ *Amylee H. Simonovich*

SE/
O: 8/15/23
49

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC012710
Case Name	KHULMI, KARIM v. PROFESSIONAL SECURITY
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Gerald Granada, Arbitrator

Petitioner Attorney	Jason Marker
Respondent Attorney	Miles Cahill

DATE FILED: 5/3/2022

THE INTEREST RATE FOR THE WEEK OF MAY 3, 2022 1.42%

/s/Gerald Granada, Arbitrator

Signature

23IWCC0434

STATE OF ILLINOIS)
)SS.
COUNTY OF DU PAGE)

☐ 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)

Karim Khulmi
Employee/Petitioner

v.

Professional Security
Employer/Respondent

Case # **17** WC **012710**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Wheaton**, on **11/8/21, 12/30/21, 1/20/22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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, **3/14/17**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**18,432.00;** ; the average weekly wage was $**512.00**.

On the date of accident, Petitioner was **40** years of age, ***single*** with **0** dependent children.

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

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

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

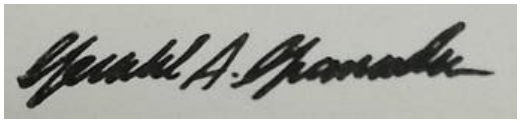
ORDER

Respondent shall pay reasonable and necessary medical services subject to the fee schedule directly to the Petitioner for any medical services provided by Petitioner at the VNA clinic following his March 14, 2017 accident, but prior to his April 1, 2017 accident, as provided in Sections 8(a) and 8.2 of the Act.

Because the Arbitrator has found that the Petitioner's current condition of ill-being is not related to his March 14, 2017, Petitioner's claim for benefits (other than expenses related to his one visit to the VNA clinic), including any additional medical expenses, TTD and prospective medical treatment, 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.



Signature of Arbitrator Gerald Granada

MAY 3, 2022

FINDINGS OF FACT

This case involves Petitioner Karim Khulmi who alleges to have sustained injuries while working for the Respondent Professional Security on March 14, 2017 (17WC012710) and on April 1, 2017 (17WC012709). This decision will be on the March 14, 2017 claim under 17WC012710. The issues in dispute in both cases are: 1) accident; 2) notice; 3) causation; 4) medical expenses; 5) TTD; and 6) prospective medical treatment. Petitioner testified via a Farsi interpreter. The original hearing of this matter was held in Wheaton on November 8, 2021. On December 30, 2021 and January 2021 proofs were re-opened and closed to supplement exhibits that were missing pages.

Petitioner worked for Respondent as a security guard at the Fox Valley Mall in Aurora, IL, where his work hours were from 11:00 pm to 7:00 am. There was no night supervisor on his shift but there was another dispatch employee who worked with him named Mr. Birdsong, who was in his 70's or 80's. Petitioner would communicate with Mr. Birdsong via a radio. Petitioner's job duties required walking the Fox Valley Mall many times a day, in addition to writing out reports of his findings. Petitioner testified that prior to his accidents, he never injured his head, back, arms, feet, nor did he have memory problems or forgetfulness. He was able to walk without problem and do all aspects of his job before the work accidents.

March 14, 2017 Accident (17WC012710)

On March 14, 2017, there was a construction company working in the mall, making a new store. Near the end of his shift, dispatch (Mr. Birdsong) told Petitioner to open the ceiling roof hatch for construction workers. Petitioner went to open the roof hatch in Dock D, which required him to climb a tall ladder. While coming down, he was about five or six feet up when he slipped and fell. He stated his feet hit hard and he felt pain in his feet and back. He reported the incident in person to Mr. Birdsong in the office. Mr. Birdsong advised he would tell the managers about his fall. There was nobody else to notify as there was no supervisor that day on night shift. Petitioner eventually contacted his supervisor Mr. Pond and explained what happened. Mr. Pond promised to talk to the Respondent's owner Brandon Newberry, but Petitioner never received any assistance from either Mr. Pond or Mr. Newberry.

On March 20, 2017, Petitioner went to the VNA clinic because they were cheaper, and he had no health insurance. Medical records that day indicate a history of "fall 3 days ago from a roof approximately 1 floor high (10 feet) when his foot slipped and he fell laying down on the floor. States he hit the right side of his head, right back, right shoulder and right hip and right leg hit on the floor. He is having pain in the right shoulder, lower back, and right knee. Has had headache, dizziness, vision changes, right sided chest pain". (PX 8).

Petitioner was able to return to work following this incident. He testified that he and took Ibuprofen and Tylenol for the pain in his head, feet and back.

April 1, 2017 Accident (17WC012709)

On April 1, 2017, Petitioner was working his usual shift for Respondent. On that day, an alarm had been activated and he was told a theft was in progress. The police were called and around 3:00 a.m., and dispatch (Mr. Birdsong) asked him to go open the door at entrance "3" to let the police in. He met four or five police officers and they patrolled the area together. They found the door that was sounding the

alarm but not the thief and the police left. A copy of the police report from that day was entered into evidence and showed police "m[e]t security at entrance 3" at 3:28 a.m. and "alarm 2nd floor motion" was noted at 3:52 a.m. (PX 4).

Petitioner continued to patrol the area after the police left based upon their recommendation and he found the ceiling roof hatch in Dock D was open. He called dispatch and was told to close it. At this time, the construction company continued to be working. After communicating to dispatch, Petitioner climbed up the same ladder and when he got to the top, the roof hatch was open and so he closed it. As he was coming down, he slipped about half-way down, in the middle of it, about 10-14 feet up. His feet slipped and he started falling and put his right hand out and grabbed a rung to catch himself. He couldn't bear his weight and he continued falling. As he continued to fall, his body turned and twisted so that his back was to the ladder. He continued to fall all the way to the ground, where there was a railing before the stairs go down. After falling to the ground, he struck his right side against the railing with his right leg and right arm and was then bounced off the railing to the door at the end of the vestibule to the left, where he struck his head on the door. He lost consciousness for 3 to 5 minutes.

When he awoke, he was on the ground by the door and noticed blood coming from his nose. He was able to get up and go to the bathroom to clean up and dust off his clothes. He washed his face and hands and then notified dispatch. He then went to the office to talk to Mr. Birdsong. He told him he closed the roof hatch and fell coming down the ladder and that he was in a lot of pain in his back, shoulder, head and feet. Mr. Newberry - the Respondent's owner was on vacation and there was no other shift supervisor working that day. Mr. Birdsong tried calling another supervisor, Mr. Pond that day three times in front of Petitioner, but he did not answer. Petitioner remained in the office for the remainder of his shift that day. He was able to drive himself home, where he felt pain in his head, right arm, neck, back, feet and knees. He iced his forehead and took pain medication. Later that day, Petitioner attempted to see his primary care physician, Dr. Sayeed, but was turned away because of no insurance.

On April 20, 2017, Petitioner went to Rush Copley in Aurora. Petitioner did not see a doctor until that date because he had just received his Medicaid health insurance card. The records from that day state: "patient reports that on April 1, he was at work. He went up to the roof to check to make certain that everything was closed. He was descending the ladder when he slipped and fell and was able to catch himself. He continued to descend, slipped again, upon landing at the base of the ladder, he hit the guard rail and the left forehead hit the door. Reports loss of consciousness for a couple minutes, bloody left nose, headache. Since then, with continued headache, right neck and shoulder pain. He has taken ibuprofen without significant relief." (RX 10, 355). X-rays of the cervical spine and right shoulder were performed as was a CT of the brain which showed no hemorrhage. He was given pain mediation and muscle relaxers and referred for an MRI of the right shoulder and follow up with an orthopedic at Castle Orthopedics as well as his primary care doctor. (PX 10).

On April 21, 2017, Petitioner went to VNA Clinic, whose records from that visit indicate: "works as a security officer, was on the roof and fell April 1st, approximately 10-12 feet – Knocked out – does not know how long – woke up – and per pt eyes were black. Patient was in the ER yesterday at Copley negative CT per pt. States that he has had short term memory loss since first fall. Is A&O x 3. Has difficulty concentrating." He was told to go to the ER and make an appointment for DM check and labs.

After going to the Hospital and the VNA, Petitioner attempted to talk to Respondent's owner, Mr. Brandon Newberry, but could not talk to him because he was on vacation. Petitioner then tried speaking

to Mr. Pond while Mr. Newberry was out, but Mr. Pond never responded to him. Petitioner eventually met with Mr. Newberry in the office, and he told him about both his first and second accidents, his issues with no insurance, his complaints of pain, and he asked if he could provide a doctor to help him. Petitioner testified that he was told to go home and come back when he gets better. Petitioner testified that Mr. Newberry did not direct him to any medical provider. Petitioner has been off work per his doctors since his second accident and was neither provided any chance to return to work or any benefits while he has been off work.

Treatment for post-concussion

On May 17, 2017, Petitioner followed up with his primary care doctor Dr. Quadir, who noted that Petitioner reported: "he fell at his work on April 1. He was climbing a ladder leading to the roof of a building. He suffered a concussion. He has right shoulder pain. Back pain. Pain in both knees. He was seen by orthopedics. He is scheduled for an MRI of the right shoulder. He is getting physical therapy for his neck, back and knees. He has not been able to go to work since April 1." (PX 9, 102). He complained of bloody nose, headaches, and dizziness in addition to pain in the right arm, knees, feet and back and neck. He was having bloody noses a few times a week and his dizziness was making it hard for him to sleep. He was given an off work note that day and referred to a neurologist – Dr. Siddiq. (PX 9).

On September 28, 2017, Petitioner saw neurologist, Dr. Siddiq on referral by Dr. Quadir. Dr. Siddiq's records indicate Petitioner reporting frequent headaches and memory loss. After exam, Dr. Siddiq diagnosed post-concussion syndrome and recommended an MRI of the brain and medication for headache. (PX 18, 34). In his follow up visits with Dr. Siddiq, Petitioner reported complaints of insomnia, headaches, poor memory, and difficulty concentrating for which he was diagnosed with post-concussion syndrome, depression, and anxiety. Dr. Siddiq prescribed Midrin, Zoloft, Xanax and ordered Petitioner off work. On June 27, 2018, Petitioner underwent an MRI of the brain at Rush Copley Hospital. On July 27, 2018, Dr. Siddiq noted the MRI was negative and recommended neuropsychological testing. (PX 10, 23). He continued to see Dr. Siddiq thereafter and his medications were adjusted. On February 14, 2019, Petitioner went to Presence Mercy Hospital with complaints of headache, chest pain, and nosebleed, for which a CT of the head was performed that showed no evidence of acute hemorrhage.

On February 25, 2019, Dr. Siddiq provided a referral for speech therapy and recommended continued medications. (PX 10, 16). Petitioner underwent speech therapy at Presence Mercy Medical Center from March through August of 2019. (PX 14). On January 29, 2020, Petitioner last saw Dr. Siddiq, who noted that Petitioner has poor memory, poor ability to function, is unable to focus and concentrate and follow directions, unable to perform job, and is unable to interact with other people. Dr. Siddiq noted that even a simple job is difficult for Petitioner to perform. (PX 18). Dr. Siddiq also noted that Petitioner never had the recommended neuropsych testing and that Dr. Kirincic oversees all his medications.

From June 1, 2019 through September 11, 2019, Petitioner attended therapy with a psychologist at Aurora Community Health Center for his anxiety and depression at the recommendation of Dr. Quadir. His therapy records show he was diagnosed with major depressive disorder, anxiety disorder, and history of head injury from fall at work in 2017. (PX 20). He continued this treatment up to the time of trial and he continues to take prescribe medications, which are referenced on petitioner's prescription ledger from Naperville Pharmacy. (PX 7).

Treatment for the right arm/hand

On April 26, 2017, Petitioner saw Dr. Saleem at Castle Orthopedics for his shoulder pain. He provided a history of accident from April 1, 2017 that was consistent with the history he gave at Rush and at the VNA Clinic. Dr. Saleem took Petitioner off work and ordered an MRI performed on June 6, 2017. (PX 12, 124). On June 8, 2017, Dr. Saleem performed an ultrasound-guided injection into Petitioner's shoulder. (PX 12, 92). A second injection was performed on June 13, 2017. (PX 12 91). On that date, Dr. Saleem diagnosed him with a partial supraspinatus tear and partial subscapularis tear as well as degenerative labral tearing. On October 17, 2017, Dr. Saleem performed a right shoulder rotator cuff repair, subacromial decompression, distal clavicle resection, debridement of labrum and open biceps tenodesis. (RX 10, 254). Dr. Saleem wrote a note "To Whom It May Concern" on October 27, 2017, stating "this surgery was felt to be the result of the injury that he sustained as described above…at work". (PX 12, 78).

After surgery, Petitioner underwent physical therapy at Presence Mercy through February 2019. (PX 13). However, he continued to have issues with numbness in the right hand and fingers, and pain in the right elbow. (R 114). The records from this provider indicate that since surgery, Petitioner has been having pain in the shoulder, on the side of the neck and even occasional pain radiating down the arm. On July 12, 2018, Dr. Saleem's assessment was right elbow severe ulnar neuropathy with weakness in the FDP. He ordered an EMG and referred Petitioner to his partner, Dr. Tueting for evaluation. Petitioner remained off work. On July 12, 2018, Petitioner underwent an EMG that showed moderate to severe cubital tunnel syndrome and carpal tunnel syndrome. (PX 12, 41)

On July 16, 2018, Petitioner saw Dr. Tueting, who reviewed the EMG and recommended an MRI of the elbow. Dr. Tueting noted that Petitioner's right hand pain symptoms began when he had an injury on April 1, 2017. The August 15, 2018 MRI showed a chronic medial epicondyle fracture and a partial tear of the MCL. (RX 10, 134) On November 13, 2018, Dr. Tueting performed surgery involving a carpal tunnel release, an ulnar tunnel release, and ulnar nerve decompression elbow/cubital tunnel release. (RX 10, 38). Petitioner underwent post-surgical physical therapy, but continued to complain of numbness in his small, middle and ring fingers. Petitioner's last visit with Castle Orthopedics was on January 22, 2019 following his complaints of having to wait for two hours at the doctor's office. He then followed up his medical treatment with Dr. Urbanosky.

Petitioner first saw Dr. Urbanosky on May 20, 2019. Her notes indicate he complained of pain in the right elbow, wrist and small finger following his November 3, 2018 surgery. Petitioner complained that he was unable to flex his right small finger and had increased pain. (PX 16) Dr. Urbanosky recommended an EMG and kept Petitioner off work. On August 1, 2019, Dr. Urbanosky reviewed the EMG and noted it showed a lesion in the ulnar nerve. After a few months of trying medication without improvement, on December 13, 2019, Dr. Urbanosky recommended a surgical revision including ulnar nerve exploration, decompression, anterior intrafascial transposition and placement of a nerve protector. Her last record of August 17, 2020 reiterated her surgical recommendation and off work restrictions and noted Petitioner wished to proceed with surgery. (PX 16).

Treatment for the Neck and Back / Pain Management

After his initial hospital and PCP follow up visit, Petitioner saw Dr. Mark Lorenz at Hinsdale Orthopedics upon referral from his PCP. At his first visit on July 13, 2017, he presented "for evaluation of neck and lumbar back pain after work related injury on April 1, 2017. He works as a security officer, was on a ladder to close to the roof, when he fell off the ladder." (PX 16). He also complained of pain "across his cervical spine with radiation of pain extending into his right shoulder to the right elbow with associated numbness and weakness." (PX 16). Dr. Lorenz ordered MRI's on that day and kept Petitioner off work. MRI's of the spine were performed at Imaging Centers of America on March 17, 2018. (PX 16). Dr. Lorenz reviewed the lumbar MRI and his impression was aggravation of L5-S1 with no significant disc herniation. He noted there was nothing surgical to offer and he referred Petitioner to Dr. Kirincic for pain management. (PX 16).

Mr. Khulmi testified Dr. Kirincic now oversees all of his medications as his pain doctor and he continues to see her. He first saw Dr. Kirincic on April 26, 2018. On that day, she performed acupuncture and trigger point injections into the "TL, PS, gluts, and R trap." She recommended he do PT and kept him off work. (PX 16). From May of 2018 through February of 2020, Dr. Kirincic performed acupuncture and/or additional trigger point injections on nearly every visit – every few months. She also tried various medications for his pain. In 2019, she diagnosed him with opioid dependency in addition to his other conditions. The last time Mr. Khulmi saw Dr. Kirincic before trial was on July 27, 2021, and she noted he had continued pain in his knees, right elbow, feet and back. She noted he was seeing a psychiatrist for memory issues still and also had a social housekeeper at his home. She provided him with an updated off work note. She reviewed his medications and provided refills. (PX 16). A prescription ledger was admitted into evidence showing all prescriptions Mr. Khulmi was taking and overseen by Dr. Kirincic. (PX 7).

Treatment for the Knees

On June 29, 2017, Mr. Khulmi saw Dr. Belich at Loyola for his knees upon referral from his PCP. (PX 15, 3). Records indicates he "comes in with a history of falling off a roof on 4/1/17…he states he works as a security officer." He complained of pain in both knees and upon exam, there was tenderness in the medial and lateral joint lines. He diagnosed Petitioner with bilateral knee sprains and recommended an MRI and returning to his primary care. (PX 15). Petitioner only saw Dr. Belich once because Dr. Lorenz then referred him to Dr. Durkin in his office for treatment of his knees. (R 109).

Petitioner first saw Dr. Durkin on July 17, 2017. Records indicate "he fell off from a ladder at work and landed on concrete on April 1, 2017. Patient reports he fell 12 feet." X-rays were performed showing no fractures. MRI's of the knees were ordered and he was unable to work. (PX 16). He had an MRI of the knees at Imaging Centers of America on March 19, 2018. He returned to Dr. Durkin and he found they showed on the left – a radial tear of the medial meniscus, and on the right – osteoarthritis. (PX 16). He had done PT and thus, a left knee injection was recommended and performed. He ordered Mr. Khulmi to wear a left knee brace. On March 29, 2018, he had an injection into the left knee. On April 24, 1018, Dr. Durkin performed bilateral Gel One injections. He noted the Gel One injections could be administered every six months.

On September 4, 2018, Dr. Durkin administered a left knee cortisone injection. On September 7, 2018, Dr. Durkin's performed another Gel One injection into the left knee. On November 20, 2018, he noted Petitioner was still using a cane. A Gel one injection was administered into the right knee. On February 1, 2019, Dr. Durkin recommended surgery for the right knee, in the form of an MAKO total knee arthroplasty. On March 14, 2019, he underwent another cortisone injection into the left knee. On June 7, 2019, he had bilateral cortisone injections. On December 6, 2019, and August 11, 2020, Dr. Durkin administered Gel One injections into both knees. On August 2, 2021, the least time he saw Dr. Durkin before trial, a Gel One injection was administered into the left knee and he was to remain off work. Dr. Durkin continued to recommend the MAKO TKA surgery and Petitioner testified he would like to proceed with the surgery.

Treatment for the Feet

Mr. Khulmi was referred by Dr. Kirincic to Dr. Ho at Hinsdale Orthopedics for his foot pain. He first saw Dr. Ho on June 4, 2018. (PX 16). Notes from that day indicate he presented with bilateral heel pain and that "an injury occurred when he fell from a ladder on 4/1/17…he reports that when he fell, he landed directly on both of his feet and heels. He tried to catch himself with his arm but was unsuccessful. Since that time, he has had conservative treatment including PT. He continues to report pain in both heels worse with activity." (PX 16). X-rays of the heels were ordered and showed a fracture in the right heel. (PX 16). Dr. Ho then ordered an MRI of the left ankle, which was done at Rush Copley on August 24, 2018, and showed partial thickness tears of the peroneus longus and brevis tendons, tendinosis of the tibialis posterior tendon, edema within the deep fibers of the deltoid ligament suggestive of a grade 2 sprain. (PX 10, 80). Dr. Ho reviewed the MRI findings and recommended plantar injections into both feet, which were performed on October 18, 2018. He had a second round of plantar injections two weeks later. At that time, Dr. Ho recommended plantar fascia stretches in the morning, soft orthotic full-length inserts, achilles stretches daily, avoid barefoot walking, and follow up as needed.

Independent Medical Exams

Petitioner saw two physicians at the request of the Respondent. He was sent to Dr. Sagerman for the right arm/hand and Dr. Kramer for his neurologic symptoms. He saw Dr. Sagerman two times on June 28, 2018, and July 9, 2021. His reports were introduced into evidence. (RX 1 & 2). The first report of June 28, 2018, indicates Petitioner reported "numbness and tingling in his right small finger with weakness which began after surgery." (RX 1, 2). Dr. Sagerman opined the "right shoulder condition was aggravated as a result of the work accidents precipitating the need for treatment." (RX 1, 7). He opined all treatment was reasonable and necessary, including the shoulder surgery. He opined Petitioner was "nearing MMI" but also recommended more therapy and an EMG to evaluate his symptoms of right hand. (RX 1, 6).

Dr. Sagerman's second report from July 9, 2021, indicates Petitioner had surgery to the elbow and hand and "sensation in the hand had improved, but he felt pain in the right shoulder down his arm and it felt like "needles" in the right ring and small fingers. (RX 2, 2). Dr. Sagerman performed his own x-rays and opined, "Radiographically, there was an ununited bone fragment suggesting prior fracture. Based upon the medical records following the work incident, there is no indication of any trauma to the right elbow which would account for the elbow findings. I do not see any evidence to support a causal connection for the right elbow condition." (RX 2, 5). He opined Petitioner had reached MMI, but he also opined more

medical treatment was needed including a "follow up EMG, and if a showing of cubital tunnel, then he was a candidate for revision cubital tunnel release and excision of the ununited bone fragment and ulnar nerve transposition." (RX 2, 5).

Dr. Kramer, neurologist, agreed Petitioner suffered a concussion with subsequent headaches. However, he stated in his July 22, 2021, report that "the majority of his symptoms today do not relate to that injury from a neurologic perspective. There are significant psychiatric and psychological issues." He felt Petitioner showed evidence of medication dependency but noted all of his treatment had been reasonable and medically necessary. He found Petitioner had reached MMI with respect to the head injury as of the date of his report. (RX 3, 5).

CONCLUSIONS OF LAW

1. With regard to the issue of the Petitioner's March 14, 2017, accident, 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. Petitioner testified that he sustained a fall from a ladder on March 14, 2017. This history is corroborated in the VNA records, the Rush Copley records, as well as those from his primary care physician. Respondent offered no evidence to rebut Petitioner on this issue. Therefore, the Arbitrator concludes that the Petitioner sustained an accident arising out of and in the course of his employment on March 14, 2017.

2. With regard to the issue of Notice of Petitioner's March 14, 2017 accident, 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 that he informed the Respondent's dispatch person – Mr. Birdsong about his March 14, 2017 accident on the day it happened. Respondent offered no evidence or testimony to rebut Petitioner on this issue. Therefore, the Arbitrator concludes that the Petitioner provided timely notice of March 14, 2017 accident to Respondent.

3. Regarding the issue of causation, the Arbitrator finds that the Petitioner's current condition of ill-being is not causally related to his March 14, 2017 accident. Petitioner did complain of pain in his head, back, right shoulder and right leg following the March 14, 2017 accident, but his medical treatment following that incident was very minimal and Petitioner was able to return to work full duty following that accident. The bulk of Petitioner's medical treatment followed Petitioner's subsequent accident on April 1, 2017, which affected all the same body parts and broke the causal connection chain between the Petitioner's March 14, 2017 accident and his current condition of ill-being. Accordingly, the Petitioner's claim for additional benefits stemming from his March 14, 2017 work accident are denied.

4. Based on the Arbitrator's findings with regard to the issue of causation, Petitioner is awarded any medical expenses stemming from his one visit to VNA following his March 14, 2017 accident. The remaining medical expenses appear to relate to Petitioner's subsequent accident and are hereby denied. All other issues are rendered moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC022603
Case Name	Amanda Casnova v. Menard's
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	23IWCC0435
Number of Pages of Decision	22
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Kevin Veugeler
Respondent Attorney	Monica Fernandez

DATE FILED: 10/10/2023

/s/Amylee Simonovich, Commissioner

Signature

23IWCC0435

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 Causal Connection, Medical, Temporary Disability	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

AMANDA CASNOVA,

Petitioner,

vs. NO: 16 WC 22603

MENARDS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by both the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of whether Petitioner's current right carpal tunnel and right middle finger conditions are causally related to the stipulated April 30, 2016 work accident, entitlement to incurred medical expenses as well as prospective medical care, entitlement to additional temporary disability benefits, and entitlement to §19(k) penalties, §19(l) penalties and §16 attorney fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as set forth below, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327 (1980).

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.

On June 30, 2016, Dr. Gary Kronen reviewed the June 28, 2016 EMG results and diagnosed right wrist carpal tunnel and ulnar nerve compression, right elbow cubital tunnel, and flexor

tendinitis of the middle finger. He opined these conditions occurred acutely after Petitioner's instant crush injury and were thus so related. He recommended a carpal tunnel release and ulnar nerve release at the elbow along with a cubital tunnel release and transposition and flexor tenosynovectomy. He also continued Petitioner on occupational therapy. PX 2.

On August 16, 2016, during a follow-up visit with Dr. Tom Kim, Petitioner continued complaining of pain in her right hand, wrist, and elbow. Physical examination revealed she had pain with range of motion and weakness in her grip. Dr. Kim diagnosed a crushing injury of the right hand and carpal tunnel syndrome of the right wrist, which corroborated the EMG results. PX 4.

On August 25, 2016, Dr. Harun Durudogan diagnosed right carpal tunnel syndrome in addition to right trigger finger and neuralgia of the right hand and wrist, and opined that these conditions were related to the instant work injury. With regards to the right middle finger and carpal tunnel conditions, Dr. Durudogan specifically noted they were "directly and causally associated with this work injury." Dr. Durudogan also recommended physical therapy, home exercises, and anti-inflammatory medication. PX 3.

On September 4, 2016, Petitioner underwent a §12 examination at Respondent's request with Dr. Thomas Wiedrich. Dr. Wiedrich noted objective EMG evidence of bilateral carpal tunnel syndrome with complaints of numbness, pain, and swelling, but that there appeared to be significant symptom magnification. §12 Report of Dr. Wiedrich, p.41.

The Commission corrects the scrivener's error contained on page 7 of the Decision of the Arbitrator, wherein it is noted Petitioner followed up with Dr. Durudogan on *January 30*, 2017 and, after examination, was recommended for surgery in the form of a right ulnar decompression and possible transposition, as well as a carpal tunnel release, an injection of the lateral epicondyle of the right elbow, and an A1 pulley release of the right long finger. The Commission notes that this visit is actually dated *January 3*, 2017.

On February 10, 2017, the parties held a hearing at the Commission, during which Respondent informed Petitioner there was work available within her restrictions. Petitioner was instructed to call Anthony Palucki, Respondent's First Assistant GM. However, upon calling Mr. Palucki, Petitioner was informed that there was no work available for her.

On March 29, 2017, in addition to a trigger finger release of the right middle finger, Petitioner also underwent a right carpal tunnel injection. PX 5, p.58.

CONCLUSIONS OF LAW

In finding only Petitioner's right middle finger and resolved right hand contusion/abrasion conditions are causally related to the undisputed April 30, 2016 work accident, the Arbitrator relied on his review of the medical records, and a finding that the opinions of Respondent's §12 physician, Dr. Wiedrich, were more persuasive. The Commission agrees with the Arbitrator's findings regarding Petitioner's right middle finger and resolved right hand contusion/abrasion conditions. However, with regards to Petitioner's right carpal tunnel condition, we view the evidence differently and find that the right carpal tunnel condition is also causally related to the

accident, but only through October 10, 2017.

I. Causal Connection/Prospective Medical

A. Right Carpal Tunnel

To begin, the Commission notes conflicting indicia concerning whether Petitioner's right carpal tunnel condition pre-existed the instant accident, or was instigated by the same. Petitioner provided testimony that prior to the instant accident, she had no prior right hand or arm issues or medical treatment. Moreover, treating physicians Dr. Kronen and Dr. Durudogan both opined Petitioner's right carpal tunnel condition was causally related to the instant work injury. In contrast, we note that Respondent's §12 examiner Dr. Wiedrich opined that Petitioner's right carpal tunnel condition pre-existed the instant accident.

The Commission finds that, even viewing this in a light most favorable to Respondent, and finding Petitioner's right carpal tunnel condition pre-existed the accident, the evidence supports a finding that Petitioner's right carpal tunnel condition was aggravated by the accident.

It is well established that an accident need not be the sole or primary cause—as long as employment is a cause—of a claimant's condition. *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 205 (2003). Furthermore, an employer takes its employees as it finds them (*St. Elizabeth's Hospital v. Illinois Workers' Compensation Commission*, 371 Ill. App. 3d 882, 888 (5th Dist. 2007)), and a claimant with a pre-existing condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Commission*, 92 Ill. 2d 30, 36 (1982). As the Appellate Court held in *Schroeder v. Illinois Workers' Compensation Commission*, 2017 IL App (4th) 160192WC, the inquiry focuses on whether there has been a deterioration in the claimant's condition:

> That is, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition; it is the resulting deterioration from whatever the previous condition had been. *Schroeder, at P26*.

Here, assuming Petitioner had a pre-existing right carpal tunnel condition prior to the April 30, 2016 accident, the evidence supports a finding that it was asymptomatic, as Petitioner offered unrebutted testimony that she had no prior right hand or arm issues or medical treatment. Further, the evidence reflects Petitioner had no right hand or arm issues on the date of accident at the start of her shift. She was working full duty with no right upper extremity complaints. However, after the accident, Petitioner immediately and consistently complained of right arm issues, including hand and wrist pain radiating to her elbow, swelling, tenderness, numbness, and grip weakness. After several visits with Dr. Gary Kronen, Petitioner was diagnosed with right wrist carpal tunnel and ulnar nerve compression, right elbow cubital tunnel, and flexor tendinitis of the middle finger. The carpal tunnel syndrome diagnosis was echoed by fellow treating physicians Dr. Tom Kim and Dr. Harun Durudogan. A June 28, 2016 EMG confirmed *bilateral* carpal tunnel syndrome, but Petitioner was only symptomatic on the right side, supporting a finding that the instant accident aggravated her right upper extremity and made her right carpal tunnel condition symptomatic. Petitioner's complaints remained ongoing and were treated conservatively with physical and

occupational therapy, home exercises, anti-inflammatory medication, carpal tunnel injections, and work restrictions which were not accommodated by Respondent.[1]

These facts belie the opinions of Respondent-§12 examiner Dr. Thomas Wiedrich, who opined there was no evidence of carpal tunnel syndrome. Moreover, we find Dr. Wiedrich also allowed for the possibility that the accident could have caused an aggravation of Petitioner's pre-existing condition, although he characterized any aggravation as "minimal." Section 12 Report of Dr. Wiedrich, p.41. However, the Commission takes note of the fact that, at the conclusion of Dr. Wiedrich's first §12 examination on September 14, 2016, he recommended a carpal tunnel injection. We find that the recommendation of this injection indicates the aggravation was more than minimal. See *Krantz v. Industrial Commission*, 289 Ill. App. 3d 447, 450-51 (5th Dist. 1997) (The Commission is an administrative tribunal that hears only workers' compensation cases and deals extensively with medical issues); and *Long v. Industrial Commission*, 76 Ill. 2d 561, 566 (1979) (The Commission possesses inherent expertise regarding medical issues).

The Commission finds that the record in totality supports a finding that Petitioner's right carpal tunnel condition deteriorated after the stipulated accident, leading to surgical recommendations from Dr. Kronen in addition to Dr. Durudogan, both of whom recommended ulnar and carpal tunnel releases. Moreover, both Dr. Kronen and Dr. Durudogan opined Petitioner's symptoms were causally related to her work accident. There is no indication Petitioner had been recommended for a right carpal tunnel release prior to the work accident.

Next, the Commission notes that medical records indicate Petitioner suffered an exacerbation to her symptoms on September 5, 2016 when a co-worker struck down on her right shoulder, resulting in immediate radiating pain down Petitioner's arm and into her latissimus dorsi (a broad, flat muscle on the side of the back) area and right rib cage. Records also indicate another exacerbation occurred on October 6, 2016, while Petitioner was pushing a flat cart at work and had pain and swelling into her arm, right wrist weakness, swelling, tenderness, and pain, with numbness and tingling in the median nerve distribution, and was taken off work. However, the Commission finds that neither event rises to the level of an intervening accident breaking the causation chain.

An aggravation injury does not break the causal connection between the original work injury and the present condition when: (a) the original injury has not resolved, and (b) "but for" the work injury, the aggravation injury would have been tolerated. See *Vogel v. Industrial Commission*, 354 Ill. App 3d 780, 788 (2d Dist. 205). Here, we find the evidence supports a finding that Petitioner's right carpal tunnel condition was ongoing and had not resolved at the time of these two exacerbations. Additionally, the Commission finds that the exacerbation injuries would have been tolerated but for the work injury, as the work injury caused symptomatology in the right carpal tunnel. We find this increased symptomatology predisposed Petitioner to additional aggravation. Accordingly, we find that while the aforementioned exacerbating events increased Petitioner's right upper extremity symptoms, neither broke the causal chain between the work accident and Petitioner's right carpal tunnel condition.

Although the evidence supports a finding that Petitioner's right carpal tunnel condition was aggravated by the instant work accident, the Commission finds that the evidence also indicates

[1] Petitioner testified she modified her own work duties by using her left hand more often.

that this condition has since resolved and is thus not *currently* related to the work accident. Accordingly, we find that any right carpal tunnel surgical recommendations made through October 10, 2017 are now unnecessary and are denied.

In so ruling, we find that while Petitioner's right carpal tunnel condition remained ongoing after the work accident, records indicate the related symptoms slowly began to subside after the March 29, 2017 carpal tunnel injection, and ultimately resolved. By the October 10, 2017 visit with Dr. Durudogan, Petitioner's complaints were overwhelmingly limited to her right middle finger trigger finger, and her only other documented complaints were right wrist tenderness and wrist pain, but only at extreme limits of range of motion. These complaints were an improvement from previous follow-up visits. Dr. Durudogan diagnosed complex regional pain syndrome, but released Petitioner to full duty with no restrictions as of October 30, 2017. Prior to this visit, Dr. Durudogan had recommended either restricted duty or kept Petitioner off work completely. We find that the conservative treatment rendered resolved Petitioner's right carpal tunnel condition by that date, to the point where she was able to return to full duty work. Accordingly, we find causal connection between the instant accident and Petitioner's right carpal tunnel condition, but only through October 10, 2017.

Petitioner argues she is entitled to the prospective carpal tunnel surgery, which was allegedly recommended by Dr. Durudogan on November 12, 2021. She testified that the surgical recommendation discussed during this visit was the same as was previously recommended by Dr. Durudogan.[2] However, a review of the November 12, 2021 record reveals Petitioner's complaints were limited to her right middle finger. She had no complaints about the hand, wrist, or forearm. She was diagnosed with bilateral hand pain status post trigger finger release, and Dr. Durudogan administered an injection along the right long MCP joint. Dr. Durudogan recommended no repetitive motions, prescribed topical anti-inflammatories with deep tissue massage, and recommended surgery if no improvement. PX 13. The Commission notes that this visit was focused on Petitioner's finger complaints and treatment, supporting a finding that any surgical discussion would be related to treatment of the finger, and not Petitioner's carpal tunnel condition.

Moreover, we find Petitioner's assertion that any surgery was *recommended* on November 12, 2021 to be premature. Dr. Durudogan simply listed surgery as an option <u>if</u> no improvement was shown after further conservative treatment. We find that no prospective surgery was recommended on this date. Thus, there is no prospective surgery to award. However, the Commission does award the prospective conservative treatment of topical anti-inflammatories and deep tissue massage recommended by Dr. Durudogan on November 12, 2021, given its necessity to cure or relieve Petitioner's right middle finger complaints.

Accordingly, based on the totality of evidence, the Commission modifies the causal connection finding in the Decision of the Arbitrator, and finds that Petitioner's right carpal tunnel condition was aggravated by the instant accident, but only through October 10, 2017.

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[2] On January 3, 2017, Dr. Durudogan recommended a right ulnar decompression and possible transposition, as well as a carpal tunnel release, an injection of the lateral epicondyle of the right elbow, and an A1 pulley release of the right long finger.

B. Right Middle Finger Trigger Finger/Right Hand Contusion/Abrasion

Regarding Petitioner's current right middle finger trigger finger condition and resolved right hand contusion/abrasion, the Commission affirms the Decision of the Arbitrator finding causal connection between these conditions and the instant work accident.

II. Temporary Disability

The Arbitrator awarded temporary total disability benefits from October 6, 2016 through February 10, 2017, and March 29, 2017 (the date of surgery) through October 9, 2017. Petitioner requests a modification of this award to October 6, 2016 through October 9, 2017. However, the Commission notes that on the Request for Hearing form, Petitioner only sought temporary total disability benefits from October 6, 2016 through February 10, 2017; and again from March 28, 2017 through October 9, 2017. As the Request for Hearing is binding on the parties as to the claims made therein, Petitioner is precluded from seeking the additional temporary total disability benefits she requests in her Statement of Exceptions. See *Walker v. Industrial Commission*, 345 Ill. App. 3d 1084, 1088 (4th Dist. 2004).

The record reflects that Petitioner sought work from Respondent within her restrictions on or about February 10, 2017, but none was offered by Respondent. In the interim, there is no indication in the record that any such accommodations were made leading up to the March 29, 2017 surgery. Accordingly, the requested temporary total disability date of March 28, 2017 can be awarded by the Commission. In accordance with the above, we modify the award granted in the Decision of the Arbitrator so that it mirrors the dates sought by Petitioner on the Request for Hearing form. Respondent did not offer any alternative award dates.

III. Medical Expenses

The Arbitrator awarded medical expenses in the amount of $23,079.18, to the exclusion of the $573.00 bill from Duly Health and Care from November 12, 2021. However, we find this exclusion to be at odds with the evidence. The November 12, 2021 medical record appears to be for treatment of Petitioner's right middle finger trigger finger, a condition which was found by the Arbitrator—and affirmed by the Commission herein—to be currently causally related to the work accident. Thus, all expenses related to the reasonable and necessary treatment of the finger condition should be awarded. This includes a portion of the $573.00 Duly Health and Care bill. We acknowledge that at least $84.00 of the bill was appropriately excluded by the Arbitrator, as it relates to treatment for Petitioner's unrelated left hand condition. PX 14. We also note a $235.00 charge for treatment related to both Petitioner's right and left hand. The parties will need to determine how much of that $235.00 was designated to Petitioner's causally related right hand condition before determining how much of the $573.00 bill shall be awarded for treatment related to Petitioner's right hand.

All else is affirmed.

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

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner's current right middle finger condition and resolved right hand contusion/abrasion are causally related to the instant accident.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner's right carpal tunnel condition is causally related to the instant accident, but only through October 10, 2017.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical expenses of $23,079.18, as well as the portion of the $573.00 Duly Health and Care bill which is causally related to Petitioner's right hand/finger condition, 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 provide and pay for the prospective conservative treatment recommended by Dr. Durudogan on November 12, 2021 related to Petitioner's right middle finger trigger finger condition, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $406.67 per week for a period of 46 & 2/7ths weeks, representing October 6, 2016 through February 10, 2017; and March 28, 2017 through October 9, 2017, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have a credit of $1,852.09 for temporary total disability benefits already paid.

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

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $41,600.00. 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.

/s/*Stephen J. Mathis*

/s/*Deborah L. Simpson*

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on August 9, 2023, before a three member panel of the Commission including members Deborah J. Baker, Stephen J. Mathis, and Deborah L. Simpson, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of Commissioner Baker, the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three member panel, but no formal written decision was signed and issued.

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the panel members in this case, I have reviewed the Decision worksheet showing how Commissioner Baker voted in this case, as well as the provisions of the Supreme Court in *Zeigler v. Industrial Commission*, 51 Ill. 2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

OCTOBER 10, 2023

/s/*Amylee Simonovich*

wde

O: 8/9/23

43

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC022603
Case Name	CASNOVA, AMANDA v. MENARDS
Consolidated Cases	
Proceeding Type	19(b)/8(a) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Jeffrey Huebsch, Arbitrator

Petitioner Attorney	Kevin Veugeler
Respondent Attorney	Monica Fernandez

DATE FILED: 9/19/2022

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

/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
19(b)/8(a)

Amanda Casnova
Employee/Petitioner
v.
Menards
Employer/Respondent

Case # **16** WC **022603**

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 **March 17, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **4/30/2016**, 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, in part,*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**31,720.00**, the average weekly wage was $**610.00.**

On the date of accident, Petitioner was **49** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**1,852.09** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**1,852.09**.

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

ORDER

Petitioner's claim for prospective medical care is denied.

Respondent shall pay reasonable and necessary medical services of $23,079.18, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act, and as is set forth below.

Respondent shall pay Petitioner temporary total disability benefits of $406.67/week for 46-1/7 weeks, commencing 10/6/2016 to 2/10/2017 and continuing 3/29/2017 through 10/9/2017, in accordance with Section 8(b) of the Act.

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

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

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

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

SEPTEMBER 19, 2022

Signature of Arbitrator

FINDINGS OF FACT

Petitioner was employed by Respondent as a service guest host. Her job duties included greeting guests, working in the garden center and hardware center, answering questions and helping guests find products. She would also stock inventory and help guests carry products.

The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of her employment by Respondent on April 30, 2016. Petitioner was unloading inventory and arranging plants onto carts, when her right hand was crushed between two carts at the center of her palm. After the accident, Petitioner was down on the ground, holding her hand crying.

Petitioner testified that she did not have any issues or problems with her right hand or arm and had not had any medical treatment or therapy for her right hand or arm before April 30, 2016.

Immediately after the accident, Petitioner was seen at the emergency room at Little Company of Mary Hospital. Petitioner reported she was at work moving racks when her hand became smashed between two racks. She complained of pain to the entire hand that radiated up to her right elbow. Physical exam of the hand revealed no gross deformity, no ecchymosis, or erythema. There was a small abrasion and her bones were mildly tender to palpation. The bones of the fingers were nontender. She had full range of motion, to flexion, extension, abduction, and adduction throughout all the fingers. X-rays of the right hand showed no evidence of focal soft tissue swelling, fracture, or dislocation. Petitioner was diagnosed with a right-hand contusion. Her right hand was placed in a cock-up splint and she was instructed to follow up with her Primary Care Physician. Petitioner arrived at the ER at 10:30am and was discharged at 12:18pm. (PX 1)

Petitioner followed up with her PCP, Dr. Tom Kim at Advocate Medical Group on May 2, 2016. Petitioner reported improvement with the splint and pain with certain movements. Physical exam revealed swelling of the right wrist (very swollen, dorsally), full range of motion with pain, tenderness dorsally at metacarpals, and was neurovascularly intact dorsally. There was said to be some weakness of the hand. Dr. Tom Kim referred Petitioner to Dr. Gary A. Kronen for an orthopedic consultation and restricted Petitioner to no lifting more than 5 lbs at a time. On May 12, 2016, Petitioner returned to Dr. Kim, complaining of a rash due to sun exposure. It was noted that she was working a lot more and she was having more joint pain. The musculoskeletal exam showed normal range of motion, muscle strength and tone. (PX 4)

On May 5, 2016, Petitioner presented to MidAmerica Orthopaedics and was seen by Dr. Gary A. Kronen. Physical exam revealed radial and ulnar nerves were motor and sensory intact bilaterally, palpable radial pulses, brisk capillary refill bilaterally, no significant swelling, an abrasion dorsally at the wrist junction with tenderness overlaying the area, and normal active range of motion. Median and radial nerves were intact. Dr. Kronen's impression was crush injury of the right hand. Dr. Kronen recommended occupational therapy for

range of motion exercises, strengthening, and a follow up in three weeks. Petitioner was released back to work with no restrictions. (PX 2)

Physical therapy began on May 10, 2016, at MidAmerica Orthopaedics. Petitioner attended physical therapy between May 10, 2016, and July 19, 2016. She attended 17 out of 17 sessions. At the last visit, decreased strength, decreased use of the right hand, increased pain and complaints of paresthesias were noted. (PX 2)

On June 23, 2016, Petitioner followed up with Dr. Kronen. Dr. Kronen's physical exam revealed ganglion cyst on the volar aspect of the wrist overlying the radial artery. There was significant swelling and tenderness at the base of the right 3rd digit, consistent with flexor tendinitis. Dr. Kronen also identified triggering, motor weakness in the ulnar nerve distribution, and numbness and tingling. Impressions for this visit were flexor tendinitis right middle finger, ganglion cyst right wrist, and ulnar nerve injury right upper extremity. Dr. Kronen performed a corticosteroid injection for treatment of the flexor tendinitis and recommended an EMG to evaluate the ulnar nerves. Petitioner was to continue with previous restrictions. (PX 2)

On June 28, 2016, Petitioner presented to MidAmerica Orthopaedics for an EMG. Dr. George Charuk performed the study. His impression was as follows:

- Abnormal EMG and nerve conduction study of bilateral upper extremities with evidence of median mononeuropathy.

- There was no delay noted to the distal median or ulnar motor latency.

- There was a drop in the median amplitude noted, right greater than the left in comparison to the ulnar nerve.

- There was no slowing of the nerve conduction velocities noted to the median or ulnar nerve.

- Sensory nerve action potentials to the median nerve showed a delay to the peak amplitude in comparison to the ulnar and radial nerve.

- EMG needle examination was normal to bilateral upper extremities and all muscles tested.

- These findings are consistent with mild/moderate bilateral carpal tunnel syndrome. (PX 2)

On June 30, 2016, Petitioner followed up with Dr. Kronen for review of the EMG results. Dr. Kronen advised Petitioner that she had carpal tunnel syndrome of the right wrist, as well as ulnar nerve compression at the wrist and cubital tunnel syndrome at the right elbow. Dr. Kronen also identified flexor tendinitis at the right middle finger. Dr. Kronen recommended proceeding with carpal tunnel release and ulnar nerve release at the elbow along with cubital tunnel release and transposition and flexor tenosynovectomy of the right middle finger. (PX 2)

Petitioner returned to Dr. Kim on August 16, 2016. She reported continued pain in the right hand, wrist and elbow, with tingling in the 4th and 5th fingers. She had returned to work, not really using her right hand and was experiencing left upper extremity discomfort. Surgery had been recommended by the Ortho and had not been approved by insurance. The physical exam showed thre right wrist was in a brace, pain with ROM and some weakness of grip. Petitioner could not take NSAIDs due to a cardiomyopathy condition. Dr. Kim recommended a referral (to an Ortho?) for a second opinion. (PX 4)

On August 25, 2016, Petitioner was seen by Dr. Durudogan at Southwest Center for Healthy Joints for an initial orthopedic evaluation/second opinion regarding her right-hand pain. The medical records indicate that another patient referred Petitioner to this physician. Physical exam of right-hand revealed swelling to the middle finger, trigger middle finger, tenderness to palpation to the middle finger, abnormal motion of the middle finger. There was diffuse swelling, warmth, tenderness to palpation, and pain to the right wrist. Phalens's maneuver showed numbness/tingling in the median nerve distribution. Tinel's sign of the median nerve was positive. Tinel's sign of the ulnar nerve was negative. Froment's sign was not observed in the right hand. Dr. Durudogan's impressions were trigger finger of the right middle finger, right carpal tunnel, neuralgia right hand, and neuralgia right wrist. Petitioner was restricted to no work with the right upper extremity, no lifting/pushing/pulling, carrying over 5lbs, no repetitive activity with right upper extremity greater than 15 minutes at one time, and use of a wrist brace. (PX 3)

As an aside, the Arbitrator notes that Dr. Durudogan charted that Petitioner was right hand dominant. She also had a PMH of hypertension, CHF/cardiomyopathy and Thyroid cancer. PX 3 contained several mentions of Petitioner's SSN, which were redacted by the Arbitrator in order to comply with SCR 138. The Parties are reminded that they are responsible for complying with SCR 138. Finally, PX 3 contained 27 pages of medical records for a Benita Brown. These records were removed from the exhibit and were destroyed by the Arbitrator. (PX 3)

On September 8, 2016, Petitioner followed up with Dr. Durudogan. She reported a recurrent injury on 9/5/2016 while at work. She indicated a coworker with her left arm extended struck down upon Petitioner's right shoulder, which resulted in immediate painful radiation down her arm, latissimus dorsi area, and rib cage.

Dr. Durudogan notes that the mechanism would be consistent with a traumatic exacerbation of Petitioner's complex regional pain syndrome of the right upper extremity. Dr. Durudogan recommended Petitioner see Dr. Jido for consideration of sympathetic blocks. Petitioner continued with work restrictions of no use of the right upper extremity. (PX 3)

On September 14, 2016, Petitioner was examined by Dr. Thomas A. Wiedrich at the request of Respondent pursuant to Section 12 of the Act. The history to Dr. Wiedrich was that a 10-foot rack slid down an incline, she attempted to stop the rack from moving, and a portion of the rack struck the palm of her right hand and dorsum of the right hand, crushing it between another rack at approximately mid palm. She described the portion of the rack that struck her to be approximately two inches in width. During her examination by Dr. Wiedrich, Petitioner denied triggering and indicated pain over the middle finger dorsally and palmarly that radiated up into her volar forearm and posterior arm. She reported constant numbness and tingling in the index, long, and ring fingers of the right hand. She also reported occasional numbness to the thumb and the small finger, again both palmarly and dorsally. (RX 1)

Dr. Wiedrich noted that Petitioner had tenderness with every palpatory maneuver about the hand, wrist, and forearm. He also noted that all provocative tests caused a burning in the volar forearm and dorsal aspect of the upper arm, and that the Tinel's sign over the subcutaneous border of the ulna caused the exact response as percussion over the median never, ulnar nerve, and radial nerve. He believed that there was significant symptom exaggeration and inappropriate ill behavior on the part of Petitioner since provocative tests, even in areas far remote from major nerves, caused symptoms in a non-anatomic area. Dr. Wiedrich further indicated that the EMG revealed no clinical evidence of cubital tunnel syndrome or significant tenosynovitis of the long finger. Petitioner's examination was said to be entirely nonanatomic with regards to the ulnar nerve, as she had symptoms in areas not innervated by the ulnar nerve on both the palmar and dorsal aspect of the hand. Furthermore, examination of the median and radial nerves caused the same symptoms as examination of the ulnar nerve. (RX 1)

Ultimately, Dr. Wiedrich concluded that it was difficult to assess any significant injury due to Petitioner's symptom exaggeration and nonanatomic findings. Based on his exam, he believed that if the incident had caused an aggravation to Petitioner's pre-existing carpal tunnel, it would have been minimal, if at all. Her examination was just not consistent with carpal tunnel syndrome, cubital tunnel syndrome, or any other peripheral neuropathy. Dr. Wiedrich believed a diagnostic injection into Petitioner's carpal tunnel was reasonable in order to determine if her symptoms were related to carpal tunnel syndrome. He further opined that Petitioner was not at MMI as of the 9/14/2016 exam. (RX 1)

Petitioner returned to Dr. Durudogan on October 6, 2016 and reported an acute exacerbation of her right upper extremity complaints after pushing a flat cart at work. She further indicated that she did not think she

could work in any capacity with her right upper extremity. An examination was performed, and the assessment was trigger finger of the right middle finger, right carpal tunnel syndrome, "neuralgia—right hand—complex regional pain syndrome right upper extremity," and neuralgia of the right wrist. The treatment plan included continued therapy for the neuralgia and neuritis, return in four weeks for reevaluation. Petitioner was ordered off work. (PX 3)

On October 17, 2016, Petitioner presented to Advocate Christ Medical Center Pain Management regarding her right arm and back pain. Lyrica was prescribed and an EMG was ordered. Petitioner was instructed to return in three weeks for possible injection and median nerve blocks. Respondent did not approve the Lyrica script. (PX 5)

On November 3, 2016, Petitioner was seen by Dr. Durudogan. She reported continued pain, burning to the hand and middle finger, and that therapy was helping. The medical records for this visit indicate the Petitioner was referred by her PCP. Petitioner was restricted to no work. Petitioner returned to Dr. Durudogan on November 22, 2016. She reported that the therapy was helping her and that she had burning in her hand and middle finger. The examination noted swelling, erythema, instability of the right hand and wrist with some pain with extreme limits of ROM and tenderness to palpation of the wrist. Assessment was trigger finger of the right middle finger. She was released to work with no use of the right upper extremity and asked to continue physical therapy. (PX 3)

On January 30, 2017, Petitioner returned to Dr. Durudogan. She had been doing home exercise programs and using her H-wave. Physical exam revealed swelling of the right middle finger, trigger finger of the right hand, pain with motion of the right middle finger, wrist pain on the extreme limits of range of motion, wrist swelling, tenderness on palpation, Phalen's maneuver showed numbness/tingling in the median nerve distribution, positive Tinels' sign of the median nerve, positive Tinel's sign of the ulnar nerve at the ulnar groove, negative Tinel's sign of the ulnar nerve, swelling of the right elbow, tenderness on palpation at the lateral epicondyle with positive tennis elbow test, tenderness on palpation at the medial epicondyle, tenderness on palpation over the ulnar nerve. Assessments were right middle trigger finger, cubital tunnel syndrome, and complex regional pain syndrome of the right upper extremity. Dr. Durudogan recommended right elbow ulnar nerve decompression and possible transposition, open carpal tunnel release, injection lateral epicondyle right elbow and A1 pulley release right long finger. Petitioner was restricted from returning to work. (PX 3)

On March 29, 2017, Petitioner had a trigger release of the right third finger. Preoperative and post-operative diagnoses were neuropraxia right upper extremity with active triggering of her right long finger and intermittent carpal tunnel symptoms. Surgical findings were active triggering of the right long finger, thickening FDS and FDP tendons right long finger. There was thickening and synovial tissue about the tendons. (PX 5)

On April 11, 2017, Petitioner followed up with Dr. Durudogan's office for her first post op visit. Petitioner had started therapy and was doing well. Dressings were removed and the wound was examined. Petitioner next followed up with Dr. Durudogan on June 20, 2017. She reported her finger felt tight, like it was going to break, if she bent it. Physical exam of right middle finger revealed, swelling, tenderness to palpation, pain, well healed incision, difficulty with scar tissue. Right wrist exam revealed swelling, tenderness to palpation and pain elicited by motion. Weakness of the right wrist was observed along with flexion weakness of the fingers of the right hand. Petitioner was restricted from returning to work. (PX 3)

Petitioner examined again by Dr. Durudogan on August 1, 2017. Dr. Durudogan referred her to a pain specialist, Dr. Jido, at Advocate Christ Hospital. He also ordered an EMG for carpal tunnel syndrome and therapy. Diagnosis was trigger finger, right middle finger. Dr. Durudogan also ordered her off work and to be reevaluated in four to six weeks following her EMG. (PX 3)

The EMG was done on August 22, 2017 and was said to reveal no electrodiagnostic abnormalities for peripheral nerve compromise to account for the patient's symptoms. Further there was no electrodiagnostic evidence for right median nerve compression at the wrist (carpal tunnel syndrome). The study was said to be a normal EMG/NCV. (PX 3)

On August 25, 2017, Petitioner was seen by Dr. Durudogan for EMG results. Petitioner was s/p right open A1 pulley release. Assessment was traction neuropraxia complex regional pain syndrome right upper extremity. Strength testing noted weakness of the right wrist and some 4/5 deficits in both upper extremities. Petitioner was interested in returning to work. Dr. Durudogan recommended work hardening/conditioning and restricted Petitioner from returning to work. (PX 3)

On August 28, 2017, Petitioner was re-examined by Dr. Thomas A. Wiedrich at Respondent's request, pursuant to Section 12 of the Act. Petitioner complained of burning in the forearm and long finger that occurred intermittently during the day. She complained of numbness in the thumb and index, long, and small fingers. She reported a sense of coldness and goosebumps that occurred 1-2 times per day, lasting a few minutes. Petitioner had undergone a release of the right long trigger finger and undergone physical therapy and was scheduled to undergo work conditioning. Petitioner reported pain management had been recommended and she had recently undergone an EMG. Like in his previous exam, provocative tests were all positive and now the Phalen's test was positive for front and back of the long finger, as were the provocative tests for ulnar neuropathy. Additionally, Petitioner complained of tingling to fingers enervated by the radial nerve during ulnar and radial median nerve exams. Furthermore, Dr. Wiedrich's examination revealed no objective findings for complex regional pain syndrome, there was no allodynia, swelling or increased hair growth. There was no sign of any atrophic changes or joint swelling. There was no digital stiffness. The physical exam was inconsistent and not anatomically correct. Dr. Wiedrich opined that Petitioner's current condition of illbeing was not causally related

to the work accident of April 30, 2016. There were no signs of reflex sympathetic dystrophy. He further opined that provocative tests for carpal tunnel syndrome performed during his examination were inconsistent and occurred in all three peripheral nerve distributions with equal intensity. Furthermore, the mechanism of injury and the location of the injury were not sufficiently close to the carpal tunnel to cause a person to develop carpal tunnel syndrome on the basis of swelling. Dr. Wiedrich indicated that his first examination on September 14, 2016 had not revealed trigger finger. However, if Petitioner indeed had trigger finger, the mechanism of injury could have potentially caused it. On the other hand, it would not have caused carpal tunnel. He further opined that Petitioner required no additional treatment. He opined that Petitioner was at MMI from the work accident. The treatment to date was reasonable and necessary, as the patient had complaints and the physician tries to alleviate them. Petitioner had no work restrictions based upon the physical exam. (RX 1)

Petitioner again was seen by Dr. Durudogan on October 10, 2017. Petitioner testified that, at that time, she noticed that her finger would click, it would stick (stay in place) and there would be swelling and pain. She testified that she continued to have pain in her wrist and elbow. Dr. Durudogan released Petitioner back to work with no restrictions, effective October 30, 2017. Petitioner was to continue with HEP. The chart note for October 10 says that Petitioner was progressing and only has tightness when pushing the fingers back and an occasional clicking. The physical exam of the right hand showed TTP of the middle finger, swelling of the middle finger and pain elicited by motion of the middle finger. Bilateral wrist exam noted pain at the extreme limits of ROM. The right wrist exam showed TTP, no swelling, no erythema, no warmth, no instability. The assessment was CRPS of the RUE. Petitioner was released, PRN. (PX 3)

Petitioner did not return to work at Respondent, as her employment had been terminated.

Petitioner saw Dr. Durudogan again on November 12, 2021. She testified that she was experiencing burning, swelling on the inside of the palm, pain back into the elbow all the way up and swelling. Dr. Durudogan instructed Petitioner to avoid repetitive motions, provided a cortisone injection in Petitioner's wrist and talked about possible surgery. Petitioner testified that this was the previously recommended surgery.The Duly records (Dr. Durudogan changed practices) show that x-rays of both hands showed age appropriate changes, there was pain to palpation at the scar, but no evidence of triggering. The assessment was bilateral hand pain, s/p trigger finger release. The injection was to the right long MCP joint. One therapy visit was scripted. The doctor did not chart any specifics regarding any proposed or offered surgery. (PX 13)

Petitioner testified that the therapy was not approved by workers' compensation and she has not had the therapy because her group is not accepted by Duly. Petitioner testified that she has pain. The Arbitrator noted that some of the pain is from the dorsal aspect of the hand up to the wrist. Her hand goes numb. It turns red and she gets a shooting pain up into the elbow.

On cross examination, Petitioner testified that she works in telemarketing, full time without restrictions.

Petitioner has suffered no subsequent injuries to her hand.

Dr. Thomas Wiedrich testified via evidence deposition on November 24, 2020. He is a board certified plastic surgeon, with additional hand qualifications. He is fellowship trained in hand surgery. Petitioner gave the history of her right hand being struck and stuck between 2 carts. She was struck in the middle of the palm. Her physical exam was not consistent with any particular nerve distribution. The diagnosis at the time of the first exam was subjective complaints of pain and bilateral carpal tunnel syndrome. There was no exacerbation by any injury to the right hand. He could not endorse causal connection, secondary to the nature of the exam and the physical findings. Additionally, the EMG findings were consistent bilaterally, which would not weigh in favor of causality regarding a trauma to one upper extremity. As of the first exam, Petitioner was not at MMI because a cortisone injection to the carpal tunnel might be diagnostic and therapeutic. At the second exam, Petitioner exhibited inconsistencies, the exam was not anatomically consistent. The trigger finger release could be causally related to the trauma, although she did not exhibit a trigger finger at the time of the exam. A trigger finger condition could be idiopathic and could be related to Petitioner's hypothyroid condition. There was a nonanatomic physical exam and there was nothing to show any aggravation by the work accident. There was no evidence of CRPS and no need for cubital tunnel/ulnar nerve surgery. (RX 1)

CONCLUSIONS OF LAW

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

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

To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of her claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between her employment and her injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989)

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

WITH RESPECT TO ISSUE (F), IS PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY,THE ARBITRATOR FINDS:

Petitioner's current condition of ill-being regarding her right hand is, in part, causally related to the injury. The condition of ill-being that is related to the accident is status post right long trigger finger release and resolved right hand contusion/abrasion. Any other conditions regarding Petitioner's right upper extremity are found to be not causally related to the work accident of April 30, 2016.

This finding is based upon the medical records and the persuasive opinions of Dr. Wiedrich.

First, the Arbitrator notes that the final medical diagnosis in evidence is that of Dr. Durudogan of November 21, 2021 and it was bilateral hand pain and s/p trigger finger release. There was no evidence of Carpal tunnel syndrome, cubital tunnel syndrome, ulnar nerve impingement or CRPS. Given this diagnosis and Dr. Wiedrich's testimony, the Arbitrator finds causation as to the right long finger trigger finger release and a resolved right hand contusion/abrasion.

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:

Given the Arbitrator's finding above on the issue of causation, the following medical bills are found to be causally related and reasonable and necessary to cure or relieve the effects of the injury:

PX 7 Radiology Imaging Specialists (4/30/2016):	**$70.00**
PX 8 Southwest Center for Healthy Joints (2/23/2017-10/10/2017):	**$1,855.00**
PX 9 Advocate Christ Medical Center (10/17/2016-8/22/2017):	**$17,283.50**
PX 10 Electronic Waveform Lab, Inc. (10/3/2016-2/3/2017):	**$3,870.68**
TOTAL:	**$23,079.18**

The bill from Duly (PX 14) is not awarded based on the Arbitrator's finding regarding the issue of causation and because it contains charges for treatment related to Petitioner's left hand, which was not injured in the April 30, 2016 work accident.

Accordingly, Respondent shall pay reasonable and necessary medical expenses of $23,079.18, pursuant to the medical fee schedule, pursuant to Sections 8(a) and 8.2 of the Act. Respondent is entitled to a credit for all awarded bills that it has paid or compromised.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS:

Based upon the Arbitrator's finding on the issue of causation, above, Petitioner's claim for prospective medical care is denied.

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

Petitioner claimed to be entitled to TTD benefits from 10/6/2016 to 2/10/2017 and 3/28/2017 to 10/9/2017, a time period of 46-2/7 weeks. Respondent disputed and did not suggest any appropriate TTD time period. (ArbX 1)

After considering the testimony of Petitioner and the medical records the Arbitrator finds that the appropriate award for TTD is 10/6/2016 to 2/10/2017 (18-2/7 weeks) and 3/29/2017 (the date of the trigger finger release surgery) through 10/9/2017 (the last date claimed by Petitioner) a time period of 46-1/7 weeks, based upon the Arbitrator's finding on the issue of causation, above.

Accordingly, Respondent shall pay Petitioner temporary total disability benefits of $406.67/week for 46-1/7 weeks, commencing 10/6/2016 to 2/10/2017 and continuing 3/29/2017 through 10/9/2017. Respondent is entitled to a credit for $1,852.09 in TTD benefits already paid.

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES OR FEES BE IMPOSED UPON RESPONDENT?, THE ARBITRATOR FINDS:

Petitioner's claim for Penalties and Attorney's Fees is denied.

The proofs do not support and award of Section 19(l) penalties and the Arbitrator does not feel that Respondent's disputes in this case are vexatious or in bad faith, such that Section 19(k) penalties and/or Section 16 attorney's fees are merited.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC013557
Case Name	Debra Johnson v. Trico Community Unit School District #176
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0436
Number of Pages of Decision	20
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Daniel Jones
Respondent Attorney	Khristopher Dunard

DATE FILED: 10/10/2023

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Debra Johnson,

Petitioner,

vs. NO: 20 WC 13557

Trico Community Unit School
District #176,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, causal connection, medical expenses, and prospective medical care, and being advised of the facts and law, clarifies the award of prospective medical care 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).

In her Decision of December 29, 2022, the Arbitrator ordered Respondent to "authorize and pay for the treatment recommended by Dr. Jones, pursuant to §8(a) of the Act." However, the Arbitrator failed to specify the treatment recommended. In his May 10, 2022, office note, Dr. Jones recommended facet injections at C4-5. In his May 17, 2022, deposition, the doctor testified that his treatment plan was to try facet injections and possibly rhizotomies in an attempt to avoid extending Petitioner's current cervical fusion to that level. The Commission finds that Respondent shall authorize and pay for facet injections and rhizotomies at C4-5, pursuant to §8(a) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the award of prospective medical care in the Decision of the Arbitrator filed December 29, 2022, is hereby clarified as discussed above, and all else is affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for facet injections and rhizotomies at C4-5, as recommended by Dr. Jones, pursuant to §8(a) 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.

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

October 10, 2023
MP:yl
o 10/5/23
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	20WC013557
Case Name	Debra Johnson v. Trico Community Unit School District #176
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	17
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Daniel Jones
Respondent Attorney	Khristopher Dunard

DATE FILED: 12/29/2022

THE INTEREST RATE FOR THE WEEK OF DECEMBER 28, 2022 4.60%

/s/ Jeanne AuBuchon, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Debra Johnson
Employee/Petitioner

v.

Trico Community School Dist. #176
Employer/Respondent

Case # **20** WC **013557**

Consolidated cases: _

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeanne L. AuBuchon**, Arbitrator of the Commission, in the city of **Herrin**, on **July 21, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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, **October 23, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**30,421.88**; the average weekly wage was $**585.04**.

On the date of accident, Petitioner was **60** years of age, ***married*** with **0** dependent children.

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

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 the medical expenses outlined in Petitioner's Exhibits 5 and 12-17, as provided in § 8(a) and § 8.2 of the Act. Respondent shall have credit for any amounts previously paid and shall indemnify and hold Petitioner harmless from claims made by any health providers arising from the expenses for which it claims credit.

Respondent shall authorize and pay for the treatment recommended by Dr. Jones, pursuant to §8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $**390.030.56**/week for **46** weeks, as provided in Section 8(b) of the Act, for Petitioner's periods of disability from **September 1, 2021**, through **July 21, 2022**.

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 29, 2022

PROCEDURAL HISTORY

This matter proceeded to trial on July 21, 2022, pursuant to Sections 19(b) and 8(a) if the Illinois Workers' Compensation Act (hereinafter "the Act"). The issues in dispute are: 1) the causal connection between the accident and the Petitioner's cervical spine condition following a fusion surgery; 2) payment of medical bills incurred after May 22, 2020; 3) entitlement to TTD benefits from September 1, 2021, to the present; and 4) entitlement to prospective medical care to the Petitioner's cervical spine. The Respondent has accepted injuries to the Petitioner's C5-7 discs that resulted in s discectomy and fusion. The parties stipulated that any medical bills for the Petitioner's right arm were not related to the accident for the purposes of this hearing.

FINDINGS OF FACT

At the time of the accident, the Petitioner was employed with the Respondent a bus driver for disabled students. (T. 15) On October 23, 2019, the Petitioner was inspecting her bus as she did every morning and finished the inspection in the driver's seat. (T. 24-25) She then got up so she could get off the bus and turn in her inspection sheet. (T. 25) She leaned over the bus steps to flip the manual switch to open the bus door and fell face forward. (T. 25-26). She tried to catch herself with her right arm on the arm rail, and, although she grabbed the rail, she fell down all three steps of the stairwell and ended up with her face against the locked door – completely upside down with her feet towards the seat. (T. 26) She had trouble getting up after the fall, and required the assistance of the bus monitor. (T. 27) She then turned in her inspection report and continued on with her bus route. (T. 28) Following the fall, she felt pain all over her body, including her neck. (T. 29) She said she had no prior neck or shoulder problems. (T. 13-14)

The Petitioner did not seek medical attention until November 3, 2019, because she thought she would get better. (T. 29-30) She said the pain got somewhat worse after the accident, but on

November 3, 2019, she experienced sudden pain in her shoulder area. (T. 29-30) She went to the Carbondale Memorial Hospital emergency room, was given a muscle relaxer and pain medication and told to see her primary care physician. (T. 30-31, PX1) She saw Dr. Michael Workman of SIH Logan Primary Care on November 5, 2019, and he referred her to orthopedic surgeon Dr. Treg Brown at The Orthopaedic Institute of Southern Illinois, where she was seen on November 7, 2019, by Physician Assistant Darrel Cutler. (T. 31-32, PX5) She was diagnosed with cervicalgia (neck pain) and cervical radiculopathy (irritation of nerves in the neck leaving the spinal canal) and given work restrictions of no lifting, pushing or pulling. (PX5) Dr. Brown referred her to Dr. Swastik Sinha, an orthopedic spine surgeon of that same office (T. 32-33, PX5)

The Petitioner was seen at Dr. Sinha's office on November 8, 2019, and complained of severe pain on the right and left sides of her neck and was diagnosed with cervical radiculopathy and cervical spondylosis (wear and tear of the spinal discs in the neck). (PX5) An MRI was ordered and the Petitioner was referred to physical therapy and prescribed oral steroids and pain medication. (Id.) She was placed off work. (Id.) The Petitioner underwent physical therapy at SIH Murphysboro Rehab for neck pain from November 13, 2019, through December 4, 2019, for a total of eight visits. (PX4) At her last visit, it was noted that she had shown no progress. (Id.)

The Petitioner underwent an MRI of the cervical spine on December 5, 2019, at Cedar Court Imaging. (PX3) she saw Dr. Sinha on December 11, 2019, and he read the MRI as showing a large C5-6 disc extrusion with C5-7 cord compression and bilateral neuroforaminal stenosis (narrowing of the space between vertebrae where the nerves exit the spinal canal). (PX5) He recommended anterior cervical discectomy and fusion at levels C5-7 and took the Petitioner off work. (Id.) He performed the surgery on January 20, 2020. (PX5, PX6, PX10). The Petitioner testified that afterwards, she was feeling better and that the pressure had been taken off, but she

still had numbness in her right hand in her index and middle finger, through her arm and elbow. (T. 33- 34) She said she had trouble holding a pen or a pair of scissors and would drop her coffee cup. (T. 34) She said she continued having these problems during her physical therapy but thought they were just part of the healing process. (T. 34) She said she began to suffer from headaches that started gradually but became more frequent. (T. 36-37)

On February 3, 2020, the Petitioner underwent a Section 12 examination by orthopedic spine surgeon Dr. Donald deGrange. (RX1, Deposition Exhibit 2) He agreed that the work accident was the most likely explanation for the Petitioner's complaints and need for surgery. (Id.) He said the treatment provided was reasonable and necessary and that the Petitioner had not yet achieved maximum medical improvement. (Id.)

The Petitioner returned to Dr. Sinha on February 5, 2020, and reported that her pain was improving, that she had no pain in her right arm and that the numbness and tingling were gone in her first three fingers but remained in the fourth and fifth – albeit less intensely. (PX5) On March 4, 2020, she complained of neck and right elbow pain. (Id.) Dr. Sinha ordered physical therapy electrodiagnostic studies and continued off-work orders. (Id.) Electromyography (EMG) and nerve condition study (NCS) performed on March 19, 2020, showed carpal tunnel syndrome, mild right ulnar neuropathy, no evidence of cervical radiculopathy but suspected cervical radiculitis (inflammation of the spinal nerve root), given the Petitioner's history and physical, which included positive Spurling's test (indicative of nerve root compression). (Id.)

On April 24, 2020, Petitioner presented to Dr. Sinha's Physician's Assistant Meisha Reed and reported that she was pleased with the surgery, she had of intermittent pain in both sides of her neck. (Id.) Dr. Sinha referred the Petitioner to Dr. Steven Young, another orthopedic surgeon at the same practice, for cubital tunnel syndrome, for which she eventually had surgery. (Id.) On

May 22, 2020, the Petitioner reported to Dr. Sinha that her neck was improving but she still had aching, dull and discomforting pain in her neck that was aggravated by activity, driving, extension and flexion. (Id.) X-rays showed no evidence of hardware failure, and Dr. Sinha allowed the Petitioner to return to work with no restrictions. (Id.) He did not order a CT scan but instructed her to return in a year. (Id.)

The Petitioner testified that after returning to work, she was still experiencing problems with her neck, which she thought was part of the healing process. (T. 38) She said that if she was driving a bus or riding, she would hold onto her neck by using her left hand and placing her palm against the back of her neck because of the rough ride. (T. 38-39) The Petitioner said she did not know how often she was doing this until the bus monitor brought it to her attention. (T. 38) She said she was having pain in her neck every day and headaches that interfered with her sleep and somewhat interfered with her ability to do her job to the extent that sometimes she had to call off work. (T. 42-43) The Petitioner thought the pain was part of the healing process and she just needed to toughen up or just hang on to get better, but she never did (T. 56)

On January 18, 2021, the Petitioner went back for her one-year checkup following surgery and found that Dr. Sinha was no longer with Herrin Orthopedic. (T. 40-41) She came under the care of Dr. Jeffrey Jones, a neurosurgeon of that same practice group. (T. 41, PX5) She complained of pain in the lower cervical region and right trapezius at times radiating down the posterior aspect of her upper arm, pain in the left elbow with radiation down the lateral arm into the finger and numbness and tingling to the right fourth and fifth fingers that worsened when driving. (PX5) Radiologist Dr. Harold Halfhill performed a CT scan that day and noted lucency associated with the right C5 anchoring screw suggesting some early loosening. (PX5, PX18) He saw bony neural foraminal encroachment at several levels related to facet (joints of the spine)

overgrowth and uncinate spurring (bone spurs). (Id.) PA Reed reported that the CT scan showed no evidence of hardware failure, fracture, loosening or pseudoarthrosis (failure of the bones to fuse together). (PX5) PA Reed said the Petitioner's symptoms were consistent with cervical spondylosis and radiculopathy and recommended a new MRI of the cervical spine, physical therapy and medication. (Id.)

On January 27, 2021, the Petitioner underwent nerve conduction of the right upper extremity that showed carpal tunnel syndrome, ulnar neuropathy and a chronic right C-7 radiculopathy. (PX5) Radiologist Dr. Joseph Lambert performed an MRI on February 3, 2021, that he said showed: 1) mild degenerative disc disease at C4-5 with shallow posterior disc protrusion causing mild thecal sac (membrane surrounding the spinal cord) narrowing and 2) fusion changes at C5-6 and C6-7 with very mild left foraminal narrowing and right foraminal narrowing at C3-4. (Id.)

The Petitioner saw PA Reed on February 3, 2021, and reported constant, worsening pain in her neck radiating to the left hand. (Id.) PA Reed reported that the MRI showed an osteophyte complex (bone spurs affecting more than one vertebra) with mild right neural foraminal stenosis, paracentral disc osteophyte complex at C4-5 with no central stenosis, residual left mild neuroforaminal stenosis at C6-7 and mild to moderate bilateral neuroforaminal stenosis at C7-T1. (Id.) PA Reed stated that the Petitioner was demonstrating symptoms consistent with C7 cervical radiculopathy and recommended injections. (Id.)

The Petitioner underwent a cervical epidural steroid injection March 15, 2021, at C7-T1 by Dr. John Ruxer, a pain medicine specialist at Elite Pain & Spine. (PX8) On April 5, 2021, she reported receiving some relief but was experiencing pain again on April 12, 2021. (Id.) She underwent cervical medial branch block injections at C 4-5 and C7-T1 on April 27, 2021. (Id.)

On April 29, 2021, she reported no relief. (Id.) She received another cervical epidural steroid injection on May 4, 2021. (Id.)

The Petitioner testified that the injections and physical therapy did not help. (T. 45) On June 1, 2021, the Petitioner reported to PA Reed that the steroid injection in March did not help her neck pain and the medial branch blocks in March failed. (PX5) But she said the steroid injection in May significantly helped her neck pain, but she was having in pain in the right posterior upper arm or triceps. (Id.) X-rays that day showed no evidence of hardware failure or fracture. (Id.) Dr. Jones saw Petitioner on June 22, 2021, and concluded that the Petitioner had a pseudoarthrosis at C5-6 and C6-7 that was most likely causing her pain. (Id.) He said that although the Petitioner initially did very well after the anterior cervical discectomy and fusion, she had slowly gotten worse most likely due to some subsidence of the grafts. (Id.) He thought she would benefit from a posterior cervical fusion at C5-6 and C6-7. (Id.) He stated that she had some degenerative changes at C4-5 and C7-T1, but her arm symptoms really did not match those levels and her foraminal stenosis was mild at best at those levels. (Id.) He performed that surgery on September 1, 2021. (PX5, PX7, PX11)

At follow-up visits on September 17, 2021, September 24, 2021, and October 29, 2021, PA Reed gave the Petitioner off-work slips. (PX5) At these visits, the Petitioner reported improvement in her symptoms. (Id.) On December 14, 2021, the Petitioner reported neck pain on the left side, stating that she was fairly miserable and felt like her hardware was coming out. (Id.) She had no radiating pain but said she could hardly do anything without developing swelling in her neck and intense pain on the left side of the lower cervical spine. (Id.) X-rays showed no evidence of hardware fracture or failure. (Id.) PA Reed prescribed pain medication and physical

therapy and kept the Petitioner off work. (Id.) The Petitioner underwent physical therapy from December 15, 2021, through March 8, 2022, at SIH Marion Rehab for a total of 13 visits. (PX9)

On February 15, 2022, the Petitioner saw Dr. Jones, who said the hardware appeared intact and thought the Petitioner was beginning to fuse at C5-6 and C6-7. (PX5) He said the Petitioner was doing better with physical therapy. (Id.) He opined that the second surgery was related to the initial work accident. (Id.) He ordered a new MRI. (Id.)

Dr. deGrange performed a records review for the Respondent on February 25, 2022. (RX1, Deposition Exhibit 3) In addition to updated medical records, he reviewed the post-operative X-rays and CT scan. (Id.) On the X-rays, he noted no motion on flexion/extension between C5-6 and C6-7. (Id.) On the CT scan, he did not see significant lucencies around the cages to suggest pseudoarthrosis. (Id.) He suggested another CT scan for further assessment. (Id.) He believed the Petitioner had a solid fusion after the first operation and did not believe the injections and revision surgery were appropriate and were not medically causally related to the work accident. (Id.) He opined that due to discrepancies between the Petitioner's subjective complaints and objective findings, future medical care was not indicated – depending on the results of the CT scan he recommended. (Id.) He said the Petitioner did not require any work restrictions related to the accident and a finding of maximum medical improvement would have to wait until assessment of the recommended CT scan. (Id.)

The MRI ordered by Dr. Jones was performed on March 1, 2022. (Id.) Dr. Lambert found: 1) adjacent level disease (complications of spinal fusion) at C4-5 with mild increase in anterolisthesis (one vertebrae slipping forward on the vertebrae below) as well as mild thecal sac stenosis and moderate right and severe left foraminal stenosis; 2) some nonspecific fluid signal in the posterior soft tissues in the surgical bed that could have represented seroma (a mass or lump

caused by buildup of clear fluid) but was indeterminate; 3) moderate left and mild right foraminal stenosis at C5-6, mild left foraminal stenosis at C6-7, mild right foraminal stenosis at C3-4 and mild bilateral foraminal stenosis at C7-T1; and 4) a shallow posterior disc protrusion at T1-2. (Id.)

On May 10, 2022, Dr. Jones reported that it appeared the Petitioner had a successful fusion at C5-6 and C6-7 but said she had some anterolisthesis of C4 on C5. (Id.) He said the Petitioner had a history of headaches and had done well on headache medications, but some of the headaches may have been exacerbated by what was going on at C4-5. (Id.) Her right-hand paresthesia (tingling) improved significantly, and Dr. Jones thought her remaining neck pain was likely coming from C4-5. (Id.) He recommended facet injections at C4-5. (Id.) There was no return-to-work release in the records from the February 15, 2022, or May 10, 2022, visits. (Id.)

Dr. Jones testified consistently with his records at a deposition on May 17, 2022. (PX18) He explained how the January 18, 2021, CT scan showing early loosening of the right C5 anchoring screw was consistent with pseudoarthrosis in that when the bones do not fuse, the screw becomes "wallowed out" with movement. (Id.) He said that when he reviewed the CT scan in preparation for the deposition, he saw a lucency line going through C5-6 and possibly C6-7. (Id.) He stated that the Petitioner's symptoms were consistent with problems at the fused levels. (Id.) He explained that she initially got much better after the first surgery because the foramina were open but as she developed pseudoarthrosis and the bones started moving closer together and closing the foramina, pinching the nerves and causing the symptoms to come back. (Id.)

As to his ongoing treatment, Dr. Jones explained that the MRI on March 1, 2022, showed that the C4-5 disc was wearing out because the levels adjacent to a fusion turn more and bear more weight. (Id.) He said it is a known medical problem with cervical fusions that they can lead to more advanced degeneration at the levels that are left – usually the level above the fusion. (Id.)

He thought the Petitioner's headaches were being exacerbated by the problems at C4-5. (Id.) He said his plan for injections at C4-5 would see if he could get the problem under control without having to do more fusion surgeries. (Id.) But he warned that the Petitioner may need another fusion at some point. (Id.) He said the Petitioner was not yet at maximum medical improvement from the work injury and still needed treatment. (Id.)

On cross-examination, Dr. Jones stated that it would not be unusual to send a patient with pseudoarthrosis back to work because doctors don't look at pseudoarthrosis if the patent is doing well and wants to go back to work. (Id.) He acknowledged that his interpretation of the January 18, 2021, CT scan was different than that of his physician assistant and Dr. deGrange but said the lucency he saw was "pretty evident." (Id.) Regarding the Petitioner's continuing headaches, Dr. Jones said it was hard to say at that time whether they were due to her pre-existing migraine condition or her C4-5 pathology, adding that the recommended injections would give him a better feel as to whether the headaches were coming from C4-5. (Id.)

Dr. deGrange testified consistently with his reports at a deposition on June 7, 2022. (RX1) He said that after the first fusion surgery, he would expect a complete resolution of all injury-related symptoms in about six months. (Id.) Later in his deposition, he said six to nine months. (Id.) He said Dr. Sinha's records from May 22, 2020, did not note any pseudarthrosis or non-fusion on the X-rays taken that day and stated that it would be highly unusual for a treating physician to release someone to work full duty if her fusion had not fully healed. (Id.) Dr. deGrange said that from his review of the X-rays, it appeared that the fusion was progressing as expected. (Id.) Regarding the CT scan from January 18, 2021, he said the spine looked like it had fused. (Id.) He said he saw the lucencies that were reported by the radiologist, but those are commonly seen and have to do with the technical aspects of the CT – specifically that metallic

markers on the cages, the plates and the screws can induce and cause artifacts. (Id.) He disagreed with Dr. Jones' assessment that lucency at the right C5 anchoring screw was indicative of a non-fusion or pseudoarthrosis and said a true pseudarthrosis would not be around one screw. (Id.) He stated that he saw no areas of lucency around the grafts, supporting his conclusion that there was most likely a solid fusion. (Id.) He said Dr. Jones' testimony that he saw lucency lines in the bone formations at C5-6 and C6-7 was not consistent with the radiologist's reading that the grafts were well-seated. (Id.) Dr. deGrange also noted that the scans showed an absence of soft tissue signs – suggesting no pseudoarthrosis. (Id.) As another indicator that there was no pseudoarthrosis, he said the X-rays showed bony continuity – moving together in unity – among the vertebrae at C5-7. (Id.) As to the Petitioner's complaints and symptoms after the first surgery, Dr. deGrange stated that those were not unusual and were to be expected. (Id.)

In addition to saying the second surgery was unnecessary because there was no pseudoarthrosis, Dr. deGrange said the injections performed by Dr. Ruxer were unnecessary. (Id.) He said there was no logical medical reason for the injections because there was no clinical correlation for injections at the levels on which they were performed. (Id.)

Prior to the deposition, Dr. deGrange reviewed updated records from Dr. Jones and the MRI report of March 1, 2022, that he said did not change his opinions. (Id.) He disagreed with Dr. Jones' testimony that the levels above C4-5 were beginning to deteriorate as a result of the surgeries performed, causing increased pressure on the C-4-5 level. (Id.) He said such changes occur over the course of many years – not in the three months between the Petitioner reporting improvement and mild symptoms in February 2022 and severe symptoms in May 2022. (Id.)

On cross-examination, Dr. deGrange acknowledged that at the time Dr. Sinha believed the fusions were progressing in May 2020, there was no CT scan performed, which would be the most

definitive way to tell if a fusion is taking place. (Id.) He agreed that lucency around the fusion screws on a CT scan is one sign of pseudarthrosis. (Id.)

At the time of arbitration, the Petitioner was scheduled to have an ablation procedure. (T. 49) She testified that she had worsening headaches that occurred about four times per week for which she uses medication and ice packs and has to lie down. (T. 49-50) She said she was experiencing numbness in her left hand and pain in her shoulder blade. (T. 55) She wants to continue to treat with Dr. Jones until her neck pain is better. (T. 51)

CONCLUSIONS OF LAW

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

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

The causal disputes in this case involve whether the second fusion surgery and the Petitioner's current cervical condition at C4-5 were connected to the work accident.

Every natural consequence that flows from an injury that arose out of and in the course of one's employment is compensable under the Act absent the occurrence of an independent intervening accident that breaks the chain of causation between the work-related injury and an ensuing disability or injury. *Nat'l Freight Indus. v. Ill. Workers' Comp. Comm'n*, 2013 IL App (5th) 120043WC, ¶ 26, 993 N.E.2d 473, 373 Ill. Dec. 167.

As to whether the first fusion failed and resulted in pseudoarthrosis, Dr. Jones said it did while Dr. deGrange said it did not. Dr. Jones thoroughly explained how the lucencies he saw on the CT scans and the correlation between the Petitioner's symptoms following the first fusion and the pseudoarthrosis he saw. Dr. deGrange credited the lucencies on the CT scan to metallic

artifacts from the materials used in the fusion. However, he admitted that lucency around the fusion screws on a CT scan is one sign of pseudarthrosis and that at the time of the Petitioner's release by Dr. Sinha, there had been no CT scan, which he said would be the most definitive way to tell if a fusion is taking place. The timing of the Petitioner's symptoms and treatment supports Dr. Jones' opinions. Dr. deGrange testified that it could take up to nine months for the injury-related symptoms to resolve after a fusion. Dr. Sinha released the Petitioner after four months. A year after the surgery, the Petitioner was still experiencing symptoms that correlated with the fused levels.

For these reasons, the Petitioner gives greater weight to the opinions of Dr. Jones than those of Dr. deGrange. In addition, Dr. Jones' opinions deserve greater weight because, as the treating physician, he had more opportunities to become familiar with the Petitioner and her conditions. As the surgeon for the second fusion, he had a first-hand look at the condition of the Petitioner's cervical spine and proceeded with the posterior fusion.

As to the dispute regarding the causal connection between the Petitioner's current C4-5 condition, Dr. Jones explained how the added pressure from the fusions caused that level to deteriorate and explained the correlation between the Petitioner's symptoms and the pathology at C4-5. Dr. deGrange opined at his deposition that not enough time had passed from the second fusion to the time of the diagnosis for the C4-5 pathology to have been a result of wear and tear from fusion. The Arbitrator notes that it had been more than two years from the date of the first fusion surgery until the MRI showing pathology at C4-5. Based on these facts and the reasons stated above, the Arbitrator again gives more weight to the opinions of Dr. Jones.

The Arbitrator finds that the pseudoarthrosis and deterioration of the C4-5 level are natural consequences of the work injury, and, therefore, the Petitioner has met her burden of proof

establishing causal connection between the accident and the Petitioner's need for the second fusion surgery and her cervical spine condition at C4-5.

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

The right to be compensated for medical costs associated with work-related injuries is at the very heart of the Workers' Compensation Act. *Hagene v. Derek Polling Const*., 388 Ill. App. 3d 380, 383, 902 N.E.2d 1269, 1273 (2009).

Based on the findings above regarding causation and the opinions of Dr. Jones, the Arbitrator finds that the medical services provided after May 22, 2020, were reasonable and necessary. The Respondent has not paid for these medical services. Therefore, the Arbitrator orders the Respondent to pay the medical expenses contained in Petitioner's Exhibits 12-17 and the billing at the end of Dr. Jones' records in Petitioner's Exhibit 5. The Respondent shall have credit for any amounts already paid or paid through its group carrier. The Respondent shall indemnify and hold the Petitioner harmless from any claims arising out of the expenses for which it claims credit.

Issue (K): Is Petitioner entitled to any prospective medical care?

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13 (1997). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 758 N.E.2d 18 (2001).

Based on the findings above regarding causation and the fact that Dr. Jones had not finished treating the Petitioner's cervical spine conditions, the Arbitrator finds that the Petitioner is entitled to prospective medical care as recommended by Dr. Jones, and the Respondent shall authorize and pay for such care.

Issue (L): What temporary benefits are in dispute? (TTD)

The parties dispute temporary total disability benefits for the period of September 1, 2021, through the date of trial on July 21, 2022. An employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 118 (1990). The ability to do light or restricted work does not preclude a finding of temporary total disability. *Id.* at 121.

The Petitioner has not returned to work since the surgery on September 1, 2021, and has not been released by her treating physician. Therefore, the Petitioner is entitled to temporary total disability benefits pursuant to Section 8(b) of the Act for 46 weeks, from September 1, 2021, through July 21, 2022.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC000426
Case Name	Daniel Dye v. North American Lighting
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0437
Number of Pages of Decision	20
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Stephen Carter

DATE FILED: 10/10/2023

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Daniel Dye,

Petitioner,

vs. NO: 20 WC 00426

North American Lighting,

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, prospective medical care, temporary total disability, permanent partial disability, and several evidentiary issues, and being advised of the facts and law, modifies the award of medical expenses and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Arbitrator awarded Petitioner all medical expenses contained in Petitioner's Group Exhibit 1, pursuant to the fee schedule. One of the included bills was for $500.00 for Dr. Cizek's July 7, 2021, radiological report comparing Petitioner's 2017 and 2020 cervical MRIs. On review, Petitioner argued that this report was prepared for the purpose of determining Petitioner's diagnosis. However, Dr. Cizek's report was prepared after all treatment had been completed and Petitioner had returned to work full duty. The Commission concludes that the report was prepared in preparation for litigation and was not a legitimate medical expense under §8(a). Therefore, Respondent is not liable to Petitioner for the $500.00 report by Dr. Cizek. The Commission affirms the award for all other medical expenses.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 18, 2022, is hereby modified as set out above and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is not liable for the $500.00 billed by Dr. Cizek for his radiological report. Respondent shall pay to Petitioner all other medical expenses included in Petitioner's Group Exhibit 1, pursuant to the fee schedule, as provided in §8(a) and §8.2 of the Act. Respondent shall receive credit for all amounts previously paid under §8(a) or §8(j) and shall hold Petitioner harmless from all claims made by the group insurer to the extent of the §8(j) credit.

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 $53,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

October 10, 2023
MP:dk
o 10/5/23
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	20WC000426
Case Name	DYE, DANIEL v. NORTH AMERICAN LIGHTING
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	17
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Stephen Carter

DATE FILED: 3/18/2022

THE INTEREST RATE FOR THE WEEK OF MARCH 15, 2022 0.82%

/s/Linda Cantrell, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DANIEL DYE
Employee/Petitioner

v.

NORTH AMERICAN LIGHTING
Employer/Respondent

Case # **20-WC-000426**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Herrin**, on **December 20, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury (after September 18, 2019)?
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 (after 9/18/19)? Has Respondent paid all appropriate charges for all reasonable and necessary medical services (after 9/18/19)?
K. ☒ What temporary benefits are in dispute (after 9/18/19)?
☐ 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 **Overpayment of TTD benefits**

FINDINGS

On **January 28, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**29,606.52**; the average weekly wage was $**643.62**.

On the date of accident, Petitioner was **39** years of age, ***single*** with **1** dependent child.

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

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

Respondent shall be given a credit of $**2,329.32** for TTD, $**0** for TPD, $**0** for maintenance, and $**43,644.18 in medical bills paid, plus any short-term disability benefits paid**, for a total credit of $**45,973.50, plus STD benefits paid**.

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

ORDER

Respondent shall pay the medical expenses contained in Petitioner's Group Exhibit 1, pursuant to the fee schedule, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit. Pursuant to the stipulation of the parties, Respondent shall receive a credit in the amount of $43,644.18 in medical expenses paid and any medical expenses paid through its group medical plan under Section 8(j) of the Act. Respondent shall further hold Petitioner harmless from all claims or liabilities made by the group medical plan to the extent of such 8(j) credit.

Respondent shall pay Petitioner temporary total disability benefits of **$429.08**/week for **12** weeks, for the periods **9/28/18 through 11/1/18 and 12/18/20 through 2/4/21**, as provided in Section 8(b) of the Act. Respondent shall have credit, as stated above, for benefits paid.

Respondent shall pay Petitioner permanent partial disability benefits of **$386.17**/week for **125** weeks, because the injuries sustained caused **25**% loss of the **body as a whole** for Petitioner's cervical spine, as provided in §8(d)2 of the Act.

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

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

MARCH 18, 2022

Arbitrator Linda J. Cantrell

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DANEIL DYE,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 20-WC-000426
	)	
NORTH AMERICAN LIGHTING,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on December 20, 2021 on all issues. On February 24, 2020, Petitioner filed an Amended Application for Adjustment of Claim alleging injuries to his left shoulder, back, body as a whole, and neck as a result of lifting/jerking on a target on January 28, 2017. The parties initially proceeded to simultaneously arbitrate Case No. 21-WC-006988 (not consolidated), which is reflected on the Request for Hearing; however, Petitioner made an oral motion to voluntarily dismiss Case No. 21-WC-006988 prior to testimony which was granted by this Arbitrator.

The issues in dispute are causal connection related to Petitioner's low back and left shoulder conditions and for all injuries after 9/18/19, medical bills related to all conditions after 9/18/19, temporary total disability benefits related to all conditions after 9/18/19, overpayment of TTD benefits, and the nature and extent of Petitioner's injuries. All other issues have been stipulated.

TESTIMONY

Petitioner was 39 years old, single, with one dependent child at the time of accident. Petitioner was a BM crew maintenance person for Respondent at the time of injury. He worked for Respondent for 24 years. His job duties included disassembling machines, replacing motors, and performing general maintenance which required lifting, tugging, and pulling on heavy objects and the use of hand tools. Petitioner testified that on 1/28/17 he was pulling a target out of a 200-pound machine that jammed. He stated he pulled and tugged to get the target loose and felt pain in his low back and neck following the activity.

Petitioner testified that his low back is doing better, and he is not claiming permanent disability for his lumbar spine. Petitioner testified he was referred to Dr. Kitchens by Respondent who performed a C4-5 fusion. He testified that prior to his neck surgery he had pain radiating

from his neck into his shoulders, burning and stabbing pain through his back, and migraines. Petitioner testified that the cervical surgery improved his headaches but did not relieve the pain radiating to his shoulder blade. He underwent physical therapy following surgery and reported some improvement. Petitioner told Dr. Kitchens at his last visit he still had burning and stabbing pain that radiated from his neck to his shoulder.

Petitioner sought additional treatment with Dr. Rutz who removed the cervical hardware and performed a disc replacement at C5-6 and C6-7. Petitioner testified the second surgery considerably improved the burning and stabbing pain into his shoulder. He returned to full duty work on 2/4/21 and has not missed work since due to his cervical condition.

Petitioner testified he still has some burning and tingling into his shoulder with tugging, pulling, lifting, and climbing activities. He takes two to four 500-milligram over-the-counter Tylenol per day when working 12-hour shifts. His hobbies of playing with his child, hunting, and fishing have been adversely affected. Petitioner stated he had hunting tags for the 2019-2020 season and was able to hunt. He was working full duty with no restrictions in 2019. He hunted in November and early December 2020, prior to Dr. Rutz placing him off work on 12/18/20. He testified he was not on any restrictions when he hunted in 2020. He worked full duty up until his surgery with Dr. Rutz.

On cross-examination, Petitioner agreed Respondent accepted his injury that occurred on 1/28/17. Petitioner testified he had symptoms down his arm when he first treated with Dr. Kitchens. Petitioner agreed that Dr. Kitchens diagnosed a herniation at C4-5, and no pathology at C5-6 or C6-7. Dr. Kitchens recommended surgery at C5-6 on 5/10/17 and Petitioner advised he wanted time to decide. Petitioner did not return to Dr. Kitchens for fourteen months and did not treat with any other providers and worked full duty during that period. Petitioner returned to Dr. Kitchens on 7/18/18 and filled out another pain diagram. Petitioner testified he reported radiating pain in his arm, which he did not indicate in his pain diagram in 2017. He rated his pain 7-8/10 in July 2018. Petitioner denied that Dr. Kitchens told him that a delay in surgery could result in permanent nerve damage.

Petitioner agreed that one week following surgery the numbness/tingling in his left hand and headaches improved. He testified he did not have left arm pain or tingling/numbness in his left hand when he initially treated with Dr. Kitchens in 2017. Petitioner stated that Dr. Kitchens told him his symptoms were caused by a condition at C4-5, and not C5-6 or C6-7. He agreed his pain level was 3/10 in October 2018 and he was released to medium work on 10/31/18 which Respondent accommodated. Petitioner stated he may have reported to Dr. Kitchens after returning to medium duty work that he had low back pain. Dr. Kitchens ordered a lumbar MRI.

Petitioner testified he told Dr. Kitchens in 2017 he had headaches, but he may not have indicated headaches on his pain diagram. Petitioner stated Dr. Kitchens was only treating him for his neck condition, other than obtaining a lumbar MRI. He agreed he did not complain of neck pain while undergoing physical therapy in December 2018.

Petitioner treated with Dr. Young for his left shoulder at the referral of Dr. Kitchens. He agreed diagnostic testing was normal and Dr. Young released him back to Dr. Kitchens. He

agreed his pain level was 3-4/10 when Dr. Kitchens released him at MMI on 9/18/19. Petitioner testified he told Dr. Kitchens he still had symptoms that increased with activity when he was released. He stated he returned to full duty work and approximately nine months later he was referred to Dr. Rutz by his attorney. He met with Dr. Rutz on 6/20/20 who recommended a discogram to determine the source of his neck pain. Petitioner testified he did not undergo the recommended discogram or injections. Dr. Rutz performed a two-level disc replacement and released Petitioner at full duty without restrictions. Petitioner testified he continues to work the same job position as prior to his accident and has received pay raises. Petitioner is right-handed. He does not take medication for his injuries and he has not received treatment since being released by Dr. Rutz.

MEDICAL HISTORY

On 1/31/17, Petitioner presented to SSM Health Express Clinic with complaints of left upper back pain following a work injury a few days earlier on 1/28/17. He reported he was on a machine removing parts and he had to use force to unjam the machine. He reported he had immediate pain to his left upper back and low back. Petitioner denied any previous injuries to his extremity. Ibuprofen, Tylenol, and heat did not alleviate his symptoms. Physical examination revealed left upper back pain and pain to palpation of the trapezius with spasms. He was referred to physical therapy and given work restrictions.

On 2/6/17, Petitioner was evaluated for physical therapy at SSM Health Good Samaritan Mt. Vernon. (PX4) Petitioner presented with left inferior scapula pain radiating from the medial border under the inferior border to the lateral border and the mid side of his ribcage. Petitioner reported his pain started following an injury at work where he was lifting a 220-pound object with assistance of chains, but the assistance fell. His left arm was at the top pulling the object and his right arm was pushing the object onto a shelf. Petitioner reported he then used his leg to get the object back on the shelf. Since the accident, the symptoms in his mid-back improved, but the symptoms near his left scapula were increasing. He was unable to perform his work duties of pushing, pulling, twisting, bending, or sitting for extended periods of time. Examination revealed his left scapula pain was in the midpoint of the medial border of the scapular and wrapped around to the mid thoracic. He rated his pain 6/10. His mid-back revealed tenderness at T9, which Petitioner rated 4/10. He had pain with shoulder abduction as well as external rotation, and elbow extension. His normal work duties consisted of lifting, pushing, and pulling 150 pounds, and driving a forklift. His current work restrictions included no lifting or pushing over 50 pounds. It was noted Petitioner had no history of back or scapular pain. He was assessed to benefit from physical therapy biweekly for three weeks.

On 2/7/17, Petitioner returned to SSM Health Express Clinic and reported his pain was a little better, but he still had constant pain in his shoulder blade area. He continued to have left upper back pain and pain with palpation to his lower trapezius with spasms. Prednisone and Cyclobenzaprine were prescribed, and work restrictions were continued.

Petitioner continued physical therapy and returned to SSM Health Express Clinic on 2/22/17 with left trapezius muscle spasms and back pain. He described his pain as under his left shoulder blade and around to the front. Physical exam showed continued left upper back pain

with pain to palpation in the lower trapezius with spasms. He was instructed to continue therapy and work restrictions.

On 3/9/17, Petitioner returned to SSM Health Express Clinic and reported some relief from therapy. Physical exam showed continued left upper back pain with pain to palpation of the lower trapezius with spasms. He was recommended to continue physical therapy and work restrictions.

On 3/30/17, Petitioner reported persistent left trapezius muscle spasms and back pain. He reported during therapy the week prior his pain flared up, and he was still having pain between his shoulder blades and below. Physical exam remained the same. Petitioner was to continue current work restrictions and he was referred to Dr. Daniel Kitchens.

On 4/19/17, Petitioner presented to Dr. Kitchens for evaluation of his left shoulder. (PX5) Dr. Kitchens noted Petitioner was taking a heavy target from a machine that weighed around 220 pounds on a chain hoist when it became jammed. Petitioner reported he grabbed the top with his left arm and the bottom with his right arm and jerked with all his strength, causing pain in his back and left shoulder. Petitioner reported he tugged on the target two more times before it became loose. Dr. Kitchens noted Petitioner was currently working. Petitioner indicated his pain was mainly in his left scapula area on a diagram. He reported the pain was constant, much worse with movement, and woke him at night. Petitioner reported weakness in his left arm and hand. Dr. Kitchens diagnosed a left trapezius strain and noted he also had symptoms in his left shoulder and around his left shoulder blade. Dr. Kitchens ordered a cervical MRI and released Petitioner to work without restrictions.

On 5/10/17, Dr. Kitchens noted the MRI revealed a broad-based disc herniation at C4-5 and mild uncinated process spurring and degenerative changes at C5-6 and C6-7. Dr. Kitchens opined Petitioner could continue conservative measures or proceed with surgery. He noted Petitioner wished to proceed with surgery, and Petitioner was given a release to work without restrictions.

Petitioner next saw Dr. Kitchens on 7/18/18 and reported continued pain in his left shoulder and pain with range of motion of his neck. He described pain in the left side of his neck into his occipital region. He continued to work without restrictions but had more discomfort as the day progressed. He rated his current neck and arm pain as a 7-8/10. Dr. Kitchens noted Petitioner's pain in his arms, legs, buttocks, and hips was severe and incapacitating. He continued to have weakness in his left arm and hand. Dr. Kitchens noted he had a long trial of conservative measures without significant improvement and recommended an anterior cervical discectomy and fusion at C4-5. Petitioner was to continue working without restrictions pending surgery.

On 9/25/18, Dr. Kitchens performed an anterior cervical discectomy and fusion at C4-5. One week later, Petitioner reported improvement in the numbness and tingling in his hand, with some discomfort in his left side. He rated his pain 3/10. Dr. Kitchens continued Petitioner off work.

On 10/31/18, Petitioner reported gradual improvement in his left shoulder and arm symptoms but had some discomfort in his left interscapular region and left side of his neck, with continued numbness from his incision to his chin. He rated his neck pain 3/10. X-rays revealed adequate progression of his fusion and he was referred to physical therapy. Petitioner was given a 30-pound lifting restriction.

Petitioner began physical therapy at SSM Health Good Samaritan Mt. Vernon on 11/9/19. (PX4) Petitioner reported he worked 12-hour shifts over the weekend and had increased pain until Wednesday. He had continued numbness and tingling in the ulnar side of his left hand and difficulty reaching overhead. He indicated his pain was located in the left subscapular lateral border area, with stabbing and burning. Working and movement increased his pain. Physical examination revealed tenderness at the mid-lower left trapezius region following inferior/lateral border of the scapular. He had impaired posture of the left scapula with increased anterior tipping, downward rotation, and winging, compared to his right. He was assessed to benefit from physical therapy twice per week for three weeks.

On 11/28/18, Dr. Kitchens noted Petitioner continued to have pain in his neck into his left shoulder, as well as increased pain in his lower back which started after his work incident in 2017. He had more discomfort when crawling and with certain positions of the neck and back. Petitioner rated his back pain 3/10. Petitioner reported improvement in his neck pain and headaches since surgery, but continued discomfort in his left shoulder. Dr. Kitchens ordered a lumbar MRI and referred Petitioner to an orthopedic surgeon for his left shoulder. Dr. Kitchens ordered continued physical therapy and returned Petitioner to work without restrictions.

Petitioner continued physical therapy and underwent a lumbar MRI on 12/10/18. (PX4, PX8) On 12/12/18, Petitioner reported to Dr. Kitchens he had continued discomfort in his neck and left shoulder and pain in his lower back. His pain increased with bending, twisting, and flexing and was 4/10. Dr. Kitchens noted the lumbar MRI revealed mild disc bulging at L1-2, L3-4, and L5-S1, with no significant degenerative disc changes and increased T2-signal within the facet joints at L4-5 and L5-S1. Dr. Kitchens believed Petitioner had degenerative facet changes and mild facet arthropathy at L4-5 and recommended conservative treatment. Dr. Kitchens recommended Petitioner continue physical therapy for his cervical spine and to follow up in one month.

Petitioner continued physical therapy through 1/18/19 and reported 75% improvement in his neck. He reported continued intermittent low back pain, left scapula pain, flank pain, and increased difficulty sleeping. Petitioner returned to Dr. Kitchens on 1/23/19 and again reported discomfort in his neck. Dr. Kitchens noted an onset of severe neck pain and pain into Petitioner's left shoulder and across his upper back after wrenching and pulling. Petitioner noted his discomfort was gradually improving. He continued to have pain in his low back into his buttocks. Dr. Kitchens recommended Petitioner undergo a cervical CT scan to evaluate the progression of the fusion. He was to continue working without restrictions and follow up in two weeks.

On 2/6/19, Petitioner reported to Dr. Kitchens he continued to have achiness in his neck with numbness in the left side into his chin. He rated his low back pain 7/10 and his left shoulder

and arm pain 5/10. Dr. Kitchens noted the cervical CT scan revealed plate stabilization at C4-5, with some bone growth but no solid fusion. He did not appreciate any evidence of hardware failure or loosening. Dr. Kitchens recommended he continue working full duty and to follow up in two months.

On 3/19/19, Petitioner was examined by Dr. Jason Young for his left shoulder. (PX9). Petitioner stated his shoulder symptoms where unchanged since the injury, with the exception the numbness in his hand had resolved. He continued to have pain over the lateral chest wall and around the scapula. His pain increased with reaching overhead and pulling. He denied any prior history of injury to his shoulder. Physical examination showed mild asymmetry of the latissimus dorsi muscle belly over the left chest wall and complaints to the lateral chest wall with forward elevation. X-rays showed no abnormalities. An MRI was recommended.

On 4/3/19, Petitioner reported to Dr. Kitchens he had stiffness and achiness when he turned his head from side to side, with numbness in the left side of his neck and chin. He rated his neck pain 2-3/10. Dr. Kitchens recommended physical therapy, a TENS unit, and a cervical CT scan to evaluate the fusion. Petitioner continued to work without restrictions.

On 4/8/19, Petitioner returned to Dr. Young who noted Petitioner returned to work and had continued pain. Dr. Young reviewed the left shoulder MRI and appreciated no significant internal derangement, but a slight lateral down sloping acromion. Petitioner's pain was located in the mid-axillary region of his shoulder with full elevation. Dr. Young noted a palpable bulge and some soreness in that area. He believed further workup was warranted to determine the cause of the pain and continued Petitioner on full duty status.

On 4/10/19, Petitioner underwent an MRI of his left scapula and chest wall. Dr. Young did not appreciate any abnormalities on the MRI and believed Petitioner could work full duty without restrictions. Petitioner was released at MMI with regard to his left shoulder on 4/15/19.

On 4/22/19, Petitioner underwent a new cervical CT scan and returned to Dr. Kitchens on 5/1/19. Petitioner reported constant pain in his left shoulder and shoulder blade, with increased discomfort while working and movement. Petitioner reported numbness under his jaw. Dr. Kitchens noted Petitioner was developing osseous fusion in the center portion of the bone graft with the C4 screw slightly into the endplate. He recommended continued physical therapy, full duty work, and x-rays.

Petitioner attended physical therapy for his left shoulder from 4/19/19 through 5/2/19. Upon discharge, Petitioner denied any improvement and reported constant burning pain across his left scapula and pain in his left lateral rib.

On 6/26/19, Petitioner returned to Dr. Kitchens and reported pain in his left shoulder blade, pain when he tried to climb, and numbness in the left side of his neck up to his chin. He rated his pain 3-4/10. X-rays showed adequate progression of the fusion. Dr. Kitchens recommended he continue working full duty and to follow up in two months. Petitioner returned to Dr. Kitchens and physical examination revealed discomfort to palpation of the left interscapular region. X-rays showed progression of his fusion. Dr. Kitchens recommended he

receive additional workup, including a cervical CT scan to evaluate the fusion. Petitioner continued to work full duty. The cervical CT scan was performed on 8/26/19 and revealed adequate progression of the fustion. (PX8). On 9/18/19, Petitioner returned to Dr. Kitchens and reported continued discomfort into the left side of his neck, left interscapular region, and underneath his left chin. He rated his pain 4/10. Dr. Kitchens believed Petitioner had reached MMI and released him from his care with no restrictions.

On 6/2/20, Petitioner presented to Dr. Kevin Rutz for evaluation. (PX13) Dr. Rutz noted Petitioner was involved in a work accident on 1/28/17 when he felt pain in his lower back and left shoulder while pulling a 200-pound metal object out of a machine. Petitioner stated the fusion resulted in mild improvement in his cervical symptoms. Petitioner reported continued pain in his posterior neck with a burning sensation into the left parascapular region. He also reported low back pain following the accident which had persisted. Petitioner's pain was worse with activity and woke him from sleep on a regular basis. His headaches had improved. Physical examination revealed diminished lumbar extension with low back pain, diminished cervical flexion with left neck pain, burning in the left upper trapezial muscles, and diminished cervical extension.

Dr. Rutz noted tenderness over the left cervical paraspinal muscles, left upper trapezial muscles and parascapular region, and over the midline lumbar spine. He believed the cervical fusion was appropriate and covered a large portion of Petitioner's symptoms; however, he suspected pathology at C5-6. Dr. Rutz ordered a cervical MRI and a nerve block and discography to find the origin of Petitioner's symptoms. The cervical MRI was performed on 6/8/20 and revealed a left-sided disc herniation at C5-6 and a smaller, central disc herniation at C6-7. (PX10). On 12/18/20, Dr. Rutz removed the anterior instrumentation at C4-5 and performed total disc arthroplasties at C5-6 and C6-7. (PX16, p.64-65) Objective intraoperative findings confirmed Dr. Rutz's diagnoses.

On 12/29/20, Dr. Rutz noted Petitioner's radicular symptoms resolved. X-rays showed good positioning of the arthroplasties. Dr. Rutz recommended Petitioner remain off work for another month, after which he could return to work without restrictions.

On 2/23/21, Dr. Rutz noted Petitioner had some residual soreness, but was pleased with how he was progressing. Petitioner's preoperative headaches resolved, and he was tolerating full duty work for the past month well. Dr. Rutz found overall Petitioner was much further along than he was prior to surgery. X-rays demonstrated good positioning of the arthroplasties and good maintenance of motion. Dr. Rutz placed Petitioner at MMI.

Dr. Daniel Kitchens testified by way of evidence deposition on 3/17/21. Dr. Kitchens is a board-certified neurosurgeon. He testified that the only pathology he diagnosed at C5-6 and C6-7 was bone spurring, which he did not treat. Dr. Kitchens testified he did not believe Petitioner required any treatment for his low back and did not feel that Petitioner's back complaints were related to any work injury. Dr. Kitchens testified that Petitioner sustained a disc herniation at C4-5 as a result of the work accident. He stated this was the only level that correlated with Petitioner's symptoms. Dr. Kitchens acknowledged that this level could cause back pain; however, he did not see evidence of C5-6 or C6-7 radiculopathy. Dr. Kitchens acknowledged

that Petitioner had persistent symptoms following the fusion, but he did not believe there was any way to attribute those continued complaints to C5-6 or C6-7. Dr. Kitchens opined that Petitioner reached MMI on 9/18/19.

Dr. Kitchens was presented with the cervical MRI performed on 6/8/20 and identified herniations at C5-6 and C6-7. He testified that to his belief, no such findings were present on the 2017 MRI. He stated that if such findings were present he would have treated them. In reviewing the 2020 MRI, Dr. Kitchens noted a left disc herniation at C5-6 that was clearly impinging on the spinal cord and the nerve, which was different pathology when compared to the 2017 MRI. He testified that for him to opine the work incident caused the herniation at C5-6, he would have had to have seen the same pathology on the 2017 MRI performed four months after Petitioner's accident. Dr. Kitchens opinion was the same for level C6-7.

Dr. Kitchens did not believe that any other incidents, including Petitioner's report of increased pain following use of a wrench at work, aggravated Petitioner's condition or caused further injury. He stated the C5-6 and C6-7 conditions were to some extent related to degenerative disc disease but explained that a person cannot have degenerative disc bulging and that degenerative disk disease do not cause a herniation of the disc.

On cross-examination, Dr. Kitchens testified that his facility possesses an MRI machine, the magnet strength of which was approximately two Tesla. Respondent's insurance carrier referred Petitioner to a different facility, Cedar Court Imaging, and he was unaware of the strength of the facility's MRI magnet. Although 15 to 16 months passed prior to the Cedar Court MRI, he did not obtain a new MRI prior to surgery. Dr. Kitchens acknowledged that when he last saw Petitioner, he continued to have left-sided neck and interscapular pain. He agreed that strains typically resolve within four to six weeks.

Dr. Kitchens testified that the surgery performed by Dr. Rutz at C5-6 and C6-7 was reasonable given the MRI findings and Petitioner's ongoing symptoms. He agreed there was no indication Petitioner was malingering or exaggerating his symptoms. Dr. Kitchens testified the does not perform disc replacement surgeries.

Dr. Kitchens provided further testimony on 6/30/21 following Petitioner's subsequent accident on 12/30/19. (RX7). This claim was voluntarily dismissed by Petitioner at arbitration. Dr. Kitchens found no evidence of further injury caused by the 12/30/19 accident.

Dr. Gregory Cizek testified by way of evidence deposition on 8/30/21. Dr. Cizek is a board-certified radiologist and testified as to the findings on Petitioner's Cedar Court Imaging MRI in 2017 and the Greater Missouri Imaging MRI in 2020. (PX18) Dr. Cizek stated in his report dated 7/7/21 that the 2017 MRI showed a broad-based disc bulge at C5-6 and a questionable small protrusion at C6-7, somewhat in the midline. (PX15) He confirmed that the C6-7 defect on the 2020 study "may have been present on the previous study" but was "difficult to confirm given the changes in techniques and quality."

Dr. Cizek testified that MRI machines work by using a large electromagnet to generate an image of the spine. He stated that machines can vary in quality due to the age and strength of the

magnet used. He explained that magnet strengths are rated by a grade called Tesla, with the standard magnet being a 1.5. Dr. Cizek reviewed the 2017 MRI during his deposition and identified the C4-5 disc herniation. He testified the imaging also showed a C5-6 disc bulge across the midline creating impression on the dura. Dr. Cizek reviewed the 2020 MRI and stated it was a better quality film than the 2017 study. He identified a disc protrusion at C6-7 in addition to the pathology visualized above through C4.

Dr. Cizek testified that in addition to improved image quality, Petitioner's 2020 MRI had additional image views that the 2017 MRI did not have. Dr. Cizek admitted it was difficult to determine whether the study differences represented quality improvement or interval change. However, he noted there was no interval change in Petitioner's central canal or foraminal stenosis.

Dr. Kevin Rutz testified by way of evidence deposition on 3/12/21. (PX16) Dr. Rutz is a board-certified orthopedic surgeon who specializes in spinal surgery. He testified that he is versed in surgical procedures including decompression, microdiscectomy, fusion, and disc replacement. Dr. Rutz reviewed Petitioner's records, including the 2017 MRI from Cedar Court Imaging and the current imaging studies. He noted that Petitioner improved somewhat following Dr. Kitchens' surgery but a separate portion of Petitioner's symptoms, specifically his neck pain with radiation into the left parascapular region, remained unresolved. Dr. Rutz testified that Petitioner's symptoms correlated with a potential problem at C5-6 and recommended a new MRI. Dr. Rutz testified that the C6-7 level can also cause parascapular discomfort and the MRI findings at C5-6 and C6-7 correlated with Petitioner's symptoms. Dr. Rutz found no evidence of symptom magnification or malingering at any time during Petitioner's clinical care.

Dr. Rutz testified that his diagnoses and exact findings on the MRI were confirmed by the objective intraoperative findings. He appreciated a left-sided herniation at C5-6 and a smaller central disc herniation at C6-7. He testified that Petitioner progressed well following surgery and was improved over his pre-disc replacement state. Dr. Rutz opined Petitioner had not reached maximum medical improvement on 9/18/19 because Petitioner's symptoms were still present and did not improve until he performed the second surgery. Dr. Rutz stated that fusion at C4-5 carried the risk of adjacent level disc failure. However, he believed Petitioner's cervical condition at all three levels was caused by the work accident in 2017. When asked whether Petitioner's report of increased pain from the wrench incident furthered or worsened Petitioner's condition, Dr. Rutz remained of the opinion that Petitioner's condition was related to the 2017 accident.

On cross-examination, Dr. Rutz testified that his causation opinion is based on the onset of symptoms regardless of what level of the spine is the source of the symptoms. Dr. Rutz testified that Petitioner's parascapular pain resolved following the second surgery, which buttressed his opinion that the procedure he performed was related to the January 2017 work accident.

CONCLUSIONS OF LAW

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

Respondent argues that Petitioner's current conditions of ill-being in his left shoulder and cervical spine are no longer causally connected to the undisputed work accident following 9/18/19 when Dr. Kitchens released Petitioner at MMI. Respondent argues that Petitioner's lumbar spine injury is not causally connected to his work 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. Industrial Comm'n*, 260 Ill.App.3d 92, 631 N.E.2d 724 (1994); *International Harvester v. Industrial Comm'n*, 93 Ill.2d 59, 442 N.E.2d 908 (1982). A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the workers' compensation claimant's injury. *Shafer v. Illinois Workers' Comp. Comm'n*, 2011 IL App (4th) 100505WC, 976 N.E.2d 1 (2011). If a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967); see also *Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 362 N.E.2d 339 (Ill. 1977).

With regard to Petitioner's low back, the Arbitrator notes that Petitioner's contemporaneous complaints following the accident, the unbroken chain of events, and the imaging studies establish that his low back complaints were causally related to the accident. Petitioner complained of low back pain at his first visit on 1/31/17 at SSM Health Express Clinic. On 11/28/18, Dr. Kitchens noted Petitioner continued to have pain in his low back which started after his work incident in 2017. Dr. Kitchens ordered a lumbar MRI as a result of Petitioner's ongoing symptoms which was read to reveal mild disc bulging at L1-2, L3-4, and L5-S1, with no significant degenerative disc changes and increased T2-signal within the facet joints at L4-5 and L5-S1. Dr. Kitchens believed Petitioner had degenerative facet changes and mild facet arthropathy at L4-5 and recommended conservative treatment. The focus of Petitioner's treatment was to his neck and shoulder and he was referred for physical therapy with respect to his cervical injury.

With regard to Petitioner's left shoulder, the records support that his symptoms were related to his cervical spine injury which resolved following surgery performed by Dr. Rutz. Although Respondent maintains that Petitioner's condition of ill-being in his cervical spine is not causally related to the injury after Dr. Kitchens placed Petitioner at MMI on 9/18/19, the Arbitrator concludes based on the objective medical evidence that Petitioner's condition thereafter remained causally connected to the undisputed 2017 work accident.

The Arbitrator first addresses Respondent's *Ghere* objection to Dr. Rutz's testimony. The Arbitrator finds Respondent's reliance on *Ghere* to strike Dr. Rutz's testimony misplaced. The Appellate Court made clear that although the purpose of the ruling in *Ghere* was to prevent surprise, it "did not set forth a bright-line rule or presumption that undisclosed opinion testimony constitutes surprise." *Homebrite Ace Hardware v. Indus. Comm'n*, 351 Ill. App. 3d 333, 339, 814 N.E.2d 126, 132 (2004). In fact, the Appellate Court in *Homebrite Ace Hardware* concluded that

there was no surprise in allowing a treating physician to testify as to causation, as the documentation of the problem in the physician's records "put [the] employer on notice" that the physician might testify as to causal relationship. *Id.* N.E.2d at 132. There was no surprise in this case as 1) Respondent had every reason to believe that Petitioner's treating physician would give a causation opinion; 2) Respondent already obtained the report espousing the opinion to which it objected in response to its subpoena; and 3) Respondent had full and fair opportunity to cross-examine Dr. Rutz regarding his opinions. As there was clearly neither surprise nor prejudice, Respondent's *Ghere* objection is overruled.

The Arbitrator places significant weight on the fact that both Dr. Cizek and Dr. Rutz found evidence of disc injuries at C5-6 and C6-7 on the 2017 MRI. Although these findings were not appreciated by Dr. Kitchens, the objective intraoperative findings revealed during the C5-6 and C6-7 disc replacement procedure confirmed the presence of the disc injuries demonstrated on both MRIs. The Arbitrator also places substantial weight on the fact Petitioner consistently complained of parascapular pain upon being released by Dr. Kitchens, reporting levels of pain at 4-5 out of 10, resulting in continued care with Dr. Rutz.

The Arbitrator finds the opinion of Dr. Rutz more persuasive than that of Dr. Kitchens and concludes that Petitioner's condition of ill-being in his left shoulder and cervical spine continued to be causally connected to his work accident after being released by Dr. Kitchens on 9/18/19.

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

Respondent disputes liability for medical bills after Dr. Kitchens placed Petitioner at MMI on 9/18/19. Based upon the foregoing findings as to causal connection, the Arbitrator finds the care and treatment rendered by Dr. Rutz was reasonable and necessary. In support thereof, the Arbitrator notes that Dr. Kitchens, notwithstanding causation, acknowledged the reasonableness of Dr. Rutz's surgery given the diagnoses of disc injuries at C5-6 and C6-7 and Petitioner's continued complaints.

Respondent shall therefore pay the medical expenses contained in Petitioner's Group Exhibit 1, pursuant to the fee schedule, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit. Pursuant to the stipulation of the parties, Respondent shall receive a credit in the amount of $43,644.18 in medical expenses paid and any medical expenses paid through its group medical plan under Section 8(j) of the Act. Respondent shall further hold Petitioner harmless from all claims or liabilities made by the group medical plan to the extent of such 8(j) credit.

Issue (K): What temporary benefits are in dispute? (TTD)
Issue (O): Overpayment of temporary total disability benefits.

Respondent disputes liability for payment of temporary total disability benefits after Dr. Kitchens placed Petitioner at MMI 9/18/19.

Based upon the foregoing findings as to causation and reasonableness and necessity of medical care, Respondent shall pay temporary total disability benefits from 9/28/18 through 11/1/18 and 12/18/20 through 2/4/21, representing 12 weeks. Respondent shall receive credit for TTD benefits paid in the amount of $2,329.32. Therefore, the Arbitrator finds Respondent has not overpaid TTD benefits.

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 gives no weight to this factor.

(ii) **Occupation**: Petitioner continues to work for Respondent performing his pre-accident job duties. The Arbitrator places some weight on this factor.

(iii) **Age**: Petitioner was 39 years old at the time of his injury. He is young and must live and work with his disability for an extended period of time. The Arbitrator places greater weight on this factor. *Jones v. Southwest Airlines*, 16 I.W.C.C. 0137 (2016).

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

(v) **Disability**: As a result of his undisputed work accident, Petitioner suffered disc injuries and herniation at C4-5, C5-6, and C6-7, resulting in a C4-5 fusion and a second surgery consisting of hardware removal at C4-5 and total disc arthroplasties at C5-6 and C6-7. Petitioner testified that despite the improvement from surgery he continues to have burning and tingling into his shoulder, predominately aggravated by tugging, pulling, lifting, and climbing. He takes over-the-counter Tylenol for his symptoms. His hobbies of playing with his children and hunting and fishing have been adversely affected. Petitioner testified he is not claiming permanent partial

disability with regard to his lumbar spine. The Arbitrator places greater weight on this factor.

Based on the foregoing factors, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 25% loss of his body as a whole related to his cervical spine, under Section 8(d)2 of the Act.

Arbitrator Linda J. Cantrell DATED:

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC008847
Case Name	Kelly E Huffman v. PepsiCo
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0438
Number of Pages of Decision	13
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Gary Stokes
Respondent Attorney	Eric Chovanec

DATE FILED: 10/10/2023

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KELLY E. HUFFMAN,

Petitioner,

vs. NO: 21 WC 8847

PEPSICO,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, 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 November 2, 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 $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.

October 10, 2023
O: 10/5/23
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	21WC008847
Case Name	HUFFMAN, KELLY E. v. PEPSICO
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	Gary Stokes
Respondent Attorney	Eric Chovanec

DATE FILED: 11/2/2022

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 1, 2022 4.44%

/s/Edward Lee, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

KELLY E. HUFFMAN
Employee/Petitioner

v.

PEPSICO
Employer/Respondent

Case # **21** WC **008847**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **EDWARD LEE**, Arbitrator of the Commission, in the city of **Champaign**, on **October 17, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **February 21, 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 $**70,672.68**; the average weekly wage was $**1,359.09**.

On the date of accident, Petitioner was **55** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**16,759.60 (short term disability)** for other benefits, for a total credit of $**16,759.60**.

ORDER

Medical Benefits

Respondent shall pay reasonable and necessary medical charges, pursuant to the medical fee schedule, for those services of OSF (PX8), Fyzical (PX9), C.D.I. (PX10), Carle Hospital (PX11), Carle Physicians Group (PX12) and Kennekuk ER (Px13) and shall receive credit for all group health insurance payments toward said charges pursuant to Section 8(j) of the Act. 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.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $906.06/week for 40 & 2/7ths weeks, commencing 02/21/2021 through 02/23/21 and 04/27/21 through 01/30/22, as provided in Section 8(b) of the Act.

Permanent Partial Disability: Schedule injury

Respondent shall pay Petitioner permanent partial disability benefits of $815.45/week for 32.25 weeks because the injuries sustained caused 15 % loss of use of the right leg, as provided in Section 8(e) of the Act.

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

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

NOVEMBER 2, 2022

Edward Lee
Signature of Arbitrator

Huffman v. Pepsico
21 WC 008847
Arbitrator Lee

STATEMENT OF FACTS

Respondent manufactures, packages and ships granola bars from its Danville, Illinois factory. Petitioner has been employed at the Danville, Illinois plant for 17 ½ years. Petitioner's job title from 2012 through the date of accident was "wrapper-operator." As a wrapper-operator, it was Petitioner's responsibility to monitor, maintain and service four different machines that operate continuously throughout her 12-hour shift. Two of the machines wrap the individual granola bars in foil and two machines package the bars into cartons.

The job is extremely fast-paced, each machine processing 300,000 bars per 12-hour shift. Petitioner had to monitor and record code dates every 15 minutes on each machine and load foil and cartons into each machine every 30 minutes. Petitioner also had to immediately tend to any interruption of production, such as roller lockups, broken belts, or foil-snaps. Petitioner moved in and around each machine at a pace faster than a normal walk, but less than running speed, to manage her duties.

On February 21, 2021, Petitioner was working her normal shift and was walking to the end of a machine to record the code date when an alarm sounded to her left, alerting her that production had stopped on one of the other machines. Petitioner planted her right foot and attempted to pivot and turn her body to the left to address the alarm as quickly as possible. At the moment Petitioner attempted to pivot, her right forefoot was located on a painted, yellow-striped line and her right heel was on the textured concrete surface of the floor (PX14).

Petitioner described the painted stripe as shiny, smooth and much slicker than the surrounding concrete surface. The concrete surface below her heel gripped the sole of the company-issued steel-toed boot, and Petitioner felt and heard a snap on the other side of her right knee with an immediate onset of pain. A supervisor brought a wheelchair, and Petitioner was transported to the OSF emergency room (PX1).

Petitioner was placed on crutches and restricted from work until she could be evaluated by a specialist (PX1, p.9). The history given to the emergency room staff corroborates her testimony (PX1, p.10).

Petitioner was seen by the company physician assistant, Michael Wagner, two days later and released to a light-duty, sit-down job (PX2). Petitioner continued working her light-duty job until Respondent sent her home on April 27, 2021 and instructed her to not return until she was released full-duty. Petitioner remained off of work until her return to full duty on January 31, 2022 (PX5).

Petitioner attended physical therapy in March 2021 (PX3) but experienced no improvement in her knee pain. Therapy notes report ongoing pain on the lateral side of Petitioner's right knee. Petitioner denied any pain on the inside or "medial" side of her right knee (PX3, p.1, 3). Petitioner was finally sent for an MRI on March 30, 2021 (PX4). The MRI reported a six-millimeter full-thickness tear of the lateral meniscus in Petitioner's right knee (PX4). Petitioner was immediately referred to an orthopedic surgeon, Dr. Bane at Carle Clinic.

Dr. Bane recommended surgery, and Petitioner was sent by Respondent to Dr. Michael Nogalski for an IME. Surgery, described as a lateral meniscectomy, proceeded on August 23, 2021 (PX6). Petitioner followed up with Dr. Bane's office post-operatively through January 20, 2022. Petitioner was released at the time to return to work full duty (PX5), and Respondent allowed her to return on January 31, 2022.

FINDINGS

In support of the Arbitrator's decision relating to: **(C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds the following facts:**

On February 21, 2021, The Petitioner suffered an injury to her right knee, specifically a torn lateral meniscus that "arose out of" and "in the course of" her employment. To be compensable, Petitioner must establish both elements by a preponderance of the evidence. *Sisbro, Inc. v. Industrial Commission*, 207 Ill.2d 193 (2003).

Injuries occur "in the course of" employment when they occur at work or while the Employee is performing reasonably related activities in conjunction with the employment. *Wise v. Industrial Commission*, 54 Ill.2d 138 (1973). It is undisputed that the events of February 21, 2021, occurred at Respondent's Danville,

Illinois plant during Petitioner's shift and while Petitioner was performing her normal work duties. Respondent presented no evidence to the contrary.

To establish an injury "arose out of" employment, the Petitioner must introduce evidence of a risk associated with the employment and the causal connection of that risk with the injury. *Caterpillar Tractor v. Industrial Commission*, 129 Ill.2d 52 (1989). The "risk" analysis begins with identifying the relevant risk and then categorizing that risk into one of three groups: (1) employment risks, (2) personal risks, and (3) neutral risks. *McAllister v. Illinois Workers Compensation Commission*, 2020 IL 124848.

Employment risks are those directly associated with the work environment such as "tripping on a defect at the employer's premises, falling on uneven or slippery ground at the worksite, or performing some work-related task which contributes to the risk of falling," *First Cash Financial Services v. Industrial Commission*, 367 Ill.App.3d 102, 106 (2006). "(A) risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common-law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties," *McAllister v. Illinois Workers Compensation Commission*, 2020 IL 124848, ¶ 15.

Personal risks are risks associated with an employee's nonoccupational disease or personal infirmity such as an episode of dizziness or an epileptic seizure or a trick knee. Neutral risks are risks that have no particular association with the employment or with employee. Risks such as stray bullets, dog bites, lightning strikes, hurricanes, etc. *Illinois Institute of Technology Research Institute vs. Industrial Commission,* 314 Ill.App.3d 149 (2000).

In the case at hand, the risks confronted by Petitioner were employment risks and were direct causes of the injury she suffered to her right knee. The risks were twofold: (1) a defect on the employer's premises, specifically the placement of smooth surfaces or stripes painted onto textured concrete allowing one portion of the foot to slide or pivot while the remainder of the foot in the company-issued boot sticks on the unpainted

surface, leading to a twisting or wrenching of the knee and consequent lateral meniscus tear, and (2) the fast-paced work environment and urgent response required when alarms sound due to machine breakdowns and interruptions in production.

The Arbitrator finds the Petitioner to be highly credible and her testimony fully corroborated by the medical record. Petitioner was unquestionably performing acts she was instructed to perform by the employer, specifically, walking at a rapid pace to meet the time demands of her normal duties when an alarm sounded from a different direction, requiring she turn and respond quickly to the emergency to get production back up and running.

In support of the Arbitrator's decision relating to**: (F) Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds the following facts:**

Petitioner testified that she had never experienced problems with either of her knees prior to the date of injury in this case. Nor had she experienced pain, or been treated for pain, in either knee prior to February 21, 2021. There are no medical records, or any other evidence, suggesting otherwise.

Emergency room records report "swelling, tenderness and signs of injury present," several hours after the accident (PX1, p.8). Edema was still present two weeks later when therapy commenced (PX3, p.2). Petitioner was still experiencing constant pain in the right knee by the conclusion of therapy on March 31, 2021 (PX 3, p.29).

An MRI taken on March 30, 2021, confirmed a tear of the anterior lateral meniscus in the right knee (PX4, p.2). Petitioner still had right knee swelling when initially examined by Dr. Bane on June 11, 2021 (PX7, p.7). Dr. Bane testified that Petitioner's complaints of pain and swelling and popping were entirely consistent with a tear of the lateral meniscus (PX7, p.9). Operative findings on August 23, 2021, confirmed complex tearing of the lateral meniscus in the right knee (PX6, p.2). Dr. Bane testified that the torn lateral meniscus was directly caused by the injury suffered by Petitioner on February 21, 2021 (PX7, p.11).

Respondent's IME, Dr. Nogalski, testified that he examined Petitioner on June 22, 2021 (RX3, p.12). Dr. Nogalski testified that Petitioner's right knee condition was not causally connected to the injury suffered on February 21, 2021. Dr. Nogalski testified that Petitioner's knee complaints were "self-generated" or

attributable to issues outside of his expertise, such as symptom magnification (RX3, p.16).

On cross examination, Respondent's IME admitted that Petitioner might or could have sustained an injury to her right knee in the February 21, 2021, incident (RX3, p.25). Dr. Nogalski felt, however, that any injury suffered on February 21, 2021, would have been temporary in nature and would have resolved itself within two to six weeks (RX3, p.27).

The Arbitrator finds the testimony of Dr. Bane more credible than that of Dr. Nogalski. There is no evidence that Petitioner's right knee symptoms resolved within two to six weeks after her injury. Indeed, the medical record corroborates ongoing symptoms of pain and swelling throughout the six-month period from date of injury through Petitioner's August 23, 2021, surgery. That surgery confirmed the tear of the lateral meniscus initially identified in the MRI of March 30, 2021 (PX6).

Petitioner credibly testified that she has not sustained any injuries to the right knee since her date of accident on February 21, 2021, and the ongoing difficulties she has with daily pain and swelling are unchanged since her release from medical care in January 2022.

The Arbitrator finds Petitioner's torn lateral meniscus of the right knee and her current post-operative condition are causally connected to the injuries sustained on February 21, 2021.

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 facts:**

Respondent disputes the itemized medical bills contained in Petitioner's Exhibits #8 through #13 on the basis of liability only. Based on the findings above regarding accident and causal connection, said bills are awarded subject to the applicable fee schedule. Respondent shall receive a credit for all payments made by its group health insurance carrier.

In support of the Arbitrator's decision relating to: **(K) What temporary benefits are in dispute, the Arbitrator finds the following facts:**

Once again, Respondent appears to dispute temporary total disability benefits on the basis of liability alone. Petitioner testified to two periods of temporary total disability that are corroborated by the medical

record. Respondent offered no evidence to the contrary. Based on the findings above regarding accident and causal connection, temporary total disability benefits are awarded for 40 & 2/7^{ths} weeks from February 21, 2021, through February 23, 2021 and April 27, 2021 through January 30, 2022.

In support of the Arbitrator's decision relating to: **(L) What is the nature and extent of the injury, the Arbitrator finds the following facts:**

Section 8.1b(b)(i)

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator, therefore, gives no weight to this factor.

Section 8.1b(b)(ii)

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator finds that Petitioner has been employed as an industrial laborer her entire career. Her current position is very physical and fast-paced. Petitioner must stand and walk from 12 to 16 hours per workday, pull carts weighing up to 70 pounds and lift parts overhead weighing up to 60 pounds.

Petitioner has measured her daily steps with a pedometer and learned that she is taking 17,000 to 22,000 steps per day. Since returning to work in January 2022, Petitioner notices her knee begins to swell after three to four hours into her shift accompanied by the onset of throbbing pain. By the end of the day her pain level reaches an '8.' Upon her return home, Petitioner must elevate and ice the knee each evening.

Petitioner testified that she has no work or professional experience outside of industrial labor and has no training or education to perform light-duty jobs, such as clerical or secretarial positions. It is evident that Petitioner's occupation places great demands on her body and particularly the lower extremities. Considering the very physical nature of Petitioner's occupation, the Arbitrator gives great weight to this factor.

Section 8.1b(b)(iii)

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner is only 56 years of age and will have to manage the demands of her occupation for at least another nine to ten years. The Arbitrator gives

moderate weight to this factor.

Section 8.1b(b)(iv)

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator finds Petitioner's current earnings are enhanced by virtue of her employment as an industrial laborer and union membership. Should Petitioner be unable to continue as an industrial laborer, future earnings would be substantially reduced. However, since Petitioner's potential inability to continue her occupation in industrial labor is not a certainty, the Arbitrator places minimal weight on this factor.

Section 8.1b(b)(v)

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator finds that Petitioner now suffers from considerable disability with her right knee and leg that is corroborated by the medical record, her history of surgery and post-operative complications. Petitioner credibly testified that her pain level is a constant '4' that increases to an '8' by the end of her 12-hour workday. The knee pain persists despite taking Tylenol daily. Swelling also remains a daily complication requiring her to elevate and ice the knee on her return home.

Petitioner must ascend and descend steps by placing both feet on each step before moving to the next. Petitioner can no longer hike or bicycle with her grandchildren or walk the dog due to right knee pain.

Medical records note ongoing pain and swelling weeks after surgery (PX5, p.22) and physician concerns regarding the physically demanding nature of Petitioner's work (PX5, p.23). The doctor recognized that Respondent required Petitioner be released without restrictions if she were to continue her employment (PX5, p.33).

Because the extent of disability illustrated by Petitioner's testimony is significant and is corroborated by the medical record, the Arbitrator gives great weight to this factor. Based upon all of the above factors and the record taken as a whole, the Arbitrator finds that Petitioner has sustained permanent partial disability to the extent of 15% loss of use her right leg.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC014730
Case Name	Michael Rosado v. Meikem Supply Inc
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0439
Number of Pages of Decision	30
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Philip D Blomberg
Respondent Attorney	Katrina Robinson

DATE FILED: 10/12/2023

/s/Amylee Simonovich, Commissioner

Signature

DISSENT: /s/Amylee Simonovich, Commissioner

Signature

23IWCC0439

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

Michael Rosado,

Petitioner,

vs. NO: 20 WC 014730

Meikem Supply, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, prospective medical care, temporary total disability ("TTD"), permanent partial disability ("PPD") and penalties and fees under Sections 16, 19(k) and 19(l), and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof, but makes changes and clerical corrections as outlined below.

The Commission makes the following changes to the Decision:

The Commission modifies the Arbitrator's decision, Section F, Right Shoulder, striking the last two full paragraphs of the Section.

The Commission modifies the Arbitrator's decision, striking the entirety of Section K.

The Commission modifies the Arbitrator's decision, replacing the letter for Section L with Section K.

The Commission modifies the Arbitrator's decision, replacing the letter for Section N with Section L and moving the modified Section L to begin after Section K, so as to keep the Sections in alphabetical order,

The Commission modifies the Arbitrator's decision, Section O, to add to the opening sentence of the paragraph with "On April 19, 2021, Dr. Nho placed Petitioner at maximum medical improvement following three months of post-operative therapy, at which point Petitioner had returned his baseline status". (RX 2, pg 32-33, 47).

The Commission modifies the Arbitrator's decision to begin the second paragraph of Section O with "Dr. Goldberg found the lumbar spine condition unrelated to the work accident."

The Commission modifies the Arbitrator's decision, striking the last three paragraphs of the Decision.

The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on March 22, 2022, is modified as stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED that Respondent shall receive 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 $17,300.00. 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.

October 12, 2023

o: 8/15/23
AHS/kjj
51

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

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

DISSENT

I respectfully dissent from the opinion of the majority and would reverse the Decision of the Arbitrator, in part. After a careful consideration of the evidence, I believe Petitioner has permanent restrictions as a result of the accident which prohibit his return to his prior employment and is thus entitled to vocational rehabilitation.

Section 9110.10(a) dictates a vocational rehabilitation assessment is ***required*** in cases where an injured worker is unable to resume his regular duties as a result of the work-related injury.

Petitioner was employed as a delivery driver for Respondent. T.11-12. His job duties included delivering chemicals and machines, which included dishwashers and 15-gallon drums of chemicals which could weigh hundreds of pounds. T.11-12, 67-70. His job had physical demand limits of "very heavy". PX4. Pg. 2. Owner Robert Hall confirmed that Petitioner would load a

two-wheel dolly with either three to four cases of product, each weighing forty pounds, two to three 5-gallon pails, each weighing fifty pounds, or one 15-gallon drum weighing 150 pounds. T. 66-67.

In this case, Petitioner sustained a work-related injury, which resulted in a permanent aggravation of a pre-existing injury. The record shows that Petitioner had a right shoulder injury in 2011, however, Petitioner's job was not affected by his right shoulder condition until the injury on March 23, 2020. Since the March 23, 2020 accident, he has had continuous pain and limited function. Dr. Nikoleit testified that he did not believe Petitioner was capable of lifting the weight required of his job with the condition of his shoulder, and that is why he ordered an FCE to evaluate the right shoulder. PX5, p. 18-19.

Pursuant to the Functional Capacity Evaluation (FCE), Petitioner has physical demand limitations that only allow him to function at the medium demand level. PX4. A careful examination of the entirety of the FCE results shows clear deficits due to the related right shoulder condition which would have prevented Petitioner from returning to work in his prior capacity. Petitioner failed lifting from floor to chest level, as he had an increase pain complaint in his right shoulder of 8/10 and there was scapular compensation present. PX4. Pg. 3. He failed pushing/pulling capacity testing, as he had an increased pain in his right shoulder bringing the pain to 8/10 and his was observed to be compensating with right scapular substitution. PX4. Pg. 3. He failed his reaching ability test, as he only able to reach for objects in all directions with the left arm, but not with the right. PX4. Pg. 4. These right shoulder deficits affected Petitioner's overall functional physical demand level and prevented him from reaching the demand level required for him to resume his regular duties.

The FCE showed Petitioner could lift 40 pounds and carry 25 pounds. These weights are well below what Mr. Hall testified would have to be stacked on the two-wheel dolly. Further, the FCE documented Petitioner was capable of push/pull up to 240 pounds. Yet according to Respondent's own witness, Mr. Hall, the dishwasher that caused Petitioner's injury on March 23, 2020 weighed 269 pounds. T.70. The objective evidence shows that due to his related right shoulder condition, Petitioner was not capable of returning to his pre-injury employment.

The application of Section 9110.10(a) is clarified in *CDW Corporation v. Illinois Workers' Compensation Comm'n*, 2021 IL. App. (2d) 200562WC-U. The issue before the Court was permanency, specifically whether Petitioner was to be classified in an odd lot permanent total category. The claimant in *CDW* had made a demand for vocational rehabilitation assessment, which had never been supplied by employer. The Court found that the "**only condition for a vocational rehabilitation assessment is that the work-related injury rendered the claimant unable to resume her regular duties**" [emphasis added]. *Id* at 28. The claimant was found to have met the burden of showing the work-related injury precluded her from returning to her usual and customary occupation. *Id* at 2-3 and 28**.** The case was remanded to the Commission for a vocational rehabilitation assessment. *Id* at 30.

Petitioner's limited function was objectively documented throughout the physical therapy records, was quantified at the FCE on September 28, 2021, and was supported by the testimony of Dr. Nikoleit. His physical demand function was several categories lower than the physical demand

category required for his job with Respondent. As such, he has met the **only** requirement under Section 9110.10(a) of the Commission rules for entitlement to vocational rehabilitation, namely that he is unable to resume his regular duties due to his work-related injury. An award of a vocational rehabilitation assessment is therefore appropriate.

For the foregoing reasons, I would reverse the Decision of the Arbitrator with regard to an award of permanency and remand for an award of a vocational rehabilitation assessment.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC014730
Case Name	ROSADO, MICHAEL v. MEIKEM SUPPLY, INC.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	25
Decision Issued By	William McLaughlin, Arbitrator

Petitioner Attorney	Philip Blomberg
Respondent Attorney	Katrina Robinson

DATE FILED: 3/22/2022

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

/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

MICHAEL ROSADO
Employee/Petitioner

Case # **20** WC **014730**

vs.

MEIKEM SUPPLY, 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 McLaughlin**, Arbitrator of the Commission, in the city of **Chicago**, on **January 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 **prospective medical care, vocational services, maximum medical improvement**

FINDINGS

On ***March 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 the accidents ***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 ***$37,153.20***; the average weekly wage was ***$714.48***.

On the date of accident, Petitioner was ***49*** 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 ***$28,517.00*** for TTD, ***$0.00*** for TPD, ***$0.00*** for maintenance, and ***$0.00*** for other benefits, for a total credit of ***$.00***.

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

ORDER

Petitioner's current condition of ill-being as to the lumbar spine is not causally related to the accident. All benefits, past and future, are denied as to the lumbar spine.

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

Respondent has paid all appropriate charges for all reasonable and necessary medical services for the right shoulder. Additional medical services are denied.

Petitioner has received all temporary total disability benefits to which he is entitled. Additional TTD benefits are denied.

Respondent is awarded a credit of $1,298.65 representing its TTD overpayment.

Petitioner is not entitled to vocational services. Vocational services are denied.

Petitioner has reached maximum medical improvement for the right shoulder. Petitioner is awarded 8% loss of use of the person as a whole for an aggravation to a pre-existing condition his right shoulder. Said award represents 40 weeks at Petitioner's PPD rate of $428.69, or $17,147.60.

Petitioner is not entitled to penalties or fees. 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.

MARCH 22, 2022

Signature of Arbitrator

FINDINGS OF FACTS

The parties entered a completed stipulation sheet prior to trial. This was entered into evidence as Arbitrator's Exhibit 1. (Arb.X 1). The parties stipulated to Petitioner's average weekly wage of $714.48. (Arb.X 1, T 7-8).

Trial proceeded on the following issues: causal connection; medical bills incurred after the IME; temporary total disability benefits; prospective medical treatment and vocational services versus maximum medical improvement and nature and extent of the injury; and penalties and fees. (Arb.X 1, T 5-6).

Testimony of Petitioner

Petitioner testified he was 49 years old, married, with three children over the age of 18. (T 10). He believed he received his CDL in 2001. (T 11). From 2001 to 2013, he drove a straight truck and delivered to restaurants. (*Id.*). He then worked for Meikem Supply from June 2013 through March 23, 2020, driving a truck and delivering chemicals and machines. (*Id.*). Petitioner guessed that the dishwasher machines weighed 600 pounds. (T 12). He testified that the chemicals weighed between 40 and 250 pounds, and were delivered in 15-gallon drums. (*Id.*).

On cross-examination, Petitioner claimed that the weight of the machines were not in writing, and that "the warehouse" verbally told Petitioner the weight if he asked them. (T 38-39). He claimed that he always asked the warehouse the weight of his delivery product, but admitted that did not keep any sort of written documentation or log. (T 39). Petitioner claimed that the maximum weight he was required to lift and carry would be a drum weighing 250 pounds. (T 40). The most he was required to lift overhead was 75 pounds, and the most he was required to push or pull was over 1,000 pounds. (T 40-41). He claimed that he delivered large dish machines "maybe a couple of times in a month." (T 41). He admitted that Respondent provided wheeled dollies and that the delivery trucks had a lowered lift gate that went down to the ground. (T 41-42). However, he claimed that he lifted overhead "all day" to put chemicals, boxes, and drums on customers' shelves. (T 42). He also described four-inch curbs that he would need to walk on to get behind machines. (T 45). He stated that he did so sometimes, daily, and all the time. (T 42, 45).

Petitioner testified that, on March 23, 2020, he was delivering a dish machine and pulled his right shoulder. (T 12). He first sought treatment with Elmhurst Orthopaedics on March 25, 2020. (T 13). He was familiar with Elmhurst Orthopaedics because he had treated there for a May 18, 2011 shoulder injury from playing football. (T 13-14). He testified the 2011 injury resulted in two surgeries: a June 7, 2011 open reduction and internal fixation of a right glenoid fracture and biceps tenodesis, and a September 27, 2011 manipulation and hardware removal. (T 15-16). Petitioner testified that he was released from care on December 22, 2011 and was able to perform his job for years thereafter. (T 16, 27). He testified that he did not have any right shoulder treatment during all the years he worked for Meikem. (T 27).

Following the March 23, 2020 work accident, Petitioner testified that he underwent treatment with Dr. Bartucci, including a cortisone injection, and that he received an MRI on April 15,

2020. (T 17-18). He underwent 13 sessions of physical therapy from May 12, 2020 through June 8, 2020. (T 18). He then began treatment with Dr. Nikoleit, who performed right shoulder surgery on July 21, 2020. (T 18-19). Petitioner underwent 29 sessions of physical therapy from August 4, 2020 through October 17, 2020. (T 19-20). He transitioned to work conditioning on October 23, 2020. (T 20).

Petitioner testified that he hurt his back in work conditioning. (T 20). He described lifting a box with weights in it from the ground to overhead. (*Id.*). He testified that, when he bent down, he hurt something in his back. (*Id.*). He described performing sets of 10, and that it was his eighth lift of his second set when he hurt his back. (T 21). Petitioner was asked, "Do you recall the day this happened?" and he replied, "I believe it was January 28th - - or 29th" of 2021. (*Id.*).

Thereafter, Petitioner testified, he was taken out of work conditioning, and received 46 sessions of physical therapy between March 4, 2021 and July 30, 2021. (T 21-22). He denied that he told the physical therapist that he had hurt his back in work conditioning on January 28, 2021. (T 55).

Petitioner received MRIs of the right shoulder and lumbar spine on March 12, 2021. (T 22). He testified as to his visits with Dr. Nikoleit between April 1, 2021 and December 6, 2021 (T 22-26). These visits included three right shoulder injections, and a referral to pain management for a lumbar injection. (*Id.*).

At the time of trial, Petitioner described his right shoulder as being "nowhere where it should be." (T 26-27). He stated that he was not able to work with the weights required for his job, and that he was last working with 8 and 10-pound weights in physical therapy. (T 27). He testified that those weights had not changed over his course of physical therapy. (*Id.*). On cross-examination, Petitioner admitted that he could handle and lift more than 10 pounds. (T 60.)

Petitioner described his back as being "very uncomfortable" and that it bothered him if he sat or stood for too long. (T 29). He took four hydrocodone per day and used heat, ice, and hot showers to manage his discomfort. (T 29-30). On cross-examination, Petitioner could not define "too long" other than stating, "it's just when it starts to bother me." (T 37).

As to his claim for vocational rehabilitation, Petitioner testified that he had not completed any year of high school, and did not have a diploma or GED. (T 31). His work experience included operating tow trucks, repossession work, security work, machine operation, oil changes, transmission work, making pizza, and driving trucks. (T 31-32). He was never in the military and never attended a trade school. (T 32). On cross-examination, he denied undergoing any training or driving instruction, and claimed that he "got a book" and "took the test" to obtain his CDL license. (T 33).

Petitioner testified that he filed one prior workers' compensation claim for a 2015 neck injury, case 16 WC 19914, which settled for 6% loss of use of the person as a whole. (T 27-28). He testified that his right shoulder was not injured in that accident. (T 28). Petitioner testified that, other than the 2011 football injury, he had no other injuries to his right shoulder. (T 29). He testified that, other than work hardening incident, he had no other injuries to his back. (*Id.*).

On cross-examination, Petitioner admitted that he had filed two additional prior workers' compensation claims involving his back and bilateral legs, cases 03 WC 011545 and 03 WC 011546. (T 33-34). He was not sure if he was paid for 75 weeks off work connected to those injuries. (T 34). He admitted that those cases settled together for $37,000.00, to the best of his recollection. (*Id.*). As to his 2015 injury, Petitioner again denied that his right shoulder was involved. (T 34-35). Petitioner agreed, and his attorney stipulated, that the settlement contract for that case was approved on March 11, 2020 for $15,854.70. (T 35). Petitioner claimed that he would not know whether the current right shoulder case occurred 12 days after the 2016 contract was approved. (*Id.*)

On further cross-examination, Petitioner confirmed that he had no history of back problems, and denied reporting a history of back problems to his medical providers dating back to at least 2015. (T 46). He did not recall reporting a history of back problems when he sought treatment at Elmhurst Memorial on July 27, 2015. (T 47-48). Although he was not sure of the August 3, 2015 date, he admitted that he underwent lumbar x-rays. (T 48). Petitioner did not agree as to the date of "late 2015," but had "no reason to disbelieve" that he followed up at Elmhurst Memorial regarding his back three times. (*Id.*). He could not agree or disagree that he reported a history of back problems at Elmhurst Memorial in November of 2015 and April of 2016. (T 49). He denied that he complained of ongoing back pain at his work conditioning session on November 10, 2020. (*Id.*).

Petitioner further admitted that he was prescribed medication for ongoing symptoms from his 2015 injuries, and that he continued taking those medications up to the 2020 accident at issue. (T 36). He admitted that, when he first saw Dr. Bartucci, he reported that he was still taking Cyclobenzaprine and Norco from his July 2015 injury, although he testified that the 2015 injury was only to his neck. (*Id.*).

Petitioner also admitted that it was possible that he cancelled or no-called no-showed for ten work conditioning sessions between January 27, 2021 and February 27, 2021. (T 51-54). As to the February 4, 2021 work conditioning cancellation, Petitioner denied that he had indicated to ATI Physical Therapy that he chose to treat via rest and a hot tub instead of work conditioning. (T 53-54).

Petitioner testified that he told the physical therapist that he injured his back when it happened, on January 28, 2021. (T 52). He testified that he also told his physical therapist the very next day, on January 29, 2021. He denied that he failed to mention any low back complaints at his February 1, 2021 work conditioning session. (T 52-53, 55). He denied that he failed to mention any low back complaints at his February 1, 2021 appointment with Dr. Nikoleit. (T 53).

Following the April 19, 2021 IME appointments, Petitioner testified that he did not have any conversations with physical therapist Glenn Patterson regarding the date that he hurt his back; but he knew that Dr. Nikoleit was in communications with the therapist regarding his treatment. (T 57-58).

When confronted that the fact that he did not attend physical therapy or work conditioning on January 28, 2021, Petitioner claimed that the back injury had happened either on January 28 or 29, 2021, he was not sure which day. (T 58). Petitioner denied that his memory was better at the

time of his low back incident than his memory was at trial approximately one year later. (T 59-60).

Testimony of Mr. Robert Hall

Mr. Hall testified that he was the majority owner of Meikem Supply for 14 years and one month as of the date of trial. (T 63). Mr. Hall is responsible for sales, service, and managing Meikem's 17 employees. (*Id.*) This included acting as Petitioner's supervisor. (*Id.*)

Mr. Hall was familiar with Petitioner's job duties as a delivery driver, which included pre-trip inspection of the truck, loading products, delivering products, and returning empty drums. (T 64). He testified that Petitioner delivered detergents, rinse additives, degreasers, floor and glass cleaners, dishwasher machines, and general cleaning maintenance items to kitchens and restaurants. (T 65). For nursing homes, additional laundry chemicals were delivered. (*Id.*). Delivery drivers typically made 14-22 deliveries per day. (T 69).

Mr. Hall testified that some product was in small containers, but the majority would be in 40-pound cases, 50-pound pails, and 150-pound 15-gallon drums. (T 66). Product is moved on a two-wheeled dolly with a curved back for nestling. (T 67). The delivery trucks are equipped with a lift gate, which lowers to ground level. (T 68). He testified that there was typically no overhead lifting involved. (T 69). As Meikem has approximately 550 customers, Mr. Hall did not know the exact storage arrangement of each facility, but generally was familiar with where chemicals were stored or placed upon delivery. (T 69).

Mr. Hall testified that large items, including dishwashing machines, were delivered "relatively infrequently" for new accounts or if a customer's machine needed to be replaced. (T 69). While the frequency varied depending on business activity, Mr. Hall approximated that large machine deliveries occurred once every one to two months. (T 69-70).

As to Petitioner's March 23, 2020 delivery, Mr. Hall testified that the single-tank low-temp dish machine had a shipping weight of 269 pounds, which included a 40-pound pallet and 10-pound box. (T 70). Mr. Hall testified that Petitioner did not report any sort of shoulder injury when he returned to work at the end of his shift. (T 71).

Mr. Hall testified that, from time to time over the years, Petitioner would occasionally complain that he tweaked his back or that his back sore. (T 72). Petitioner's comments did not indicate a specific source of pain, but rather life in general. (*Id.*).

On cross-examination, Mr. Hall described a February 2021 phone call from Petitioner, wherein Petitioner expressed that he needed help because he expected to be returned to work, but his doctor kept him in physical therapy pending an MRI. (T 74). As far as Mr. Hall was aware, Petitioner had been an honest in his direct dealings with Meikem. (T 75). He thought Petitioner performed his work well when he was actually working, but noted that Petitioner had been absent a lot due to digestive health issues. (T 73). Mr. Hall confirmed that Petitioner had not returned to work since the 2020 accident. (*Id.*).

Testimony of Dr. Edward Goldberg

Dr. Goldberg testified via evidence deposition on August 2, 2021 regarding his April 19, 2021 Section 12 examination. (RX 1). He underwent two spine fellowships, is board certified, and has been an orthopedic spine surgeon at Midwest Orthopedics at Rush since 1990. (RX 1 pg 5-7, Dep.X 1). 85% - 95% of Dr. Goldberg's practice is dedicated to treating patients, 99.9% of which suffer from spine conditions. (RX 1 pg 7-8).

Dr. Goldberg testified that Petitioner reported injuring his lumbar spine on January 28, 2021 while doing rehabilitation for his right shoulder. (RX 1 pg 10-11). Petitioner reported that he was lifting a box containing weights when he developed low back pain that traveled into the right buttock. (RX 1 pg 11). Petitioner reported a history of lumbar spine problems after a motor vehicle accident in 2015, which reportedly resolved after therapy. (*Id.*).

Dr. Goldberg testified that the medical records he reviewed were outlined in his report, including records relating to the lumbar spine prior to the alleged low back incident. (RX 1 pg 11-12, Dep.X 2). He was specifically looking at the medical records to see whether the incident occurred during therapy or not, and "did not see any specific mention of it occurring during the therapy" as alleged. (RX 1 pg 12-13). He testified as to Petitioner's later reports to the physical therapist and Dr. Nikoleit regarding his low back. (RX 1 pg 13). Dr. Goldberg testified as to his review of the March 12, 2021 lumbar MRI films, which revealed a very small central disc herniation or protrusion at L5-S1 without nerve compression. (RX 1 pg 14).

Dr. Goldberg further testified regarding his physical examination of Petitioner. (RX 1 pg 14-15). He was 6 feet tall and weighed 248 pounds. Lumbar flexion was 70 degrees with pain, and extension was 30 degrees. Petitioner was tender to palpation at the lumbosacral junction. He had a negative straight leg raising bilaterally for any radicular pain. Achilles and patellar reflex were normal, and there was no atrophy or long tract findings.

Dr. Goldberg testified as to his diagnosis of a small central disc herniation at L5-S1 causing low back pain and right leg radicular type symptoms. (RX 1 pg 15). His causation opinion was conditional on the question of whether Petitioner actually injured his lumbar spine while in rehabilitation for the right shoulder. (RX 1 pg 15-16). If the lumbar injury did not occur in therapy, then Petitioner's lumbar spine condition would not be secondary to the work accident. (RX 1 pg 16). Dr. Goldberg testified that the records and Petitioner's report to him were at odds, and he noted that herniations could arise de novo without any trauma. (*Id.*)

Regardless of causation, Dr. Goldberg recommended a lumbar epidural injection. (RX 1 pg 16). He explained that an epidural cortisone injection could address Petitioner's inflammatory symptoms, as there was no physical nerve compression. (RX 1 pg 25-26). He testified that Petitioner was not a surgical candidate. (RX 1 pg 17).

Regarding Petitioner's work capacity as it related to the lumbar spine, Dr. Goldberg testified that Petitioner could return to work full duty as a delivery driver. (RX 1 pg 17).

On cross examination, as to the physical therapist's documentation on March 4, 2021 noting the "nature of the injury" and the date of the low back injury as January 28, 2021, Dr. Goldberg indicated that he could not speak for the therapist and how s/he documents her/his records. (RX 1 pg 22-23). He reiterated that his causation opinion is determinant on whether Petitioner actually injured his low back in therapy. (RX 1 pg 23).

Testimony of Dr. Shane Nho

Dr. Nho testified via evidence deposition on August 4, 2021 regarding his April 19, 2021 Section 12 examination. (RX 2, Dep.X 2). Dr. Nho has been an orthopedic surgeon since 2009, is board certified, and is a professor at Rush Medical College of Rush University. (RX 2 pg 5-6, Dep.X 1). 95% of Dr. Nho's practice is dedicated to treating patients, 20- 25% of which suffer from shoulder conditions. (RX 2, pg 8).

Dr. Nho testified as to his review of medical records regarding Petitioner's 2011 and 2015 right shoulder injuries. (RX 2 pg 10-13, Dep.X 2). He testified as to the medical records and diagnostics he reviewed following the March 23, 2020 accident. (RX 2 pg 13-23, Dep.X 2).

Dr. Nho reviewed the April 15, 2020 x-ray and MRI imaging, which revealed degenerative findings, including osteoarthritis. (RX 2 pg 15-16). He noted that the 2015 right shoulder x-rays showed no evidence of arthritis, but the April 15, 2020 right shoulder x-rays showed spur formation and degenerative changes, which took years to form. (RX 2 pg 43). As to the MRI radiologist's report noting that the biceps tendon and biceps anchor mechanism were "completely disrupted," Dr. Nho explained that Petitioner's 2011 surgery included a tenodesis, which required a removal or disruption of the biceps anchor or long head biceps from the superior labrum. (RX 2, pg 51). The 2020 MRI showed the post-operative changes from the 2011 tenodesis. (*Id.*).

As to the July 21, 2020 surgery, Dr. Nho testified that Dr. Nikoleit did not find or address a rotator cuff tear, and that the surgery was a "cleanup" or debridement procedure. (RX 2 pg 47).

Dr. Nho also reviewed the March 12, 2021 MRI imaging, which revealed no new findings when compared to the 2020 imaging. (RX 2 pg 21). He explained that articular surface tears are chronic degenerative findings, and that fatty atrophy suggests chronic degenerative changes of the muscle and tendon. (RX 2, pg 39-40). Dr. Nho also testified as to the x-rays that were taken on the date of the IME, April 19, 2021, which revealed moderate arthritis in the glenohumeral joint and no other abnormalities. (RX 2 pg 28-29).

Dr. Nho testified that, at the IME, Petitioner complained of dull and achy pain in the anterior aspect of his shoulder, worse with overhead lifting, and some weakness. (RX 2 pg 23). Petitioner denied radiating pain down either arm, and denied any numbness or tinging. (*Id.*). Dr. Nho testified as to his physical examination, which revealed reduced range of motion as well as mild tenderness over the AC joint clavicle, SC joint, scapular spine, scapular borders, and bicipital groove. (RX 2 pg 26-27). Petitioner demonstrated 4+/5 strength with flexion, and 5/5 strength with external and internal rotation. (RX 2 pg 26). He had a negative belly press/lift off, negative apprehension, negative sulcus, negative Neer, negative Speeds, and negative Yergason. (*Id.*). Sensation was intact. (*Id.*). As to the positive Hawkins and O' Brien findings, Dr. Nho explained that these maneuvers relate to impingement. (RX 2 pg 26-27). Petitioner had pain free range of motion in his neck, and good grip strength and pulses bilaterally. (*Id.*).

Dr. Nho testified that Petitioner's subjective complaints of discomfort, stiffness, and pain in late 2020 and early 2021 were consistent with glenohumeral arthritis, an osteoarthritic situation in the right shoulder. (RX 2 pg 21-22). He explained that Petitioner's relief only from the

glenohumeral joint injection, but not the subacromial or biceps injections, was consistent with the glenohumeral joint being the source of his pain. (RX 2 pg 24-25).

Dr. Nho testified that Petitioner suffered right shoulder impingement as a result of the March 23, 2020 work accident. (RX 2 pg 29). He testified that surgery, three months of post-operative physical therapy, and a course of work conditioning was reasonable, necessary, and related. (RX 2 pg 30). Dr. Nho testified that Petitioner did not need of any further medical treatment for his right shoulder. (*Id.*). He explained that Petitioner's subjective symptoms related back to his pre-existing chronic degenerative osteoarthritis, and that those symptoms would not completely resolve despite further treatment. (RX 2, pg 30-31).

Dr. Nho testified that Petitioner reached maximum medical improvement for his right shoulder following three months of post-operative therapy, at which point he returned his baseline status. (RX 2, pg 32-33, 47). At that juncture, he explained, Petitioner's complaints related to his underlying shoulder osteoarthritis. (RX 2, pg 33). Dr. Nho testified that Petitioner was capable of returning to full duty work without restrictions. (RX 2, pg 31). He explained that Petitioner did not have any acute structural injury, that he had been treated for his episodic work injury, and that he could work in the same capacity as he worked prior to the work injury. (RX 2, pg 32). Dr. Nho testified as to his AMA impairment rating of 2% of the upper extremity, or 1% of the person as a whole. (RX 2, pg 33-34).

On cross-examination, Dr. Nho confirmed that there was no objective difference between Petitioner's shoulder pre- and post-accident. (RX 2 pg 41). Dr. Nho stated that, "There is nothing going on here that suggests that there's any aggravation or worsening of his underlying pre-existing chronic moderate glenohumeral osteoarthritis related to his previous injury from a shoulder dislocation years ago." (RX 2 pg 43).

Testimony of Dr. Nikoleit

Dr. Nikoleit testified via evidence deposition on September 28, 2021. (PX 5). Dr. Nikoleit is an orthopedic surgeon, but does not specialize in any particular area of the body. (PX 5 pg 5, 24-25).

As to the right shoulder, Dr. Nikoleit testified as to Petitioner's 2011 surgeries, including removal of the biceps tendon anchor or long head. (PX 5 pg 6-7). Treatment had ended on December 22, 2011, at which point Petitioner had improved quite well. (PX 5 pg 7). Dr. Nikoleit was unaware of any right shoulder treatment or complaints from December 2011 through March 2020. (PX 5 pg 24).

Dr. Nikoleit testified as to his July 21, 2020 operative findings. (PX 5 pg 10). He found biceps remnants from Petitioner's prior surgery, which he debrided; bone spurs, which he removed; and arthritic changes. (*Id.*). He did not find a full thickness rotator cuff tear, and he did not repair any tear. (*Id.*). He described the procedure as a decompression for impingement, removing degenerative spurs that were rubbing into the rotator cuff and causing irritation. (*Id.*). Dr. Nikoleit opined that Petitioner's work injury aggravated his degenerative condition, but

confirmed that Petitioner's condition had existed for some time and was caused by use over time. (PX 5 pg 11).

Dr. Nikoleit testified that the March 12, 2021 right shoulder MRI showed partial thickness rotator cuff tears that he also saw during surgery, which was not new or unusual. (PX 5 pg 13). He explained that some fatty atrophy of the muscles meant "a little bit of disuse has caused them to sort of atrophy and get weak." (PX 5 pg 13-14). He testified that the MRI showed severe osteoarthritis in the glenohumeral joint, moderate AC joint and acromioclavicular arthritis, and some inflammation in the subacromial region. (PX 5 pg 14). He opined that Petitioner's arthritis "was the main issue," but there were some signs of inflammation. (*Id.*).

Dr. Nikoleit testified that Petitioner was at maximum medical improvement for the right shoulder. (PX 5 pg 17). He opined that Petitioner's arthritis would cause ongoing complaints and the need for further treatment. (PX 5 pg 18).

As to the lumbar spine, Dr. Nikoleit testified that Petitioner first reported low back complaints on March 2, 2021. (PX 5 pg 11). Dr. Nikoleit admitted that he saw Petitioner on February 1, 2021, and that Petitioner did not mention his back at that time. (PX 5 pg 27-28).

Dr. Nikoleit testified that the March 12, 2021 lumbar MRI showed no displacement of the nerves, and no significant canal or foraminal narrowing. (PX 5 pg 16). He did not place Petitioner at maximum medical improvement for the lumbar spine because Petitioner would like further treatment. (PX 5 pg 17-18). He testified that Petitioner's symptoms might require physical therapy, anti-inflammatories, or injections, but that the odds of needing back surgery was "very, very small." (PX 5 pg 18). He thought that the back condition contributed to work restrictions because "with the pain he's experiencing in his back, he's not able to do the heavy lifting that his job requires." (PX 5 pg 17).

On cross-examination, Dr. Nikoleit admitted that he reviewed Dr. Goldberg's and Dr. Nho's IME reports and deposition transcripts, which were sent to him by Petitioner's attorney in April 2021. (PX 5 pg 23-24). He was aware of the pending workers' compensation case as far as denials or authorizations were concerned. (PX 5 pg 26). He admitted that he did not review daily notes from physical therapy or work conditioning. (PX 5 pg 22).

Dr. Nikoleit further admitted that he did not know the details of Petitioner's work, but understood that Petitioner had to lift "heavy things like a dishwasher." (PX 5 pg 20-21). He kept Petitioner off work because he was waiting on the functional capacity evaluation results and because treatment and symptoms were ongoing. (PX 5 pg 15, 21-22). He referenced that physical therapy notes indicated that Petitioner was not ready to return to regular duty work. (PX 5 pg 15). Dr. Nikoleit also admitted that there were office visits when he was just "waiting for things to resolve" because "one, we were done with treatment with the shoulder; and two, we couldn't go forward with treatment on the back." (PX 5 pg 27).

Medical Records

Petitioner presented to the emergency room of Elmhurst Memorial Hospital on May 18, 2011 for a right shoulder injury. (PX 1 pg 53). Post reduction x-rays revealed a questionable flattening of the posterior-superior humeral head as well as Hill-Sachs impaction and curvilinear lucency

within the inferior glenoid, which the radiologist believed might represent a non-displaced bony Bankart fracture. (PX 1 pg 55). Petitioner underwent a right shoulder EMG for pain and weakness on May 26, 2011. (PX 1 pg 58-60). He underwent a right shoulder MRI on May 27, 2011. (PX 1 pg 56-57). He underwent a right shoulder CT scan on June 2, 2011 (PX 1 pg 63-64).

On June 7, 2011, Dr. Rawal performed a right glenoid open reduction and internal fixation, interior-inferior capsule application, and biceps tenodesis. The post-operative diagnosis was right anterior shoulder dislocation with anterior-inferior glenoid fracture and instability plus biceps tendinitis. (PX 1 pg 72-74). Due to Petitioner's limited improvement, Dr. Rawal performed a right shoulder exam under anesthesia, manipulation, arthroscopic capsular release, and open glenoid hardware removal on September 27, 2011. (PX 1 pg 83-85). The post-operative diagnosis was right shoulder arthrofibrosis status post glenoid open reduction and internal fixation as well as symptomatic hardware of the right shoulder. On December 22, 2011, Dr. Rawal noted that Petitioner continued to complain of difficulty and pain after a long day, but that he had recovered well overall. (PX 1 pg 94).

Petitioner presented to Elmhurst Memorial Hospital on July 27, 2015. (RX 14). He presented with a history, in part, of low back pain and back problems. He reported bouncing in his truck and hitting his head, resulting in pain shooting down his neck into his shoulders. He complained of right shoulder pain and clicking. On physical exam, Petitioner was tender along at the anterior right shoulder and there was audible clicking. He was also tender along the right paraspinal lumbar region. Right shoulder x-rays revealed an old Hill-Sachs deformity at the humeral head laterally, post-surgical changes at the glenoid, and mild hypertrophy of the AC joint. The radiologist's impression categorized the findings as "chronic changes."

On August 3, 2015, Petitioner underwent lumbar spine x-rays for his low back pain. (RX 14). Per the radiologist, the imaging showed mild dextroscoliosis, minimal lumbar spondylosis, and a mild chronic L1 vertebral wedge configuration. Petitioner sought further treatment for his back and neck pain at with Dr. Ross at Elmhurst Memorial Hospital on August 28, 2015; September 21, 2015; and October 7, 2015. (*Id.*).

Upon referral from Dr. Ross, Petitioner presented to Dr. Couri at Elmhurst Neurosciences Institute on October 1, 2015. (RX 14). He complained of neck pain radiating to his right shoulder and had a positive right shoulder Hawkins test. (*Id.*).

On November 28, 2015, Petitioner presented to Elmhurst Memorial Hospital for unrelated treatment, but reported a history of back problems. (RX 14). On April 8, 2016, Petitioner returned to Elmhurst Memorial Hospital and again reported a history of back problems. (*Id.*).

On October 10, 2016, Dr. Couri noted that Petitioner had reduced right upper extremity strength, reduced right shoulder range of motion, and an absent right bicep reflex. Petitioner was placed on work restrictions. (RX 14). Amongst other complaints, Petitioner could not sleep on his right side due to neck and shoulder pain. (*Id.*). Petitioner returned to see Dr. Couri on January 16, 2017, with complaints right arm electric shocks; difficulty sleeping; and diminished right arm and right shoulder strength. (*Id.*). Petitioner's neurological exam revealed decreased reaction to light touch in his right shoulder and right upper lateral arm. (*Id.*).

On June 1, 2017, Petitioner complained to Dr. Couri of pain after returning to work, including shoulder spasms and jerking. (RX 14). He reported that Norco helped his shoulder symptoms, and he was taking 3 Norco's per day. (*Id.*).

On February 20, 2018, Petitioner underwent an EMG of his bilateral upper extremities due to symptoms of numbness, weakness, and tingling in his bilateral shoulders, arms, and hands. (RX 14). He returned to see Dr. Couri on March 23, 2018, and complained of neck pain, worse on the right, radiating bilaterally down his shoulders and into his hands. (*Id.*). Petitioner complained of right sided upper extremity weakness, which occurred predominately while at work. Petitioner reported he was unable to perform most of his physical work tasks, including lifting barrels on and off the truck. He thought his symptoms were worsening in intensity and described right arm weakness. Dr. Couri noted right upper extremity reduced muscle strength and the absent right bicep reflex. (*Id.*).

Elmhurst Medical documented that Petitioner had unresolved arm numbness and tingling when he was treated for unrelated issues on March 31, 2018; April 20, 2018; and March 8, 2019. (RX 14). Petitioner's records from Elmhurst Neurosciences Institute, Elmhurst Rehab Services, and Elmhurst Hospital document Petitioner's continued and consistent use medications for pain, inflammation, and muscle relaxation following his July 2015 neck and right shoulder injury. (RX 14).

Following the March 23, 2020 work accident, Petitioner presented to Elmhurst Orthopaedics on March 25, 2020. (PX 1 pg 8-9). Petitioner reported to Dr. Bartucci that he worked as a truck driver and was moving a 600-pound dishwashing machine when something snapped or gave in his shoulder. He complained of throbbing pain in his shoulder and an inability to work. He reported that he was taking Cyclobenzaprine and Norco for a prior neck injury. X-rays showed a spur on the inferior aspect of the humeral head, and the rotator cuff interval on one view was noted to be significantly narrow. Dr. Bartucci recommended an MRI.

Per the radiologist, the April 15, 2020 right shoulder MRI revealed advanced secondary osteoarthritis of the right glenohumeral articulation with chondral defects of the glenoid articular surface. There was less extensive reciprocal chondral loss of the humeral head, and sequela of a remote glenoid articular surface fracture and prior hardware removal. There were labral injuries superimposed on extensive underlying labral degeneration, likely degenerative in nature. There was diffuse attenuation of the right supraspinatus tendon compatible with attritional tendinosis, perhaps with small thickness perforations of the anterior insertional fibers. There was a partial rupture of the subscapularis tendon with attendant moderate fatty atrophy of the subscapularis muscle. There was displacement of the long head biceps tendon with post procedural changes suggesting a previous failed tenodesis. The intra-articular biceps tendon and biceps anchor mechanism appeared completely disrupted. There was mild hypertrophic degeneration of the right acromioclavicular joint, and a suspected partial rupture of the inferior glenohumeral ligament. (PX 1 pg 11-12).

Per the radiologist, the April 15, 2020 right shoulder x-rays revealed right glenohumeral degeneration with marginal spur formation. Mild hypertrophic degeneration of the right AC joint was seen. The radiologist's impression noted glenohumeral degeneration with marginal spur formation, and metallic densities within the glenoid consistent with chronic residuals following hardware removal. (PX 1 pg 15).

On May 6, 2020, Dr. Bartucci administered a cortisone injection and prescribed physical therapy. (PX 1 pg 18). Petitioner attended 13 sessions of physical therapy between May 12, 2020 and June 8, 2020. (PX 3 pg 433, 425). On May 29, 2020, Dr. Bartucci noted that some of the shoulder findings were from a prior injury, but he thought that there was new pathology. (PX 1 pg 19). He referred Petitioner to Dr. Nikoleit.

Dr. Nikoleit first saw Petitioner on June 8, 2020. (PX 1 pg 20-21). Petitioner demonstrated a positive impingement sign, weakness with abduction strength testing, and tenderness of the AC joint. Dr. Nikoleit reviewed the MRI and recommended a subacromial decompression, distal clavicle resection, and open rotator cuff repair. (*Id.*).

On July 21, 2020, Dr. Nikoleit performed a right shoulder arthroscopic biceps debridement, subacromial decompression, and distal clavicle resection. (PX 1 pg 25-26). Petitioner followed up with Dr. Nikoleit post-operatively on July 31, 2020; August 21, 2020; September 18, 2020; and October 16, 2020. (PX 1 pg 28-31). Petitioner also underwent 29 post-operative physical therapy sessions between August 4, 2020 and October 17, 2020. (PX 3 pg 371, 357). He began work conditioning on October 23, 2020. (PX 3 pg 255).

On November 4, 2020, Dr. Nikoleit administered a subacromial injection as Petitioner was painful throughout his range of motion. (PX 1, pg 32). He noted that Petitioner had good mobility. (*Id.*).

On Petitioner's ninth work conditioning session on November 7, 2020, the therapist indicated that Petitioner was progressing with all weights and functional activity. (PX 3 pg 200). At the tenth session on November 10, 2020, Petitioner reported that he was "still having back pain." (PX 3 pg 197). Following the November 11, 2020 work conditioning session, Petitioner self-quarantined due to a family member having COVID. (PX 3 pg 263-264).

On December 4, 2020, Dr. Nikoleit administered a cortisone injection to the glenohumeral joint as Petitioner complained of discomfort at that joint. (PX 1, pg 33).

Petitioner resumed work conditioning on December 7, 2020. (PX 3 pg 185). He presented with decreased strength and impairments with lifting mechanics. He reported that his work as a hazardous material truck driver required a very heavy physical demand level and indicated that he was required to handle 265 pounds in the following capacities: carrying, lifting, lifting overhead, and pushing/pulling. (*Id.*). Petitioner attended work conditioning on December 8, 2020, but thereafter self-quarantined again due to a family member having COVID. (PX 3 pg 182, 244).

Petitioner saw Dr. Nikoleit on January 4, 2021, and reported mild discomfort in his shoulder. . (PX 1, pg 34). He attended work conditioning on January 7 and 8, 2021. (PX 3 pg 244, 176). Thereafter, he again self-quarantined due to a family member having COVID. (PX 3 pg 261). He was cleared to resume work conditioning on January 27, 2021. (*Id.*).

Petitioner was a no call-no show for his January 27, 2021 and January 28, 2021 work conditioning sessions. (PX 3 pg 261). On January 29, 2021, Petitioner attended work conditioning. (PX 3 pg 167). The contemporaneous notes from the physical therapist do not

document that Petitioner injured his back during the session, nor do they document any subjective back complaints. Petitioner's therapeutic activities including lifting a 15-pound box from floor to waist. (PX 3 pg 165). The January 29, 2021 note includes an addendum dated May 10, 2021, where physical therapist Glenn Patterson noted that during the session, after repeated lifting, Petitioner reported pain to his low back and right leg. (PX 3 pg 167).

Petitioner no-called no-showed for work conditioning on January 30, 2021. (PX 3 pg 260-261). On February 1, 2021, Petitioner attended work conditioning and reported being tired and a little sore. (PX 3 pg 164). Petitioner's activities including lifting a 15-pound box from floor to waist. (PX 3 pg 162). This note includes an addendum dated February 4, 2021, where therapist Patterson noted that Petitioner presented to the session with low back pain and radiating symptoms to the right foot. (PX 3 pg 164). Petitioner was advised to avoid repeated lifting and to report any change in symptoms throughout the session. (*Id.*). Petitioner also saw Dr. Nikoleit on February 1, 2021. (PX 1, pg 35). He complained of some stiffness and pain in his shoulder. On physical exam of the shoulder, Petitioner lacked full internal rotation and he had some discomfort with overhead use. Petitioner did not make any complaints, and Dr. Nikoleit made no findings, regarding Petitioner's lumbar spine.

Petitioner no-called no-showed for work conditioning on February 2, 2021. (PX 3 pg 260). When he presented to work conditioning on February 3, 2021, Petitioner complained of right-sided low back pain traveling to his foot/ankle. (PX 3 pg 161). The therapist noted right-sided tightness and SI joint tenderness, and that prone positions were tolerated more so than flexed. (*Id.*). The session was modified to avoid strength training, and Petitioner's activities did not include lifting any boxes. (PX 3 pg 161, 159).

Petitioner canceled his February 4, 2021 work conditioning session due to increased pain (PX 3 pg 260). Petitioner reported that he chose to rest and spend time in a hot tub as opposed to present for working conditioning. (*Id.*). On February 5, 2021, he complained of low back and leg pain. (PX 3 pg 158). The therapist noted that Petitioner was limited by his low back and right leg issues, particularly with lifting tolerance. (PX 3 pg 156). The February 6, 2021 work conditioning progress report notes that Petitioner had made objective improvements in strength and with lifting mechanics. (PX 3 pg 237). However, the therapist also noted that Petitioner was limited in his participation due to COVID self-quarantine and back pain, which limited his lifting ability. (*Id.*). On February 8, 2021, Petitioner complained of low back and leg pain, and his work conditioning was modified to avoid lifting and twisting. (PX 3 pg 150). On February 9, 2021, he complained of significant back pain and was unable to stand up straight; work conditioning was reduced to treatment via heat, stimulation, and low back stretches. (PX 3 pg 149).

Petitioner no-called no-showed for work conditioning on February 11, 2021. (PX 3 pg 260). On February 12, 2021, the therapist modified weights and eliminated some exercises. (PX 3 pg 144). On February 13, 2021, Petitioner continued to complain of back pain. (PX 3 pg 137).

Petitioner no-called no-showed for work conditioning on February 16, 2021. (PX 3 pg 260). On February 19, 2021, Petitioner complained of significant back pain, and the session was shortened. (PX 3 pg 134). On February 20, 2021, Petitioner complained of back pain that limited his lifting. (PX 3 pg 131). The therapist omitted lifting, carrying, cable workout, and bending activities due to Petitioner' s back complaints. (*Id.*).

Petitioner no-called no-showed for work conditioning on February 22, 2021. (PX 3 pg 259). On February 23, 2021, the therapist continued to modify activities. (PX 3 pg 128). Petitioner no-called no-showed for work conditioning on February 24, 2021. (PX 3 pg 259). On February 25, 2021, Petitioner complained of back pain that traveling to his foot and ankle, and his activities were modified. (PX 3 pg 125). He no-called no-showed for work conditioning on February 26 and 27, 2021. (PX 3 pg 258-259).

Petitioner returned to see Dr. Nikoleit on March 2, 2021. (PX 1 pg 36). His right shoulder was improving, and he had only mild discomfort. Dr. Nikoleit documented Petitioner's reported that, "on January 28, 2021, he injured his back when he was lifting boxes" and that he had persistent back pain that radiated down his right side as well as lumbar spasms. Petitioner did not indicate that the lifting occurred in physical therapy. Dr. Nikoleit recommended MRIs of the right shoulder and lumbar spine.

Petitioner resumed physical therapy, as opposed to work conditioning, on March 4, 2021. (PX 3 pg 113). The therapist noted in the header that the date of injury was January 28, 2021, and that Petitioner's primary pain was to his lumbar spine. The "Nature of Injury" indicated that Petitioner presented with back pain after lifting a 25-pound box from floor to waist while in work conditioning for his right shoulder. (*Id.*).

On March 12, 2021, Petitioner underwent a right shoulder MRI. (PX 1 pg 38-39). Per the radiologist, the imaging showed revealed partial thickness articular surface tears, but no retracted or full thickness tear. Fatty atrophy and infiltration was seen throughout the rotator cuff muscles, suggestive of chronic tearing. It was also noted that there was severe glenohumeral osteoarthritis, moderate acromioclavicular osteoarthritis, subacromial/subdeltoid bursitis, and small glenohumeral joint effusion with synovitis and a small intra-articular joint bodies. (*Id.*).

On March 12, 2021, Petitioner also underwent a lumbar MRI. (PX 1 pg 37). Per the radiologist, the imaging showed mild degenerative disc and facet disease throughout the lower lumbar spine without significant canal or foraminal narrowing. A small posterior disc protrusion at L5-S1 was noted to abut, but not displace, the exiting left S1 nerve root. Small posterior annular fissures at L3-L4 and L4-L5 were noted. (*Id.*).

Pet the March 17, 2021 physical therapy discharge note, Petitioner had felt okay in his shoulder since February 6, 2021, but his back and leg complaints were limiting his lifting capability. (PX 3 pg 233). Despite the discharge note, Petitioner was scheduled for additional physical therapy sessions. He received physical therapy on March 20 and 25, 2021. (PX 3 pg 99, 101). Petitioner no-called no-showed on March 18, 22, 26, 27, and 29, 2021. (RX 15).

Petitioner returned to Dr. Nikoleit on April 1, 2021. (PX 1 pg 42). He complained of back pain radiating into his gluteal region with a numb sensation. Dr. Nikoleit reviewed the MRIs and administered an injection into the right shoulder joint. He recommended a pain clinic for the lumbar spine, and recommended additional physical therapy. (*Id.*). Petitioner received nine physical therapy sessions between April 2, 2021 and April 30, 2021, and had no significant change in his symptoms. (PX 3 pg 71-94).

On April 19, 2021, Petitioner presented to Dr. Goldberg and Dr. Nho for Section 12 examinations. (RX 1, RX 2).

On May 3, 2021, Dr. Nikoleit recommended a pain clinic the lumbar spine, a functional capacity evaluation (FCE) for the right shoulder, and continued physical therapy. (PX 1 pg 43). Petitioner received eleven physical therapy sessions between May 3, 2021 and May 26, 2021, and had no significant change in his symptoms. (PX 3 pg 47-69).

On June 1, 2021, Petitioner returned to see Dr. Nikoleit, who noted that he was trying to get authorization for an FCE and for the pain clinic. (PX 1 pg 44). Continued therapy was recommended. (*Id.*). Petitioner received nine physical therapy sessions between June 2, 2021 and June 25, 2021, and had no significant change in his symptoms. (PX 3 pg 15-45).

On June 29, 2021, Dr. Nikoleit again noted that he was trying to get authorization or an FCE and for the pain clinic. (PX 1 pg 45). Continued therapy was recommended. (*Id.*). Petitioner received eight physical therapy sessions between July 5, 2021 and July 29, 2021, and showed no improvement in in his symptoms. (PX 3 pg 449-460.5).

On July 20, 2021, board certified occupational medicine physician Dr. Ayyar conducted a Utilization Review, and determined that physical therapy for the right shoulder was not medically necessary. (RX 7).

Petitioner returned to see Dr. Nikoleit on July 27, 2021. (PX 1 pg 47). Petitioner felt that therapy was aggravating more than helping. Dr. Nikoleit administered a right shoulder injection and referred Petitioner to an unidentified new physical therapy facility. (*Id.*). However, Petitioner did not present to a new physical therapy facility. He was discharged from ATI Physical Therapy on July 30, 2021. (PX 3 pg 461-463). The therapist noted that Petitioner did not make significant progress, despite 46 sessions of therapy. (PX 3 pg 462).

At the August 24, 2021 visit, Dr. Nikoleit noted he was waiting for authorizations. (PX 1 pg 49). At the September 17, 2021 visit, Dr. Nikoleit noted that he was waiting for the pain clinic authorization, and that Petitioner was going to an FCE. (PX 1 pg 51).

Petitioner presented to Mr. Sedlacek on September 28, 2021 for a functional capacity evaluation. (PX 4). Petitioner reported that he needed to lift 263 pounds from the floor to the waist, 50 pounds overhead, move 526 pounds on a two-wheeled dolly, and navigate the dolly up and down stairs. Mr. Sedlacek opined that Petitioner's job was very heavy and that he was only capable medium work. He found that Petitioner could lift 40 pounds, carry 25 pounds, and push/pull a 2-wheeled dolly up to 240 pounds. Due to Petitioner's subjective low back pain, Mr. Sedlacek opined that he could only stand for 18 minutes and sit for 25 minutes. He opined that Petitioner was not able to stand, walk, and crouch on a narrow beam or use his right arm for overhead activities above 130 degrees of flexion. (*Id.*).

On October 15, 2021, Dr. Nikoleit released Petitioner to return to work for his shoulder, per the FCE, but he kept Petitioner off work pending lumbar treatment. (PX 1 pg 52.5). On December 6, 2021, Petitioner saw Dr. Nikoleit at a new facility, Chicago Hand & Orthopedic Surgery Center. (PX 6). He complained of severe back pain and spasm, and painful mobility in glenohumeral joint of the right shoulder, for which he wanted a cortisone injection. Dr. Nikoleit noted that Petitioner had no current medications, and diagnosed right shoulder osteoarthritis and a lumbar sprain. He administered a shoulder injection into the glenohumeral joint. Dr. Nikoleit

noted that Petitioner was going to court for authorization for lumbar treatment, and he authorized Petitioner off work "pending the treatment." (*Id.*).

CONCLUSIONS OF LAW

The Arbitrator incorporates his findings of fact herein. The Arbitrator has fully considered the entirety of the evidence in coming to the conclusions herein.

It is well established that it is the employee's burden to establish the elements of his claim by a preponderance of the credible evidence. *Illinois Bell Tel. Co. v. Industrial Comm' n*, 265 Ill. App. 3d 681; 638 N.E. 2d 307 (1st Dist. 1994). 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 such a finding, there is no right to recover. *Board of Trustees v. Industrial Comm' n*, 44 Ill.2d 207, 214 (1969). The Commission is not required to give more weight to a treating physician's opinion over another examining physician's opinion. *Prairie Farms Dairy v. The Industrial Commission,* 279 Ill.App.3d 546 (5th Dist. Ind. Comm. Div. 1996).

Credibility is the quality of a witness that renders his evidence worthy of belief. 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 Comm' n*, 39 Ill.2d 396, 405 (1968); *Swift v. Industrial Comm' n*, 52 Ill.2d 490 (1972). 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 Il.W.C. 004187 (Ill.Indus. Comm'n 2010).

The Arbitrator notes that Petitioner's testimony was inconsistent and inconsistent with Mr. Hall's credible testimony, the physicians' testimony, his own medical records, and evidence presented at trial. Petitioner was misleading as to his medical condition prior to the 2020 work accident, and regarding his prior workers' compensation claims. (RX 13). He was evasive regarding his attendance at work conditioning and physical therapy.

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

Right Shoulder

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

Petitioner suffered a temporary aggravation to a pre-existing and degenerative right shoulder condition. The medical records document Petitioner's significant right shoulder injury in 2011, and his subsequent injury in 2015. Petitioner continued to periodically treat for his symptoms and was still taking prescription medications at the time of his March 23, 2020 work accident.

Dr. Nho testified that Petitioner's April 15, 2020 imaging showed spur formation and degenerative changes, which took years to form, as well as post-operative changes from Petitioner's 2011 surgery. (RX 2 pg 43, 51). He described the July 21, 2020 surgery as a "cleanup" procedure. (RX 2 pg 47). He testified that the March 12, 2021 MRI showed chronic degenerative findings and changes. (RX 2, pg 39-40). He testified that the April 19, 2021 x-rays

showed moderate arthritis in the glenohumeral joint and no other abnormalities. (RX 2 pg 28-29).

Dr. Nho testified that Petitioner suffered right shoulder impingement as a result of the March 23, 2020 work accident. (RX 2 pg 29). He explained that Petitioner's subjective symptoms related back to his pre-existing chronic degenerative osteoarthritis. (RX 2, pg 30-31). Dr. Nho placed Petitioner at maximum medical improvement following three months of post-operative therapy, at which point Petitioner had returned his baseline status. (RX 2, pg 32-33, 47).

Petitioner's surgeon, Dr. Nikoleit, agreed with many of Dr. Nho's opinions. Dr. Nikoleit testified as the degenerative nature shown in Petitioner's imaging, and that "Petitioner's condition had existed for some time and was caused by use over time." (PX 5 pg 11). He agreed that Petitioner's arthritis was the main source of his shoulder symptoms. (PX 5 pg 14). He also placed Petitioner was at maximum medical improvement for the right shoulder. (PX 5 pg 17).

The Arbitrator finds the Petitioner's right shoulder condition had returned to baseline status as of the April 19, 2021 IME. Therefore, Petitioner's current condition of ill-being is no longer related to the work injury, but is a natural progression of his pre-existing degenerative shoulder condition.

Lastly, the Arbitrator further finds that Petitioner has failed to meet his burden regarding entitlement to vocational rehabilitation services. In *Bevera*ge, the court noted that an injured employee is generally not entitled to vocational rehabilitation if the evidence shows that the employee does not intend to return to work, although able to do so. *Beverage v. Illinois Workers' Compensation Commission*, 2019 IL App (2d) 180090WC, 429 Ill. Dec. 517, 524 (App. Ct. 2d Dist. 2019), citing *Schoon v. Industrial Comm'n*, 259 Ill. App. 3d at 594, 197 Ill.Dec. 217, 630 (1994). The court noted that, if the employee has sufficient skills to obtain employment, that factor weighs against an award of vocational rehabilitation. *Id*., citing *National Tea Co. v. Industrial Comm'n*, 97 Ill. 2d 424, 432, 73 Ill.Dec. 575 (1983).

The entirety of the evidence on this issue is Petitioner's his own brief testimony as to his work history in a variety of trades, his lack of education or military experience, and his apparent ability to obtain a CDL from reading a book and taking a test without any further instruction or training. Petitioner failed to provide any evidence of a single effort to re-enter the workforce. It is therefore moot to question whether any such effort was made in good faith or with the intent to actually return to work. As Petitioner failed to even attempt to re-enter the workforce, and as he offered no evidence from any vocational witness on the matter, there is no evidence for the Arbitrator to consider as to whether Petitioner would be more likely to find employment with vocational rehabilitation services.

Lumbar Spine

The Arbitrator finds that Petitioner did not suffer a low back injury while in rehabilitation for his right shoulder. Therefore, Petitioner's current condition of ill-being is not related to the work injury.

The Arbitrator notes that the timeline in this analysis is critical:

- January 27 and 28, 2021 – Petitioner was cleared to resume work conditioning on January 27, 2021 following COVID self-quarantine, but he no-called no-showed for both sessions. (PX 3 pg 261).
- January 29, 2021 - Petitioner attended work conditioning, and the contemporaneous notes do not document that Petitioner injured his back during the session, nor do they document any subjective back complaints. (PX 3 pg 167).
- January 30, 2021 - Petitioner no-called no-showed for work conditioning. (PX 3 pg 260-261).
- February 1, 2021 - Petitioner attended work conditioning and made no low back complaints. (PX 3 pg 164). At his visit with Dr. Nikoleit, he made no low back complaints, and Dr. Nikoleit made no documentation regarding Petitioner's lumbar spine. (PX 1, pg 35). Dr. Nikoleit testified that Petitioner did not mention his low back at that time. (PX 5 pg 27-28).
- February 2, 2021 - Petitioner no-called no-showed for work conditioning. (PX 3 pg 260).
- February 3, 2021, Petitioner attended work conditioning and complained of right-sided low back pain traveling to his foot/ankle. (PX 3 pg 161). The therapist noted Petitioner's specific low back subjective complaints as well as his observations regarding the same; and activities were modified. (PX 3 pg 161, 159).
- February 4, 2021 - Petitioner canceled work conditioning due to increased pain; he chose to rest and spend time in a hot tub instead. (PX 3 pg 260). Therapist Patterson authored an addendum, stating that Petitioner had presented to the February 1, 2021 session with low back pain and radiating symptoms to the right foot. (PX 3 pg 164).
- February 5, 6, 8, and 9, 2021 – Petitioner made subjective complaints in work conditioning regarding his low back and treatment activities had to be modified. (PX 3 pg 149, 150, 156, 158, 237).
- February 11-27, 2021 – Petitioner no-called no-showed for work conditioning on six occasions. (PX 3 pg 258-260). For the six sessions that he attended, Petitioner complained of back pain and his activities had to be modified. (PX 3 pg 125, 128, 131, 134, 137, 144).
- March 2, 2021 – Petitioner reported to Dr. Nikoleit that, "on January 28, 2021, he injured his back when he was lifting boxes." (PX 1 pg 36). Petitioner did not report that the lifting occurred in work conditioning. Petitioner's subjective low back complaints and Dr. Nikoleit's observations were noted. (*Id.*) Dr. Nikoleit testified that this was the first time Petitioner had reported low back complaints. (PX 5 pg 11).
- March 4, 2021 – Petitioner reported to the physical therapist that he had back pain in work conditioning on January 28, 2021. (PX 3 pg 113).
- April 19, 2021 - Petitioner presented to Dr. Goldberg for an Independent Medical Examination and reported that his low back injury occurred on January 28, 2021. (RX 1).
- April 29, 2021 - Respondent tendered Dr. Goldberg's report with notice of termination of benefits. (RX 10). Dr. Nikoleit testified that admitted that he reviewed Dr. Goldberg's IME report, which was sent to him by Petitioner's attorney in April 2021. (PX 5 pg 23-24). He testified that he was aware of the pending workers' compensation case as far as denials or authorizations were concerned. (PX 5 pg 26). At trial, Petitioner admitted that Dr. Nikoleit was in communications with the therapist regarding his treatment following the IME. (T 57-58).
- May 10, 2021 - Therapist Patterson authored an addendum stating that, during the January 29, 2021 session, after repeated lifting, Petitioner reported pain to his low back and right leg. (PX 3 pg 167).

- January 27, 2022 – Petitioner testified at trial that he hurt his back in work conditioning on January 28 or 29, 2021. (T 20, 58). He testified that he told the therapist the day that it happened and the very next day. (T 52-53).

The Arbitrator finds that Petitioner did not injury his low back in work conditioning on January 28, 2021. There are no contemporaneous medical records to support that allegation, and Petitioner was not in work conditioning that day. Every medical record that documents Petitioner's report of the date of his low back injury references January 28, 2021.

The only exception is the May 10, 2021 addendum, which references January 29, 2021 as the date of the low back injury. That Addendum was authored 4.5 months after the alleged injury date, and occurred shortly after Respondent tendered Dr. Goldberg's IME report and Dr. Nikoleit reviewed the same.

The Arbitrator further finds that Petitioner did not injury his low back in work conditioning on January 29, 2021. There are no contemporaneous medical records to support that allegation. The only medical record that references this date of injury is the February 4, 2021 addendum stating that Petitioner presented to the February 1, 2021 session with low back pain. (PX 3 pg 164).

Further, Petitioner testified that he told his physical therapist the day that he hurt his low back and the very next day. Petitioner's attendance at work conditioning proves otherwise. He no-called no-showed on January 28 and 30, 2021. Thus, Petitioner could not have told his physical therapist the day-of and the day-after. He did not show up for two consecutive days for either of the alleged dates of the low back injury.

The Arbitrator finds that the records point to a low back injury occurring after Petitioner's medical appointments on February 1, 2021 and before his February 3, 2021 work conditioning session. During that period, Petitioner was a no-call no-show for his February 2, 2021 session. There is no contemporaneous evidence in the medical records that Petitioner reported a back injury or made back complaints prior to his February 3, 2021 session. On February 3, 2021, and thereafter, the records contemporaneously document Petitioner's subjective low back complaints and medical providers' observations regarding the same.

Every reference to a January 28 or 29, 2021 low back injury was documented on or after February 4, 2021. The Arbitrator notes that Petitioner canceled work conditioning that day due to increased pain, when he chose to rest and spend time in a hot tub. February 4, 2021 is when therapist Patterson authored his first addendum.

Based on these findings, the Arbitrator does not need to address Petitioner's documented history of back issues.

As Petitioner's current condition of ill-being is not related to the work injury, the remaining issues of are rendered moot.

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

Right Shoulder

Based on the Arbitrator's findings as to Issues (F) and (O), the Arbitrator find that the medical services provided to Petitioner were reasonable and necessary up to the April 19, 2021 Section 12 examinations. The Arbitrator further finds that Respondent paid all appropriate charges for all reasonable and necessary medical services.

Lumbar Spine

Based on the Arbitrator's findings as to Issue (F), none of the medical services received for the lumbar spine were reasonable and necessary.

(K) Whether the Petitioner is entitled to prospective medical care?

Dr. Nikoleit also placed Petitioner was at maximum medical improvement for the right shoulder. (PX 5 pg 17).

Petitioner is not entitlement to prospective medical care or vocational rehabilitation services. Petitioner has reached maximum medical improvement.

(L) What total disability benefits is Petitioner entitled to?

Right Shoulder

Based on the Arbitrator's findings as to Issues (F) and (O), The Arbitrator finds that Petitioner was entitled to temporary total disability benefits from March 24, 2020 through April 28, 2021. The Arbitrator notes that Respondent tendered the IME reports with notice of termination of benefits on April 29, 2021.

Therefore, Petitioner was entitled to 57.143 weeks of TTD at a rate of $476.32, or a total of $27,218.35. Respondent paid a total of $28,517.00 in TTD benefits, and is entitled to an overpayment credit of $1,298.65. (RX 4, RX 9).

Lumbar Spine

Based on the Arbitrator's findings as to Issue (F), Petitioner was no entitled to any temporary total disability benefits as to the lumbar spine.

(M) Should penalties or fees be imposed upon Respondent?

Neither penalties nor fees should be imposed on Respondent. Respondent timely filed its Response to Petitioner's Petition for Immediate Hearing and its Response to Petitioner's Motion for Penalties & Fees. (RX 11, RX 12).

Respondent paid for medical benefits through the April 19, 2021 Section 12 examinations with Dr. Goldberg and Dr. Nho. Respondent paid temporary total disability benefits in a consistent and timely manner through its tender of the IME reports, which included notice of TTD termination. (RX 4, RX 10). The Arbitrator notes that Respondent paid medical and TTD benefits despite the disputed nature of the lumbar injury, and despite Petitioner's non-compliance with physical therapy and work conditioning.

Respondent denied further benefits for the right shoulder and lumbar spine in good faith and in reasonable reliance on the opinions of Dr. Goldberg and Dr. Nho. As to the lumbar spine, Respondent further relied on Petitioner's own treating records as a basis for denial. Respondent should not be subjected to penalties or fees as there has been no unreasonable or vexatious delay of payment or any compensation. Therefore, penalties and fees under Sections 16, 16(a), 19(k), and 19(l) are not appropriate.

(N) What is the nature and extent of the injury?

As to the nature and extent of the right shoulder injury, Dr. Nho testified as to his AMA impairment rating of 2% of the upper extremity, or 1% of the person as a whole. (RX 2, pg 33-34). Dr. Nho testified that Petitioner was capable of returning to full duty work without restrictions. (RX 2, pg 31). He explained that Petitioner did not have any acute structural injury to the shoulder, that he had been treated for his episodic work injury, and that he could work in the same capacity as he worked prior to the work injury. (RX 2, pg 32). Dr. Nikoleit deferred to the FCE as to work capacity, but testified that Petitioner's low back condition contributed to his restrictions. (PX 5 pg 17). This echoes the physical therapy records, which point to the lumbar spine as the source of Petitioner's symptoms and limitations.
The Arbitrator finds that Petitioner has suffered 8% loss of use of the person as a whole for an aggravation to a pre-existing degenerative condition in the right shoulder.

(O) Is Petitioner entitled to prospective medical care or vocational rehabilitation services? Has Petitioner reached maximum medical improvement?

Dr. Nho placed Petitioner at maximum medical improvement following three months of post-operative therapy, at which point Petitioner had returned his baseline status. (RX 2, pg 32-33, 47). He opined that Petitioner did not need of any further medical treatment for his right shoulder, and that further treatment would not resolve Petitioner's subjective symptoms. (RX 2, pg 30-31).

Dr. Goldberg and Dr. Nho both placed Petitioner at maximum medical improvement for the right shoulder. The Arbitrator finds that Petitioner reached maximum medical improvement, and that he is not entitled to prospective medical care for the right shoulder.

Dr. Nikoleit also placed Petitioner was at maximum medical improvement for the right shoulder. (PX 5 pg 17).

Petitioner is not entitlement to prospective medical care or vocational rehabilitation services. Petitioner has reached maximum medical improvement and has suffered 8% loss of use of the person a whole

Lastly, the Arbitrator further finds that Petitioner has failed to meet his burden regarding entitlement to vocational rehabilitation services. In *Beverag*e, the court noted that an injured employee is generally not entitled to vocational rehabilitation if the evidence shows that the employee does not intend to return to work, although able to do so. *Beverage v. Illinois Workers' Compensation Commission*, 2019 IL App (2d) 180090WC, 429 Ill. Dec. 517, 524 (App. Ct. 2d Dist. 2019), citing *Schoon v. Industrial Comm'n*, 259 Ill. App. 3d at 594, 197 Ill.Dec. 217, 630 (1994). The court noted that, if the employee has sufficient skills to obtain employment, that factor weighs against an award of vocational rehabilitation. *Id*., citing *National Tea Co. v. Industrial Comm'n*, 97 Ill. 2d 424, 432, 73 Ill.Dec. 575 (1983).

The entirety of the evidence on this issue is Petitioner's his own brief testimony as to his work history in a variety of trades, his lack of education or military experience, and his apparent ability to obtain a CDL from reading a book and taking a test without any further instruction or training. Petitioner failed to provide any evidence of a single effort to re-enter the workforce. It is therefore moot to question whether any such effort was made in good faith or with the intent to actually return to work. As Petitioner failed to even attempt to re-enter the workforce, and as he offered no evidence from any vocational witness on the matter, there is no evidence for the Arbitrator to consider as to whether Petitioner would be more likely to find employment with vocational rehabilitation services.

Petitioner failed to prove that vocational rehabilitation services are appropriate, reasonable, or necessary, and Petitioner is not entitled to the same.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	07WC016166
Case Name	Mary Pat Hannigan v. Westrec Marinas
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0440
Number of Pages of Decision	16
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Jason Carroll
Respondent Attorney	Cristi Nelson

DATE FILED: 10/13/2023

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mary Pat Hannigan,

Petitioner,

vs. No. 07 WC 16166

Westrec Marinas,

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, benefit rates, temporary disability and permanent disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner, a 34-year-old tender boat operator, injured her left arm on June 13, 2004 while holding onto another boat with her left hand in rough waters. At the time of her injury, Petitioner had concurrent employment as a nanny. The parties disagree on correct calculation of Petitioner's average weekly wage.

Section 10 of the Act states:

> When the employee is working concurrently with two or more employers and the respondent employer had knowledge of such employment prior to the injury, his wages from all such employers shall be considered as if earned from the employer liable for compensation (820 ILCS 305/10).

The parties do not dispute that prior to Petitioner's accident, Respondent was aware of Petitioner's concurrent employment as a nanny. Nor do they dispute that her $327.50 weekly earnings from that concurrent employment should be added to the AWW from her earnings at Respondent. The parties' sole dispute regarding Petitioner's AWW is the calculation of her AWW from her earnings at Respondent.

The Arbitrator calculated Petitioner's average weekly wage from Respondent to be $233.49. After adding Petitioner's weekly nanny earnings of $327.50 to that figure, the Arbitrator found Petitioner's AWW for this claim to be $560.99. The Commission, however, views the evidence and calculation of Petitioner's AWW differently than the Arbitrator.

In this case, evidence which would allow the Commission to properly calculate Petitioner's AWW from Respondent was sparse. No wage statement or pay details were offered into evidence. However, Petitioner offered her 2004 W-2 from Respondent, and provided some testimony relative to calculating her AWW.

Petitioner testified that her job at Respondent was seasonal, typically running from May 1st to October 31st of each year. She also testified that she worked for Respondent on Wednesdays, Saturdays and Sundays – usually from 8:00 am to 4:00 pm; or to 4:30 pm, if she took lunch.

We find Petitioner's usual workweek at Respondent consisted of three 8-hour days. There were 20 days Petitioner worked between May 1, 2004 and her June 13, 2004 accident: six Wednesdays, seven Saturdays, and seven Sundays. Per Petitioner's W-2, she was paid $3,813.92 from Respondent for the 2004 calendar year. Although Petitioner testified her $3,813.92 earnings from Respondent included pay for working 5 days *after* her accident, she acknowledged that she was paid the same amount for working on those days. Thus, we find Petitioner worked a total of 25 days for Respondent in 2004, for which Respondent paid her $3,813.92, or $152.56 per day.

We find Petitioner's AWW from Respondent to be $457.68 per week, based upon her 3-day workweek (3 x $152.56). After adding to that $457.68 figure Petitioner's undisputed, $327.50 AWW from her concurrent nanny job, we find Petitioner's AWW in this case to be $785.18.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's average weekly wage is modified to be $785.18.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits of $471.11 per week for 29.375 weeks, as provided in §8(e) of the Act, because the injuries sustained caused the 12.5% loss of use of the left arm.

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 $13,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

October 13, 2023

MP/mcp
o-09/07/23
068

/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	07WC016166
Case Name	Mary Pat Hannigan v. Westrec Marinas
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Jeffrey Huebsch, Arbitrator

Petitioner Attorney	Jason Carroll
Respondent Attorney	Cristi Nelson

DATE FILED: 12/15/2022

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

/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

Mary Pat Hannigan,
Employee/Petitioner
v.
Westrec Marinas,
Employer/Respondent

Case # **07** WC **016166**

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 28, 2022 and 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. ☒ 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

M. P. Hannigan v. Westrec Marinas, 07 WC 016166

FINDINGS

On **June 13, 2004**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, the average weekly wage was $**560.99**.

On the date of accident, Petitioner was **34** years of age, ***single***, with **0** dependent children.

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

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

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

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

ORDER

Petitioner's claim for temporary total disability benefits is denied.

Petitioner's claim for medical expenses is denied.

Respondent shall pay Petitioner permanent partial disability benefits of $336.59 per week for 29.375 weeks, because the injuries sustained caused the 12.5% loss of the left arm, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner the compensation benefits that have accrued from 6/13/2004 through 5/20/2022, 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.

DECEMBER 15, 2022

Signature of Arbitrator

FINDINGS OF FACT

Petitioner testified via evidence deposition, taken September 23, 2021. (PX 2) The Arbitrator notes that the Parties stipulated that Petitioner was married on the date of accident on the RFH form, but she testified that she was 34 years old and single, with no dependent children on June 13, 2004. (ArbX 1, PX 2) The Arbitrator therefore finds consistent with Petitioner's testimony on the issues of age, marital status and dependency.

On June 13, 2004, Petitioner was employed by Respondent as a tender captain. Respondent was a harbor company and Petitioner's job was to take passengers to and from their private boats (moored in the harbor) from the dock. She had a Coastguard license. She had been employed by Respondent since June of 1996. She worked Wednesday, Saturday and Sunday, 8:00am to 4:00 or 4:30pm. This was a seasonal job, from May 1st to October 31st. At that time, Petitioner was also employed by the Lynch family as a nanny. The Parties agreed that Respondent was aware of Petitioner's employment with the Lynch family.

PX 1 was copies of W-2 forms for Petitioner for 2004 from Respondent and the Lynch family. This was the only wage records submitted by the Parties. Petitioner made $17,030.00 from the Lynch family and $3,813.92 from Respondent in 2004. (PX 1) Petitioner testified that she received full salary from the Lynch family in 2004 and was paid by Respondent for working from May 1, 2004 through June 13, 2004 and for 5 days thereafter through October 31, 2004. After the accident, Petitioner worked at a light duty dispatcher job for the 5 days that she worked in the remainder of the 2004 season.

Petitioner testified that she is right-handed.

The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of her employment by Respondent on June 13, 2004. Petitioner testified that she was tendering and the weather had gotten rough. She was picking people up from their boat. She grabbed onto the sailboat with her left arm extended out. She heard something snap and when she got back to the dock, her hand was numb. Petitioner testified she thinks that the snap occurred in her neck. The numbness was in her left ring and pinky finger. Her fingers and her hand were numb. Her left elbow started to hurt that day or the next day. Petitioner reported the injury to her boss, Nancy David, who told her to ice it. She thinks that she finished out her work day, although her hand was getting more numb. Petitioner did not seek medical attention on that day. She did not think that she was in severe enough pain – "It didn't really hurt." (T. 15)

Petitioner testified that she first sought medical attention on June 17, 2004. She was afraid that she was having a heart attack. She saw her PCP, Dr. Melissa Robledo. The records of Dr. Robledo show that she presented for left arm, elbow, shoulder and back pain and numbness ((-)

upper arm) which started Sunday. The Arbitrator will take judicial notice that June 13, 2004 was a Sunday. The doctor's notes appear to state: "Started from using computer. Carried 8lb bag of ice. Left arm was asleep for 3 hours. Tingling up and down forearm into fingers. Worse when raises arms. C/O left elbow pain and left shoulder pain. Uses left arm at work to pull sailboats." (PX 20, RX 5). Petitioner disputed the reference to computers. She had no idea where the reference to a computer came from. Petitioner said that she told the doctor that her elbow hurt and numbness was getting progressively worse. The physical exam was said to show that Petitioner was in pain. There was no spinal tenderness, with left trapezial muscle spasm and tenderness, causes numbness, left subdeltoid tenderness and left medial epicondyle tenderness with decreased range of motion, especially left elbow flexion. The impression was bursitis, rule out shoulder cuff injury. The plan was: Motrin 800 mg, twice a day, ice, three times a day, stretching, PT and Flexeril. There was no mention of a snap in the patient's neck. (PX 20, RX 5)

Dr. Robledo's records document that Petitioner had left elbow, shoulder and neck pain on July 10, 2004 (seeing worker's (sic) comp MD), July 24, 2004, September 4, 2004, November 13, 2004 and December 4, 2004. The December 4, 2004 chart note has the impression of left elbow tennis elbow (Left elbow hit and now nerve pain exacerbated) and a tennis elbow band/elbow pad was recommended. (PX 20, pp 49-56). She was seen several times in 2005, with no mention of left shoulder, elbow or neck pain. (PX 20, pp 39-48) Pain in the left shoulder and neck was noted on February 8, 2006. (PX 20, pp 37-38)

Petitioner testified that she then began treatment at Mercy Works on June 23, 2004, on a referral from her boss at Westrec. The Mercy Works records show a history of an onset of pain in the left elbow, numbness in the entire left hand initially and later to the left 4th and 5th digits on June 20, 2004. There was no history of a specific event and no history of any snap in the neck. The shoulder exam was benign. The Mercy Works chart references Petitioner's job and that it was particularly windy on the day that her symptoms began. There was tenderness over the left medial epicondyle and tenderness of the ulnar nerve in the ulnar groove of the left elbow with decreased sensation of the left fifth finger and metacarpal, not extending into the forearm. Grip strength was 5/5, bilaterally. The diagnosis was left elbow tendinitis. Petitioner was given a Medrol dosepak, Tylenol #3, an elastic elbow brace and a sling. (PX 3)

Petitioner had follow ups at Mercy Works on June 30, 2004, July 7, 2004, July 9, 2004 and August 3, 2004. The work up was for left ulnar neuritis and left elbow tendonitis. Through Mercy Works, Petitioner was referred to Dr. Heller at Midland Orthopedics. (PX 3)

Petitioner first saw Dr. Heller on July 9, 2004. She presented with severe left elbow pain and left hand burning and tingling in the 4th and 5th digits. The date of onset was June 13, 2004. There was no history of any specific event or of a snap in the neck, although Petitioner's written history was: "Driving a boat at work, carrying passengers to their private boats during a busy, windy day while holding on to another boat w/arm, it started to hurt then went numb." (PX 4,

p4) Dr. Heller documented that Petitioner's work duties required continuous utilization of her left elbow in a flexed position. The diagnosis was evidence of ulnar neuritis of the left elbow, which Dr. Heller thought was related to Petitioner's work duties. Dr. Heller recommended an EMG and light duty work. (PX 4)

The EMG was negative for ulnar nerve issues, although the clinical exam was consistent with an ulnar neuropathy. Petitioner had some tenderness in the neck and C4-C5 DDD on x-ray. Dr. Heller thought that Petitioner's symptoms were not consistent with the C4-C5 pathology, but there could be more cervical pathology. Dr. Heller ordered a cervical spine MRI, which was not done, as Petitioner sought treatment with a different orthopod, Craig Williams, MD, at IBJI. (PX 4)

Petitioner chose Dr. Williams on her own, and was first seen by him on August 11, 2004. Petitioner complained of persistent pain in her left elbow, with numbness in her entire left hand, primarily in the 4th and 5th digits. The date of onset was said to be approximately June 19, 2003, and was related to using increased left arm force while operating a shuttle boat on a windy day, with less than cooperative passengers. There was no history of a specific event and nothing documented about a snap in the neck in the chart note. Dr. Williams' impression was irritability of the ulnar nerve (cubital tunnel syndrome or ulnar neuropathy) and significant medial epicondylitis. Dr. Williams did not think that surgery was appropriate and recommended PT and desk duty work restrictions. (PX 6, pp 48-49)

When seen for follow-up by Dr. Williams on September 1, 2004, Petitioner advised that her left arm numbness and tingling had greatly diminished, the medial epicondylitis was about the same and therapy involving her neck seems to exacerbate the numbness and tingling at the elbow. Dr. Williams thought that there might be some cervical radiculopathy involved, but deferred a work-up in this area if things were getting better. A cervical MRI might be appropriate in the future. On September 22, 2004 improvement was noted. The left arm was generally doing better, the numbness and tingling was better. There were some mild neck symptoms noted. She was to continue light duty and therapy. Dr. Williams saw Petitioner again on December 8, 2004. She was doing pretty well regarding her left elbow, with mild complaints and ulnar nerve symptoms. Petitioner was to continue light duty and HEP, with follow up in April to see if she could be cleared to return to the tender captain job. (PX 6, pp 44-47)

Petitioner's last visit with Dr. Williams was on April 6, 2005. She was overall doing well, with minor symptoms and increased strength. There was no numbness or tingling in her hand. She was said to have near resolution of symptoms, ongoing epicondylitis. The elbow exam showed full flexion and extension, no tenderness over the medial epicondyle, but minimal pain with resisted pronation. She had an excellent grip. There was no mention of any neck complaints or findings at that time. Petitioner was released to full duty work and was to be seen prn. (PX 6, p 43)

Petitioner testified that she had headaches and left arm and hand symptoms throughout 2005-2006.

Petitioner was next seen by Dr. Jeffrey Visotsky at IBJI on December 22, 2006. The history was of new left shoulder pain, with burning pain down her arm and pain radiating up in the paracervical area, ongoing for 3 or 4 weeks. There was dysesthesias radiating down to her left 4th and 5th fingers. Physical exam revealed a positive Spurling's test and some shoulder findings. Dr. Visotsky noted that Petitioner had significant osteopenia. His impression was partial thickness RTC tear and C5-6 and C6-7 focal disc herniation. Cervical and left shoulder MRIs were ordered. The shoulder MRI did not reveal RTC tears or labral pathology. The cervical MRI showed moderate spondylolisthesis C3-C4 to C6-C7, with moderate narrowing at C5-C6. Dr. Visotsky recommended a consult with a spinal surgeon. (PX 6, pp 41-42)

Petitioner was seen by Dr. Christopher Bergin on January 12, 2007. Dr. Bergin charted that the patient was being seen for neck pain radiating to the left upper extremity from the trapezius into the shoulder, down the posterior and lateral arm to the dorsal forearm to the radial three and a half fingers, which has been ongoing since a work injury on June 19, 2004. She was treated for cubital tunnel syndrome that gradually got better. She has always had this neck pain radiating to the left upper extremity since the injury and she thinks that it is getting worse. Dr. Bergin recommended a neurologic consult with Dr. Reichitsky. The EMG showed mild CTS, and left C5 and C6 radiculopathy. (PX 6, p 38, 40)

The IBJI records contain several "Adult Medical History" forms filled out by Petitioner. (PX 6, pp 110-125) The form that she filled out on 8/11/2004 for Dr. Williams shows that Petitioner has been a smoker for 15 years. Her presenting problem was left elbow pain, some numbness in last 2 fingers, which began 6/19/04. It was the result of an injury-"Driving a boat as my job on a windy day boarding passengers from their boat, my arm was snapped down and immediate pain & numbness in hand." (p 123) The form filled out for Dr. Visotsky on12/22/2006 says that she is presenting for left shoulder pain of 3 weeks duration. She could not remember if this was related to an injury. She had been seen in urgent care and received a shot of Toradol. (p 120) The 1/12/2007 form for Dr. Bergin says that she is presenting for neck and left shoulder pain, not related to an injury, that began 5 weeks ago. She had an adjustment from a chiropractor that made her severely worse, so she went to the ER and was given Flexeril. (p 117) The history form for a Dr. Bergin post-op visit on 5/6/2008 sets forth an injury date of 6/13/03. (p114) The form for 1/12/2010 sets forth an onset/injury date of 6/13/04. (p 110)

Petitioner had follow-up care for cervical radiculopathy from Dr. Bergin (pain management by Dr. Konowitz) which resulted in 6 cervical spine surgeries, done with Dr. George Bovis, a neurosurgeon. The first procedure was an anterior cervical discectomy at C4-C5 and C5-C6 on April 13, 2007. (PX 6, p 70) The second procedure was a posterior fusion from C3 to C6 on December 18, 2008. (PX 6, pp 66-69) Prior to the second procedure, Petitioner presented to Dr. Bergin on October 3, 2008, with right upper extremity and neck pain that was exacerbated by

heavy lifting at new employment by a daycare facility. (PX 6, p 25) The third procedure was an anterior cervical discectomy and fusion at C6-C7, on July 7, 2011. (PX 14 pp 210-215) The fourth procedure was a posterior decompression and fusion at C6-C7, due to a non-union of the prior C6-C7 fusion, performed on August 15, 2012. (PX 19, p 31) The fifth procedure was done on May 21, 2013, involving removal of all of the instrumentation at C6-C7 with repair of the pseudoarthrosis and anterior cervical discectomy and fusion from C7-T1, including anterior instrumentation at C6-T1. (PX 10, pp 47-50) The last procedure was done on September 12, 2013, and consisted of a posterior fusion at C6-C7 and C7-T1. (PX 14, pp197-198)

Petitioner had follow-up care with Dr. Bergin, who ordered a FCE, performed on March 26, 2019. The FCE was said to be valid and placed Petitioner at light demand capacity, sedentary for lifting above the shoulder. (PX 12) Petitioner underwent pain management with Dr. Adanin. (PX 11) She currently sees Dr. Adanin about two times a year.

Petitioner testified that she has pain in her neck. She gets headaches. She takes OTC Ibuprofen. Her activities are limited. She receives SSDI benefits. She has not had any neck injuries subsequent to June 13, 2004. Petitioner attempted to work at Respondent in 2005 and 2006. She worked for the Lynch family in 2006. She testified that she worked at a daycare job in 2006 and 2007.

Petitioner was seen by an orthopedic surgeon, Dr. Mark Cohen, for a §12 exam on January 14, 2005. Dr. Cohen noted a largely benign left elbow and left upper extremity exam. There was tenderness over the pronator teres area and complaints of significant medial elbow pain during the moving valgus test. There was no mention of any cervical complaints or findings. Dr. Cohen thought that Petitioner might have stretched or injured the medial collateral ligament and suffered an acute stretch injury to the ulnar nerve as a result of the described 6/13/2004 injury (armed pulled when operating a boat, no mention of neck problems or a snap in the neck). Dr. 12Cohen endorsed causation and thought permanency was unlikely, due to the extent of Petitioner's recovery noted at the time of the exam. (RX 1)

Petitioner was also examined by Dr. Jesse Butler, an orthopedic spinal surgeon, pursuant to §12. The exam took place on January 11, 2013. Dr. Butler testified via evidence deposition on June 11, 2014. (RX 2) Dr. Butler is a board certified orthopedic surgeon, specializing in spinal surgery. Dr. Butler's diagnosis was degenerative disc disease in the cervical spine. The etiology for this condition was preexisting. The medical records do not suggest a work injury to Petitioner's neck. (25) The initial diagnosis was left elbow tendonitis. There was no evidence of neck pain or cervical radiculopathy in the initial records. The first EMG did not show cervical radiculopathy. There was no treatment from April 6, 2005 to December 22, 2006. The treatment to the cervical spine is not related to the work accident. Any disability to the cervical spine is not related to the work accident. (26-27) Dr. Butler noted that when Petitioner presented to Dr. Visotsky in December of 2006, it was for a new problem. Dr. Butler testified

that Dr. Bergin's statement that Petitioner had neck pain since the injury is not borne out by his review of the records.

On cross-examination, it was noted that there were cervical spine findings noted by Dr. Heller on 8/4/2004 and by Dr. Williams charted the possibility of cervical radiculopathy. Dr. Butler noted that on April 6, 2005 Dr. Williams noted the patient had improved, with minor symptoms such that she could return to work at full duty and was to return as necessary. Then there was no treatment until 12/22/2006. At that time, she had left shoulder complaints and findings more consistent with cervical issues, as opposed to the prior ulnar nerve issues.

On redirect, it was noted that at the time of the release from care in April of 2005, there was no evidence of intractable neck pain. The 18 month gap in treatment indicates that whatever symptoms Petitioner had were tolerable. (48)

Dr. Bergin testified via evidence deposition on April 9, 2014. (PX 19, RX 4) Dr. Bergin is a board certified orthopedic surgeon, concentrating on spinal surgery. He testified that he first saw Petitioner on January 12, 2007. The history was of neck pain radiating to the left upper extremity since a work injury of June 2004. Dr. Bergin diagnosed cervical radiculopathy and sent Petitioner to a neurologist, Dr. Rechitsky, for an EMG. In follow-up, the diagnosis was refined to cervical spinal stenosis with left C5-6 radiculopathy. Thereafter, Dr. Bergin performed an ACDF at C4-5 and C5-6 on April 13, 2007. Dr. Bergin also described the subsequent five neck surgeries, the last occurring on September 12, 2013. At the time of the deposition, Petitioner's radicular complaints were gone. She just had muscular pain. It was Dr. Bergin's opinion that her current condition of ill-being was causally related to the June 13, 2004 work accident in that her C5-C6 radiculopathies which were secondary to stenosis were aggravated. The adjacent surgical procedures were related to the number one procedure. Dr. Bergin agreed that between April 6, 2005 and December 22, 2006 Petitioner did not require surgery.

CONCLUSIONS OF LAW

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

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

To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of her claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between her employment and her injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989)

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

WITH RESPECT TO ISSUE (F), IS PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS:

Petitioner's current condition of ill-being is, in part, causally related to the injury.

The Arbitrator finds that Petitioner's current condition of ill-being regarding her left elbow (to wit: left ulnar neuropathy and left medial epicondylitis, as is documented by Dr. Cohen and Dr. Williams, at MMI as of April 6, 2005) is causally related to the injury. This finding is based upon the records of Mercy Works, Dr. Heller and Dr. Williams, along with the report of Dr. Cohen.

The Arbitrator finds that Petitioner's current condition of ill-being regarding her cervical spine (Cervical radiculopathy, secondary to stenosis leading to 6 neck surgeries) are not causally related to the injury.

Accident was stipulated to. The medical records through April 6, 2005 (the date that Dr. Williams released her to full duty, prn, regarding her left elbow, with no complaints of numbness or tingling in the LUE and no neck complaints or findings being noted) show that the focus of the treatment was to the left elbow and ulnar nerve and there were minor neck complaints, which were not pursued (a cervical MRI was considered, but not followed up on). Thereafter, there is an 18 month gap in treatment after which left shoulder and cervical spine treatment is pursued. The gap in treatment is fatal to any claim for cervical injuries.

Further, Dr. Butler's opinions are more persuasive than the opinions of Dr. Bergin and are more consistent with the evidence adduced. The premise of Dr. Bergin's opinion is that Petitioner always had neck pain that radiated to her LUE after the accident and that is not what the medical records show. As Dr. Butler noted, the initial records do not support the presence of ongoing neck pain after the June 13, 2004. Dr. Butler's opinion is correct. Petitioner's DDD condition of the cervical spine that led to the surgeries preexisted the injury and causation by aggravation is negated by the 18 month gap in treatment.

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

The wage evidence that was submitted does not allow a determination of the earnings for the 52 weeks preceding the accident date, as required by §10 of the Act. (PX 1)

The Arbitrator's finding on this issue is that the AWW is $560.99.

First, Petitioner's AWW for her employment by the Lynchs is $327.50 ($17,030.00 divided by 52). As to the AWW for her employment by Respondent, the Arbitrator finds that the AWW is $233.49. The calculation is as follows: $3,813.92 wages for May 1, 2004 through June 13, 2004 plus five post accident days worked. May 1 through June 13 is 44 days. The work week was described by Petitioner as being 3 days (Wednesday, Saturday and Sunday). $3,813.92 divided by 49 is 77.83 (daily rate) times 3 (number of days per week customarily worked) equals $233.49. $233.49 plus $327.50 equals $560.99.

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:

Petitioner's claimed bills are for services rendered after she reached MMI and was released from care from Dr. Williams (April 6, 2005). Based upon the Arbitrator's finding on the issue of causation, above, the claimed bills are denied.

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

Petitioner's claim for TTD begins April 13, 2007. Based upon the Arbitrator's finding on the issue of causation, above, the claim for TTD is denied.

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

The records establish that Petitioner suffered an injury to his left elbow (medial epicondylitis) and ulnar nerve instability/neuropathy as a result of the June 13, 2004 work accident. She was found to be at MMI and released prn by Dr. Williams as of April 6, 2005. She had full range of motion, good grip strength and mild epicondylitis symptoms.

Based upon the above, the Arbitrator finds that as a result of the injuries sustained Petitioner suffered the 12.5% loss of use of her left arm.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC022825
Case Name	Todd Skipworth v. Pioneer Oil Company
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0441
Number of Pages of Decision	17
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Richard Johnson
Respondent Attorney	Justin Nestor

DATE FILED: 10/13/2023

/s/Carolyn Doherty, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TODD SKIPWORTH,

Petitioner,

vs. NO: 21 WC 22825

PIONEER OIL COMPANY

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission writes additionally on the issue of prospective care to clarify that Respondent shall authorize and pay for a pre-surgical EMG and cervical spine surgery involving the C4-C5, C5-C6, and C6-C7 levels recommended by Dr. Taylor, as well as the reasonable and necessary care attendant thereto.

The Commission also writes additionally to clarify the Arbitrator's award of TTD credit to Respondent. In affirming and adopting the Arbitrator's award of a credit for TTD benefits already paid, the Commission observes that at trial the parties stipulated that Petitioner was entitled to TTD benefits for the periods from February 27, 2019 through April 9, 2019, and from June 28, 2019 through August 11, 2019, a total of 12 and 3/7ths weeks, and that said paid TTD and credit applies to that stipulated period. Arbitrator's Exhibit 1.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 2, 2023, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for a pre-surgical EMG and cervical spine surgery involving the C4-C5, C5-C6, and C6-C7 levels recommended by Dr. Taylor, as well as the reasonable and necessary care attendant thereto.

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

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

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

Bond for the removal of this cause to the Circuit Court is hereby fixed at the sum of $7,000.00. 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.

October 13, 2023
o: 10/05/23
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	21WC022825
Case Name	Todd Skipworth v. Pioneer Oil Company
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Richard Johnson
Respondent Attorney	Timothy Alberts

DATE FILED: 2/2/2023

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

/s/ Jeanne AuBuchon, 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)

Todd Skipworth
Employee/Petitioner

v.

Pioneer Oil Company
Employer/Respondent

Case # **21** WC **22825**

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 **Jeanne L. AuBuchon**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **September 14, 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, **02/26/2019**, 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 $**72,594.04**; the average weekly wage was $**1,192.56**.

On the date of accident, Petitioner was **55** 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 $**11,572.99** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $.

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

ORDER

Respondent shall pay reasonable and necessary medical services as listed in Petitioner's Exhibits 7 and 8, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall provide authorization and pay for prospective medical treatment as recommended by Dr. Taylor, including further evaluation, diagnostic testing, treatment, surgical intervention and follow-up care pursuant to 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.

Jeanne L. AuBuchon

Signature of Arbitrator

FEBRUARY 2, 2023

ICArbDec19(b)

PROCEDURAL HISTORY

This matter proceeded to trial on September 14, 2022, pursuant to Sections 19(b) and 8(a) of the Illinois Workers' Compensation Act (hereinafter "the Act"). The issues in dispute are: 1) the causal connection between the accident and the Petitioner's current cervical spine condition; 2) average weekly wage; 3) payment of medical bills on and after November 11, 2021; and 4) entitlement to prospective medical care to the Petitioner's cervical spine.

FINDINGS OF FACT

At the time of the accident, the Petitioner was 55 years old and employed by the Respondent repairing and maintaining equipment in the field. (T. 12) He testified that the wages he earned in the 52 weeks prior to the accident were for 3,100 hours – all of which were mandatory. (T. 13) He was earning $20.00 per hour for regular duty. (RX6) On February 26, 2019, he was involved in a backhoe accident. (T. 16) He testified that before the accident, he had no problems with his neck other than the normal stiff neck once in a while. (T. 33)

After the accident, the Petitioner went to the emergency room at Good Samaritan Hospital and complained of headache and some burning and pins and needles sensations in the back of his hands. (PX1) He denied neck pain or loss of consciousness. (Id.) A cervical MRI showed moderate to severe spinal canal stenosis (narrowing of the space occupied by the spinal cord) at C5-6 from a broad-based central disc protrusion with endplate osteophyte (bone spur at the top or bottom edges of the vertebrae), contacting the spinal cord. (Id.) A CT scan showed degenerative chronic changes but no acute-appearing bony abnormality. (Id.) He was diagnosed with cervical disc herniation, given intravenous pain medicine and transferred to Deaconess Hospital. (Id.)

At Deaconess Hospital, the Petitioner complained of minor neck pain but significant pain in his hands. (PX2) He was diagnosed with hyperesthesis (increased sensitivity to stimulation)

and moderate to severe spinal canal stenosis at C5-6 for a broad-based central disc protrusion. (Id.) He was admitted to the hospital for a neurosurgery consult. (Id.) Neurosurgeon Dr. Harold Cannon found the Petitioner would require outpatient surgery, which was scheduled for March 14, 2019. (Id.) The Petitioner was instructed to wear a cervical collar at all times. (Id.)

On March 7, 2019, the Petitioner saw Dr. John Grimm, an orthopedic surgeon at Tri-State Orthopaedics, and complained of neck and bilateral hand pain and hypersensitivity. (PX3) He was diagnosed with subacute cervical radiculomyelopathy syndrome (pain, weakness or reduced reflexes that follow the path of nerves that come from the neck region) secondary to herniated nucleus pulposus (HNP – herniated disc) at C5-6 with pre-existing spondylosis (abnormal wear on the cartilage and bones) at C4-5 and C5-6 with spinal stenosis. (Id.) Dr. Grimm recommended an anterior corpectomy (removing the front part of the vertebra) at C5 with anterior cervical decompression and fusion from C4 to C6. (Id.) The surgery was delayed because the Petitioner started to show significant improvement in his symptoms – only having numbness and tingling between the second and third digits of his hands and a little bit of fingertip numbness on the pointer fingers primarily. (Id.) On April 4, 2019, he was allowed to return to work with restrictions. (Id.) He was then released to work without restrictions on April 22, 2019. (Id.)

The Petitioner testified that when he went back to work, he started noticing problems – burning and over-sensitivity in his hands, lack of feeling in the back of his hands and muscle atrophy in his right arm. (T. 22) He returned to Dr. Grimm on May 23, 2019, and reported hyperesthesia up both forearms on the radial aspect ad in the right index and long fingers. (PX3) Dr. Grimm put the Petitioner on light duty status, ordered another MRI and recommended surgery. (Id.) After reviewing the MRI on June 14, 2019, Dr. Grimm again recommended surgery. (Id.)

Dr. Grimm performed a cervical discectomy and interbody fusion of C5-6 on June 28, 2019. (Id.) At follow-up visits with Dr. Grimm, the Petitioner's symptoms improved, with some residual numbness and tingling in the index fingers. (Id.) In phone calls with Dr. Grimm's office, the Petitioner reported increased symptoms. (Id.) On August 8, 2019, he reported residual numbness and tingling and some atrophy of the right mobile wad (forearm muscles). (Id.) He was released to work without restrictions starting August 12, 2019. (Id.) The Petitioner said Dr. Grimm retired shortly after his surgery. (T. 23) The Petitioner said he returned to work on August 12, 2019, and began having more symptoms, causing him to return to Dr. Grimm's practice, where he saw Dr. Jason Conaughty. (T. 23-24, PX3)

On August 19, 2019, the Petitioner saw Dr Conaughty and reported issues with right upper extremity radiculopathy and radicular weakness, particularly in the biceps, that had not resolved after the surgery. (PX3) Dr. Conaughty diagnosed delayed union of the fusion and recommended nerve studies and an MRI to see if there is any retained disc fragment or persistent stenosis that would prevent the Petitioner from recovering fully. (Id.)

The nerve studies and MRI were performed on October 9, 2019. (Id.) The nerve conduction studies (NCS) were normal, but the electromyography (EMG) of the right arm showed evidence consistent with a chronic right-sided cervical radiculopathy – likely at the C6 level – with evidence of mild reinnervation (restoration of function). (Id.) The MRI showed cervical spondylosis and overall small canal with moderate narrowing at C4-5 and C6-7 and moderately severe right foraminal narrowing (narrowing of the space occupied by nerves exiting the spinal cord) at C4-5. (Id.)

On October 21, 2019, the Petitioner returned to Dr. Conaughty, who read the MRI as showing: age expected degenerative changes with some disc loss of height and facet arthropathy

(arthritis affecting the joints of the spine); no evidence of acute spinal infection, fracture or tumor; no evidence of high-grade stenosis or acute disc herniation; and post-surgical changes at C5-6 with no evidence of recurrent/persistent disc herniation or severe foraminal stenosis. (Id.) He diagnosed the Petitioner with persistent C6 radicular symptoms that he characterized as mild to moderate. (Id.) Dr. Conaughty found that the Petitioner being four months out from surgery would place him at "medically stationary" and gave an 8 percent permanent total body impairment. (Id.)

The Petitioner testified that as he continued to work, he noticed a gradual progression of symptoms – with his right arm getting worse and developing symptoms in his left hand. (T. 25) On November 26, 2019, the Petitioner reported to Dr. Conaughty's office that he was having cold sensitivity in both hands/fingers. (PX3) Dr. Conaughty verified that this was not something for which he would see the Petitioner and suggested getting approval from the insurance adjuster for physiatry or pain management for residual issues. (Id.)

The Petitioner underwent physical therapy at St. Vincent Occupational Medicine Clinic on February 13, 2020, but apparently did not return, as there were no other visit notes presented. (PX4) At his last contact on March 30, 2020, he reported the increased sensation had lessened some and his grip strength increased but still felt his right side was weaker than the left. (Id.) He was discharged and referred to orthopedics. (Id.)

On November 24, 2020, the Petitioner underwent a Section 12 examination by Dr. Robert Bernardi, a spinal neurosurgeon at Olive Surgical Group. (RX3) After reviewing medical records and imaging studies and examining the Petitioner, Dr. Bernardi diagnosed congenital stenosis, multilevel degenerative disc disease, multilevel foraminal stenosis, multilevel degenerative/congenital central stenosis, status post C5-6 decompression/fusion and central cord syndrome. (Id.) He stated that the medical records strongly suggested a causal relationship

between the accident, the Petitioner's central cord syndrome and the surgery that was required to address it. (Id.) He said the Petitioner hyperextended his cervical spine, reducing the spine's canal diameter sufficiently to transiently compress and contuse his spinal cord. (Id.) He said the subsequent evolution of symptoms was quite typical for this type of spinal cord injury. (Id.) He said that although the Petitioner recovered much more function than many with such an injury, most people are left with some permanent signs and symptoms, and his objective findings regarding the Petitioner support his symptoms. (Id.) Dr. Bernardi determined that the Petitioner's symptoms were causally related to the accident and the treatment to date was reasonable, appropriate and causally related to the work injury. (Id.) He said the work accident aggravated the Petitioners pre-existing but previously quiescent central stenosis in such a manner as to produce a central cord syndrome, transient quadriparesis and the residual forearm and hand symptoms the Petitioner reported. (Id.) He believed the Petitioner should have additional diagnostic testing and may require additional treatment, based on the results. (Id.) He did not believe the Petitioner had reached maximum medical improvement. (Id.)

X-rays and an MRI were performed on January 10, 2021, and Dr. Bernardi issued a supplemental report that day stating that it did not appear that the symptoms the Petitioner described were a manifestation of spinal cord compression. (Id.) He stated that while the Petitioner's spinal canal was congenitally small, there was no stenosis at the levels next to the fusion. (Id.) Dr. Bernardi recommended at CT scan to assess the status of the Petitioner's fusion, noting that micromotion at C5-6 coupled with foraminal narrowing as see on the MRI could have been irritating the C6 nerve roots and producing the symptoms. (Id.)

Dr. Bernardi issued another addendum on June 5, 2021, after having reviewed a CT scan performed on May 12, 2021. (Id.) He said the fusion looked to be solid but noted degenerative

changes affecting the atlantodental articulation (movement of the joint between the first and second cervical vertebrae). (Id.) He also noted multilevel disc and facet disease most pronounced at C6-7, where it was severe and manifested by loss of height, spurs and subchondral cysts (cysts in the layer of bone just below the cartilage) (Id.) He noted congenital stenosis. (Id.) Dr. Bernardi concluded that the Petitioner's arm complaints were the manifestation of intrinsic spinal cord damage. (Id.) He expected the symptoms would improve with time, with some days being up and some days down but generally trending in the upward direction. (Id.) He did not think another operation would be of any benefit and believed the Petitioner reached maximum medical improvement from a surgical perspective. (Id.) He said it was possible that the Petitioner would benefit from an anti-neuropathic agent, such as gabapentin, Lyrica, Cymbalta or Elavil. (Id.)

The Petitioner testified that since June 2021, his symptoms were still progressing, and he noticed them when bouncing around while operating equipment. (T. 29-30)

On November 11, 2021, the Petitioner saw Dr. Brett Taylor, an orthopedic surgeon at Town & Country Crossing Orthopedics, and reported 10 percent neck pain and 90 percent arm pain, with the arm pain being 60 percent in the right and 40 percent in the left in the upper arms, forearms, hands and fingers. (PX5) He said moving the neck sometimes worsens the pain and there was weakness in the forearms, hands and fingers and numbness in the forearms, index fingers and long fingers. (Id.) He perceived the effect of surgical treatment was much worsened. (Id.) Dr. Taylor reviewed the Petitioner's medical records, performed an examination and reviewed the imaging studies. (Id.) He diagnosed the Petitioner with mild cervical myelopathy (injury to the spinal cord) with adjacent segment critical stenosis at C4-5 and C6-7. (Id.) He opined that the work accident was the primary causative factor in the Petitioner's current symptomology. (Id.) He said the surgery did not address the totality of the Petitioner's cervical critical stenosis. (Id.) He stated

that in his practice, the adjacent C4-5 and C6-7 levels would have been included in the surgery. (Id.) He said the Petitioner's congenital stenosis placed him at an increased risk to require a posterior decompressive procedure to fully decompress the neural elements. (Id.) He recommended nerve studies and X-rays and consideration of diagnostic injections. (Id.)

On January 3, 2022, the Petitioner underwent X-rays at Professional Imaging that showed no acute bony abnormality, complete fusion at C5-6 without evidence of hardware failure, moderate to severe C6-7 degenerative disc disease and mild C3-4 and C4-5 degenerative disc disease. (Id.) On January 20, 2022, the Petitioner underwent right and left C4-5 transforaminal cervical epidural steroid injections. (Id.) On January 26, 2022, the Petitioner reported improvement in his symptoms. (Id.) On February 18, 2022, he underwent a C6-7 cervical epidural steroid injection. (Id.) Dr. Taylor reported that the injections confirmed clinically significant pathology at C4-5 and C6-7. (Id.) He said the Petitioner's objective weakness in his right upper extremity, subjective complaints consistent with the 4-5 and C6-7 levels and responses to the injections confirmed that revision surgery was the only indicated course of treatment. (Id.) He again recommended nerve studies before surgery, but those had been denied. (Id.)

Dr. Taylor testified consistently with his records at a deposition on June 2, 2022. (PX6) He said he was recommending surgical repair of the C4-5, C5-6 and C6-7 levels that were clearly pathologic. (Id.) He explained that the pathology at the adjacent levels to the fused levels predated the surgery and said the prior surgery was inadequate because it did not address the other pathologic levels. (Id.) He said the likelihood of the Petitioner improving with conservative care was "nil." (Id.) He said there is no spontaneous resolution of the Petitioner's progressive neurologic deficit short of surgical intervention. (Id.) He opined that the need for revision surgery was causally related to the work accident. (Id.)

Dr. Bernardi testified consistently with his reports at a deposition on July 15, 2022. (RX1) He said the Petitioner's symptoms at the time of his last report were related to the work accident. (Id.) He didn't think the Petitioner's residual burning symptoms would ever go away completely. (Id.) He said the aggravation of the Petitioner's pre-existing conditions that he referred to in his report was permanent. (Id.) On cross-examination, Dr. Bernardi acknowledged that he had not reviewed Dr. Taylor's records. (Id.) He agreed the Petitioner seemed to be an honest individual representing his symptoms accurately. (Id.)

The Petitioner testified that his usual work involves lifting 50-150 pounds, being on his feet 90 percent of the time, being in awkward positions, bending or stooping, using various hand tools and cutting fuses on power poles with a 40-foot "hot stick." (T. 14-15) He said he wants to undergo the surgery because of the progression of his symptoms and worry about what it's going to be like in five years. (T. 32) He said he was still experiencing sensitivity and lack of strength in both arms. (Id.) He said his hands are shaky, while they were not before. (Id.) He said his arms start tingling and go numb when he uses the "hot stick." (T. 33)

CONCLUSIONS OF LAW

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

Issue (F): Is Petitioner's current condition of ill-being, specifically her cervical spine condition experienced after September 9, 2018, causally related to the accident?

An accident need not be the sole or primary cause as long as employment is a cause of a claimant's condition. *Sisbro, Inc. v. Indus. Comm'n,* 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill.Dec. 70 (2003). An employer takes its employees as it finds them. *St. Elizabeth's Hosp. v.*

Workers' Comp. Comm'n, 371 Ill.App.3d 882, 888, 864 N.E.2d 266, 309 Ill.Dec. 400 (5th Dist. 2007). A claimant with a preexisting condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Comm.,* 92 Ill. 2d 30, 36, 440 N.E.2d 861, 65 Ill.Dec. 6 (1982). Employers are to take their employees as they find them. *A.C.& S. v. Industrial Comm'n*, 304 Ill.App.3d 875, 883, 710 N.E.2d 837, 238 Ill.Dec. 40 (1st Dist. 1999)

The doctors agreed that the Petitioner's cervical injury at C5-6 was caused by the work accident. Dr. Bernardi opined that the accident permanently aggravated the Petitioner's pre-existing conditions that included congenital stenosis, multilevel degenerative disc disease, multilevel foraminal stenosis and multilevel degenerative/congenital central stenosis. Dr. Taylor believed the Petitioner also had pathology at the C4-5 and C6-7 levels prior to the surgery that were not addressed by Dr. Grimm. Dr. Bernardi did not review Dr. Taylor's records nor examine the Petitioner since his initial evaluation on November 24, 2020. Thus, there is no evidence to rebut Dr. Taylor's opinion that the Petitioner's current condition is causally related to the work accident.

Therefore, the Arbitrator finds that the Petitioner's current cervical spine condition is causally related to the work accident.

Issue G: What was the Petitioner's Average Weekly Wage?

Pursuant to § 10 of the Act, average weekly wage "shall mean the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury, illness or disablement excluding overtime, and bonus divided by 52…" 820 ILCS 305/10.

The appellate court has defined overtime as including "those hours in excess of an employee's regular weekly hours of employment that he or she is not required to work as a condition of his or her employment or which are not part of a set number of hours consistently worked each week." *Airborne Express, Inc. v. Ill. Workers' Comp. Comm'n*, 372 Ill. App. 3d 549, 554 (1st Dist 2007)

The Petitioner testified that his overtime hours were mandatory. The Arbitrator finds that the mandatory overtime hours the Petitioner worked should be included in calculating his average weekly wage at his normal hourly rate. In the 52 months preceding the accident, the Petitioner worked 3,100.66 hours. At his regular hourly rate, he would have earned $62,013.20 or $1,192.56 per week, which the Arbitrator finds is the Petitioner's average weekly wage.

Issue (J): Were the medical services that were provided to Petitioner from November 11, 2021, forward reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The right to be compensated for medical costs associated with work-related injuries is at the very heart of the Workers' Compensation Act. *Hagene v. Derek Polling Const*., 388 Ill. App. 3d 380, 383, 902 N.E.2d 1269, 1273 (2009).

Dr. Bernardi gave no opinion as to Dr. Taylor's treatment, as he had not reviewed Dr. Taylor's records. Therefore, the Arbitrator finds that the medical services listed in Petitioner's Exhibits 7 and 8 were reasonable and necessary and have not been paid. The Arbitrator orders the Respondent to pay these pursuant to Section 8(a) of the Act and in accordance with medical fee schedules. The Respondent shall have credit for any amounts already paid or paid through its group carrier. The Respondent shall indemnify and hold the Petitioner harmless from any claims arising out of the expenses for which it claims credit.

Issue (K): Is Petitioner entitled to any prospective medical care?

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13 (1997). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 758 N.E.2d 18 (2001).

Dr. Taylor has recommended revision surgery at three cervical levels. In June 2021, Dr. Bernardi opined that the Petitioner did not need further surgery. However, the Petitioner's symptoms continued to worsen since that time. The Arbitrator finds the Petitioner to be credible. Dr. Taylor's opinions deserve greater weight as a treating physician in that he has had more – and more recent – opportunities to become familiar with the Petitioner's condition. An important function of the Act is to give workers the treatment necessary to try to return them to the conditions they were in prior to their work accidents. The Although efforts have been made to return the Petitioner to his pre-accident state, this has not been accomplished, and treatment options have not been exhausted. Therefore, the Arbitrator finds that the Petitioner is entitled to prospective medical care, specifically further evaluation, diagnostic testing and treatment, including surgical intervention and follow-up care as recommended by Dr. Taylor. The Respondent shall authorize and pay for such.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC026214
Case Name	Donald E Strieker v. Knapheide
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0442
Number of Pages of Decision	16
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Richard Day

DATE FILED: 10/13/2023

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

☐ 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

DONALD STREIKER,

Petitioner,

vs. NO: 16 WC 26214

KNAPHEIDE,

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 maintenance and permanent partial disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof.

The Commission writes additionally on the issue of maintenance. The Commission affirms the Decision of the Arbitrator ordering Respondent to pay Petitioner maintenance benefits of $544.61 per week for 64 and 3/7ths weeks, commencing August 14, 2018 (when Respondent suspended benefits) through November 8, 2019 (when Petitioner started working for RailCrew Xpress). The Commission acknowledges that Petitioner did not present job search logs for the period from January 15, 2019 through November 8, 2019. However, Petitioner's testimony that he continued to search for work after the suspension of maintenance is sufficient in this matter and is corroborated by the fact the Petitioner actually found employment with RailCrew Xpress following his search.

The Commission modifies the Decision of the Arbitrator regarding permanent partial disability. The Arbitrator ordered Respondent to pay Petitioner permanent partial disability benefits in the form of a wage differential award. Based on the wage increases provided in the collective bargaining agreement submitted into evidence, the Arbitrator calculated that Petitioner's average weekly wage (AWW) with Respondent would have been $808.40 ($20.21 x 40). The Arbitrator then calculated that what Petitioner could earn with RailCrew Xpress was

$480.00 ($12.00 x 40, based on Petitioner's testimony that he was calling in as available to work Monday through Friday). The Arbitrator then ordered a wage differential award of $218.93 per week, representing two-thirds of the difference between $808.40 and $480.00.

Wage differential awards are governed by Section 8(d)1 of the Act, which provides:

> "If, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall *** receive compensation for the duration of his disability, subject to the limitations as to maximum amounts fixed in paragraph (b) of this Section, equal to 66-⅔% of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident. …" 820 ILCS 305/8(d)1 (West 2022).

The first issue is the calculation of Petitioner's projected AWW had he been able to work as a machine operator for Respondent. In *Franklin County Coal Corp. v. Industrial Comm'n*, 398 Ill. 528 (1947), the court rejected the employer's argument that a wage differential under section 8(d) should be measured solely by gross yearly income. *Id*. at 532. Rather, the court looked to factors such as wage increases, overtime, and increased hours of work. Although *Franklin* interpreted an earlier version of section 8(d), the language "is earning or is able to earn" remains the same. Petitioner calculates that his AWW with Respondent would have been $1,050.90 ($22.60 x 46.5, based on his testimony that he worked that many hours per week for Respondent). The Commission affirms the Arbitrator's calculation of the projected hourly wage of $20.21 ($19.15 x 1.03 x 1.025 per Petitioner's Exhibit 23). Moreover, given that the calculation is to be made pursuant to sections 8 and 10 of the Act, the use of a 40-hour week is correct. See *Franklin*, 398 Ill. At 533-34. Accordingly, the Commission agrees that Petitioner's projected AWW had he been able to work as a machine operator for Respondent was $808.40.

Regarding Petitioner's current earning capacity, as noted above, the Arbitrator calculated Petitioner's earning capacity with RailCrew Xpress was $480.00 ($12.00 x 40, based on Petitioner's testimony). The Commission disagrees. Although there are cases where the Commission may be required to consider a projection of what Petitioner *may be able to* earn, it sees no reason to do so in this case, where the Commission has been provided the records of what Petitioner *actually* earned, reflecting the varied hours worked, wage increases, and a lack of overtime. Petitioner submitted his actual earnings records for 86 weeks prior to the hearing date. Petitioner calculates that his current AWW with RailCrew Xpress is $179.06 ($15,398.84 / 86 weeks, per Petitioner's Exhibit 20). However, given that the calculation is to be made pursuant to sections 8 and 10 of the Act, the Commission looks to the last 52 weeks of wage records submitted by Petitioner, which indicate that he earned $10,393.41 in regular wages. The resulting AWW is $199.87 ($10,393.41 / 52 weeks). The resulting wage differential is $608.13 ($808.40 - $199.87). The resulting wage differential award is $405.42 per week ($608.13 x 0.67).

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 February 28, 2022, is modified as stated herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS FURTHER ORDERED BY THE COMMISSION that shall pay Petitioner permanent partial disability benefits, commencing November 9, 2019, of $405.42 per 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.

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.

October 13, 2023
o: 10/05/23
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	16WC026214
Case Name	STRIEKER, DONALD v. KNAPHEIDE
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Richard Day

DATE FILED: 2/28/2022

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 23, 2022 0.71%

/s/Edward Lee, Arbitrator

Signature

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

☐ 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

Donald Strieker
Employee/Petitioner

v.

Knapheide
Employer/Respondent

Case # **16** WC **26214**

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 **Edward Lee**, Arbitrator of the Commission, in the city of **Quincy**, on **11/3/21**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **4/29/15**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did*** 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 $**28,591.83**; the average weekly wage was $**816.91**.

On the date of accident, Petitioner was **53** years of age, ***single*** with **1** dependent children.

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

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

Respondent shall be given a credit of $**38,907.55** for TTD, $**0** for TPD, $**16,043.48** for maintenance, and $**0** for other benefits, for a total credit of $**54,951.03**.

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

ORDER

The Arbitrator finds that Respondent is entitled to a TTD overpayment of $1,609.29.

Respondent shall pay Petitioner maintenance benefits of $544.61/week for 64 and 3/7 weeks, commencing 8/14/18 through 11/8/19, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits, commencing 11/9/2019, of $218.93/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.

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

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

_Edward Lee_____
Signature of Arbitrator

FEBRUARY 28, 2022

FINDINGS OF FACT

The Petitioner was 53 years old at the time of his accident. He is married and has a 9th grade education. Petitioner has lived in the Quincy, IL area his entire life. (AT p. 7)

On 4/29/15 the Petitioner was employed by the Respondent as a machine operator, a position he had held for 16-17 years. (AT p. 8) Petitioner testified that on 4/29/15 he injured his right shoulder when pulling a sheet of steel. (AT p. 8)

The Petitioner presented to Dr. Pylawka at SIU Healthcare on 5/19/15. The Petitioner presented with a history of doing some activities at work lifting sheet metal and had increased pain in his shoulder. Dr. Pylawka's examination revealed a positive O'Briens test, positive empty can sign, and positive impingement signs for the right shoulder. X-rays were also taken of the right shoulder which revealed no acute abnormality. X-rays of the cervical spine were also taken which revealed spondylosis of the cervical spine without acute fracture. The Petitioner was diagnosed with a suspected partial rotator cuff tear on the right. There was concern that the Petitioner may be suffering from cervical spine pathology as well as right shoulder pathology. As such an MRI of the right shoulder and an MRI of the cervical spine was recommended. (PX 2, PX 3)

The Petitioner underwent MRIs of his cervical spine and right shoulder at Blessing Hospital on 6/22/15. MRI of the cervical spine revealed multi-level cervical spondylosis greatest at C5-6. MRI of the right shoulder revealed post-surgical changes from prior supraspinatus repair with no evidence of full-thickness retear, infraspinatus mild tendinopathy without evidence of full-thickness tearing, intertubercular portion of the long head of the biceps is subluxed medially compatible with disruption of the pulley mechanism, subscapularis moderate tendinosis with interstitial tearing of the superior bundle, mild acromioclavicular osteoarthritis. (PX 3)

The Petitioner followed up with Dr. Pylawka on 6/24/15. This office note indicates that the workers' compensation representatives from the Respondent have requested that if the Petitioner required surgery for his right shoulder that he would have to seek care elsewhere. This record also indicates that Mr. Strieker wished to continue treating with Dr. Pylawka and not seek care elsewhere. The examination of the right shoulder again revealed positive O'Brien's test, positive impingement signs as well as a positive liftoff test. Dr. Pylawka reviewed the MRI which revealed a medial subluxed biceps tendon with subscapularis edema and concern for a subscapularis tear with mild AC joint arthritis. Dr. Pylawka diagnosed the Petitioner with impingement of the right shoulder subluxed biceps tendon and an upper 1/3 subscapularis tear. Dr. Pylawka recommended that the Petitioner undergo surgery on his right shoulder in the form of a rotator cuff repair, subacromial decompression, and a subpec biceps tenodesis. (PX 2)

Dr. Pylawka performed surgery on the Petitioner's right shoulder on 8/20/15. The procedure performed was a subacromial decompression, subpectoral biceps tenodesis, debridement of the suprasinatis cuff, and repair of the subscapularis tendon tear. Pre-operative diagnosis was right rotator cuff tear with subluxing biceps tendon. Post-operative diagnosis was right rotator cuff tear involving the upper 1/3 subscapularis as well as a partial bursal sided tear of the supraspinatus as well as a subluxing biceps tendon. (PX 3)

The Petitioner followed up with Dr. Pylawka on 8/24/15. The Petitioner was doing well and controlling his pain with medication. The Petitioner was to follow up in one week and was given a note to be able to return to work on 9/7/15 with no use of the right arm, continue in a sling and left arm activity as tolerated. It was also noted that the Petitioner was diagnosed as status post right rotator repair involving the subscapularis, a subpec biceps tenodesis and a tear at the musculotendinous junction in the supraspinatus which was nonrepairable. (PX 2)

The Petitioner followed up with Dr. Pylawka on 9/1/15. The Petitioner was continuing to do well. The Petitioner was given a refill of his pain medications and was instructed to be in physical therapy next week. The Petitioner was again continued off work until 9/7/15 at which time his restrictions would be no use of the right arm, continue the sling and using his left arm as tolerated. (PX 2)

The Petitioner began physical therapy on 9/8/15 at Advance Physical Therapy in Quincy. (PX 5)

The Petitioner followed up with Dr. Pylawka on 9/15/15. The Petitioner was to continue in physical therapy and was placed on light duty of no use of the right arm and activities as tolerated with the left upper extremity. (PX 2)

The order for physical therapy and the restrictions were maintained at the time of the Petitioner's 9/29/15 and 10/20/15 visits with Dr. Pylawka. (PX 2)

When the Petitioner present to Dr. Pylawka on 11/9/15 and 12/8/15 it was recommended that he continue physical therapy and his work restrictions stayed the same with no use of the right arm. (PX 2)

When the Petitioner presented to Dr. Pylawka's office on 1/15/16 he indicated that while he was in physical therapy and they were stretching him, he felt a pulling sensation in the right shoulder on the posterior side. Dr. Pylawka's note indicates that she contacted the physical therapy office while the Petitioner was at the office visit and the physical therapy facility confirmed that the Petitioner had extra pain with some of the stretching. The Petitioner was instructed to follow up in 4 weeks and was issued work restrictions of no lifting more than 10 lbs with the right arm. (PX 2)

The Petitioner followed up with Dr. Pylawka on 2/10/16. The Petitioner was continuing to do a home exercise program and reported that his pain had continued to improve. Dr. Pylawka recommended the Petitioner undergo a Functional Capacity Evaluation for his bilateral shoulders. Work restrictions were updated to include no restrictions relative to the left upper extremity and the Petitioner could lift up to 40 lbs with his right upper extremity. (PX 2)

The Respondent then sent the Petitioner for an IME with Dr. Collard on 2/17/16. (AT p. 11; RX 4)

The Petitioner followed up with Dr. Pylawka's office on 3/9/16. The Petitioner reported that he had noticed an increased bulge in his right arm for which he did not remember any trauma and did not have any increased pain. The Petitioner did report that his right shoulder is

still fatigued with extended use. Dr. Pylawka continued to recommend an FCE however this time it was only for the left shoulder. As of 3/9/16 Dr. Pylawka recommended the Petitioner undergo an MRI arthrogram of the right shoulder and issued work restrictions of no lifting more than 20 lbs with the right arm. (PX 2)

The Petitioner underwent an FCE on 4/5/16 at Quincy Medical Group. The Petitioner passed all validity criteria and pain behavior testing. The FCE was considered valid and the Petitioner was able to lift a maximum weight to waist level of 46 lbs bilaterally, 22 lbs with the right arm, and 21 lbs with the left arm as well as maximum lift over shoulder height 35 lbs bilaterally, 15 lbs with the right, and 19 lbs with the left. The Petitioner was noted to meet the material handling demands for a medium demand vocation per the dictionary of occupational titles. (PX 10)

On 4/8/16 the Petitioner underwent the recommended MRI arthrogram of the right shoulder at Blessing Hospital. The impression of this study was interval tenodesis of the long head biceps tendon to the proximal humerus, intra-articular portion of the long head of the biceps tendon now not seen, suture anchor at the insertion of the supraspinatus tendon with development of a partial under surface of the supraspinatus tendon affecting 80% of the diameter of the fibers, blunting of the superior labrum which could reflect postoperative change or focal tear, and increasing interstitial tear of subscapularis tendon at the insertion affecting 80% of the diameter of the fibers. (PX 3)

The Petitioner returned to see Dr. Pylawka on 4/19/16. The Petitioner described continued fatigue with repeated overhead lifting and continued pain which was better than it was prior to surgery. Dr. Pylawka administered a Kenolog injection to the right subacromial space. Dr. Pylawka issued work restrictions of no repetitive lifting over 40 lbs above chest level, to continue home exercise program and follow up in 6 weeks. Restrictions also included no pushing, pulling, lifting more than 45 lbs, no lifting more than 25 lbs overhead repetitively. (PX 2)

The Petitioner followed up with Dr. Pylawka on 5/31/16. The Petitioner continued to complain of right shoulder pain that was about a 3/10. Continued to complain of fatigue in the shoulder with any prolonged activity. Same restrictions were maintained of no lifting more than 45 lbs above his chest and below chest level activity as tolerated. (PX 2)

The Petitioner followed up with Dr. Pylawka on 8/2/16. The Petitioner to continue to complain of having difficulty with repeated overhead lifting motion the right shoulder being the worst. The Petitioner at this time was referred to Dr. Matthew Collard in St. Louis for evaluation of the right shoulder. Restrictions were issued of no lifting, pushing, pulling more than 20 lbs with the right shoulder and no restrictions relative the left shoulder. (PX 2)

The Petitioner then presented to Dr. Greatting at the Springfield Clinic on 9/21/16. The Petitioner provided a history of the accident as well as an outline of the medical care he had underwent for his right shoulder. Dr. Greatting performed an examination. The Petitioner was tender over the anterior shoulder area with limited range of motion as well as a positive Hawkins impingement test. Dr. Greatting opined that the Petitioner clinically likely had a significant

recurrent high grade partial thickness tear of his rotator cuff. Dr. Greatting recommended a right shoulder arthroscopy and probable repair of recurrent right rotator cuff tear. Depending upon the significance of any subscapularis tendon tear, the Petitioner may require open repair of the subscapularis tendon. The Petitioner was continued on his light duty restrictions of no lifting, pushing or pulling over 20 lbs with his right arm and no reaching above shoulder level. (PX 6)

On 3/24/17 Dr. Greatting performed a right shoulder arthroscopy with subacromial decompression and rotator cuff repair. The Petitioner was taken off of work at this time. (PX 7)

The Petitioner followed up with Dr. Greatting's office on 4/6/17. The Petitioner was placed in am immobilizer and was kept off work to follow up in one month. On 5/11/17 the Petitioner returned to Dr. Greatting's office. At which time physical therapy was recommended and the Petitioner was kept off work. (PX 6)

The Petitioner began physical therapy at Advanced Physical Therapy on 5/15/17. (PX 5)

The Petitioner returned to Dr. Greatting on 6/12/17. The Petitioner's pain was well controlled. The Petitioner was returned to work light duty with left-handed work only and was to continue in physical therapy. As of 7/13/17, the Petitioner was still having pain and felt as though his range of motion and strength were improving with therapy. The Petitioner was to continue off of work and to continue in physical therapy. On 8/10/17 the Petitioner reported continued improvement with therapy. The Petitioner was again kept off of work and was to be re-evaluated in 1 month. (PX 6)

The Petitioner followed up with Dr. Greatting's office on 9/11/17. The Petitioner complained of ongoing pain and due to this Dr. Greatting recommended an updated MRI to evaluate the integrity of the rotator cuff repair. The Petitioner was kept off of work. (PX 6)

The Respondent then sent to the Petitioner for an additional IME with Dr. Milne in St. Louis. (AT p. 14) The IME report of Dr. Milne was not admitted into evidence by the Respondent.

The Petitioner underwent an MRI of the right shoulder at Springfield Clinic on 11/17/17. Impression was high-grade partial-thickness articular surface tear of the infraspinatus tendon, low-grade partial thickness tear of the supraspinatus, intra-articular segment of the long head of the biceps tendon not seen, superior labral tear with multiple fixation screws in the humeral head and a fixation screw in the teres minor muscle and tendon. (PX 6)

The Petitioner followed up with Dr. Greatting's office on 11/15/17. Dr. Greatting reviewed the 11/17/17 MRI with the Petitioner. Dr. Greatting opined no further surgical treatment was indicated and the Petitioner was likely going to require permanent restrictions and Dr. Greatting ordered an FCE. (PX 6)

On 12/27/17 the Petitioner underwent an FCE at First Choice Physical Therapy in Quincy. (PX 8)

The Petitioner followed up with Dr. Greatting on 1/24/18. Dr. Greatting reviewed the FCE results with the Petitioner and released him at maximum medical improvement. Dr.

Greatting issued the Petitioner permanent work restrictions of no lifting greater than 25 lbs with the right arm to waist level, greater than 5 lbs to shoulder level, and no lifting above the shoulder level. The Petitioner has not returned to see Dr. Greatting since the 1/24/18 visit. (PX 6)

The Petitioner was paid benefits by the work comp carrier through his release by Dr. Greatting in January 2018. (AT p. 15) The Petitioner was not offered a job by the Respondent within his permanent restrictions. (AT p. 16) The Respondent then hired a vocational counselor, Bob Hammond, to work with the Petitioner in March 2018. (AT p. 16)

The Petitioner met with Mr. Hammond regularly both in person and over the phone. (AT p. 16-17) The Petitioner also met with Mr. Hammonds job developer. The Petitioner testified that he never missed a meeting with Mr. Hammond (AT p. 17) The Petitioner testified that he followed up on all job leads provided by Mr. Hammond (AT p. 17)

The Petitioner confirmed that his wife did help him with his job search, because he has difficulty operating a computer. (AT p. 18) The Petitioner testified that when his wife would help him, he would be operating the computer and she would be showing him how to access the websites, how to find jobs, and sort of coaching him how to use the online job search engines he was using. (AT p. 18) The Petitioner testified that his wife never submitted job applications online for him when he was not present and taking part. (AT p. 18) Prior to beginning his job search, the Petitioner had no prior training on how to search for a job and had never used an online job search engine. (AT p. 19) The Petitioner was not familiar with computers before he began his job search and still does not own a computer of his own. (AT p. 19)

The Petitioner confirmed that Mr. Hammond also provided him with a booklet that included expectations of Petitioner during the job search. (AT p. 19, RX 1 Ex 10 p. 18) These included submitting applications or resumes in person to job leads for prospective employers given to him by Mr. Hammond, which Petitioner did. (AT p. 20) Petitioner also registered at his local Department of Employment Security office. (AT p. 20) Petitioner was prepared to interview with prospective employers. (AT p. 20) Petitioner documented at least 10 employer contacts her week on average. (AT p. 20) Petitioner testified he completed applications for prospective employers truthfully. (AT p. 20) Petitioner informed Mr. Hammond of all interview requests and job offers. (AT p. 21)

Petitioner never used inappropriate speech or cursed at either Mr. Hammond or prospective employers. (AT p. 21) Petitioner never presented to a prospective employer in ratty clothes, with holes in his jeans or shirts, hair a mess, or wore anything with offensive labeling or wording on it. (AT p. 22) Petitioner testified that he gave his best effort in his job search. (AT p. 22) Petitioner never turned down any jobs that were offered to him. (AT p. 22)

Petitioner confirmed that he met with Jim Ragains in November 2018 for some testing. (AT p. 24) At that time Mr. Ragains recommended additional testing with Dr. Trieger, which was later performed. Petitioner testified that he gave full effort on the testing administered by Mr. Ragains and Dr. Trieger. (AT p. 24) Petitioner again met with Mr. Ragains in February 2019, at which time Mr. Ragains opined that a stable labor market did not exist for the Petitioner. (PX 17, 21) Despite that opinion, the Petitioner continued to look for work. (AT p. 25)

Petitioner job search efforts resulted in him later being hired by RailCrew Xpress in November 2019. (AT p. 25) Petitioner was hired to drive railroaders around to different places. (AT p. 26) This job is within Petitioners permanent restrictions and he still held that position as of the date of trial. (AT p. 26) Petitioner admitted into evidence his pay stubs from RailCrew Xpress, which accurately reflect his earnings with them. (AT p. 26, PX 20)

Petitioner maintenance benefits were cut by the Respondent on 8/13/18. (AT p. 27) Petitioner has not received any benefits from the work comp carrier since that time. (AT p. 27) Petitioner has also not received any wage differential benefits from the Respondent since he started working at RailCrew Xpress. (AT p. 27)

When Petitioner was employed by the Respondent he was a member of the District 9 International Association of Machinists and Aerospace Workers union . (AT p. 28) Petitioner was making $19.15 an hour at the time of his 4/29/15 accident. (PX 19) Petitioner submitted into evidence the current collective bargaining agreement between the Respondent and the District 9 International Association of Machinists and Aerospace Workers union. (PX 23) Petitioner received regular annual raises when employed by the Respondent. (AT p. 29) Petitioner estimated that he would be earning over $22 an hour if he was still employed by the Respondent. (AT p. 30) The CBA admitted as PX 23 indicates the Petitioner would receive raises at 2.5-3% annually, which would make his current wage if still employed by the Respondent to be $22.60 an hour. (PX 23 p. 30-32) Petitioner testified that he worked between 45-48 hours a week when he was employed by the Respondent. (AT p. 30) Petitioner currently earns $12 an hour working for RailCrew Xpress (AT p. 31)

Petitioner testified that his right shoulder still bothers him. Petitioner does not believe he could do his original job with the Respondent due to the ongoing issues he has with his right shoulder. (AT p. 30) Petitioner is right hand dominant, (AT p. 72)

The Petitioner's wife, Kristy Strieker was called to testify at trial. Mrs. Strieker confirmed that she did help Petitioner with his job search. She testified that they sat at a computer desk together and submitted applications online. (AT p. 75-76) Mrs. Strieker testified that she never submitted applications for Petitioner without him being present. (AT p. 77)

Mr. Jim Ragains testified via evidence deposition on 8/21/20. (PX 21) Mr. Ragains is a certified rehabilitation counselor. Mr. Ragains has a Bachelor's degree is Psychology from Georgetown College and a Masters degree in Education with an emphasis on vocational rehabilitation. (PX 21 p. 8-9) Mr. Ragains spent his entire career working in the field of vocational rehabilitation.

Mr. Ragains first met with the Petitioner on 11/19/18 to administer academic achievement and intelligence testing. Mr. Ragains administered the Wide Range Achievement Test (WRAT) and the Slosson Intelligence Test (SIT-R). The testing performed by Mr. Ragains showed the Petitioner could read, write, and perform arithmetic only at grade school levels. Intelligence testing showed that the Petitioner is a slow learner with below average intelligence. Based on the results of the testing perform, Mr. Ragains did not believe the Petitioner could pass

a GED test. Mr. Ragains recommended the Petitioner undergo additional testing with a doctorate level psychologist. (PX 16)

The Petitioner did undergo additional testing with Dr. Michael Trieger on 1/7/19. Dr. Trieger administered the Wechsler Adult Intelligence Scale (WAIS) test. The Petitioners results from the WAIS test revealed that Petitioner has below average intelligence and would have significant difficulty studying for and passing a GED test. (PX 15) Dr. Trieger also testified via evidence deposition on 11/8/19. (PX 22)

Mr. Ragains saw the Petitioner again on 2/13/19 for a full vocational assessment. At this time Mr. Ragains took extensive background, psychosocial, educational, training, and vocational information from the Petitioner. Mr. Ragains was also aware of the Petitioners medical status including his permanent work restrictions. Mr. Ragains performed a transferable skills analysis. Mr. Ragains concluded that a stable labor market did not exist in which Petitioner might find suitable, gainful employment. Mr. Ragains based this opinion on Petitioner's age, his permanent work restrictions, his work experience, his lack of transferable skills, his limited education and intelligence level, and his good faith job search effort. Mr. Ragains further believed that the Respondent was wrong in cutting Petitioner's maintenance benefits and opined that Petitioner had in fact put a good faith effort towards his job search. (PX 17)

Mr. Bob Hammond also testified via evidence deposition on 9/15/20 as Respondent's vocational counselor. (PX 1) Mr. Hammond is a vocational consultant and is certified in the field of vocational rehabilitation.

Mr. Hammond was hired by the Respondent to provide Petitioner with vocational rehabilitation. Mr. Hammond initially met with the Petitioner on 3/20/18. Mr. Hammond was to provide placement services and assist Petitioner in finding new work. Mr. Hammond agreed that Petitioner was unable to return to his prior job as a machine operator with the Respondent. (RX 1, Ex 2)

Mr. Hammond determined that a major issue affecting Petitioner's employability was his lack of a GED and acknowledged that by May 2018 the Petitioner had begun preparing to take the GED. (RX 1, Ex 3) However, contrary to the Act Mr. Hammond informed the Petitioner that he would have to pay to take the GED test. (RX 1, p. 113) Once Petitioner was wrongfully informed that he would have to pay for the GED test himself, he stopped his test preparation.

Mr. Hammond testified the Petitioner has a 9th grade education, and no training outside of the work he performed for the Respondent. (RX 1, p. 83-84) Mr. Hammond testified the Petitioner had no issues attending meetings. Petitioner was never late, inappropriate, or rude in meetings. (RX 1, p. 85) To Mr. Hammonds understanding the Petitioner followed up on all job leads provided to him. (RX 1, p. 88) Mr. Hammond confirmed that per Petitioner's email account he had applied for hundreds of different positions. (RX 1, p. 90)

Mr. Hammond also confirmed that he provided Petitioner a booklet with expectations for Petitioner during his job search. (RX 1, p. 91, Ex 10 p. 18) Contained in that booklet are 8 different job search expectations. (RX 1 Ex 10 p. 18) Petitioner testified that he adhered to each

expectation. Mr. Hammond only expressed concern with a portion of one expectation listed in the booklet, that being Petitioner's attire. Mr. Hammond had issue with Petitioner wearing a t-shirt. (RX 1, p. 98) However, the Petitioner testified that once Mr. Hammond told him to wear a button-up shirt as opposed to a t-shirt, that he also wore a button-up shirt from that point forward. (AT p. 73) Mr. Hammond testified that Petitioner never cursed or came off abrasive. (RX 1, p. 97) Mr. Hammond testified that Petitioner never presented with messy hair or inappropriate facial hair. (RX 1, p. 97-98) Despite that Mr. Hammond opined that Petitioner was not cooperating appropriately with vocational rehab efforts.

CONCLUSIONS OF LAW

Maintenance Benefits:

The Arbitrator finds that the Petitioner is entitled to maintenance benefits up until the time he secured employment with RailCrew Xpress on 11/9/19.

The Arbitrator is not persuaded by the testimony of Mr. Hammond regarding the Petitioner level of cooperation with vocational rehabilitation. The Petitioner testified that he met every expectation given to him by Mr. Hammond. (AT p. 19-22) The Arbitrator is not convinced that the Petitioner did anything to sabotage his job search nor does the Arbitrator find that Petitioner was uncooperative with Mr. Hammond. In fact, the Petitioner continued to look for work even after his own vocational expert Mr. Ragains opined that no stable labor existed for him. (AT p. 25)

The Arbitrator finds that the Respondent did not have a valid basis to cut Petitioner's maintenance benefits in August 2018. Furthermore, the record indicates that Petitioner continued to engage in a self-directed job search after his benefits were cut, making him eligible to receive ongoing maintenance benefits. (PX 18; AT p. 25)

The Arbitrator is persuaded by the sequence of events, the totality of the evidence, and the Petitioner's sincere and credible testimony. The Arbitrator notes that the Respondent paid maintenance benefits up to 8/13/18 and Petitioner later began his employment with RailCrew Xpress on 11/9/19. As such, the maintenance period awarded is from 8/14/18-11/8/19, which totals 64 and 3/7 weeks. Petitioner's average weekly wage of $816.91 was stipulated to by the parties, therefore making the Petitioner's maintenance benefit $544.61 a week.

The Arbitrators orders Respondent to pay Petitioner maintenance benefits of $544.61/week for 64 and 3/7 weeks, commencing 8/14/18 through 11/8/19, as provided in Section 8(a) of the Act.

Nature and Extent:

Under the Act, when a claimant sustains a disability, an issue arises concerning what type of compensation he is entitled to receive, a wage differential award (8(d)(1)) or a percentage-of-the person-as-a-whole award (8(d)(2)). 820 ILCS 305/8(d); *Gallianetti v. Industrial Comm'n*, 315 Ill.App.3d 721, 727, 248 Ill.Dec. 554, 734 N.E.2d 482, 487 (2000). The supreme court has expressed a preference for wage-differential awards. *General Electric Co. v. Industrial Comm'n*,

89 Ill.2d 432, 438, 60 Ill.Dec. 629, 433 N.E.2d 671, 674 (1982). The purpose of a wage differential award under section 8(d)(1) is to compensate an injured claimant for his reduced earning capacity. *Dawson v. Workers' Compensation Comm'n*, 382 Ill.App.3d 581, 586, 320 Ill.Dec. 918, 888 N.E.2d 135, 139 (2008).

Section 8(d)(1) of the Act sets out the two requirements for a wage differential award. Under section 8(d)(1), an impaired worker is entitled to a wage differential award when (1) he is "partially incapacitated from pursuing his usual and customary line of employment" and (2) there is a "difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident." 820 ILCS 305/8(d)(1)

The unrebutted evidence presented shows that the Petitioner is partially incapacitated from pursuing his usual and customary line of employment as a machine operator. Therefore, the analysis to be discussed is whether there is a difference between the average amount which he would be able to earn in the full performance of his duties as a machine operator and his current earning capacity as a driver for RailCrew Xpress.

The Petitioner testified that his current wage with RailCrew Xpress is $12.00 an hour. (AT p. 31) The Petitioner testified he was capable of working 40 hours a week. Based on this evidence the Arbitrator finds Petitioners current average weekly wage with RailCrew to be $480.00.

At the time of Arbitration, the Petitioner would be earning $20.21 an hour if he was still employed as a machine operator with Respondent. As such, if Petitioner were still employed by the Respondent as a machine operator,32 he would be making $808.40 a week (20.21 x 40).

The Arbitrator finds that the Petitioner because of his permanent restrictions, is partially incapacitated from pursuing his usual and customary line of employment as a machine operator, and there is a difference between the average amount which he would be able to earn in the full performance of his job duties as a machine operator and his current earning capacity. As such the Petitioner is entitled to wage differential benefits under Section 8(d)(1) of the Act.

The Arbitrator calculates the Petitioner's wage differential benefits as follows:

$808.40 (AWW if Petitioner was still a machine operator for Respondent)
-$ 480.00 (Petitioners current earning capacity as a driver for RailCrew Xpress)
$ 328.40
X 2/3
$218.93 (weekly wage differential benefit)

Respondent shall pay Petitioner permanent partial disability benefits, commencing 11/9/2019, of $218.93/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.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC003657
Case Name	Christopher Fritsche v. State of Illinois/Menard C.C.
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0443
Number of Pages of Decision	13
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Kenton Owens

DATE FILED: 10/16/2023

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHRISTOPHER FRITSCHE,
Petitioner,

vs. NO: 18 WC 3657

SOI/MENARD CORRECTIONAL CENTER,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection and the nature and extent of the injury, and being advised of the facts of law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof.

The Commission modifies the Decision of the Arbitrator with respect to the award of permanent partial disability.

Regarding the issue of permanent partial disability, the Arbitrator concluded Petitioner was entitled to 45% loss of use of the body, based on a loss of occupation. On review, the Commission agrees that Petitioner is entitled to permanent partial disability benefits representing a loss of occupation; however, after evaluating the five factors of Section 8.1b, increases the award to 50% loss of use of the person as a whole pursuant to Section 8(d)(2).

The five factors upon which the Commission must base its determination of the level of PPD benefits to which a claimant is entitled, include: (i) the level of impairment contained within a permanent partial disability impairment report; (ii) the claimant's occupation; (iii) the claimant's age at the time of injury; (iv) the claimant's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b(b) (West 2020). However, "[n]o single enumerated factor shall be the sole determinant of disability." *Id*. § 305/8.1b(b)(v).

Regarding factor (i) Level of Impairment, the Commission gives no weight to this factor because an impairment rating was not submitted by either party.

Regarding factor (ii) Occupation, the Commission places substantial weight on this factor because Petitioner's injuries resulted permanent work restrictions which prevented him returning to his occupation as a correctional officer. Petitioner provided unrebutted testimony that his primary employment was as a correctional officer and the evidence corroborates his permanent inability to work as a correctional officer.

Regarding factor (iii), Age, the Commission places significant weight on this factor, noting Petitioner was 41 years old at the time of his injury. As such, the Commission concludes Petitioner has a substantial portion of his work-life expectancy ahead of him, during which time he will have to live and work with permanent restrictions. Moreover, Petitioner testified that his continued efforts to find employment within his restrictions have been unsuccessful despite engaging in vocational services and the State's AEP program.

Regarding factor (iv), Earning Capacity, the Commission places great weight on this factor finding that as result of his loss of occupation as a correctional officer, Petitioner suffered a reduction in earning capacity. Petitioner testified the permanent work restrictions prevented him from returning to his job as a correctional officer, where he would be earning a monthly wage of $6,038.00 due to his years of service at a maximum-security facility. In addition, the pay scale admitted into evidence demonstrates that if Petitioner had been able to return to his employment as a correctional officer, Petitioner's monthly wages would have increased with each year of service. Thus, under the facts of this case, the loss of occupation is significant because it correlates to a direct loss of future earnings.

Regarding factor (v), Disability, the Commission assigns substantial weight on this factor noting Petitioner testified his current complaints include soreness, aching, and swelling in his right knee. These continued complaints limit his activities of daily life and limit his ability to hunt and play basketball with his daughter. Petitioner also testified to ongoing issues with anxiety and the loss of strength and range of motion in his shoulder. Petitioner's testimony regarding his disabilities is supported by the medical records.

In conclusion, after an evaluation of the five factors of Section 8.1b, the Commission modifies the Decision of the Arbitrator with respect to the issue of permanent partial disability and awards 50% loss of use of the person as a whole pursuant to Section 8(d)(2).

In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated January 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 to Petitioner permanent partial disability benefits of $756.97/week for 250 weeks representing 50% person as a whole under Section 8(d)(2) of the Act.

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

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

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.

October 16, 2023

o: 10/05/23
CMD/jjm
045

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

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC003657
Case Name	Christopher Fritsche v. State of Illinois/Menard C.C.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Kenton Owens

DATE FILED: 1/25/2023

THE INTEREST RATE FOR THE WEEK OF JANUARY 24, 2023 4.68%

/s/ Jeanne AuBuchon, Arbitrator

Signature

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

January 25, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

CHRISTOPHER FRITSCHE
Employee/Petitioner

v.

STATE OF ILLINOIS/MENARD C.C.
Employer/Respondent

Case # **18** WC **003657**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeanne L. AuBuchon**, Arbitrator of the Commission, in the city of **Collinsville**, on **August 30, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ 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 24, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**65,604.00**; the average weekly wage was $**1,261.62**.

On the date of accident, Petitioner was **41** years of age, ***single*** with **1** dependent child(ren).

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

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

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

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

ORDER

Respondent shall pay the reasonable and necessary medical services outlined in Petitioner's Exhibit 1 and the vocational rehabilitation bills from England & Co. outlined in Petitioner's Exhibit 8, 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 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 permanent partial disability benefits of $**756.97**/week for **225** weeks, because the injuries sustained caused Petitioner's loss of trade resulting in **45**% loss of the **body as a whole**, as provided in § 8(d)2 of the Act.

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

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

Jeanne L. AuBuchon

Signature of Arbitrator

JANUARY 25, 2023

PROCEDURAL HISTORY

This matter proceeded to trial on August 30, 2022. The issues in dispute are: 1) the causal connection between the accident and the Petitioner's current condition; 2) liability for medical bills – specifically the June 8, 2018, bill for an in-home rehabilitation device; and 3) the nature and extent of the Petitioner's injury.

This case was previously tried on June 11, 2020, pursuant to Sections 19(b) and 8(a) of the Workers' Compensation Act (the Act). (PX6) The Arbitrator found that the Petitioner's knee and mental health conditions were causally related to the work accident and that he was unable to return to work. (Id.) The Arbitrator awarded maintenance and vocational rehabilitation. (Id.) The Commission affirmed that decision on July 6, 2021, clarifying that the rehabilitation and maintenance awards were causally related to the Petitioner's knee condition. (Id.)

At arbitration, the respondent objected to bills listed in Petitioner's Exhibit 1 that were incurred prior to the date of the last arbitration. The parties stipulated that any award of medical expenses would be paid directly to the providers. The parties also stipulated that the Petitioner had a prior workers' compensation case (09WC32427) from which the Petitioner received 22½ percent of each arm from having cubital tunnel syndrome and a prior claim in 2000 for 22 percent of his right leg.

FINDINGS OF FACT

At the time of the accident, the Petitioner, who was 41 years old, was employed by the Respondent as a correctional officer. (AX1, T.10) On January 24, 2018, the Petitioner was attacked by an inmate and suffered injuries to his right knee and left shoulder, for which he had left shoulder repair surgery and a right knee replacement. (T. 12) He eventually was released from treatment for his shoulder with no restrictions and for his knee with permanent restrictions

of no repetitive steps/stairs, no kneeling and no sprinting. (T. 14-15) He was unable to return to work as a correctional officer. (Id.) He continued to undergo treatment for his knee and for post-traumatic stress disorder (PTSD). (PX4, PX3)

The Petitioner underwent vocational rehabilitation with England & Company Rehab Services. (T. 15) He applied for and was accepted in the alternative employment program through the State of Illinois but did not receive employment placement. (T. 16) Timothy Kaver, a vocational rehabilitation counselor with England & Company, testified that he recommended that Petitioner enroll at Logan College to earn an associate's degree in criminal justice, but his plan was not approved by the State. (PX10) Mr. Kaver stated that without additional training, the Petitioner was qualified to do sedentary work as a security alarm monitor, customer service representative or cashier. (Id.) Petitioner continued his job searches but as of the date of Mr. Kaver's deposition, he had not obtained any employment. (Id.) Mr. Kaver testified that at present, Petitioner could expect to earn an annual range of $24,960 to $33,280. (Id.) On cross-examination, Mr. Kaver testified that his job placement services were placed on hold following his last report of October 8, 2021. (Id.) The Petitioner testified that he continues to look for work and if he found a job within his restrictions, he would take it. (T. 16-17)

As he was at the time of the 19(b)/8(a) hearing on June 11, 2020, the Petitioner is co-owner of a business – Concealed Comfort Pits – that makes steel waterfowl pits for hunting. (T. 39) He testified that his income from that business has stayed the same since the prior hearing. (T. 40)

The Petitioner testified that his knee was "not so great." (T. 20) He said his knee constantly ached and his pain levels varied depending on how long he was on his feet during the day. (Id.) He said the pain is at its worst at night but is not as bad in the daytime. (T. 21) He said he experiences swelling and has "a big loss" of range of motion. (Id.) He takes Motrin or Aleve

daily. (Id.) He said the injury has changed his life and has affected his ability to clean house or go up and down stairs at home. (T. 22) He said he can't play basketball with his 9-year-old daughter. (Id.)

Regarding his shoulder, the Petitioner said it feels fine, but he has loss of range of motion overhead and loss of strength. (T. 23) The Petitioner said he takes medication for his PTSD and continues to suffer from overall worry, feeling on edge and nervousness – especially being around people. (T. 23-26)

The Petitioner testified that following his knee surgery in June 2018, he was prescribed rehabilitative aides – an ice machine and a machine for range of motion. (T. 26) The Petitioner submitted the Health Insurance Claim Form for these aides that were provided by Kinex Medical. (PX1)

On cross-examination, the Petitioner admitted that since June 2020, he had hunted deer with a shotgun but not with a bow. (T. 30-31) He said he had hunted waterfowl as well. (T. 31) He also acknowledged driving a lifted pickup truck and said he has problems getting in and out of it. (T. 32-33) The Petitioner said he sees his knee surgeon every six months, and at his last visit in July 2022, he reported difficulty going down hills and difficulty kneeling. (T. 34-35)

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 causally related to the accident?

Under the law-of-the-case, once a specific issue or question of law or fact has been decided in the course of litigation, it cannot be rehashed at a subsequent time, because "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. Indus. Comm'n*, 786 N.E.2d 218 (2nd Dist. 2003) citing *McDonald's Corp. v. Vittorio Ricci Chicago, Inc.*, 466 N.E.2d 1116 (Ill. 1984).

In the prior 19(b)/8(a) hearing, the Arbitrator found the Petitioner's shoulder, knee and mental health conditions were causally related to the work accident. There was no evidence submitted at the instant arbitration that there was a change in the Petitioner's condition or that there was a break in the causal chain since the prior decision. Therefore, Respondent's dispute as to causal connection is moot.

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?

On June 8, 2018, the Petitioner was prescribed rehabilitative aides – an ice machine and a machine for range of motion. The Respondent contends that because the bill was not submitted at the 19(b)/8(a) hearing on June 11, 2020, request for payment of the bill is waived. The Respondent cites no law supporting this proposition.

The law-of-the-case doctrine as stated in *Irizarry* above applies here as well. The Commission's decision established a causal connection between the accident and the need for knee surgery. The need for the rehabilitative aides flows from that surgery. The Respondent is therefore liable for all medical expenses required to treat Petitioner's work-related injuries. Furthermore, the Arbitrator's decision from the prior hearing was a § 19(b) hearing stated that: "This award shall in no instance be a bar to further hearing and determination of any additional amount of **medical benefits** (emphasis added) or compensation for a temporary or permanent disability, if any." That language does not limit the "additional amount" to future rather than past expenses.

Similarly, the Act contains no language to support a notion of waiver. Rather, it states that expenses are to be paid upon establishing causal connection. The Act is a humane law of a remedial nature that should be liberally construed to achieve its purpose. *Hagene v. Derek Polling Const.*, 388 Ill. App. 3d 380, 383, 902 N.E.2d 1269, 1273 (2009). That purpose in large part is to ensure employees the "right to be compensated for medical costs associated with work-related injuries." *Id.*

Therefore, the Respondent is ordered to pay directly to the providers the medical expenses listed in Petitioner's Exhibit 1 pursuant to Section 8(a) of the Act and in accordance with medical fee schedules.

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

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

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

(ii) **Occupation.** As a result of his injuries and permanent restrictions, Petitioner is no longer able to serve as a Correctional Officer. Petitioner has also been unable to obtain alternative employment within his restrictions. While he continues to look for suitable employment within his restrictions, he has suffered a loss of trade. The Arbitrator places substantial weight on this factor.

(iii) **Age.** The Petitioner was 41 years old at the time of his injuries. He is very young but must live and find employment with an artificial joint, psychological injury, and permanent restrictions for a substantial portion of his work-life expectancy. The Arbitrator places significant weight on this factor.

(iv) **Earning Capacity.** The Petitioner has suffered a dramatic reduction in earning capacity as a result of his work injuries. Although he earns passive income from co-ownership in a business, as he did prior to his work accident, his primary employment was as a correctional officer. He has been unable to find a job that would replace that lost income. The Arbitrator therefore places substantial weight on this factor.

(v) **Disability.** The Petitioner is under permanent restrictions that precluded his return to work as a correctional officer. He testified that he still experiences soreness, aching and swelling in his right knee resulting limiting activities in his daily life. As to his left shoulder, he has loss of strength and range of motion. Regarding his mental health, he still has problems with anxiety. The Arbitrator puts significant weight on this factor.

Therefore, the Arbitrator finds the Petitioner's permanent partial disability to be 45 percent of the Petitioner's body as a whole, based on loss of occupation.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC009798
Case Name	Michael Martino v. Performance Floors Corp.; Peerless Rug Co., Inc; PTO Services, Inc./Bridge HRO; Starr Indemnity & Liability Co.; and the Illinois Injured Workers' Benefit Fund Services Inc/Starr Indemnity & Liability Co & IWBF
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0444
Number of Pages of Decision	42
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Tyler Berberich
Respondent Attorney	Joseph Marciniak, Anne-Marie Foster, Matt Gorski, Carter Esterling, Rufus Barner, Jennifer Santoro

DATE FILED: 10/16/2023

/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

MICHAEL MARTINO,

Petitioner,

vs. NO: 17 WC 09798

PERFORMANCE FLOORS CORP.;
PEERLESS RUG CO., INC.;
PTO SERVICES, INC./BRIDGE HRO;
STARR INDEMNITY & LIABILITY
CO.; and the INJURED WORKERS'
BENEFIT FUND,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent Peerless Rug Company, Inc.[1] and Respondent Performance Floors[2] and notice given to all parties, the Commission, after considering the issues of whether the Starr Indemnity & Liability policies provide coverage for Petitioner's claim, whether a borrowing-lending employer relationship existed between Peerless Rug Company, Inc. and Performance Floors, and whether Petitioner exceeded his choices of physicians, and being advised of the facts and law, affirms and adopts the

[1] Respondent Peerless Rug Company, Inc.'s Petition for Review identifies benefit rate, employer-employee relationship, and Fee Schedule as issues, however no related arguments were made in its Statement of Exceptions or during oral arguments, and thus the Commission views the issues as forfeited.

[2] Respondent Performance Floors' Petition for Review identifies Fee Schedule, vocational rehabilitation, and duration of temporary disability as issues, however no related arguments were made in its Statement of Exceptions or during oral arguments, and thus the Commission views the issues as forfeited.

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 17, 2022, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of 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.

October 16, 2023
O101123
AHS/mdk
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	17WC009798
Case Name	Michael Martino v. Performance Floors Corp.; Peerless Rug Co., Inc; PTO Services, Inc./Bridge HRO; Starr Indemnity & Liability Co.; and the Illinois Injured Workers' Benefit Fund
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	39
Decision Issued By	Joseph Amarilio, Arbitrator

Petitioner Attorney	Tyler Berberich
Respondent Attorney	Carter Esterling, Jennifer Santoro, Joseph Marciniak, Anne-Marie Foster, James Gale, Matt Gorski

DATE FILED: 11/17/2022

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

/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
19(B)

Michael Martino
Employee/Petitioner

v.

Performance Floors Corp.; Peerless Rug Co., Inc; PTO Services, Inc./Bridge HRO; Starr Indemnity & Liability Co.; and the Illinois Injured Workers' Benefit Fund
Employer/Respondent

Case # **17** WC **009798**

Consolidated cases: **None**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was e-mailed to each party. The matter was heard by the Honorable **Joseph Amarilio**, Arbitrator of the Commission, in the city of **Chicago**, on **September 20, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **February 24, 2017**, Respondents Performance Floors, PTO Services and Peerless Rug Co**.** ***were*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondents Performance Floors, PTO Services and Bridge HRO.

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 $**91,068.12**; the average weekly wage was $**1,751.31**.

On the date of accident, Petitioner was **44** years of age, ***married,*** *with* **3** dependent children.

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

Respondents shall be given a credit of $**153,109.88** for TTD, $**0** for TPD, $**99,240.05** for maintenance, and $**0** for other benefits, for a total credit of $**252,349.93**.

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

Peerless Rug Co and Performance Floors Corp. both fall within the provisions of Section 1(a) 3 and Section 3 pertaining to employers and PTO Services and Bridge HR, as successor to PTO Services, fall within Section 1(a) 4.

Performance Floors, PTO Services and Bridge HRO were uninsured based on findings stated in the attachment to the Arbitration Decision.

ORDER

Respondent Peerless Rug shall pay Petitioner temporary total disability benefits in the amount of $1,167.54/week for 131- 1/7 weeks, commencing March 16, 2017 through September 19, 2019, as provided in Section 8(b) of the Act.

Respondent Peerless Rug shall pay Petitioner maintenance benefits in the amount of $1,167.54/week for 156-5/7 weeks, commencing September 20, 2019 through September 20, 2022, as provided in Section 8(a) of the Act.

Respondent Peerless Rug shall pay reasonable and necessary medical services in the amount of $292,494.54, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall make this payment directly to Petitioner's attorney in accordance with Section 9080.20 of the Rules Governing Practice before the Illinois Workers' Compensation Commission.

Respondents Peerless Rug, Performance Floors, PTO Services and Bridge HRO, as successor to PTO Services, are jointly and severally liable to the Petitioner for benefits due.

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

Respondent Peerless is liable and shall pay Petitioner the amount of $4,579.00 for rehabilitation services provided by Vocamotive. Respondent shall make this payment directly to Petitioner's attorney in accordance with Section 9080.20 of the Rules Governing Practice before the Illinois Workers' Compensation Commission

Respondent Peerless is liable and shall pay Petitioner the amount of $1,202.50 for vocational testing performed by The Eval Center. Respondent shall make this payment directly to Petitioner's attorney in accordance with Section 9080.20 of the Rules Governing Practice before the Illinois Workers' Compensation Commission

Respondent Starr Indemnity & Liability Co. is not liable to the Petitioner for any benefits under the Act.

Respondent Illinois Injured Workers' Benefit Fund is not liable to the Petitioner for any benefits under 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 17, 2022

/s/ *Joseph D. Amarilio*

Signature of Arbitrator Joseph D. Amarilio

ATTACHMENT TO ARBITRATION DECISION
MICHAEL MARTINO v. PERFORMANCE FLOORS, et al.

STATEMENT OF FACTS AND CONCLUSIONS OF LAW

I. PROCEDURAL HISTORY

Mr. Michael Martino ("Petitioner") filed an Application for Adjustment of Claim pursuant the Illinois Workers' Compensation Act ("Act") alleging that he sustained accidental injuries on February 24, 2017 that arose out of and in the course of his employment. Petitioner filed a series of amended applications thereafter. The final Amended Application for Adjustment of Claim names the following six (6) Respondents:

1. Performance Floors, Corp., 2. Peerless Rug Co., 3. PTO Services, Inc., 4. Bridge HRO, 5. Star Indemnity & Liability Co., and 6. The Illinois Injured Workers' Benefit Fund. All six Respondents filed an appearance, and all were represented by counsel at the trial. The trial proceeded on September 20, 2022 pursuant to Section 19 (b) of the Act, proofs were closed, and this matter was taken under advisement.

Based on the findings of fact and conclusions of law stated *infra the* Arbitrator finds that Peerless Rug Co. and Performance Floors Corp. both fall within the provisions of Section 1(a) 3 and Section 3 pertaining to employers and PTO Services and Bridge HR fall within Section 1(a) 4. The Arbitrator finds Respondents Peerless Rug, Performance Floors, PTO Services and Bridge HRO, as successor to PTO Services, are jointly and severally liable to pay benefits due and owing to the Petitioner. The Arbitrator further finds that Performance Floors, PTO Services and Bridge HRO were uninsured. And the Arbitrator finds that Respondent Starr Indemnity & Liability Co. and Respondent Illinois Injured Workers' Benefit Fund are not liable to the Petitioner.

II. STATEMENT OF FACTS

Mr. Michael Martino (hereinafter "Petitioner") was born on October 11, 1972, he was married and has three children aged 13, 12, and 9 (Transcript of Arbitration Proceedings (hereinafter "Tr."), 36-38). As of February 24, 2017, Petitioner was employed as a journeyman union flooring installer and a member of Carpenters Union local 1185 (Tr. 39). On February 24, 2017, Petitioner was working within his capacity as a union flooring installer with Performance Floors (Tr.40). Petitioner was hired by Dennis Muczynski (hereinafter "Dennis"), the owner of Performance Floors and the person who would provide Petitioner with instructions, jobs, the schedule, and some tools (Tr. 40-41). Petitioner was assigned by Dennis to work a commercial job located at 333 North Michigan Avenue (Tr. 76). His employer had been contracted to install flooring by another company, Peerless Rug Co. (hereinafter "Peerless"). (Tr. 76). The general contractor, DSI (Development Solutions, Incorporated), is not a party to this claim.

Petitioner testified that as part of his job, he had to lift tools, adhesives, boxes of tile, and other objects that weighed anywhere between 40 and 800 pounds (Tr. 41-42). He would unbox these materials and lift them up onto dollies in order to move them more efficiently (Tr.42-43). Petitioner also testified that he used tools such as trowels, razor blades, and tile cutters (Tr.43). When asked by the Arbitrator regarding how much lifting he had to do on the job he worked on February 24, 2017, Petitioner answered that he lifted anywhere between 50 and 120 pounds (Tr. 43). As a flooring installer, Petitioner was crawling, kneeling, or working on the floor for around 90 percent of his day (Tr. 44).

On February 24, 2017, Petitioner was unboxing carpet tiles that had been delivered to the center of a room for installation. While unboxing and lifting these materials, he felt pain in his back and shooting down his leg (Tr. 44-45). He tried to work through it, thinking the injury was just a common work pain (Tr. 44). Petitioner tried to take it easy for the rest of that day and continued to try to work over the next several weeks (Tr. 45). Throughout those weeks he noticed that his pain was radiating down from the back most

predominantly, but he did not immediately submit a workers' compensation claim because he did not want to lose employment opportunities as a result (Tr. 46). Petitioner treated twice with O'Connor Chiropractic in an attempt to alleviate his pain without reporting a workers' compensation claim (Tr. 84).

Eventually, Petitioner's pain was too great to continue working and he texted Dennis to let him know that he could not work due to the work injury (Tr. 46). After texting Dennis, he made a phone call to Bob Bishop of PTO Services (hereinafter "PTO") (Tr. 46). Petitioner identified texts from March 15, 2017 that show the exchange with Dennis wherein Petitioner reported his work injury and received the phone number for Bob Bishop (Tr. 46-47, Px 11). Bob Bishop recommended that Petitioner go to Physicians Immediate Care, where he received light duty work restrictions and a back brace (Tr. 48). Petitioner's restrictions could not be accommodated by Respondent. (Tr. 49).

Petitioner continued his medical treatment on March 20, 2017 with DuPage Medical Group in their spine surgery group, where he was taken off of work and told to start physical therapy by Dr. Dalip Pelinkovic (Tr. 49). On March 20, 2017 Dr. Pelinkovic prescribed Petitioner a course of injections and sent him for an MRI of the lumbar spine and noted L5-S1 disc space narrowing (Petitioner's Exhibit (hereinafter "PX") 2, 14). Petitioner did not notice great relief with the first set of injections and, following review of his MRI, Dr. Pelinkovic recommended surgery.

Dr. Pelinkovic performed a two-level microdiscectomy at L5-S1 and L4-L5 on May 23, 2017 (Tr. 50-51, PX 2, 220-222). Following surgery Petitioner continued to have pain down his leg to his feet and began to suffer from one of his feet becoming "pigeon-toed." Dr. Pelinkovic recommended a course of injections which were administered by Dr. John Gashkoff (Tr.51, PX 2, 200; 202; 207).

Despite the first surgery and continued treatment, Petitioner continued to experience pain in his lower back, extending down his leg. Due to the continued symptoms, Dr. Pelinkovic recommended and later performed a second surgery on November 21, 2017 consisting of a single level fusion and revision laminectomy at L4-5 (Tr. 52, PX 2, 217-220).

On February 5, 2018, Petitioner saw Dr. Edward Goldberg for the first time for Section 12 examination at Respondent's request. (PX 23, 1). Dr. Goldberg recorded a history of a lumbar spine injury on February 24, 2017 (PX 23, 1). He recorded that Petitioner underwent a two-level discectomy on the left at L4-5 and L5-S1 by Dr. Pelinkovic on May 23, 2017 as well as a revision discectomy and fusion in November 2017 (PX 23, 1). Dr. Goldberg found no positive Waddell's testing (PX 23, 2). Dr. Goldberg gave five opinions after performing his physical examination and review of the records: 1. Petitioner had persistent left lower extremity radiculitis, 2. Petitioner did sustain a herniation and recurrent herniation warranting the fusion, 3. Petitioner would benefit from additional treatment, 4. Petitioner could work sedentary duty, and 5. Petitioner would likely be reach maximum medical improvement nine months after surgery (PX 23, 2).

Following Dr. Pelinkovic's resignation from DuPage Medical Group, Dr. Mohan Vivek took over Petitioner's care (Tr.53, Px 2, 108). Dr. Mohan ordered a new MRI and new EMG (PX 2, 113). Dr. Mohan found a mildly prominent osteophyte extending into the left neural foramina that could exert mild mass effect on the exiting left L4 nerve root, which would correlate with the radicular symptoms (PX 2, 142-143). The lumbar spine MRI showed persistent enhancing granulation tissue within the L4-5 surgical bed (PX 2, 143). The EMG showed chronic L5 radiculopathy (PX 2, 143). Based on those test results and Petitioner's continued symptoms, Dr. Mohan recommended another surgery.

On May 31, 2018, Dr. Mohan performed a third back surgery consisting of a two-level fusion at L4-5 and L5-S1 that removed the prior single level fusion (Tr. 54, PX 2, 215-222). Dr. Mohan prescribed an extensive course of postoperative physical therapy (Tr. 55).

On December 8, 2018, after Dr. Mohan also resigned from DuPage Medical Group, Petitioner began treatment with Dr. Alexander Ghanayem at Loyola (Tr. 55). The records reflect that treatment with Dr. Ghanayem was arranged by the nurse case manager who had been hired by Respondent and the treatment had been approved by the adjuster, Eric Haines (PX 22, 44).

Dr. Ghanayem recommended that Petitioner consult with Dr. Troy Buck for pain management (Tr. 56-57, Px 1, 109). Dr. Buck recommended spinal cord stimulation for pain relief which involved a surgical procedure. Petitioner began use of a trial spinal cord stimulator on April 1, 2019 (Tr. 57, Px 1, 65-78). The stimulator was permanently surgically implanted on May 10, 2019 (Tr. 57, Px 1, 143-184). The stimulator currently remains implanted in the Petitioner.

Following the implant of the spinal cord stimulator, Petitioner continued to treat with Dr. Buck. Dr. Buck eventually recommended that the Petitioner undergo a Functional Capacity Evaluation (FCE), which took place on July 29, 2019 (PX 5). The FCE demonstrated that Petitioner was capable of light duty work, which fell well below the "heavy" physical demand level required for his previous occupation (PX 5, 16). Petitioner was found to be capable of lifting 19.2 pounds above his shoulder occasionally, from desk to chair occasionally, from chair to floor occasionally, and able to carry 19.6 pounds in his left and right hands occasionally (PX 5, 16). He was found to be capable of a 3-hour workday at this time and was able to sit for 3 hours in 35-minute durations, 1 hour in 25-minute durations, and capable of 1 to 2 hours of occasional short distance walking (PX 5, 16).

On September 19, 2019, Dr. Buck placed Petitioner at maximum medical improvement and assigned permanent light duty restrictions pursuant to the FCE, including a light duty work capacity with no repetitive bending or twisting and no lifting of over 20 pounds. (Tr. 58, Px 1, 432).

No argument was raised by any Respondent to dispute the fact that Petitioner was unable to return to work as a flooring installer within his permanent physical restrictions. Performance Floors did not offer any light duty work (Tr. 59).

Following his release with permanent restrictions, Petitioner began conducting a self-directed job search. Petitioner identified his job logs during the hearing and testified that he was applying to jobs within his restrictions (Tr. 60-61).

Petitioner also provided some testimony concerning his previous work history and education. Petitioner had no work experience outside of flooring since he joined the union in 1993 (Tr. 61). He had dropped out of high school in 1987 as a sophomore and finished his GED so that he could join the union (Tr. 61-63).

In 2020 Petitioner began formal vocational rehabilitation services with Vocamotive and counselor Laura Belmonte (Tr. 63). During his job search, a number of possible positions contacted Petitioner, but once his restrictions were realized any offers were rescinded (Tr. 65).

He was paid maintenance benefits prior to May 2021 (Tr. 65). After May 2021 the benefits stopped (Tr. 67). Petitioner's restrictions did not change in any way at this time; regardless, benefits still ceased (Tr. 67). Even though Petitioner's Vocamotive appointments were no longer ongoing due to his benefits being terminated by Respondent, he continued to look for work via Indeed.com, friends, and family. However, he had no success (Tr. 67-68).

Before February 24, 2017, Petitioner has never injured his back that required medical treatment nor had work restrictions related to his lower back (Tr. 68-69). Were it not for his work related injury, Petitioner had intended to continue working with his union, Local 1185 (Tr. 69)

Now, in his day-to-day life, Petitioner has constant back pain that shoots down his left leg (Tr. 77). His tailbone movements send pain up his back (Tr. 77). His pain increases while moving (Tr. 77). He takes gabapentin daily, Flexeril daily, and medical marijuana daily (Tr. 77-78). Since May 2021 Petitioner has been unable to obtain payment for doctor's visits but has stayed on his medications (Tr. 78-79). Petitioner no longer uses the stairs in his home (Tr. 100).

During cross examination Petitioner testified that the union protocol is to report accidents immediately after they occur (Tr. 82). Petitioner later clarified this remark. According to Petitioner:

> "Typically a human resources comes up with the procedure for reporting an injury. Because we're not human resources, we are actually subcontractors working a very physical trade, it would be inconceivable to report every ache and pain immediately."
> Tr. 107-108

Petitioner testified during cross examination that his injury did not occur at 444 West Lake Street in Chicago, Illinois. It occurred at 333 N. Michigan Ave. (Tr. 105, 119).

Testimony of Dennis Muczynski- Performance Floors Corp.

Dennis testified as a representative for Performance Floors, a company he has owned since 2001 (Tr. 117). Dennis is the president of Performance Floors and does the scheduling, does the billing, and manages the tools for his company (Tr. 118). According to Dennis, DSI (Development Solutions, Incorporated), was the general contractor on the 333 N. Michigan Avenue job on February 24, 2017 (Tr. 119). DSI hired Peerless Rug who Dennis has had a relationship with since 2001 (Tr. 119). Peerless Rug hired Performance Floors to do flooring installation at 333 N. Michigan Avenue job (Tr. 119). DSI is not a party at trial.

Dennis confirmed that he directed where Petitioner worked, that he supplied him with some tools, and that he scheduled his workday (Tr. 125-126). Additionally, Dennis testified that could have fired Petitioner had he failed to do his job and Dennis was the one who hired Petitioner (Tr. 131). Dennis provided the wage information to the payroll services so that they could pay Petitioner based on hours that Performance Floors accounted for him working (Tr. 132). According to Dennis, Performance Floors has had several jobs, including one ongoing, at 444 West Lake Street doing carpet install and floor preparation (Tr. 126-127). However, on the day in question, there was no job at 444 West Lake Street (Tr. 127).

Dennis explained his relationship to PTO services as well. Performance Floors hired PTO services to do payroll records and supply workers' compensation insurance to them (Tr. 120). Dennis reviewed and laid the foundation for the contract that underlines these duties (Respondent Performance Exhibit 1). On February 24, 2017 this agreement was in place (Tr. 121). This agreement eventually changed, and PTO turned over the handling of their services to Bridge HRO (Tr. 121). Dennis was informed that nothing would change internally with PTO Services, just the name on the checks would change (Tr. 121). Dennis provided a foundation for the document that informed him of the change from PTO to Bridge HRO (Respondent Performance Exhibit 3). He

worked mostly with Tony Langfeld and Scott Hanson from PTO (Tr. 122). Dennis also related these people to Vertical Holdings, who were another payroll service that he believed to be related to Bridge HRO (Tr. 132). Petitioner's Exhibit 7 is a vocational rehabilitation report addressed to Vertical Holdings and Bob Bishop, who was the human resource contact for Dennis at both PTO and Bridge HRO (Tr. 135). Dennis believed there was a link between PTO and Bridge HRO due his relationship with Scott Hanson, who was another point of contact in both companies (Tr. 128). The Arbitrator takes notice that PTO, Bridge HRO and Vertical Holdings appear to be the same or closely related entities, with the same employees, that have simply been rebranded over time.

Dennis further testified that he believed that PTO was still covering him on February 24, 2017, as his notification of the switch was simply that the switch to Bridge HRO was coming, not that it had already occurred (Tr. 128, Performance Ex. 3). The Arbitrator finds that Bridge HRO services was the successor, to PTO services.

Testimony of Phillip Liss- Peerless Rug Co.

Mr. Phillip Liss testified that he has been the acting president at Peerless Rug Company since 1958 (Tr. 137). Peerless Rug is an "all-around, full-service floor covering store," with retail work, commercial work, and installation work (Tr. 137). Their retail installation work is non-union, and their commercial installation work is union (Tr. 137).

The commercial department at Peerless Rug does work for a number of general contractors (Tr. 140). Liss stated that all of the work that Peerless Rug does for commercial jobs is contracted to Performance Floors for the installation work. (Tr. 140).

Liss claimed that Respondent Peerless Rug Company, Inc. Exhibit 1 shows a certificate of insurance for Performance Floors (Tr. 143). Peerless Rug keeps these certificates in the ordinary course of business and in this matter believed that the certificate meant that Performance Floors was insured on February 24, 2017 (Tr. 143-144). Liss, however, did not investigate whether the certificate of insurance was accurate (Tr. 147). Liss testified that he has someone else in the office handle the office work, which in this case would be filing the

certificate of insurance for a job (Tr. 148-149). The employee has been at Peerless Rug for approximately 20 years and her job is to make sure that all information about any one job that is done is in the correct file (Tr. 149). Liss assumed that this was done correctly for the job performed on February 24, 2017 at 333 Michigan Avenue because he was able to obtain payment from escrow after turning in all of his documents, but admitted he does not have actual knowledge of whether or not the contents were updated (Tr. 150).

Liss could not answer whether certificates of insurance generally have the subcontractor's name on them (Tr. 152). Performance Floors was not listed in the box as the insured on the certificate of insurance (Respondent Peerless Rug Company, Inc. Exhibit 1). Liss could not answer whether Performance Floors should be listed as the insured party on the certificate of insurance (Tr. 156).

Liss first learned of Petitioner's workers' compensation claim in the summer of 2021 (Tr. 144). Liss said that when he heard that he had a workers' compensation claim that he did not care, because he has insurance, which is supposed to take care of it for him (Tr. 144-145). Liss did eventually turn the case in to his insurance provider (Tr. 145).

Further Testimony of Dennis Muczynski

Dennis was able to identify the woman that Liss believed to handle his certificates of insurance as Donna Chambers (Tr. 158). At the time of the accident, Dennis would produce certificates for Ms. Chambers that would last over the course of several jobs (Tr. 158-159). Dennis said that he may not have been asked for a certificate in February of 2017 (Tr. 159). Dennis reviewed the certificate of insurance that was purported to be the certificate of insurance for the job in question and stated that all of his certificates have Performance Floors Corp. listed as the insured, which is not the case for this one (Tr. 160). Peerless Rug Company, Inc. Exhibit 1 lists Preferred Services, LLC as the insured party (Tr. 161).

Evidence Deposition Testimony of Justine Bolt – Starr Indemnity and Liability Company

Ms. Justine Bolt testified that she is The New York Regional Manager for Starr Indemnity and Liability Company (Respondent Starr Exhibit 1 (hereinafter "Starr 1") at p. 7).

In 2016 and 2017, Ms. Bolt was a senior underwriter for Starr. (Starr 1 at p. 7). In this position, Ms. Bolt was familiar with workers' compensation and wrap-up policies. (Starr 1 at 8-9). If an employer had a wrap-up policy, then they would only be covered for a specific project location under that policy. (Starr 1 at p. 11).

In 2016 and 2017, a group at Starr that was in charge of reporting to NCCI would provide new policy information to NCCI, including whether it was a wrap-up policy. (Starr 1 at pp. 11-12, 42-43). Starr did not have any control over what information would be published on the Workers' Compensation Commission website. (Starr 1 at pp. 14-15).

The policies held by Performance Floors and PTO Services at that time were both wrap-up policies (Starr 1 at pp. 15-16). The policies covered work only at the 444 West Lake Street, Chicago, Illinois project site. (Starr 1 at pp. 24-27).

On cross-examination, Ms. Bolt was asked a number of questions about a second address on the Starr policies for Performance and PTO but clarified on re-direct that the other address found on those policies was simply PTO's office address as the "insured domicile address" and did not convey coverage for any location other than the one specifically noted in the wrap-up policy. (Starr 1 at p. 42).

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). 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).

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 that any inconstancies in his testimony are consistent with the haziness of recalling events

of years gone by. The Arbitrator finds Petitioner's testimony to be straight forward, truthful, and consistent with the record as a whole.

The Arbitrator observed Mr. Dennis Muczynski, who testified on behalf of Performance Floors, and Mr. Phillip Liss who testified for Peerless Rug during the hearing and finds each of them to be a credible witness. Both also testified in a straightforward, non-evasive manner and their testimony was consistent with the evidence. Ms. Justine Bold was called to testify on behalf of Star Indemnity by evidence deposition. Although the Arbitrator did not observe her testify, her testimony was simple, straight forward and non-evasive. The Arbitrator has no reason to doubt her credibility.

A. On the issue of whether Respondent was operating under the Act at the time of Petitioner's accident, (A), the Arbitrator hereby finds:

Section 1(a) 3 of the Illinois Workers' Compensation Act states in relevant part, "The provisions of this Act hereinafter following shall apply automatically ... to all employers and all their employees, engaged in any department of the following enterprises or businesses which are declared to be extra hazardous, namely ... 1. [t]he erection, maintaining, removing, remodeling, altering or demolishing of any structure… 2. [a]ny enterprise in which sharp edged cutting tools, grinders or implements are used." *805 ILCS 305/3(1) and (8).*

Petitioner testified that on February 24, 2017, he was employed by Performance Floors Inc., unboxing and preparing to install flooring tiles at the 333 North Michigan Ave job site. In performing his job duties as a flooring installer, Petitioner testified that he used tools such as trowels, razor blades, and tile cutters (Tr.43). There is no reasonable dispute to the fact that Petitioner was engaged in the remodeling of the structure at 333 North Michigan Avenue or that Petitioner used sharp edged cutting tools as part of his job as a flooring installer. Respondent offered no evidence or testimony to dispute Petitioner's descriptions of his job duties as a flooring installer or the job he was working on at the time of his accident.

Based upon the type of work being performed by Performance Floors, Inc. at the time of Petitioner's accident, the Arbitrator hereby finds that Performance Floors, Inc. was operating under and subject to the Illinois Workers' Compensation Act, pursuant to Section 3(2) of the Act.

Mr. Philip Liss testified he is the President of an "all-around full-service floor covering" company, Peerless Rug Company. (Tr. 137) Peerless has a retail store, retail installation, and commercial installation. (Tr. 137 – 140). They do work for a number of general contractors, with Peerless' part being the flooring. (Tr. 140) Likewise Dennis Muczynski testified he is the President of Performance Floors Corp. Performance is a flooring installation shop. (Tr. 117) Dennis Muczynski testified PTO Services is hired by Performance to do payroll and supply workers' compensation insurance, which was memorialized in Performance Floors Exhibit 1. (Tr. 120 – 121) Bridge HR took over the contract as of January 1, 2017 and nothing was to change. (Tr. 121 – 122, Performance Floor x 3) The Arbitrator finds Peerless and Performance both fall squarely within the provisions of Section 1(a) 3 and Section 3 pertaining to employers. PTO Services and Bridge HR fall within Section 1(a) 4.

B. On the issue of employee-employer relationship (B), the Arbitrator hereby finds:

The Illinois Supreme Court has outlined a number of factors which weigh in determining whether an employee-employer relationship exists under the Illinois Workers' Compensation Act. Among these factors are the right to control the manner in which the work is done, the method of payment, the right to discharge, the skill required in the work to be done, and the furnishing of tools, materials or equipment. However, the most important of these factors in determining whether there is an employee-employer relationship is the employer's right to control the petitioner's work. *Bauer v. Industrial Commission*, 51 Ill.2d 169 (1972), *Yellow Cab Co. v. Industrial Commission*, 125 Ill.App.3d 644 (1st Dist. 1984), *Ware v. Industrial Commission*, 318 Ill.App.3d 1117 (1st Dist. 2000).

Respondent Performance Floors Exhibit 1 is the agreement between Performance Floors and PTO Services, Inc. The agreement lays out the co-employment situation between the two. Specifically, it states in

section 1.2, "This Agreement establishes a co-employment relationship between SUPERIOR and CLIENT." The agreement established a borrowing and lending arrangement between the Performance and PTO, who intended to be co-employers of the employees who did work for Performance Floors, Inc.

The result of this borrowing and lending relationship is that Petitioner was an employee of Performance Floors, Inc. on the date of the accident. Section 3.4 of the agreement reads:

> "The Administrative Employer (PTO SERVICES, INC.) is responsible for the administrative functions of the employer, such as payment of wages, payroll preparation, reporting and payment of payroll taxes, unemployment compensation claims, workers' compensation and other worker injury or illness insurance coverage and claims, employee benefit claims and professional guidance as to employment matters. The Worksite Employer (CLIENT) is responsible for functions that pertain to the business and benefit of the CLIENT" (Respondent Performance Floors Exhibit 1).

Petitioner testified that he had been working with Performance Floors since the 2000s. Dennis, the president of Performance Floors, Inc., testified that he had hiring and firing power, controlled the work, and occasionally provided tools. (Tr. 125-126; 131). Though Petitioner was paid by PTO, Performance provided all of the hours and pay information so that PTO could simply manage the payroll. PTO was required to obtain the workers' compensation insurance, but the policy itself covered statutory employees of Performance. On the day of the accident, Petitioner was working on a job for Performance. (Tr. 76).

Based on all evidence and testimony in the record, the Arbitrator finds that on February 24, 2017 an employee-employer relationship existed between Petitioner and Performance Floors as a borrowing employer from PTO Services, the lending employer, pursuant to Section 1(A)(4) of the Act. In light of the totality of the evidence, the Arbitrator finds an employee-employer relationship existed between Petitioner and Respondents Peerless Rug Co., Performance Floor Corp., PTO Services, and Bridge HR, as the successor company.

C. On the issue of whether Petitioner sustained an accident that arose out of and in the course of his employment by Respondent, (C), the Arbitrator hereby finds:

Petitioner testified that on February 24, 2017, he was unboxing carpet tiles that had been delivered to the center of a room. He was unboxing the material so he could install it and, at one point during the unboxing, he felt pain in his back and shooting down his leg while moving material from one area to another (Tr.44-45). The Arbitrator notes that this history is consistent with the histories provided by the Petitioner to his treating physicians as reflected by his medical records.

No Respondent in this case offered any testimony or evidence to dispute Petitioner's description of his February 24, 2017 work accident. After reviewing all evidence and testimony in this matter, the Arbitrator finds Petitioner's testimony regarding his accident history to be credible and, therefore, finds by a preponderance of the evidence that Petitioner did sustain an accident that arose out of and in the course of his employment by Performance on February 24, 2017.

D. On the issue of what was the date of accident, (D), the Arbitrator Finds:

Petitioner testified that on February 24, 2017 while unboxing carpet tiles that he felt pain in his back and shooting down his leg while moving material from one area to another (Tr.44-45). The Arbitrator notes that this history is consistent with the histories provided by the Petitioner to his treating physicians as reflected by his medical records. No Respondent in this case offered any testimony or evidence to dispute Petitioner's description of his February 24, 2017 work accident. After reviewing all evidence and testimony in this matter, the Arbitrator finds Petitioner's testimony regarding the date of his accident to be credible and, therefore, finds by a preponderance of the evidence that Petitioner did sustain an accident on February 24, 2017.

E. On the issue of whether Respondent was given proper notice of Petitioner's accident, (E), the Arbitrator hereby finds:

Petitioner testified that he informed Dennis, the owner of Performance, of his February 24, 2017 work accident on March 15, 2017. Petitioner presented text messages showing the Petitioner's report and Dennis'

reply with contact information for Bob Bishop of PTO Services. (Tr. 46, PX 11). Section 6 of the Act states that Petitioner has 45 days in which to inform his employer of his work-related accident. *805 ILCS 305/6*. Petitioner in this case reported his accident 19 days after its occurrence. No Respondent has offered any testimony or evidence to dispute the proper reporting of this accident by Petitioner. Based on all evidence and testimony in this case, the Arbitrator finds that by a preponderance of the evidence, Respondent was given proper and timely notice of Petitioner's accident.

F. On the issue of whether Petitioner's current condition of ill-being is causally related to his work accident, (F), the Arbitrator hereby finds:

The Arbitrator finds that Petitioner has established by a preponderance of the evidence that his current condition of ill-being is causally related to his February 24, 2017 work injury. This conclusion is based on Petitioner's testimony, the medical opinions contained in the record and the chain of events.

Whether a causal connection exists between an accident and a condition of ill being may be determined from both medical and non-medical evidence. *International Harvester v. Industrial Comm'n*, 93 Ill.2d 59 (1982). A chain of events demonstrating a prior condition of good health, an accident and a subsequent disabling condition of ill-being will suffice to establish a causal connection between the accident and the employee's injury. *Westinghouse Elec. Co. v. Industrial Comm'n*, 64 Ill.2d 244 (1976); *Plano Foundry Co. v. Industrial Comm'n*, 356 Ill. 186 (1934); *Phillips v. Industrial Comm'n*, 187 Ill.App.3d 704 (1989).

Petitioner credibly testified that prior to February 24, 2017, he had never sustained a back injury or treated for back symptoms. No credible evidence was introduced to the contrary nor was any evidence introduced that Petitioner sustained an intervening accident thereafter. Before February 24, 2017, his back was symptom-free, and he was working full duty. (Tr. 68-69). No evidence was introduced that before his accident, Petitioner missed work or requested reasonable accommodation due to a back pain.

Petitioner's treating doctors and Respondent's Section 12 examiner all agree that after Petitioner's February 24, 2017 injury, he had a new onset of lower back symptoms. The Arbitrator believes the Petitioner when he stated that he hoped that his back pain would improve in time and that he did not want to miss work.

After consulting with a chiropractor in the hope that his back pain would subside, Petitioner began medical treatment with Dr. Pelinkovic on March 20, 2017 when it was evident that he sustained a significant injury. Dr. Pelinkovic immediately imposed work restrictions and prescribed physical therapy. Within the year he had two lower back surgeries, both of which were related to his injuries according to his treating physician, Dr. Pelinkovic. The findings and opinions of Dr. Goldberg, Respondent's Section 12 examiner, do not dispute this causal relationship. In fact, Dr. Goldberg in his Section 12 report writes: "It appears that the patient sustained a herniation at L4-L5, L5-S1 due to the accident at 02/24/2017" (PX 23). Dr. Candido, the second Section 12 examiner, also related Petitioner's condition to his work injury. Dr. Candido writes in his report: "From the history described…one might surmise that the events did contribute to or cause the condition of Lumbar disc disruption described following the 02/24/17 work incident" (PX 24, 36).

By the end of 2018 Petitioner had undergone a third surgical procedure involving a two-level lumbar fusion and by the end of 2019, he had a permanent spinal cord stimulator implanted, which Dr. Buck, his treating pain management specialist, related to Petitioner's work injury (PX1, 391). In summary, Petitioner underwent five (5) surgical procedures. The first surgery on May 23,2017, the second on November 21, 2017, the third on May 31, 2018, the fourth on April 1, 2019, and the fifth on May 10, 2019.

There has been no credible evidence introduced by any Respondent in this matter to dispute that Petitioner's current work restrictions and pain are related to his February 24, 2017 work accident. Respondent has offered no medical opinion that disputes causal connection between Petitioner's current condition of ill-being and the initial accident. In fact, the only two medical examiners procured by any Respondent in this case, those of Dr. Goldberg and Dr. Candido, each express a clear opinion that the current condition of ill-being in the Petitioner's lumbar spine is causally related to Petitioner's February 24, 2017 work accident.

Based upon all evidence and testimony in the record, the Arbitrator hereby finds Petitioner has satisfied his burden of proof by a preponderance of the evidence that the current condition of ill-being in the Petitioner's lumbar spine is related to his February 24, 2017 work accident.

G. On the issue of Petitioner's Average Weekly Wage, (G), the Arbitrator hereby finds:

Petitioner and his employer, Performance Floors, stipulated to Petitioner's average weekly wage of $1,751.31 (Arbitrator's Exhibit 1). No other Respondent introduced evidence to the contrary. Thus, the Arbitrator is bound by this stipulation. Therefore, the Arbitrator finds that Petitioner's average weekly wage as of February 24, 2017 was $1,751.31 per week.

H. and I. On the issue of Petitioner's age, marital status and number of children at the time of his accident, (H) and (I), the Arbitrator hereby finds:

At trial, Petitioner testified that he was born on October 11, 1972 that he was married and has three children aged 13, 12, and 9 (Tr.36-38, *see also* PX 21). No Respondent has offered any evidence or testimony to dispute Petitioner's credible testimony regarding these facts. Therefore, the Arbitrator finds that Petitioner was 44 years old, married, with three (3) dependent children at the time of his February 24, 2017 work accident.

J. On the issues of whether the medical services that were provided to Petitioner reasonable and necessary and whether Respondent paid all appropriate charges for all reasonable and necessary medical services, (J), the Arbitrator hereby finds:

The Arbitrator has found that Petitioner sustained an accident that arose out and in the course of his employment on February 24, 2017 and that Petitioner's current condition of ill-being is related to this accident. Based on the medical records and the undisputed and uncontroverted opinions that have been entered into evidence, by the treating physicians and by the Section 12 examiners, there is no credible evidence to dispute that Petitioner's medical services have been reasonable, related, and necessary. No Respondent in this case has offered any evidence or testimony to dispute the reasonableness and necessity of Petitioner's medical treatment. Based on all evidence and testimony in this case, the Arbitrator finds that the Petitioner has proven by a

preponderance of the evidence that his medical treatment for his lower back injury has been reasonable, necessary and causally related to his work accident of February 24, 2017.

Some Respondents have asserted that Petitioner violated the "two-doctor rule". This is apparently based on Petitioner's testimony that he sought treatment at Loyola Medical Center at the suggestion of his attorney. (Tr. 56) after having chosen Dr O'Connor, then, and then DuPage Medical Group. Based on the totality of the evidence, Arbitrator disagrees.

After reviewing the records, the Arbitrator further finds that Petitioner did not exceed his statutory choice of physicians in this case. Following his injury, Petitioner was seen at O'Connor Chiropractic (PX 4). This was his first choice of physician. After reporting his injury to Dennis, Petitioner was sent to Physicians Immediate Care by Bob Bishop from PTO. Physicians Immediate Care was the company clinic and Respondent's choice of physician, not Petitioner's choice. Petitioner then began treatment with Dr. Pelinkovic at DuPage Medical Group. Dr. Pelinkovic was Petitioner's second choice. After Dr. Pelinkovic resigned, Petitioner was simply transferred within the treatment group to Dr. Mohan (PX 2). Dr. Mohan was not an additional choice of physicians. Petitioner was then referred to Dr. Ghanayem by the nurse case manager on his file with the apparent consent of Petitioner's attorney and Petitioner. This treatment was expressly approved by the adjuster for Respondent who was handling this case at that time (PX 22, 44). Petitioner was then referred to Dr. Buck by Dr. Ghanayem, whose treatment was also approved by Respondent (PX 1; PX 22). The evidence reflects that all of Petitioner's medical treatment was either within his two choices of treaters and their subsequent chains of referral or was expressly approved by Respondent.

Additionally, the Arbitrator notes that pursuant to the case of *Lanter Courier v. Industrial Commissio*n, 282 Ill.App.3d 1, 217 (Ill.App.5 Dist. 1996), the evidence does not suggest that the Petitioner was doctor shopping and the Arbitrator finds no evidence of such. The Arbitrator finds that all treating medical providers are within the "two-doctor rule". Furthermore, there is not evidence that the treatment received was not

reasonable, necessary or not causally related. The Arbitrator finds that Respondents' statutory obligation to pay benefits was interrupted due to an inability or unwellness to pay but not for just cause.

Certain Respondent's assert that they should not be liable to pay of the costs of medical marijuana. The Arbitrator agrees. Petitioner testified he is using medical marijuana in part when Respondent failed to authorize medical treatment. (Tr. 78, 79) This expense cannot be authorized or awarded by the Commission. In *Jerry Valadez v. City of Harvey*, No. 15WC 35245, 2020 Ill. Wrk. Comp. LEXIS 1124, 20 IWCC 0743 (Dec. 16, 2020), the Commission has held that a claimant is not entitled to reimbursement for medical cannabis because "the Illinois Compassionate Use of Medical Cannabis Pilot Program Act does not, and cannot, exempt participants from criminal prosecution under federal controlled substances laws." The Commission has determined that it cannot not "authorize medicinal care which violates federal law" and, therefore, "medicinal marijuana [was] not reasonable or necessary under the Illinois Worker's Compensation Act." *Id.* The Arbitrator, however, notes that this issue is moot in that Petitioner did not submit any medical marijuana bills nor did he request reimbursement.

Petitioner's group exhibit 25, Petitioner introduced into evidence unpaid medical expenses in the amount of $292,494.34 as follows:

1. Elmhurst Radiologists $57.00
2. DuPage Medical Group $45,745.00
3. ATI Physical Therapy $2,080.80
4. IWP $6,462.48
5. Rx (out-of-pocket) $18.65
6. Loyola Medical Group $142,350.41
7. Physicians Immediate Care $2,707.59
8. Loyola Medical Center $93,063.41

The Arbitrator finds Respondents Peerless Rug, Performance Floors, PTO, and Bridge HR, as the successor to PTO , jointly and severally liable for medical bills. The Arbitrator, therefore, orders that Respondent Peerless pay the unpaid medical expenses in the amount of $292,494.34, as provided in Sections 8(a) and 8.2 of the Act pursuant to its statutory obligation to pay benefits under the facts and circumstances in this matter. Respondent Peerless shall make this payment directly to Petitioner's attorney in accordance with Section 9080.20 of the Rules Governing Practice before the Illinois Workers' Compensation Commission

K. On the issue of temporary total disability and maintenance benefits, (K), the Arbitrator hereby finds:

The records reflect that Petitioner was taken off of work on March 20, 2017 by Dr. Pelinkovic due to his work related injury of February 24, 2017. The records further reflect that Petitioner was either on work restrictions or completely off work, pursuant to his treating physicians from March 20, 2017 through September 18, 2019. There is no evidence that Petitioner was ever offered any light duty work from Respondent during this time.

Petitioner underwent an FCE on July 29, 2019 and was placed on permanent light duty restrictions by Dr. Buck on September 19, 2019, consistent with the FCE results. (PX 1, 432). At no point has Respondent made a light duty job offer or made any accommodations for Petitioner. (Tr. 59). No evidence was introduced of a light duty offer.

After being released with permanent light duty restrictions, Petitioner began a job search for which he submitted job search logs. (PX 6). In December of 2020, Petitioner began formal vocational rehabilitation services through Vocamotive (PX 7). Petitioner continued vocational rehabilitation services with Vocamotive through May 2021, when payment for those services ceased and Petitioner's benefits, which were being paid at the time through Bridge HRO, stopped (PX 26). Even though Petitioner's vocational rehabilitation assistance was cut off and his maintenance benefits stopped being paid, he continued to look for work. (Tr. 67).

No Respondent has offered any testimony or evidence to dispute Petitioner's credible testimony regarding his vocational rehabilitation or job search efforts since being released from medical care with permanent restrictions. However, Petitioner did not document job search logs after benefits were unilaterally terminated.

Petitioner claims he is due maintenance from September 20, 2019 through the date of trial on September 20, 2022 or 156 5/7 weeks. (156 5/7 weeks 1167.54 x 156 5/7 = $182,970.80.) The Arbitrator finds Petitioner initiated a self-directed job search and provided supporting documentation from January 14, 2020 to August 27, 2020. (Px6) Vocational assessments and testing were performed by Vocamotive in December 2020 and January 2021. (Px7, 8, 9) Petitioner testified he participated in a job search process until May 2021 when benefits stopped. Petitioner further testified he continued to look for work following May 2021 but failed to present any evidence of that effort. It appears that Respondents agree that Partitioner is entitled to maintenance benefits up to May 31, 2021. Certain Respondent's dispute that Petitioner is entitled to maintenance benefits thereafter on the basis of Petitioner's failure to produce job searches after Respondent terminated all benefits.

Based on Petitioner's credible testimony regarding his medical treatment, restrictions, and off-work periods, in conjunction with a full review of the medical and vocational records, the Arbitrator hereby finds that Petitioner was temporarily and totally disabled from March 16, 2017 through September 19, 2019, as provided in Section 8(b) of the Act.

Given the evidence in this case, the Arbitrator will not endorse Respondent's failure to pay maintenance based on Petitioner's failure to produce job searches after Respondent terminated all benefits, medical, indemnity and vocational, without cause. It is undisputed that the Petitioner was seriously injured and sustained a significant disability. It is undisputed that he had reached maximum medical improvement by September 19, 2019. It is undisputed that Petitioner was unable to return to his regular job. It is undisputed that Petitioner requires continued medical care after being declared MMI. It is undisputed that he requires medical maintenance of his spine stimulator and related care The Arbitrator will not endorse nor condone respondents'

failure to pay maintenance where that employer does not comply with Rule 9110.10, including 9110.10, subsection c, of The Rules Governing Practice Before the Illinois Workers' Compensation Commission and does not provide an injured worker with the vocational and job placement assistance and guidance that he clearly needs. Vocational guidance that he needs in order to return to a productive and stable employment position and become a taxpayer once more. Despite the clear and undisputed needs of the Petitioner for which the Act affords to injured workers, Respondent terminated benefits.

The Arbitrator finds that Petitioner is owed maintenance benefits commencing September 20, 2019 through September 20, 2022, as provided in Section 8(a) of the Act. Therefore, the Arbitrator orders Respondent Peerless, pursuant to its statutory obligation, to pay Petitioner temporary total disability benefits of $1,167.54/week for 131-1/7 weeks, commencing March 16, 2017 through September 19, 2019, as provided in Section 8(b) of the Act and maintenance benefits of $1,167.54/week for 138-6/7 weeks, commencing September 20, 2019 through September 20, 2022, as provided in Section 8(a) of the Act. Respondent is entitled to credit for payments previously made.

N. On the issue of whether Respondent is due any credit, (N), the Arbitrator hereby finds:

Respondent Performance Floors introduced evidence of payment of benefits during some of the relevant periods (Respondent Performance Floors Exhibit 4). Petitioner has agreed that Respondent is due credit for the TTD and maintenance benefits paid. Petitioner did dispute Respondent's right to any credits pursuant to Section 8(j) of the Act. Section 8(j) states, in relevant part:

> "In the event the injured employee receives benefits, including medical, surgical or hospital benefits under any group plan covering non-occupational disabilities contributed to wholly or partially by the employer, which benefits should not have been payable if any rights of recovery existed under this Act, then such amounts so paid to the employee from any such group plan …shall be credited to or against any compensation payment for temporary total incapacity for work or any medical, surgical or hospital benefits made or to be made under this Act." *820 ILCS 305/8(j)*.

No other Respondent offered any evidence of payments made pursuant to any group plan covering non-occupational disabilities contributed to wholly or partially by the employer. The Arbitrator finds that

Respondent shall be given a credit of $153,109.88 for TTD, $0 for TPD, $99,240.05 for maintenance, and $0 for other benefits, for a total credit of $252,349.93.

O-I. On the issue of Petitioner's claim for ongoing vocational rehabilitation services, the Arbitrator hereby finds:

Under section 8(a) of the Illinois Workers' Compensation Act, "The employer shall also 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).*

Petitioner was referred to Vocamotive for vocational rehabilitation and an initial report and plan was prepared on December 1, 2020 by Laura Belmonte (PX 7, 1). Based upon her evaluation, Ms. Belmonte opined that Petitioner lost access to his preinjury occupation, that he is alternatively employable, and that for those reasons he is a candidate for vocational rehabilitation (PX 7, 9). An Illinois Workers' Compensation Commission Rehabilitation Plan was prepared and filed (PX 7, 11). Petitioner proceeded with vocational rehabilitation services based on the plan and was actively engaged in vocational rehabilitation (PX 7, PX 8). Petitioner's vocational rehabilitation services were cut off without reason while he was actively engaged.

No evidence was introduced reflecting compliance with Rule 9110.10, including 9110.10, subsection c of Rule 9110.10, As of the date of arbitration, Petitioner's job search efforts have still proven fruitless. No Respondent in this case has offered any basis to dispute Petitioner's ongoing need for vocational rehabilitation services. The Arbitrator finds that Respondent Peerless shall pay for Petitioner's incurred vocational expenses with Vocamotive in the amount of $4,579.00 (PX 25, PX 7, PX 8) and authorize and pay for continued vocational rehabilitation services under Section 8(a) of the Act. Peerless shall also pay $1,202.50 for vocational testing previously performed by the Eval Center in the amount of $1,202.50. (PX 25, PX 9)

O-II. On the issues of insurance coverage and liability for benefits due, the Arbitrator hereby finds:

As detailed in the sections above, on February 24, 2017, Petitioner was employed by Performance Floors, Corp. as a borrowed employee from PTO Services pursuant to Section 1(a)(4) of the Act. There is no

dispute that Performance Floors was contracted by Peerless Rug to perform work at the 333 N. Michigan Ave job site where Petitioner was injured. After reviewing all evidence and testimony in this case, the Arbitrator finds that neither Performance Floors nor PTO carried a valid policy of workers' compensation insurance covering their 333 N. Michigan Avenue job site at the time of Petitioner's accident. For the reasons stated below, the Arbitrator finds that Peerless Rug is liable for payment of all benefits due in this case, pursuant to Section 1(a)(3) of the Act.

Performance Floors has offered evidence showing a contract between Performance and PTO Services, in which PTO services agrees to carry the workers' compensation insurance coverage for their borrowed / loaned employees (Performance Ex. 1 at 2). As borrowing and loaning employers, PTO Services and Performance Floors are jointly and severely liable for benefits due to one of their injured employees under the Act. *820 ILCS 305/1(a)(4)*. However, Petitioner has offered evidence that neither Performance Floors Corp. nor PTO Services carried a valid policy of workers' compensation coverage for the 333 N. Michigan Ave. job at the time of Petitioner's accident.

Petitioner's Exhibits 15A and 15B are the certified records letters from the National Council on Compensation Insurance ("NCCI") detailing the workers' compensation insurance coverage for PTO Services and Performance Floors, respectively, as of February 24, 2017. Those letters each indicate that there was one workers' compensation insurance policy shown for each company on that date. Those policies are from Starr Indemnity and Liability Co (policy numbers 9000005086 for Performance Floors and 9000005087 for PTO Services) with an effective date of May 27, 2016 and an expiration date of May 27, 2017. It is indicated in each of those NCCI responses that the Starr policies are "wrap-up" policies. (PX 15A, 3 and 15B, 5). Both Petitioner and Starr offered copies of these Starr policies into evidence. The policies clearly state that they cover Performance and PTO Services' employees only at the River Point Tower Project, located at 444 West Lake Street in Chicago. (PX 19 at 14-15, 46-47). The "Designated Workplaces Exclusion Endorsement" excludes "All Workplaces Except: Where operations are performed in conjunction with the consolidated wrap-

up program 'THE WRAP-UP PORGAM' administered by PTO Services." Ms. Justine Bolt, a representative from Starr credibly testified that the policies held by Performance Floors and PTO Services at that time were both wrap-up policies (Starr 1 at 15-16) and that the policies covered work only at the 444 West Lake Street, Chicago, Illinois project site. (Starr 1 at 24-27). It is clear from a review of this policy that the 333 N. Michigan Avenue work site where Petitioner was injured was not covered by these policies policy.

The plain language of the Act permits employers and insurance carriers to insure specific work sites under a policy of insurance while excluding others. Section 4(a)(3) of the Act allows an employer to "insure his or her compensation liability with 2 or more insurance carriers" or to "insure a part" of the liability while providing other coverage, such as self-insurance, for the remainder. *820 ILCS 305/4(a)(3).*

Respondent Peerless Rug cites the Illinois Workers' Compensation Commission insurance database search to argue that coverage did exist to cover Petitioner's accident. The Commission search for Performance Floors Corp on February 24, 2017 finds the Starr Policy numbered 9000005086. This search does not indicate whether the policy is a wrap-up policy. (PX 16A).

The lack of a wrap-up policy indication on the Commission website clearly places the Commission site at certain odds with the actual insurance policy from Starr. It is the undisputed testimony of Ms. Bolt that Starr did not have any control over what information would be published on the Workers' Compensation Commission website. (Starr 1 at 14-15). In such an instance, it is obvious that the policy itself is the more credible information source and the policy in this case clearly states that it covers Performance Floors employees only at their 444 W. Lake Street project. (PX 19).

The Commission search is also seemingly at odds with the certified NCCI records, which indicate that the Starr policy is a wrap-up policy. In this instance, it is clear that the NCCI records control. The Rules Governing Practice Before the Illinois Workers' Compensation Commission indicate that every insurer must report issued policies to NCCI within 10 days of their issuance (Section 7100.30) and cancellations of those policies must also be reported to NCCI in the proper fashion (section 7100.50). Furthermore, in an insurance

compliance hearing before the Commission, a "certification from an employee of the National Council on Compensation Insurance stating that no policy information page has been filed… shall be deemed prima facie evidence of that fact." (Section 7100.100(d)(3)(D)). It is evident from the Rules that the records of workers' compensation insurance policies in Illinois are to be kept by NCCI and the records kept by NCCI will be relied upon by the Commission. In contrast, there is no authority given in the Rules or the Act to the Commission website's insurance coverage search.

Respondent Peerless Rug claims that Starr "certified" to the Commission that they held insurance policies for Performance and PTO. However, no evidence was admitting showing such a "certification." The only entity that Starr was required to certify their policies to is NCCI, which clearly delineates those policies as wrap-ups.

In this case, the NCCI records indicate that the Starr policies in question were wrap-up policies and the policies themselves show coverage for only one worksite, which was not where Petitioner sustained his accident. Therefore, the Arbitrator finds that the Starr Indemnity and Liability Co. is not liable for any benefits due in this matter.

During arbitration, reference was also made to a certificate of liability insurance held by Peerless Rug, which was supposed to represent liability coverage for Performance Floors on the 333. N. Michigan job. (PX 16 at 7). In reviewing this certificate, the Arbitrator notes that neither Performance Floors nor PTO Services are named as either the "Producer" or "Insured" under this supposed policy. No testimony or evidence was given to show that either Performance Floors or PTO Services was covered by the policy described on this document. Furthermore, Petitioner has provided a subpoena response from AIG Insurance, which wholly owns National Union Fire Insurance Company of Vermont (PX 18B), stating that no such policy number was found in their system. (PX 18A).

As no evidence was presented by any party to prove the validity of the National Union insurance policy or to show that it covered any party in this case on the date of Petitioner's accident, the Arbitrator finds that the National Union policy described did not cover Performance Floors or PTO Services for Petitioner's injury.

No other insurance policies were found by NCCI for either Performance Floors or PTO Services as of February 24, 2017. The Arbitrator therefore finds that Performance Floors and PTO Services were uninsured at the time of Petitioner's accident.

Section 1(A)(3) of the Act states, in relevant part:

> Any one engaging in any business or enterprise referred to in subsections 1 and 2 of Section 3 of this Act who undertakes to do any work enumerated therein, is liable to pay compensation to his own immediate employees in accordance with the provisions of this Act, and in addition thereto if he directly or indirectly engages any contractor whether principal or sub-contractor to do any such work, he is liable to pay compensation to the employees of any such contractor or sub-contractor unless such contractor or sub-contractor has insured, in any company or association authorized under the laws of this State to insure the liability to pay compensation under this Act, or guaranteed his liability to pay such compensation.
> *820 ILCS 305/1(a)(3)*

Since neither Performance Floors nor PTO services carried an insurance policy that covered Petitioner at the time of his injury, liability is passed to the contractor that hired the uninsured employer, Peerless Rug. The Arbitrator, therefore, finds Peerless Rug liable to pay for all benefits due and owing to the Petitioner.

Starr Indemnity & Liability Company ("Starr").

With regard to Respondent Starr's obligation to provide insurance coverage for Petitioner's claim and injuries, the Arbitrator finds that Starr owes no coverage and the Starr Policies do not provide any coverage for Petitioner's claim or injuries. In order to completely address all disputed insurance coverage issues in support of the Arbitrator's finding, the Arbitrator will address each of the four reasons that Starr asserts why coverage is not available under the Starr Policies.

1. **No Party with Standing Requested Coverage from Respondent Starr**

Starr correctly asserts that PTO and Performance Floors are the only Respondents that potentially qualify as an "insured" under the Starr Policies. (Starr Ex. 1, pp. 73-175) Starr also claims that either PTO nor

Performance Floors gave notice of Petitioner's injury or claim to Starr. (Arb. Ex. 1; 3; Starr Ex. 1, pp. 30-31, Trial Tr., pg. 130) Starr also notes that either PTO nor Performance Floors seek coverage for Petitioner's claim under the Starr Policies. (Arb. Ex. 1; 3; Trial Tr., pg. 127)

Petitioner similarly does not seek coverage from Starr under the Starr Policies for his injuries or claim. (Arb. Ex. 1-6; Trial Tr., pp. 105-106) Instead, Petitioner agrees that the Starr Policies do not provide coverage for his injuries or claim. (*Id.*; Trial Tr., pp. 34-35)

The only party that argues that the Starr Policies should cover Petitioner's injury and claim is Respondent Peerless. (Arb. Ex. 4) Starr asserts that Peerless, however, does not have standing to seek coverage under the Starr Policies.

Peerless is not a named insured or additional insured under the Starr policies. (Starr Ex. 1, pp. 73-175) Peerless makes no argument that it is an insured under the Starr Policies. Even if that argument was made, Petitioner was not injured at 444 W Lake Street, Chicago, Illinois, which is the only worksite potentially covered by the Starr Policies, whether for a direct or alternate employer. (Trial Tr., pg. 105; Starr Ex. 1, pp. 24-28; 86-87; 89; 97-98; 137-138; 140; 147-148; 175) Because Peerless is not an insured under the Starr Policies, it has no standing to seek coverage in this matter. *Transcontinental Insurance Co. v. National Union Fire Insurance Co. of Pittsburgh*, 278 Ill. App. 3d 357, 368 (1996).

Since it is not the injured worker, Starr claims that the only other means by which Peerless could potentially demonstrate standing is if it is a direct third-party beneficiary under the Starr Policies. *Caswell v. Zoya Int'l*, 274 Ill. App. 3d 1072, 1074 (1st Dist. 1995); *Founders Ins. Co. v. Munoz*, 237 Ill. 2d 424, 433 (2010); *Holmes v. Fed. Ins. Co*., 353 Ill. App. 3d 1062, 1065-1066 (5th Dist. 2004). Peerless cannot make that showing. Peerless is not listed as a beneficiary in the Starr Policies. (Starr Ex. 1, pp. 73-175) The Starr Policies also provide no potential coverage for a class of beneficiaries similar to Peerless that could convey third-party beneficiary status as required to demonstrate that Peerless has standing to seek coverage under the Starr

Policies. (*Id*.) In keeping with that, Peerless does not argue that it is a third-party beneficiary under the Starr Policies.

Because Peerless is not an insured, injured worker or direct third-party beneficiary under the Starr Policies, the Arbitrator finds it does not have standing to seek coverage for any party under the Starr Policies in this matter. Since Peerless is the only party seeking coverage under the Starr Policies for Petitioner's claim, and it does not have standing to do so, the Arbitrator finds that the Starr Policies do not provide any coverage for Petitioner's claim.

2. Respondent Starr's Wrap-Up Workers' Compensation Policy Is Permitted in Illinois

Section 4(a) of the Illinois Workers' Compensation Act (the "Act") requires employers to provide for payment of workers' compensation claims via one of the ways enumerated in the Act. As an initial matter, the Act addresses an employer's obligation not an insurer's obligation vis-à-vis workers' compensation coverage. This supports a finding of no coverage for Respondent Starr, as it is undisputed it did not employ Petitioner.

Aside from that, Section 4(a) allows for coverage of workers' compensation claims by a combination of the identified methods. The Act specifically allows for coverage under one insurer to be limited, so long as the entire compensation liability for one location is covered by one carrier. 820 ILCS 305/4(a)(3). That is how the Starr Policy functions by potentially insuring all PTO or Performance Floors employees at the subject project located at 444 West Lake Street, Chicago, Illinois.

After listing the acceptable methods for workers' compensation coverage, the Act states that, "[a]ny provisions in any policy, or in any endorsement attached thereto, attempting to limit or modify in any way, the liability of the insurance carriers issuing the same except as otherwise provided herein shall be wholly void." 820 ILCS 305/4(a)(3). "Except as otherwise provided herein" includes Section 4(a)(3)'s provision that it is acceptable for an insurer to only cover all employees at one location. That is exactly the coverage the Starr Policies potentially provide. Because the Starr Policies fall under one of the permitted enumerated items under Section 4(a)(3), the Arbitrator finds that section of the Act does not void any portion of the Starr Policies.

This finding is supported by the decision in *Va. Sur. Co. v. Adjustable Forms, Inc*. 382 Ill. App. 3d 663, 667-669 (1st Dist. 2008) in which the Court considered coverage under a wrap-up workers' compensation insurance policy, found it to be valid and did not void or change any of the terms of that policy. The Arbitrator further notes that, consistent with the ruling in *Adjustable Forms*, Starr issued the Starr Policies after first determining they were permitted in Illinois, charged premium accordingly, reported the Starr Policies to NCCI as "wrap-up" policies, and never had those policies rejected by NCCI or were otherwise advised they were not permitted in Illinois. (Starr Ex. 1, pp. 10-17; pp. 42-43; PX 15B; PX 16D)

Peerless' only argument in favor of coverage under the Starr Policies is that the policies' endorsements are void per Section 4(a)(3) of the Act. In addition to the fact the Starr Policies conform with the Act for the reasons just discussed, Peerless' citation to *Klein vs. Precision Cabinets*, 2010 Ill.Wrk.Comp. LEXIS 481 does not support voiding the endorsements of the Starr Policies. *Klein* did not address the legality of a wrap-up workers' compensation policy. Instead, *Klein* considered whether a standard workers' compensation insurance policy provided coverage for a loaned employee, despite the fact that the borrowing employer was not listed on an endorsement to the lending employer's policy. *Klein* decided that such an endorsement was not needed and cited in part to Section 4(a)(3) of the Act to support its finding that the loaning employer's workers' compensation policy covered all employees such that an endorsement identifying the borrowing employer was not required. *Id*. at pp. 7-8.

Since the policy at issue in *Klein* was not a wrap-up policy, the decision does not address whether a wrap-up policy is permitted by the Act and none of Section 4(a)(3)'s enumerated items were at issue, the Arbitrator finds that *Klein* is inapplicable to the present matter and does not supporting voiding any portion of the Starr Policies.

3. Respondent Starr's Workers Compensation Policies Do Not Cover Petitioner's Claim

In keeping with their purpose as wrap-up insurance policies, the critical inquiry under the Starr Policies is whether Petitioner was performing work at the covered location at 444 W. Lake Street at the time of his injury.

Outboard Marine Corp. v. Liberty Mutual Insurance Co., 154 Ill. 2d 90 (1992) (duty to defend and indemnify determined by comparing the terms of the policy and underlying pleading and testimony).

Petitioner's application for workers' compensation benefits and his own testimony confirms he was injured while working at 333 N. Michigan Avenue, Chicago, Illinois, not while performing work for PTO or Performance Floors at the covered location at 444 W. Lake Street in Chicago, Illinois. (Trial Tr., pp. 76; 105; 118) Performance Floors' representative specifically testified that Performance Floors had no employees working at 444 W. Lake Street on at date of Petitioner's injury. (Trial Tr., pg. 127) No party disputes the location of Petitioner's claimed injury. The Arbitrator finds that, because Petitioner was not injured at the covered location, the Starr Policies do not provide coverage for Petitioner's injuries or claim.

4. Starr No Timely Notice Defense of Petitioner's Claim

Part 4 of the Starr Policies provides in relevant part that an insured is required to tell Starr "at once" if an injury occurs. An insured is also required to "promptly" give Starr all documents related to a claim. The Starr Policies also include a Knowledge of Occurrence endorsement that require Starr be provided notice of a claim as soon as practical. (Starr Ex. 1, pg. 29) In light of the above findings and conclusions, that Arbitrator finds the lack of notice issue to be moot and, thus, does not render a finding one way or another.

O-III. Other Borrowing-Lending

Performance Floors asserts that the actual function of its relationship with Peerless Rug was not one of a true contractor/subcontractor situation. Rather, Performance Floors claims that the parties functioned more to what is contemplated in a borrowing and lending situation. PTO Services and Bridge HR, as the successor to PTO Services, were clearly in the employee leasing business and, thus, are statutorily loaning employers per Section 1(a) 4 as discussed above.

Performance Floors notes that Mr. Philip Liss testified that 100% of Peerless' commercial work is hired to Performance. "All our work is Performance. We don't use any other installer." (Tr. 140) Mr. Dennis

Muczynski from Performance likewise testified he has had a relationship with Peerless Rug since 2001 when he opened their doors. (Tr. 119) He noted Performance does not supply materials. (Tr. 119) Performance only sends installers and installs. (Tr. 119) Petitioner likewise confirmed material and supplies would come from Peerless. (Tr. 41) Mr. Dennis Muczynski made Petitioner's schedule and told him where to be. (Tr. 41) Petitioner further acknowledged they were doing work for Peerless Rug at the accident site; 333 N. Michigan Avenue and noted Performance Floors did not have their own jobs at the stie but did work for other contractors. (Tr. 76)

Performance Floors further notes that both Peerless and Performance were in the business of flooring and Peerless holds itself out as an all-around full-service flooring company, yet all of their commercial installation labor comes from a single source, Performance Floors. Thus, Performance Floors asserts that the function relationship between them is that of borrowing employer and lending employer.

Performance Floors requests that the Arbitrator find Peerless Rug to be a borrowing employer and find Performance Floors to be a lending employer. Performance Floors asserts that liability between the four entities is joint and several with no agreement to the contrary but for the agreement between Performance and PTO followed by Bridge HR.

Performance Floors finally requests the Arbitrator further to find the loaning employers, Performance Floor Corp., PTO, and Bridge HR, be entitled to receive from the borrowing employer, Peerless Rug, full reimbursement for all sums paid or incurred, including reasonable attorney's fees and expenses, pursuant to Section 1(a)4 of the Act.

The Arbitrator finds the arguments of Performance Floors to be clever, interesting and novel but one of apparent first impression. And, thus, without the benefit of Commission or judicial guidance, the Arbitrator is unable to reach the conclusion that a constructive borrowing - lending relationship exited between Performance

Floors and Peerless Rugs. The Arbitrator is bound to apply the law to the facts and does not create law. Therefore, the Arbitrator finds that Performance Peerless Rug is not a borrowing employer and finds that Performance Floors is not a lending employer. Rather the Arbitrator finds that the relationship between Peerless and Performance Floors is a contractor/subcontractor relationship. The Arbitrator does find that liability between the four entities, Peerless Rug, Performance Floors, PTO and Bridge HR is joint and several.

O-IV. Other – Statutory Employer

In light of the above, the Arbitrator finds that the sole business of PTO Services and Bridge HR was the leasing of employees. Per Section 1(a) 4 of the Act:

> An employer whose business or enterprise or a substantial part thereof consists of hiring, procuring or furnishing employees to or for other employers operating under and subject to the provisions of this Act for the performance of the work of such other employers and who pays such employees their salary or wages notwithstanding that they are doing the work of such other employers shall be deemed a loaning employer within the meaning and provisions of this Section.820 ILCS 305/1(a) 4.

The Arbitrator finds PTO Services and Bridge HR, as the successor to PTO Services, are leasing companies and thus, statutory employers per the Act.

PTO Services and Bridge HRO – JOINTLY AND SERVERALLY LIABLE

Respondent PTO Services was a professional employer organization (PEO) which contracted with clients to handle professional services like payroll, HR, and workers' compensation insurance coverage. Performance Floors hired PTO Services to handle their workers' compensation insurance. A contract outlining this relationship was admitted at hearing. RP EX 1. PTO Services purchased insurance through Compass Pilot. RPR EX 1. On November 19, 2021, Marcus Asay, the CEO of Compass Pilot, was indicted in California for writing fraudulent workers' compensation policies. RPTO EX 3.

PTO Services declared bankruptcy on April 14, 2017. RPTO EX 1. After the bankruptcy, Bridge HRO took over as PEO for Performance Floors. RP EX 2. Later, Bridge HRO became insolvent, and its LLC was revoked from the Illinois Secretary of State on June 10, 2022. RPTO EX 4.

As both PTO Services and Bridge HRO are no longer operating, Performance Floors is effectively an uninsured employer for this date of accident. In situations involving an uninsured sub-contractor, Section 305/1(a)3 of the Act which provides in relevant part:

> "Any one engaging in any business or enterprise is liable to pay compensation to his own immediate employees in accordance with the provisions of this Act, and in addition thereto if he directly or indirectly engages any contractor whether principal or subcontractor to do any such work, he is liable to pay compensation to the employees of any such contractor or subcontractor unless such contractor or subcontractor has insured in any company or association authorized under the law of this State to insure the liability to pay compensation under this Act, or guaranteed his liability to pay such compensation." *Duggan v. Builders Assocs.,* 271 Ill.App.3d 744, 648 N.E.2d 1063, (1st Dist. 1995).

In this case, Peerless Rug sub-contracted with Performance Floors to install flooring at 333 N. Michigan Avenue. Performance Floors was uninsured on the date of accident.

Based upon the facts presented at hearing and evidence admitted, the Arbitrator finds that Peerless Rug, Performance Floors, PTO Services and Bridge HRO are jointly and severally liable to the Petitioner. It does not appear, however, that Performance Floors, PTO Services and Bridge HRO are able to pay. The Arbitrator concludes that Peerless Rug should promptly pay all benefits due and owing to Petitioner.

The Injured Workers' Benefit Fund – NOT LIABLE

Pursuant to section 1(a) of the Act, anyone engaging in any business or enterprise referred to in subsections 1 and 2 of Section 3 of the Act is liable to pay compensation to his own immediate employees in accordance with the provisions of the Act. 820 ILCS 305/1. Subsection 2 of Section 3 of the Act includes "construction, excavating or electrical work." 820 ILCS 305/3(2). Furthermore, pursuant to Section 1(a)3, any general contractor is liable to pay compensation to the employees of any of its subcontractor under the Act. Peerless contracted with Performance to install the flooring at the work site. Therefore, the Arbitrator finds that since Performance Floors was uninsured, the contractor, Peerless Rug is statutorily liable to pay such compensation. In this matter Peerless Rug has workers compensation insurance provided by Twin City Fire Insurance Company. PX16a. Therefore, the Arbitrator finds that the Injured Workers' Benefit Fund is not liable for benefits in this case.

In summary, Peerless Rug is an insured entity. (PX 15E). Since liability rests with Peerless Rug, which did have insurance at the time of Petitioner's accident, the Injured Workers' Benefit Fund has no liability for payment of benefits in this case.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC000250
Case Name	Todd L Fraley v. Etnyre International
Consolidated Cases	
Proceeding Type	8(a)/19(h) Petition
Decision Type	Commission Decision
Commission Decision Number	23IWCC0445
Number of Pages of Decision	15
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Gregory Tuite
Respondent Attorney	Jeffrey Zucchi

DATE FILED: 10/16/2023

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TODD FRALEY,

Petitioner,

vs. NO: 13 WC 000250

ETNYRE INTERNATIONAL, LTD.,

Respondent.

DECISION AND OPINION ON REVIEW OF §19(h) PETITION

This matter comes before the Commission on Petitioner's Petition under §19(h) of the Illinois Workers' Compensation Act. ("Act"). Notice was given to all parties, a hearing was held before Commissioner Kathryn A. Doerries on February 7, 2023, in Rockford, Illinois and a record was made. The parties stipulated that Respondent paid for reasonable and related medical bills under §8(a) and for six weeks of lost time benefits commencing August 22, 2017, through October 2, 2017. Thus, the only issues before the Commission were with respect to causation and nature and extent. (T. 4-5; CX1) The Commission, having considered the entire record, and being advised of the facts and law, finds that Petitioner failed to sustain his burden of proving a material change in his disability since the Arbitration Decision that was issued on May 3, 2016, and denies Petitioner's §19(h) Petition for additional permanent partial disability benefits for the reasons set forth below.

FINDINGS OF FACT

2012 Injury and Post-Surgical Recovery

Petitioner was initially injured at work as a trailer assembly worker on April 2, 2012.[1]

Petitioner testified at the subject Commission hearing that his treating doctor was Dr. Robin Borchardt at the time of his initial injury. Dr. Borchardt referred Petitioner to Dr. Jon Whitehurst. (RX1) Both doctors are affiliated with OrthoIllinois. (T. 7; PX2) The medical records from OrthoIllinois, for dates of service in 2012 and 2013 were entered into the 2017 Commission Hearing record. (PX2) Further, the May 12, 2014, §12 Opinion Report authored by Dr. Stephen Weiss was entered into the Commission Hearing record. (PX3)

At the Arbitration hearing, the Petitioner testified regarding his then current complaints and what he noticed about himself and this was noted in Arbitrator Erbacci's Decision. The transcript from those proceedings is not in the record. Thus, the Petitioner's testimony and evidence noted in the Arbitrator's Decision must be relied upon as well as the 2012 and 2013 OrthoIllinois and 2014 Dr. Weiss medical records entered into evidence at the subject hearing. (RX1, PX2, PX3)

On April 3, 2012, in the "History of Present Illness" section of the office notes, Dr. Borchardt noted Petitioner was pushing on a piece of metal with his right foot, (and) the force caused his left knee to "give out." He reported that the knee was dislocated when he fell but when he stood back up the knee relocated. Petitioner also reported that he had a previous dislocated knee cap many years prior but he did not recall which knee it was that dislocated. (PX2, 3)

On April 6, 2012, Dr. Whitehurst diagnosed a rupture of the patellar tendon, dislocation of the patella, closed and a medial meniscus tear. (PX2; RX1) Petitioner ultimately underwent surgery on his left knee with Dr. Whitehurst on April 19, 2012, consisting of left knee arthroscopic reduction of patellar fracture with internal fixation of the patellar fracture, left knee patellar tendon repair with arthroscopic retinacular repair, left knee arthroscopy with partial medial and lateral meniscectomies and arthroscopic removal of loose bodies. (PX2; RX1)

On December 4, 2012, Dr. Borchardt noted, that Petitioner has experienced an increase in his discomfort and has a moderate effusion of his left knee. Dr. Borchardt noted, "I am concerned he has developed chondromalacia from his traumatic injury." He then opined that it would be

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[1] There is some inconsistency in the record as to whether the accident occurred on April 1 or April 2, 2012. (RX1, 2) Petitioner filed an Application for Adjustment of Claim with the Illinois Workers' Compensation Commission alleging an accident date on April 1, 2012, where his case was assigned number 13 WC 000250. The Arbitrator's May 3, 2016, Decision, listed April 1, 2012, in the Findings on p. 2, however, the remainder of the Decision is consistent with the accident date of April 2, 2012. (RX1) The medical records also consistently refer to a date of accident on April 2, 2012. (PX2, PX3, PX8)

helpful to obtain another MRI scan to evaluate Petitioner's left knee and to rule out a bone contusion. He started Petitioner on Medrol due to the effusion he had and the crepitus. (PX2, 30)

On December 10, 2012, Petitioner's main complaint was pain and swelling. He also reported associated symptoms of clicking, locking and giving way. (PX2, 32) Dr. Borchardt reviewed the MRI results with Petitioner and noted he had effusion and increased tendinosis of his patellar tendon. It was noted Petitioner was doing quite a bit of walking. He was placed on work restrictions to allow the tendonitis to calm down. (PX2, 33)

Petitioner testified that he was released to full-duty work on January 23, 2013, after his first left knee surgery and returned to his job as an assembly leader for the trailer line. The January 23, 2013, office visit note specifically states the following:

History of Present Illness

Follow-up:

> The patient presents for evaluation of Left knee pain. The patient is status post left knee arthroscopic partial medial and lateral meniscectomy, removal of loose body, open patellar t endon and retinacular repair, ORIF of patella avulsion fracture on 4/19/2012. The main complaint at this point is pain but not as much popping and clicking. Pain Level: at rest 3/10, with activity 7/10…Physical therapy was completed, is now simply a home exercise program. Current work status is Patient is working with restrictions of sit down work only with limited walking. The patient reports no new complaints since last visit. (PX2, 37)

Treatment

> He is much improved. The effusion has resolved. He still has occasional popping and cracking. His examination today shows improved tracking of his patella. I discussed how important it is that he restart his home exercise program and continue it three times per week at home. I reviewed his medications again. He was given a refill of Meloxicam to take for one more month and he was given hydrocodone for pain. I discussed the benefits and side effects of the medication. He will be released from our care. I will have him work four hours regular per day for two weeks and then return to regular work without restrictions...Patient is discharged. (Px2, 38)

Petitioner's case went to trial before Arbitrator Anthony Erbacci on March 17, 2016. (T. 8) Arbitrator Erbacci's May 3, 2016, Arbitration Decision ("Arbitrator's Decision") notes that at the time of his discharge from care and his release to return to work, Dr. Borchardt

noted Petitioner was "improved" but he still had complaints of swelling, constant achy pain, and popping and clicking in the knee. (RX1, 4)

Petitioner testified that the insurance company sent him to Dr. Stephen Weiss after his first surgery. (T. 14) The Arbitrator's Decision also notes that Petitioner was examined pursuant to §12 by Dr. Stephen Weiss, at the Respondent's request. Dr. Weiss's May 12, 2014, opinion report notes that Petitioner had an antalgic gait on the left side but full range of motion of both knees. (PX3; RX1) In the section, "History of Present Illness" Dr. Weiss documents the following:

> Mr. Fraley indicates that he still has pain and swelling in the left knee. He indicates that he is unable to kneel or put weight on the front of his knee. He indicates that weightbearing activities, twisting, or climbing stairs tend to make the knee worse. (PX3, 4)
>
> Dr. Weiss further noted on physical examination of Petitioner, in pertinent part:
>
> He has an antalgic gait on the left side…Clinically, there appears to be an increased valgus inclination, measuring approximately 10 degrees compared to about 6 on the opposite right side. Range of motion of the left was noted to be -0- on the left and right on extension, and 140 degrees bilaterally on flexion. There is mild effusion in the knee along with swelling and edema over the anteromedial and anterolateral joint lines. There is tenderness along both joint lines. There is a positive modified medial Apley…It is noted that the subcutaneously palpable anterior surface- of the patella measures 2 inches on the right and 2-3/4 inches on the left, possibly consistent with post-traumatic ossification. (PX3, 5-6)

Petitioner testified at the arbitration hearing that he currently continues to experience pain in the left knee, especially when performing work activities. He testified that the longer he is on his feet, the more painful the condition becomes. He also notices that he walks with a limp. This is worsened by extended standing and walking. He does not take any prescription medications, but two to three times per month has to take 800-1200 mg of Ibuprofen to reduce the pain and swelling. (RX1, 4, 7)

Arbitrator Erbacci awarded Petitioner permanent partial disability benefits of $855.09/ week for 64.5 weeks because the injuries sustained caused the 30% loss of use of the left leg, as provided in § 8(e) of the Act after consideration of all the factors enumerated in § 8.1b(b) of the Act and based upon the totality of the credible evidence adduced at hearing. (RX1)

2017 Treatment and Post-Surgery Recovery

Petitioner testified that OrthoIllinois is the only place he has treated for his left knee injury since the injury on April 1, 2012. (T. 7) Petitioner testified at the subject hearing that

he had no other injuries involving his left knee through January 2018. (T. 8) However, Petitioner testified that he had another work-related accident on January 25, 2018, that also involved his left knee. That case was tried in Rockford a few months prior to the subject hearing. Other than that January 25, 2018, accident and left knee injury he had no other accidents or injuries involving the left knee since his release from Dr. Borchardt on December 20, 2017. (T. 19) He did have an injury to his back and subsequent back surgery. (T. 8-9) He returned to work with no restrictions following the back surgery. (T. 9-10)

Petitioner testified further that between January 23, 2013, when he was released to full-duty work, and April 18, 2017, the day he returned to Dr. Borchardt, he did not have any other treatment for his left knee. He was still working for the same employer, doing the same job. (T. 10-11) Petitioner testified that the physical requirements of those duties during that time entailed a lot of walking on cement floors. He testified that he worked eight to ten hours per day, and had to climb stairs. Further, he had to lift "15, 30 pounds and carry it from one area to another." He had to push and pull carts that sometimes weighted up to 100+ pounds, and he was required to pull them all around the shop as they added parts to the carts for the particular unit he was working on, depending upon what style the unit dictated. (T. 11)

Petitioner further testified that on April 18, 2017, a little more than four years after his release on January 23, 2013, he returned to Dr. Borchardt because he noticed his knee was still swollen. It was numb to the touch, and he had a lot of pain around the kneecap preventing him from squatting or crawling on the cement. It also hurt to touch. Petitioner testified that Dr. Borchardt examined him, prescribed a Medrol Dosepak of steroids, and recommended an MRI. (T. 12-13) Petitioner underwent a left knee MRI at OrthoIllinois on April 28, 2017. He went over the MRI results with Dr. Borchardt on May 1, 2017, and he was referred back to Dr. Whitehurst, the surgeon who had operated on him in 2012. (T. 13-14, RX1)

Petitioner underwent a new §12 evaluation with Dr. Weiss on June 7, 2017. (PX7) Dr. Weiss authored a report dated June 19, 2017, outlining Petitioner's left leg past medical history and those of his current complaints at the time.

In his June 19, 2017, opinion report, Dr. Weiss opined that Petitioner's then current diagnosis remains status post ORIF patellar fracture, medial and lateral meniscectomies, patellar retinacular repair and removal of loose body secondary to the dislocated patella. Dr. Weiss agreed with Dr. Borchardt that Petitioner should undergo a repeat arthroscopy of his knee.

Petitioner was examined by Dr. Whitehurst on July 12, 2017. Dr. Whitehurst recommended another surgery which was done on August 22, 2017, at OrthoIllinois Surgery Center consisting of: 1. Left knee arthroscopic partial medial meniscectomy; 2. Left knee arthroscopic lateral release; 3. Left knee removal of hardware. (T. 14,-15; PX4) Dr. Whitehurst's post operative diagnosis was 1. Left knee complex tear of the posterior horn of the medical meniscus; 2. Left knee patellar maltracking; 3. Left knee retained painful hardware. Petitioner had worked up until the point of surgery and was off work for six weeks

after the surgery. (T. 15) Petitioner attended physical therapy sessions at Athletico commencing September 20, 2017, through December 19, 2017. (T. 16-17; PX6)

Petitioner saw Dr. Whitehurst for follow-up appointments. On October 2, 2017, Dr. Whitehurst released Petitioner to sedentary work. The Respondent accommodated the restrictions. (T. 17) The last visit with Dr. Whitehurst was on October 30, 2017. (T. 19) On October 30, 2017, he reported that he was doing well overall with complaints of weakness but denying any swelling, numbness or tingling. His pain level was reported as at rest 0/10 and with activity, 2/10. He reported that he was working. (PX4) He was referred to Dr. Borchardt for follow-up in four weeks in order to optimize work conditioning therapy and provide transition to full duty.

Petitioner presented to Dr. Borchardt for evaluation of his left knee on November 29, 2017. (T. 18, PX4, 40) He was noted to be status post left knee diagnostic and operative arthroscopy, chondroplasty, partial meniscectomy, lateral release, removal of hardware on August 22, 2017. Petitioner reported no pain complaints. His pain level at rest was described as 0/10 and with activity 3/10. He reported occasional giving out, occasional clicking. He denied limited range of motion, locking out. He was going to therapy three times per week and was working with restrictions. On "Physical Exam" his gait was normal. There was no effusion. (PX4, 40)

With respect to the physical therapy after the subject surgery, Petitioner testified that the physical therapist would ask him at every visit to rate his pain on a scale of 0 to 10, 0 being no pain, 10 the most pain imaginable or possible. (T. 34) Petitioner's December 19, 2017, Functional Status Report documents that Petitioner reported subjectively that the left knee no longer woke him at night. His pain was rated as "current 0/10, best 0/10, and worse 0/10." (PX6, 7) He demonstrated the ability to kneel for 5 reps in the clinic without difficulty. He was able to crawl on the carpet a distance of 10 feet in the clinic without difficulty. He demonstrated the ability to meet the physical demands of his job. *Id.* at 8-9. The Assessment notes: "Patient has made great progress with his rehab. Patient scored 45 on his FOTO at initial evaluation, and 76 at D/C. He is pain free 100% of the day, and has met his return to normal job duties in the clinic setting." *Id.* at 11. The Plan states, "Patient has met all of his goals at this time and can be D/C to his HEP." *Id.* The December 19, 2017, Discharge Summary addressed to Dr. Whitehurst/Dr. Borchardt, reflected those same findings. *Id*. at 12-13.

The next day, December 20, 2017, Petitioner presented to Dr. Borchardt in follow-up. His main complaint at that point was with kneeling. He was noted to be doing better in comparison to the last visit. The quality of pain was described as better. His pain level at rest was 0/10, with activity 0/10. Petitioner denied numbness or tingling. Therapy was completed and Petitioner was working full time with restrictions. He had no new complaints since the last visit. The examination of his left knee revealed a normal gait. The examination of the left knee note further documents the following:

> There is no effusion, no ecchymosis around the knee. There is no numbness in the first webspace, medial, lateral or plantar aspect of the foot. The patient is able to flex and extend the ankle and toes. Dorsalis pedis and posterior tibial pulses are 2+. Range of motion includes 0 degrees of extension to 90 degrees of flexion. Flexion strength is 5/5. Extension strength is 5/5. There is no joint line tenderness. Tibial tubercle is nontender to palpation. Gerdy's tubercle is nontender to palpation. Pes anserine is nontender to palpation. McMurray's is negative medially and laterally. Anterior drawer is negative. Posterior drawer is negative. Lachman is negative. Varus stress at 0 degrees is negative. Valgus stress at 30 degrees is negative. Patellar apprehension is negative. Patellar grind is negative. Calf tenderness not present bilaterally. (PX4)

The Treatment note states the following:

> He is doing well. He denies any pain. He has made all of goals in therapy. I have discussed his injury in detail. He will continue his home exercise program. He will be released back to work without restrictions. He is at maximum medical improvement. All questions were answered satisfactorily and all necessary paper work was completed. (PX4)

Petitioner testified that he was released from care with no restrictions by Dr. Borchardt on December 20, 2017. He returned to work full-duty at that time. (T, 18-19)

Petitioner was evaluated by Dr. Steven Chudik at his attorney's request on May 17, 2021. (T. 20) Dr. Chudik's report, dated May 17, 2021, was entered into evidence. (PX8) Dr. Chudik noted that Petitioner experienced a subsequent work-related injury and bone contusion on January 25, 2018, which further aggravated his left knee post-traumatic condition. This report documented current restrictions that were not corroborated in the 2017 post-surgical recovery records from Athletico (PX6) and OrthoIllinois/Dr. Borchardt (PX4).

Petitioner's Commission Hearing Testimony

Petitioner testified that he is no longer working for Respondent. He last worked for Respondent on August 15 or 16 of 2022. (T. 20) He was still an assembly leader at the time of his departure. Petitioner testified when he last worked for Respondent in August 2022, he noticed that he still had a limp, numbness and swelling but it was tolerable. (T. 20)

Petitioner testified that he is currently working at Amazon Air, "[s]tacking boxes into airport containers or stacking them onto rollers to feed to the next guy so he can stack them." Petitioner testified that while he is working at his new job, nothing has changed. He still has swelling, pain that is tolerable, and if he walks for a long period of time, it swells more. It gets sore. If it gets really bad, he elevates it, ices it, and takes Ibuprofen to try to get the swelling down. That does not happen often, but he walks on cement and metal floors at work and if

he is walking on the steps he has to take one step at a time with both feet. He testified that he had starting doing that "probably 3 to 6 months ago." When he is walking down stairs, he notices that his left knee is hurting and clicking. He has to take the stairs one at a time. (T. 22)

Petitioner testified that when he first went back to full-duty after being on sedentary restrictions, in the first few weeks of 2018, he "still had the pain and swelling but it wasn't to a point where I thought there was any more they could do for it. I just kind of learned to deal with the swelling and the slight pain. I mean it's not moderate or extreme pain like it was. So as far as I'm concerned, it's probably at the best it's going to get." (T. 24) Petitioner testified when he had first went back to Dr. Borchardt, it was really hurting. After the surgery, it didn't hurt as much, but he still had the pain, and he still couldn't kneel on it. *Id.*

Petitioner testified further to recreational activities that he cannot do currently, subsequent to his January 2018 accident, however, he was working full-duty with no restrictions or limitations between his release in January 2013 and the subject medical treatment beginning April 18, 2017. (T. 25-26)

On cross-examination, Petitioner testified on December 19, 2017, the day he was discharged, that he did not remember telling the physical therapist his pain was at a level of 0/10 currently, at best and at worst, but he had no reason to disagree if that is what the physical therapist documented in his records. (T. 36) Petitioner agreed with the assessment that he had made great progress with rehab. *Id.* He denied, however, telling the therapist that he was pain-free 100 percent of the day but qualified that he was, "back to the original pain that I had before going, if that makes sense." *Id.* Petitioner agreed with the physical therapist's assessment, that he was completely functional, with no limitations. At that time, he was able to ambulate without any assistive devices. He agreed at the time he was able to walk on level surfaces without limping. (T. 37-38)

Petitioner further testified on cross-examination, that at his last treatment visit in January 23, 2013, he was having popping and clicking in his knee at that time, with his pain level at rest a 3 out of 10. He agreed with activity his pain rating was actually a 7 out of 10, if that is what the record states. (T. 44)

Petitioner then testified that according to his recollection, there was no difference in his condition from January 2013 through March 2016, approximately three years, that his knee remained essentially the same as it had been. (T. 56) Petitioner could not remember what he told the physical therapist at his visits in 2017. (T. 59-60) When asked specifically on cross-examination if he was doing better in November and December 2017 than when he was discharged in 2013, Petitioner testified he could not say if he was worse or better. He then clarified he did not believe he was worse but he was not better. (T. 61) Petitioner has not sought any more care or treatment for his left knee since July 2018, almost five years prior to the subject hearing. (T. 64)

Petitioner testified on recross-examination that he started his new job at Amazon in November 2022. (T. 78) Petitioner further testified that when the physical therapist writes down that he is pain free 100 percent of the day, the words do not have the plain, normal meaning. Petitioner testified that there was no new pain. (T. 81)

On further redirect examination, Petitioner testified that when he saw Dr. Weiss in 2014, he was having problems. When he testified in front of the Arbitrator in 2016, he testified that he had told the doctors he was experiencing pain in the left knee especially when performing work activities and the longer he was on his feet, the more painful his condition would become. Further, his symptoms were worsened by extended standing and walking. (T. 83-84)

On further recross examination, Petitioner testified he was not sure if he was doing a lot better in 2017 in terms of less pain and more function than in 2014 or 2016. (T. 86) When asked again to confirm that he was not saying in December 2017 he was worse than he was in 2014 or 2016, Petitioner testified, "I don't know I'd say it's worse. I'm just saying it never got any better." When asked, "[i]t's the same?" Petitioner responded, "I would say yes, as far as—yes, as far as pain." (T. 87)

On further redirect examination, Petitioner agreed he can testify to what he feels and notices with respect to his left knee, the state of his knee with regard to pain, swelling and numbness. He testified further he never measured his range of motion and how far it goes, and he has never measured the swelling and had not looked at an x-ray or the results of an x-ray. (T. 89-90)

CONCLUSIONS OF LAW

The Commission incorporates by reference herein the Findings of Fact and Conclusions of Law set forth in the 2016 Arbitrator's Decision. The Commission further incorporates the Findings of Fact detailed above in setting forth the Commission's Conclusions of Law.

§19(h) states, in pertinent part:

> However, as to accidents occurring subsequent to July 1, 1955, which are covered by any agreement or award under this Act providing for compensation in installments made as a result of such accident, such agreement or award may at any time within 30 months, or 60 months in the case of an award under § 8(d)1, after such agreement or award be reviewed by the Commission at the request of either the employer or the employee on the ground that the disability of the employee has subsequently recurred, increased, diminished, or ended. *820 ILCS 305/19.*

To determine whether the disability has "recurred, increased, diminished, or ended" since

the time of the original decision, the *Gay* Court defines the disability standard and considerations required to make the determination:

> To warrant a change in benefits, the change in a petitioner's disability must be material. (*United States Steel Corp. v. Industrial Comm'n* (1985), 133 Ill. App. 3d 811, 478 N.E.2d 1108.) In reviewing a section 19(h) petition, the evidence presented in the original proceeding must be considered to determine if the petitioner's position has changed materially since the time of the Industrial Commission's first decision. (*Howard*, 89 Ill. 2d 428, 433 N.E.2d 657.) *Gay v. Industrial Com*m'n., 178 Ill. App. 3d 129, 132, 532 N.E.2d 1149.

Further, the precedential definition of disability is limited to physical or mental disability, and does not include economic disabilities. See *Murff v. Ill. Workers' Comp. Comm'n.,* 2017 IL App (1st) 160005WC, P21, 70 N.E.3d 273, 279.

At discharge, on January 23, 2013, Dr. Borchardt notes that Petitioner is improved but he still has complaints of swelling, constant, achy pain, popping and clicking in his left knee joint. It was also noted that his pain level at the time of Dr. Borchardt's discharge was 3/10 at rest and 7/10 with activity. (PX2, 37)

On May 12, 2014, Petitioner was examined under § 12 by Dr. Stephen Weiss at the request of Respondent. Upon examination, Dr. Weiss noted atrophy in Petitioner's left thigh. Petitioner reported taking 800-1200 mg of Ibuprofen 2-3 times per month to reduce pain and swelling. Petitioner reported to Dr. Weiss, that he was unable to kneel. Petitioner further reported to Dr. Weiss that when he takes the stairs, it makes his knee worse. Weightbearing activities, twisting, or climbing stairs tend to make his knee worse, per Dr. Weiss's report. (PX3) Dr. Weiss noted that Petitioner had an antalgic gait, but full range of motion. Dr. Weiss also noted mild effusion in Petitioner's left knee, swelling in his left patella, anterior medial and anterior joint lines. Petitioner still reported paresthesia. He was unable to kneel or put weight on his front left knee.

Thus, Petitioner had ongoing complaints of swelling, constant achy pain, popping and clicking in his left knee, he was unable to kneel, stairs made his knee worse, weightbearing activities, twisting, climbing stairs made the knee worse, he had an antalgic gait, mild effusion in his left knee, swelling in the left patella, anterior medial and anterior joint lines, in Dr. Borchardt's records at the time of his release in 2013, again when Dr. Weiss evaluated him in 2014, and consistently at the time of the arbitration hearing in 2016.

The operative report from Petitioner's 2017 surgery noted his diagnosis was left knee complex tear of posterior horn of medial meniscus, left knee patellar maltracking, left knee retained painful hardware. At the time of his surgery, findings on the undersurface of the patella were of moderate grade 3 chondrosis, not well contained. The underlying trochlear groove had grade 2-3 chondral changes to a much lesser degree. Dr. Whitehurst performed a left knee arthroscopic partial medial meniscectomy, lateral release and the painful hardware was removed.

In physical therapy, Petitioner's complaints continued to improve beginning on September 22, 2017, when he reported pain rated at 1/10 on a scale of ten being the worst. (PX6, 97) By December 19, 2017, Petitioner was noted to be pain free 100% of the day, and met all of his short-term and long-term goals and 100% of his return to normal job duties in the clinical setting, with pain rated at 0/10 current, 0/10 at best and 0/10 at worst. (PX6, 7, 11)

Petitioner testified that he did not recall telling the physical therapist that he was having pain at a level of 0 out of 10 currently, at best and at worst. However, he conceded on cross-examination, that if that was in his records, he would have no reason to disagree with that. He agreed when he was discharged from physical therapy, the physical therapist's assessment was that he had made great progress with rehabilitation. When asked, if on the day of discharge he indicated he was pain-free 100 percent of the day and met his return to normal work duties in the clinical setting, Petitioner responded, "That would have been not pain-free, but back to the original pain that I had before going, if that makes sense." (T. 36) The Commission finds that this testimony defies the plain reading of the therapist's notes and is simply not credible.

The physical therapist's assessment at discharge on December 19, 2017, was that Petitioner had no functional limitations and he was able to walk on level surfaces without limping. (PX6, T. 37-38) The Athletico physical therapy records confirm Petitioner demonstrated the ability to kneel for 5 reps in the clinic without difficulty. He was able to crawl on the carpet a distance of 10 feet in the clinic without difficulty. He demonstrated the ability to meet the physical demands of his job. *Id.* at 8-9. The Assessment notes: "Patient has made great progress with his rehab. Patient scored 45 on his FOTO at initial evaluation, and 76 at D/C. He is pain free 100% of the day, and has met his return to normal job duties in the clinic setting." *Id.* at 11. The Plan states, "Patient has met all of his goals at this time and can be D/C to his HEP." *Id.* The December 19, 2017, Discharge Summary addressed to Dr. Whitehurst/Dr. Borchardt reflected those same findings. *Id*. at 12-13.

The next day, December 20, 2017, Petitioner presented to Dr. Borchardt in follow-up and was discharged from care. His main complaint at that point was with kneeling. He was noted to be doing better in comparison to the last visit. His pain level at rest was 0/10, with activity 0/10. Petitioner denied numbness or tingling. Therapy was completed and Petitioner was working full time with restrictions. The examination of his left knee revealed a normal gait. The examination of the left knee note further documents a marked improvement over his physical findings at the time of his 2013 discharge as referenced above. He was doing well, denied any pain and was released to return to work with no restrictions, at maximum medical improvement.

Dr. Chudik's May 17, 2021, evaluation took place after Petitioner was injured in a new work-related accident that occurred on January 25, 2018, only five weeks after he was released by Dr. Borchardt after the 2017 surgery, and after he had been released to return to work full-duty with no restrictions. Dr. Chudik opined that Petitioner sustained an injury to his left knee and a tibial bone contusion. (PX8) However, Dr. Chudik failed to designate which of Petitioner's complaints are designated to the 2012 accident and which to the 2018 accident. If Dr. Chudik

based his opinion upon the records at the time of Petitioner's release on December 20, 2017, his report should have reflected that Petitioner had 0/10 pain complaints at rest and with activity reported to Dr. Borchardt, and 0/10 when he was discharged from therapy on December 19, 2017, at best, worst, and then current. The December 2017 records show that Petitioner had no swelling, popping or clicking in his left knee and no antalgic gait. In other words, Petitioner's left knee by subjective and objective standards, was at least as good or better than at the time he was released to return to full-duty work with no restrictions in 2013, when he saw Dr. Weiss in 2014 and at the time of his arbitration hearing in 2016.

Petitioner testified when he last worked for Respondent in August 2022, he noticed that he still had a limp, numbness and swelling but it was tolerable. (T. 20) Petitioner testified that he started his new job at Amazon in November 2022. (T. 78) He further testified that his new job requires him to lift more than 40 pounds from time to time, an activity beyond what he did in his old job. (T. 74) At his new job, he still has swelling, pain that is tolerable, and if he walks for a long period of time, it swells more. It gets sore. If it gets really bad, he elevates it, ices it, and takes Ibuprofen to try to get the swelling down. That does not happen often, but he walks on cement and metal floors at work and if he is walking on the steps, 90 percent of the time, he has to take one step at a time with both feet. He testified that he had started doing that "probably 3 to 6 months ago." When he is walking down stairs, he notices that his left knee is hurting and clicking. (T. 22) Thus it appears that the increased problems in his left knee when taking stairs started at his new job.

Based on the above, and the entirety of the record, the Commission finds that Petitioner failed to prove that there was a material change in his condition since the Arbitrator's May 3, 2016, Decision was issued that can be related to the 2012 injury. Petitioner's complaints at the time of the Commission hearing are noted to have increased since the time of his discharge after the 2017 surgery, however, the Commission finds that Petitioner's left knee was in fact, better after his 2017 surgery and recovery than in 2016, at the time of the Arbitration hearing. The Commission makes this conclusion based, in part, upon the Athletico discharge notes which document that Petitioner had self-rated his pain complaints as 0 out of 10, currently, at best and at worst on December 19, 2017 and Dr. Borchardt's 2017 discharge notes. (PX6, PX4) At the time of his discharge in 2013, Petitioner reported ongoing pain, swelling and popping and clicking documented in Dr. Borchardt's discharge notes. (PX2) In 2014, Dr. Weiss noted that Petitioner had mild effusion in his left knee, swelling in the left patella, anterior medial and anterior joint lines, and he was unable to kneel. These notes are in sharp contrast to Dr. Borchardt's 2017 notes that document that he had no pain complaints, no swelling and a normal gait. (PX4)

Petitioner testified that when he first went back to full-duty after being on sedentary restrictions, in the first few weeks of 2018, he "still had the pain and swelling but it wasn't to a point where I thought there was any more they could do for it. I just kind of learned to deal with the swelling and the slight pain. I mean it's not moderate or extreme pain like it was." (T. 24) The Commission finds Petitioner's testimony does not comport with his discharge records. Further, the Commission notes that Petitioner's credibility was tainted by his testimony

that when the physical therapist writes down that he is pain free 100 percent of the day, the words do not have the plain, normal meaning. (T. 81)

When asked in terms of having less pain and more function, was he doing better in November and December 2017 than when he was discharged in 2013, Petitioner conceded "I don't believe I was worse." (T. 61) In his own words, when asked again to confirm that he was not saying in December 2017 he was worse than he was in 2014 or 2016, Petitioner testified, "I don't know I'd say it's worse. I'm just saying it never got any better." When asked, "[i]t's the same?" Petitioner responded, "I would say yes, as far as—yes, as far as pain." (T. 87)

The Commission finds that the medical records when Petitioner was discharged from treatment by Athletico on December 19, 2017, and Dr. Borchardt on December 20, 2017, are the more credible evidence of Petitioner's condition after the 2017 surgery than his testimony. The Commission further acknowledges that Petitioner testified at the §19(h) hearing that he has ongoing pain and swelling, he walks with a limp, and has difficulty with stairs, however, the Commission finds that all of Petitioner's complaints are the same or similar to those that he had at the time of the 2016 arbitration hearing. Dr. Weiss's May 12, 2014, report specifically notes that Petitioner reported to Dr. Weiss that he still had pain and swelling in the left knee, he was unable to kneel or put weight on the front of his knee. Weightbearing activities, twisting, or climbing stairs reportedly made his knee worse. On physical examination Dr. Weiss noted mild effusion in the knee along with swelling and edema over the anteromedial and anterolateral joint lines. There was tenderness along both joint lines and a positive modified medial Apley. (PX3, 3, 5) The arbitrator relied on those opinions in awarding Petitioner 30% loss of use of the left leg pursuant to §8(e). (RX1)

Further, the Commission is not persuaded by Dr. Chudik's report. In the "Current Diagnosis" section, Dr. Chudik notes that as a result of the April 2, 2012, work-related injury and subsequent two surgeries, Petitioner developed post-traumatic arthritis and ongoing symptoms. In the next sentence, Dr. Chudik notes that later, Petitioner experienced a "January 25, 2018 work-related knee injury and bone contusion which further aggravated of (sic) his left knee post-traumatic condition." In the section, "Final Discussion, Conclusion, Opinions" the second paragraph, Dr. Chudik states: "Mr. Fraley sustained a second work-related left knee injury on 1/25/2018 as evidenced by the onset of new and worsening left knee symptoms consistent with the new traumatic bone contusion discovered on the 2/14/2018 left knee MRI. This resulted in a further aggravation of Mr. Fraley's left knee pain and limitations and contributed to the progression of his left knee post-traumatic condition." (PX8, 13) Therefore, the Commission finds that Dr. Chudik's report lacks clarity as to which of Petitioner's current complaints can be ascribed solely to the 2012 accident.

Thus, the Commission concludes that Petitioner failed to prove a material increase in his disability between the time that the May 3, 2016, Arbitrator's Decision issued and the subject §19(h) Commission hearing.

In regard to causation, the Commission finds the Appellate Court's Decision in *Miller v. Ill. Workers' Comp. Comm'n*, (citation omitted) instructive. The *Miller* Court held, "The threshold condition for receiving §19(h) benefits is that the claimant's disability has materially increased since the award (citation omitted), and until that threshold condition is met, a discussion of causation would be premature." *Miller v. Ill. Workers' Comp. Comm'n*, 2020 IL App (2d) 218577WC-U. Given the Commission's conclusion regarding the fact Petitioner failed to prove a material increase in his disability, the Commission finds that the causation issue is moot. Therefore, Petitioner's Petition for additional permanent partial disability benefits under §19(h) of the Act is denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that since Petitioner failed to prove his disability has materially increased since the Arbitrator's Decision dated May 3, 2016, his claim for additional permanent partial benefits under §19(h) of the Act is hereby denied.

The bond requirement in § 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(2)*. As there are no monies due and owing, there is no bond set by the Commission for the removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

October 16, 2023
KAD/bsd
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/s/*Kathryn A. Doerries*
Kathryn A. Doerries

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC019158
Case Name	Todd L Fraley v. E.D. Etnyre & Co
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0446
Number of Pages of Decision	14
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Gregory Tuite
Respondent Attorney	Jeffrey Zucchi

DATE FILED: 10/16/2023

/s/Kathryn Doerries, Commissioner

Signature

23IWCC0446

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TODD L. FRALEY,

Petitioner,

vs. NO: 18 WC 019158

E. D. ETNYRE & COMPANY,

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 permanent disability and Respondent's credit for a prior injury to the same body part, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms and adopts the Arbitrator's Decision except with regard to the issue of permanent disability. The Commission, therefore, vacates the Order on page two of the Arbitrator's Decision and substitutes the Commission Order below. Further, the Commission strikes the paragraphs under "Issue (L) What is the Nature and Extent of the Injury?" and substitutes the following:

For injuries that occur after September 1, 2011, §8.1b(b) of the Act outlines the five factors the Commission must consider to determine permanent partial disability, as follows:

> (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 sub (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. *820 ILCS 305/8.1b*.

In considering the degree to which Petitioner is permanently partially disabled as a result of the subject work-related accident, the Commission assigns the relevance and weight according to the five factor criteria in §8.1b(b) of the Act as follows:

i) The reported level of impairment pursuant to subsection (a), the AMA guidelines: Neither party submitted an AMA impairment rating into evidence. Therefore, the Commission assigns no weight to this factor.

ii) The occupation of the injured employee: According to his testimony, Petitioner works as a value stream leader in the trailer line final assembly product line for Respondent. He is supervisor to nine other employees. The job entails standing and walking, sitting in a chair or rolling stool, occasional crawling or driving a forklift. He described the physical demand as a moderate to heavy duty job. Petitioner lost no time from work as a result of this accident and was released to work full-duty with no restrictions. The Commission finds this factor is relevant in determining Petitioner's disability and assigns greater weight to this factor.

iii) The age of the employee at the time of the injury: Petitioner was 44 years old at the time of the injury and therefore has a significant work life remaining until retirement. The Commission finds this factor is relevant in determining Petitioner's disability and assigns greater weight to this factor.

iv) The employee's future earning capacity: The Commission notes that the Petitioner did not submit evidence regarding his future earning capacity. He lost no time from work as a result of this accident and was released to work full-duty with no restrictions. The Commission finds this factor is very relevant in determining Petitioner's disability and assigns significant weight to this factor.

v) Evidence of disability corroborated by the treating medical records: At the time of Petitioner's release, the OrthoIllinois records document that two MRIs confirmed left leg bone marrow edema in the anterior midline tibia as a result of the work-related accident on January 25, 2018. Dr. Borchardt's Assessment section documents the following: 1. Pain in left knee, lateral patellar compression; and 2. Chondromalacia patellae, left knee. He was given a left knee orthotic elastic knee brace. (PX2, 7, 10) Petitioner testified he no longer uses Tramadol but usually takes just Tylenol or Ibuprofen for pain. (T. 25) He further testified that his knee is in constant pain, "agony pain" and it gets stiff. (T. 26) He testified that it is "kind of hard to put the weight on the knee to go up and down stairs and crawling on the floor is very hard." (T. 27-28) Petitioner further testified that he no longer goes roller skating or bike riding. (T. 29-30)

The OrthoIllinois records confirm Petitioner had no lost time from work as a result of this accident, he did not receive any therapy, injections or surgery. (PX2) He was treated with conservative care in the form of medications, a knee brace and activity modification for one week until February 1, 2018, when Petitioner requested to be released to return to full-duty work. He was discharged from care on July 26, 2018, at which time Dr. Borchardt noted Petitioner reported pain, at rest 2/10, with activity 4/10. Symptoms were reported to be worse with prolonged walking and kneeling. On examination, the following was noted: Gait: normal. Inspection: no swelling, discoloration or deformity. Effusion: None. Wounds: no skin lesions, tibial tubercle trace tender, patellar tendon non-tender, inferior pole of the patella non- tender, superior pole of the patella non- tender, medial retinaculum non-tender, lateral retinaculum non-tender, medial joint line tender, lateral joint line non-tender, MCL nontender, LCL non-tender, iliotibial band non-tender, biceps femoris non-tender, pes anserine non-tender, popliteal fossa non-tender. ROM: full flexion and extension, patellar tracking within normal limits. Quadriceps function: good. Tests: patellar apprehension negative, patellar grind negative, McMurray's negative, medially anterior drawer negative. Neurovascular status: intact to light touch throughout the knee and peroneal distribution. (PX2, 6-7)

Petitioner was examined three years later by Dr. Steven Dr. Chudik at his attorney's request on May 17, 2021. (PX3) Dr. Chudik noted Petitioner's previous injury to his left knee and two subsequent surgeries on April 19, 2012, and August 22, 2017, as a result of Petitioner's April 2, 2012 accident. Dr. Chudik opined that Petitioner's January 25, 2018, work-related knee injury and bone contusion further aggravated his left knee post-traumatic condition. Dr. Chudik noted that Petitioner reported the following complaints: 1. Chronic aching left knee with intermittent sharp pain; 2. Paresthesia to lateral aspect of left knee; 3. Chronic swelling; 4. Chronic limp. Petitioner reported he is unable to kneel for more than a couple of minutes, crawl or climb a ladder, and play basketball or baseball, therefore experiences difficulties playing with his grandchildren. He also reported that he must delegate certain physical tasks to his work crew that involve heavy lifting. (PX3, 1-2)

Dr. Chudik documented the following on physical examination: Musculoskeletal examination: Regarding the patient's left knee. Postsurgical scars are identified. He has diminished sensations lateral to the anterior incision about his left knee. There is mild effusion. He has tenderness over the medial and lateral patella facet as well as along the medial joint line. He has minimal lateral joint line tenderness. He has full range of motion in flexion but does lack a couple degrees of terminal extension. Collateral ligaments are stable. He has a negative McMurray's maneuver. He has a negative Lachman test. He does have a mild to moderate antalgic gait. He has no significant crepitations throughout his range of motion but does have a positive patellar grind test as well as a positive Clark test. He has a negative patella apprehension test. His patella is somewhat restricted in medial and lateral movement. He does have mild distal quadriceps atrophy compared to the contralateral side but does have adequate strength.

(PX3, 8)

The Commission notes that the MRI results and the opinions of Dr. Borchardt and Dr. Chudik comport with a diagnosis of left leg bone marrow edema in the anterior midline tibia as a result of the work-related accident on January 25, 2018. Both records also confirm Petitioner reported ongoing left knee pain complaints. Dr. Chudik does not, however, designate which left knee pain complaints are specific to the Petitioner's diagnosis of left leg bone contusion at issue in this matter. Based on Petitioner's testimony and the treating medical records, this factor is very relevant to the Petitioner's disability assessment and assigned significant weight.

Based on the foregoing five factors, the Commission finds that Petitioner sustained permanent partial disability to the extent of 33% loss of use of the left leg pursuant to §8(e) of the Act less the credit of 30% loss of use of the left leg pursuant to §8(e)17 of the Act for the permanent partial disability benefits that Petitioner was previously awarded in the May 3, 2016, Arbitrator's Decision, case number 13 WC 000250, as a result of the injuries Petitioner sustained in the April 2, 2012, accident. (RX1)

§8(e)17 of the Act states as follows:

> In computing the compensation to be paid to any employee who, before the accident for which he claims compensation, had before that time sustained an injury resulting in the loss by amputation or partial loss by amputation of any member, including hand, arm, thumb or fingers, leg, foot or any toes, such loss or partial loss of any such member shall be deducted from any award made for the subsequent injury. For the permanent loss of use or the permanent partial loss of use of any such member or the partial loss of sight of an eye, for which compensation has been paid, then such loss shall be taken into consideration and deducted from any award for the subsequent injury. *820 ILCS 305/8.*

Thus, the Respondent is entitled to 30% loss of use of a left leg credit for the prior 2016 award under §8(e)17 of the Act. Therefore, the Commission finds that Respondent shall pay Petitioner permanent partial disability benefits at a rate of $719.64 per week for 6.45 weeks because the injuries sustained caused the disability of 33% loss of use of the left leg as provided in §8(e) of the Act, less a credit pursuant to §8(e)17 of 30% loss of use of the left leg for the 2016 injury to the left leg, resulting in a net disability of 3% (33% - 30%) loss of use of the left leg.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on August 30, 2022, is hereby modified for the reasons stated herein, the Arbitrator's Order is vacated, and the Decision is otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits of $719.64 per week for a period of 6.45 weeks, because the injuries sustained caused the 33% loss of use of the left leg as provided in §8(e) of the

Act, less Respondent's credit pursuant to §8(e)17 of 30% loss of use of the left leg that Petitioner was previously awarded in the May 3, 2016, Arbitrator's Decision, case number 13 WC 000250, as a result of the injuries Petitioner sustained in the April 2, 2012, accident, resulting in a net disability of 3% (33% - 30%) loss of use of the left leg.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $4,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

October 16, 2023
KAD/bsd
O081523
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/s/*Kathryn A. Doerries*
Kathryn A. Doerries

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC019158
Case Name	Todd L Fraley v. E.D. Etnyre & Co
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Paul Seal, Arbitrator

Petitioner Attorney	Gregory Tuite
Respondent Attorney	Jeffrey Zucchi

DATE FILED: 8/30/2022

/s/ Paul Seal, Arbitrator

Signature

INTEREST RATE WEEK OF AUGUST 30, 2022 3.23%

STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Todd L. Fraley.
Employee/Petitioner

v.

E.D. Etnyre & Co.
Employer/Respondent

Case # **18** WC **019158**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Seal**, Arbitrator of the Commission, in the city of **Rockford**, on **June 22, 2022**. After 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 **1/25/2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**62,368.80**; the average weekly wage was $**1,199.40**.

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

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

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

Respondent shall be given a credit of $**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

Taking into account the previous award of 30% loss of the left leg, Respondent shall pay Petitioner additional permanent partial disability benefits of $719.64/week for 26.875 weeks, because the injuries sustained caused an additional loss of 12.5% loss of use of the left leg as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

August 30, 2022

This claim involves an injury to Petitioner's left knee that occurred on January 25, 2018. Petitioner had previously injured his left knee on April 2, 2012. At that time, he was employed by the Respondent as a Trailer-Assembly Leader and sustained an undisputed accidental injury arising out of and in the course of his employment. Petitioner testified he was pushing a metal shaft with his right foot, when he felt his left knee give out and he fell to the floor in pain. He initially had emergency room treatment. A subsequent MRI documented:

> "Findings most compatible with a recent transient patellar dislocation injury with complete disruption of the medial patellofemoral ligament from the patella with: an avulsion fragment; next, large inferomedial patellar fracture with inferomedial displacement and rotation; large chondral defect of the patella compatible with a displaced patellar chondral fracture; moderately large lipohemarthrosis escaping the joint through the anteromedical capsular defect, extending into the surrounding soft tissue with distension of the prepatellar bursa; small contusion sites at the lateral margin of the lateral femoral condyle and posterolateral margin of the medial tibial plateau."

He underwent surgery by Dr. Whitehurst on April 20, 2012. Dr. Whitehurst's postoperative diagnosis included:

> "left patellar tendon rupture following dislocation; left knee patellar fracture of the inferior medial pole; left knee medial and lateral meniscal tear and left knee loose bodies greater than 5mm."

Petitioner was released from care by Dr. Borchardt of OrthoIllinois on January 23, 2013 to unrestricted work. Dr. Borchardt noted that Petitioner still had complaints of swelling, constant achy pain, and popping and clicking in the knee joint.

Petitioner went to hearing before Arbitrator Anthony Erbacci on March 17, 2016. On April 28, 2016, Arbitrator Erbacci awarded Petitioner 30% loss of the left leg pursuant to Section 8(e) of the Act. (RX 1).

On April 18, 2017, Petitioner presented to Dr. Robin Borchardt with left knee pain. Dr. Borchardt examined the knee and noted moderate effusion. Also, there was tenderness over the patella, the inferior pole of the patella and the superior pole of the patella. In addition, there was tenderness over the patella tendon. An MRI was performed on April 28, 2017. There was minimal tendinopathy noted at the quadriceps tendon insertion and chronic-appearing healed partial tearing of the patellar tendon. A defect of the medial meniscus had enlarged and was now 2 cm in size consistent with an oblique tear of the posterior horn of the medial meniscus.

Petitioner was sent to Dr. Stephen Weiss on June 7, 2017 for an evaluation. Dr. Weiss agreed with Dr. Borchardt's recommendation for a repeat arthroscopy of the knee. He also believed that the condition was related to the original work injury of April 2, 2012. Petitioner underwent

surgery on August 22, 2017 by Dr. Whitehurst of OrthoIllinois. After the surgery, Petitioner received physical therapy from September 20, 2017 through December 19, 2017. In addition, he was off work until October 10, 2017. Petitioner was released by Dr. Borchardt on December 20, 2017 with no restrictions. He was determined to be at MMI. (PX 1/p.17)

Petitioner presently has a 19(h) and 8(a) Petition pending with the Commission alleging increased disability related to the August 22, 2017 left knee surgery. That case has not proceeded to hearing.

The case pending before the Arbitrator involves an injury to the left knee that occurred on January 25, 2018 while Petitioner was performing his normal job at E.D. Etnyre & Co. Petitioner testified that while working, he stepped on a thick wire that rolled and caused his left knee to pop and buckle. On the following day, he presented to Dr. Borchardt for an evaluation. (PX1 p.8). Dr. Borchardt's records note that Petitioner turned around and stepped on a piece of wire that rolled and that his knee buckled. On exam, there was mild effusion, and a positive McMurray's test. Dr. Borchardt indicated it was consistent with a medial meniscus tear. Dr. Borchardt prescribed medications, activity modification an economy hinge brace and an MRI. The MRI was performed on February 4, 2018 at OrthoIllinois. There was no evidence of an acute meniscal tear, and the dominant finding was new moderate bone marrow edema in the anterior aspect of the tibia. The radiologist also noted stable postoperative changes of the extensor mechanism with chronic stable tendinopathy of the patellar tendon. There was also grade 3 chondromalacia in the anterior compartment of the knee joint. (PX2 p.25).

Petitioner returned to Dr. Borchardt on February 16, 2018. He started Claimant on Tramadol and advised him to advance his activities. On March 16, 2018, Dr. Borchardt recommended that he continue to use his knee brace, but that he did not need work restrictions. On April 13, 2018, Petitioner reported to Dr. Borchardt that his condition was worse. (PX2 p.12). Dr. Borchardt started Tramadol and recommended another MRI of the left knee. This was performed on May 7, 2018. (PX2 p.23). Again, there was no evidence of a recurrent tear, but it appeared that the bone marrow edema was unchanged to slightly improved. There was also moderate stable patellofemoral osteoarthropathy. Petitioner returned to Dr. Borchardt on May 10, 2018. Dr. Borchardt indicated that Petitioner should engage in stretching exercises and noted that it could take six months to heal. Petitioner had his final visit with Dr. Borchardt on July 26, 2018. (PX2 p.6). Petitioner indicated he was doing about the same, and upon exam, the medial joint line was still tender. Dr. Borchardt released him from care, but recommended that he use his brace and take Tramadol as needed. Petitioner has not had any further injuries nor any medical treatment since he was released by Dr. Borchardt.

CONCLUSIONS OF LAW

Issue (F): IS PETITIONER'S CURRENT CONDITION OF ILL BEING CAUSALLY REALTED TO THE INJURY?

The Arbitrator finds and concludes as follows: Petitioner sustained an undisputed work injury to his left knee on January 25, 2018. He immediately commenced an interrupted course of medical treatment for that injury. Approximately a month before the accident, Petitioner had been examined by Dr. Borchardt who noted the exam to be "unremarkable." Petitioner was working full duty at that time. At the first post-accident visit on January 26, 2018, his pain at rest was 2/10 and with activity, 7/10. He had symptoms of giving-way, swelling and limited range of motion. His examination showed an antalgic gait and medial joint space tenderness. (PX1 p.8). The McMurray sign was positive. Clearly, the evaluation was significant enough to cause Dr. Borchardt to arrange for an MRI. In addition, Dr. Borchardt prescribed Tramadol and a knee orthotic elastic with joints. Dr. Borchardt released Petitioner from treatment on July 26, 2018. He noted that the main complaint was pain in that Petitioner was doing about the same since the initial accident on January 25, 2018. His pain was aching in nature. It was 2/10 at rest, and 4/10 with activity and it was constant. In addition, he had symptoms of clicking. His symptoms were made better by taking Tramadol and worse with prolonged walking and kneeling. Based upon the change in condition subsequent to the admitted accident, the Arbitrator finds Petitioner's current condition of ill being causally related to the work injury of January 25, 2018. In addition Petitioner presented the report of Dr. Steven Chudik on April 16, 2021. Dr. Chudik reviewed all of the treating medical records, the pertinent imaging studies and performed a left knee x-ray at the visit. Dr. Chudik stated that:

> "Mr. Fraley sustained a 2nd work-related left knee injury on January 25, 2018, as evidenced by the onset of new and worsening left knee symptoms consistent with the new traumatic bone contusion discovered on the February 14, 2018 left knee MRI. This resulted in a further aggravation of Mr. Fraley's left knee pain and limitations and contributed to the progression of his left knee posttraumatic condition."(PX3 p.16)

The Arbitrator finds the doctor Chudik's opinion is well-supported by the evidence of record and supports a finding of causal relationship.

Issue (G): WHAT WERE THE PETITIONER'S EARNINGS?

The Arbitrator finds and concludes as follows: Respondent offered payroll records for the year preceding the date of accident. (RX 3). The gross earnings for that period were $54,989.68. Of that amount, overtime was $3,050.16 reducing the gross earnings by the extra half of time and a half of $1,016,72 leaves a balance of 53,972.96. Medical records revealed that Mr. Fraley was off work for 7 weeks in the year preceding the injury due to the August 22, 2017, left knee

surgery. Dividing the balance of $53,972.96 by 45 weeks leads to an average weekly wage calculation of $1,199.40. Based upon this evidence, the Arbitrator adopts Petitioner's calculation of an average weekly wage and finds it to be $1,199.40.

Issue (L): WHAT IS THE NATURE AND EXTENT OF THE INJURY?

The Arbitrator finds and concludes as follows: Section 8.1 (b) of the Act requires consideration of the following criteria in determining the level of permanent partial disability: the reported level of impairment based upon the most current edition of the American Medical Association's Guide to the Evaluation of Permanent Impairment; the occupation of the injured employee; the age of the employee at the time of the injury; the employee's future earning capacity; and evidence of disability corroborated by the treating medical record.

Section 8.1 (b) also states, "No single factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factor used it in addition to the level of impairment as reported by a physician must be examined." The term "impairment" in relation to the AMA guides to the Evaluation of Permanent Impairment, 6th ed. is not synonymous with the term “disability" as it is used in determining a permanent partial disability award.

In the instant case, the Petitioner suffered a second injury to his left knee which aggravated the previous condition that was caused by his April 2, 2012 left knee injury. At the time Petitioner was released by Dr. Borchardt, he was still having significant subjective complaints as well as objective findings documented by imaging studies.

Also, the evaluation by Dr. Chudik states the following:

> “Based upon my evaluation of the medical records, Mr. Fraley, in the 4/16/2021, left knee, plain radiographs, Mr. Fraley has developed symptomatic posttraumatic arthritis because of the 4/2/2012 and 1/25/2018 left knee, work-related injuries.” (PX3 p.13).

Comparing his left knee condition to that previously described during the March 17, 2016 trial, Mr. Fraley has obviously experienced an increase in permanent partial disability of his left leg since that time. There have been changes in both the subjective symptoms and objective findings on x-ray.

As a result of the April 2, 2012 and January 25, 2018 work-related left knee injuries, Mr. Fraley's left knee has developed posttraumatic arthritis and will require future medical care, including conservative treatment with injections and physical therapy as well as left knee arthroplasty surgery. Applying Section 8.1 (b) to the present case, the Arbitrator notes the following regarding the five factors.

1). The reported level of impairment pursuant to the AMA guidelines: Neither party presented an AMA impairment rating to the Arbitrator. Therefore, the Arbitrator gives no weight to this factor.

2). The occupation of the employee: The Petitioner works as a lead person asunder for Respondent. The work is heavy in nature and requires Petitioner to be on his feet most of the day. Petitioner testified that going up and down stairs causes a significant pain in the knee. The heavy exertional nature of his occupation increases the impact of his impairment on his left leg. The Arbitrator gives great weight to this factor.

3). The age of the employee at the time of the injury: Mr. Farley was 44 years of age at the time of the injury. He still has many years to work with his left knee condition. The Arbitrator gives great weight to this factor and finds that it increases Petitioner's level of permanent partial disability of the left leg.

4). The employee's future earning capacity: Petitioner did not submit any evidence regarding his future earning capacity. He was able to return to full duty work for the Respondent. This factor has no bearing on the assessment of disability.

5). Medical records document the nature of the injury sustained in the trauma to the joint, the patella, and the patellar tendon that was aggravated by the accident: In addition, Claimant continued to complain of pain and the need for Tramadol to reduce it. He also wears a brace at work and while doing exertional activities in an attempt to relieve the pain in the left knee. These findings, along with the objective and subjective findings noted by Dr. Chudik during the evaluation support a finding of additional disability caused by the January 25, 2018 accident. Taking into account the previous award of 30% loss of the left leg, the Arbitrator finds that Petitioner sustained an additional 12.5% permanent partial disability pursuant to Section 8(e) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC028232
Case Name	Richard V. Adams v. Eagle Express Lines, Inc.
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0447
Number of Pages of Decision	27
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Karolina Zielinska
Respondent Attorney	Mark Carter

DATE FILED: 10/16/2023

/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 down	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICHARD V. ADAMS,

Petitioner,

vs. NO: 19 WC 028232

EAGLE EXPRESS LINES, 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, notice, causal connection, temporary disability, medical expenses, and prospective medical, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission affirms and adopts the Arbitrator's Decision except with respect to the temporary total disability (TTD) award. The Commission views the evidence differently than the Arbitrator and finds that Petitioner is entitled to TTD from July 30, 2019, through December 16, 2019. Therefore, the Commission strikes the Arbitrator's Conclusions of Law under "Issue L, whether Petitioner is entitled to temporary total disability benefits" and substitutes the following:

CONCLUSIONS OF LAW

Issue L, whether Petitioner is entitled to temporary total disability benefits.

Respondent disputes Petitioner's claim for TTD benefits relying on accident and causal connection disputes. Considering the record as a whole, the Commission finds that Petitioner is entitled to TTD benefits commencing July 30, 2019, through December 16, 2019, for the following reasons.

> To be entitled to TTD benefits, it is the claimant's burden to prove not only that he did not work but also that he was unable to work. *Shafer*, 2011 IL App (4th) 100505WC, ¶ 45, 976 N.E.2d 1; *McDaneld v. Industrial Comm'n*, 307 Ill. App. 3d 1045, 1053, 718 N.E.2d 722. *Holocker v. Ill. Workers' Comp. Comm'n*, 2017 IL App (3d) 160363WC, P34, 82 N.E.3d 658, 665.
>
> Indeed, as Professor Larson notes, and as the Illinois supreme court has held, the test for whether a person may receive TTD benefits is whether that person is unable to work in a stable labor market. See *Zenith,* 91 Ill. 2d at 287. *Dolce v. Industrial Comm'n* (Southwest Beer Distribs.), 286 Ill. App. 3d 117, 123, 675 N.E.2d 175, 180.
>
> However, the claimant has the burden of proving each part of his claim. *Rambert,* 133 Ill. App. 3d at 902. Consequently, it is the claimant's responsibility to show that income earned while he was disabled was only occasional wages, and not from employment in the labor market. See *Esposito v. Industrial Comm'n,* 186 Ill. App. 3d 728, 739-41, 134 Ill. Dec. 497, 542 N.E.2d 843. *Dolce v. Industrial Comm'n* (Southwest Beer Distribs.), 286 Ill. App. 3d 117, 121.

The Commission finds that Petitioner did not sustain his burden of proving he was unable to work. Petitioner testified that while employed by Respondent, he was a sole proprietor of a general freight delivery business since approximately September 2018. (T. 33-34) Petitioner testified he would put drivers in his trucks or he would work, pick up the run for the driver, and then have them deliver to their route. (T. 33) He started his business two or three months before he leased to own his first semi-truck in November of 2018. (T. 34-35) The name of his business is RNE Express. (T. 35) Petitioner testified and offered an example of what he sometimes would do. "Like they had a run that was, like, maybe 50 miles further south of Louisville, Kentucky, and they wouldn't have enough hours in the day to do it. But if I went and picked the run up for them, then they had enough time to get down there and get back home." (T. 37)

Petitioner bought or leased a second truck in the beginning of 2019. (T. 38-39) He would drive that truck "every blue moon." He "mostly" had drivers for it. (T. 39) He was always an independent contractor or 1099 employee for these other side businesses. (T. 39) Petitioner would drive the truck to work from his home in Indiana and park it at Respondent's business because the freight he would be picking up was "literally four blocks away" from Respondent's business. (T.

40) The Commission notes that Respondent terminated Petitioner's TTD benefits on December 16, 2019, in reliance upon Dr. Graf's §12 opinion report. (T. 42-43; RX1) Petitioner testified that after he saw Dr. Graf and his benefits stopped, he started driving his own trucks for his side business. (T. 43) The Commission further notes by doing so Petitioner violated his own driving restriction imposed by his treating neurosurgeon, Dr. Sean Salehi. (PX2) Dr. Salehi's records consistently restrict Petitioner from "driving a company vehicle." (PX2)

On cross-examination at his evidence deposition, Dr. Salehi testified that at his first visit, he noted that Petitioner "is currently not working as his employer is unable to accommodate his work restrictions." (PX5, 25) Dr. Salehi further testified that it was his assumption that Petitioner was not working anywhere else. *Id.* Dr. Salehi then confirmed that he "comes up with" his own recommendations for restrictions. His understanding of a "company vehicle" was "[l]ike a big truck, semi." (PX5, 26) Dr. Salehi testified, "[t]hat's a recommendation that I think should be included with someone, a truck driver, who's hurt his back and has herniations." *Id.* Dr. Salehi further testified that it was his understanding that Petitioner was not driving a big truck "like that" at the time of his October 7, 2019, visit and if he had been driving a big truck like that before his visit, that would be information that Dr. Salehi would want to know. Dr. Salehi testified that he would tell Petitioner "that he shouldn't be doing that." (PX5, 26) Dr. Salehi testified that he would not change his work restriction and he would have advised him not to drive because that would aggravate his back. *Id.* Dr. Salehi confirmed that at Petitioner's visits on January 8, 2019 and February 20, 2020, Petitioner told him he was not working because his employer could not accommodate his restrictions. Dr. Salehi understood that to mean that Petitioner was not working at all. (PX5, 27-28)

The Commission acknowledges that on redirect examination, Petitioner's attorney asked if Petitioner was working a secondary job within the restrictions provided in all of his notes, if that would change Dr. Salehi's opinions. (PX5, 30) Dr. Salehi testified that if Petitioner was following his restrictions, "light duty, no lifting over 20 pounds, no pushing more than 35 pounds, then it would be okay to work within those capacities." (PX5, 31) However, the Commission finds that Dr. Salehi's testimony did not address the ramifications of Petitioner's driving regularly in a semi-truck nor does that comport with Dr. Salehi's testimony on cross-examination that he would tell Petitioner, "he shouldn't be doing that" because that "would aggravate his back." (PX5, 26, 27). Further, driving a semi-truck is not consistent with the restrictions Dr. Salehi imposed commensurate with Petitioner's treatment.

Petitioner's claim that he is entitled to TTD benefits from July 30, 2019, through June 24, 2022, the date of arbitration, is also inconsistent with the medical records which the Commission finds more reliable. On January 25, 2022, Petitioner reported to Dr. Salehi's Physician Assistant that he was working as a driver for another employer. (PX2, 3) On January 28, 2022, Petitioner reported to Midwest Anesthesia & Pain Specialists he was working without restrictions. (PX3, 35). On March 1, 2022, the Midwest Anesthesia & Pain Specialists' office note documents that Petitioner was working without restrictions. He was discharged on the same day. (PX3, 40, 43-44)

In further support of termination of Petitioner's TTD benefits after December 16, 2019, the Commission notes Petitioner also testified that he worked as an independent contractor with the following employers: 1. Drake, between October of 2019 and February 2020; 2. VL Express, between July 2018 until June of 2019; 3. QFS; and 4. Pure beginning in July 2020. (T. 63-70) Petitioner further testified that he either picked up the drivers' run and or exclusively used a driver. *Id.* When he began his job with Pure, Petitioner testified that he drove the truck in addition to having other people drive the truck. (T. 73) Petitioner testified that he stopped working about April 10, 2022, however, he still had an ongoing independent contractor relationship with Pure. (T. 75-76) Petitioner testified he worked for Pure beginning in July 2020, and he earned $85,000.00 less expenses from Pure for the five months of work in 2020 alone. (T. 72-73)

Petitioner never claimed loss of secondary wages thus the Commission infers that Petitioner continued to drive his semi-truck vehicles as often as necessary and manage his secondary business, especially, per his own testimony, after his TTD benefits were terminated. The Commission finds that by doing so, Petitioner proved he can work in a stable labor market.

> A person is totally disabled when he cannot perform any services except those that are so limited in quantity, dependability, or quality that there is no reasonably stable market for them. *Interlake,* 86 Ill. 2d at 176. Accordingly, temporary total disability occurs when an employee is unable to perform any work except that for which no labor market of reasonable stability exists. *Zenith,* 91 Ill. 2d at 287. *Dolce v. Industrial Comm'n* (Southwest Beer Distribs.), 286 Ill. App. 3d 117, 122.

Thus, after considering the entire record as a whole the Commission finds that Petitioner was working as a driver after December 16, 2019, which was not consistent with his treating doctor's imposed restrictions, and thus has failed to sustain his burden of proving TTD entitlement thereafter. Therefore, the Commission finds that Petitioner is entitled to TTD benefits from July 30, 2019 through December 16, 2019.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on October 7, 2022, is hereby modified for the reasons stated herein, that the Arbitrator's TTD award is hereby vacated, and the Arbitrator's Decisions is otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $901.27 per week for a period of 20 weeks, commencing July 30, 2019, through December 16, 2019, 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. Respondent shall be given a credit of $18,044.80 for TTD benefits paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay directly to Petitioner reasonable and necessary medical services, as provided in Petitioner's Exhibit 4, pursuant to the medical fee schedule and §8(a) and §8.2 of the Act. Respondent is entitled to a credit for any payments made towards the awarded outstanding expenses, including those reflected in Rx1, and shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay for the prospective medical treatment plan recommended by Dr. Salehi and Dr. Pontinen, including a spinal cord stimulator trial and psychological evaluation, as provided in §8(a) and §8.2 of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $22,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

October 16, 2023
KAD/bsd
O081523
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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	19WC028232
Case Name	Richard V. Adams v. Eagle Express Lines, Inc.
Consolidated Cases	
Proceeding Type	19(b)/8(a) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	21
Decision Issued By	Ana Vazquez, Arbitrator

Petitioner Attorney	Karolina Zielinska
Respondent Attorney	Mark Carter

DATE FILED: 10/7/2022

THE INTEREST RATE FOR THE WEEK OF OCTOBER 4, 2022 3.85%

/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)

Richard V. Adams.
Employee/Petitioner

v.

Eagle Express Lines, Inc.
Employer/Respondent

Case # **19** WC **028232**

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 **6/24/2022**. 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, **July 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 $**48,668.71**; the average weekly wage was $**1,351.91**

On the date of accident, Petitioner was **43** 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 $**18,044.80** for TTD, $**0** for TPD, $**0** for maintenance, and $**0,** for other benefits, for a total credit of $**18,044.80**.

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

ORDER

Respondent shall pay directly to Petitioner reasonable and necessary medical services, as provided in Petitioner's Exhibit 4, 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, including those reflected in Rx1, and shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit.

Respondent shall authorize and is liable for the prospective medical treatment plan recommended by Dr. Salehi and Dr. Pontinen, including a spinal cord stimulator trial and psychological evaluation, as provided in Section 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$901.27/ week** for **151 4/7** weeks, commencing **July 30, 2019** through **June 24, 2022**, the date of arbitration, as provided in Section 8(b) of the Act. Per the Parties' stipulation, Respondent is entitled to a credit in the amount of **$18,044.80** for temporary total disability benefits paid by Respondent to Petitioner. Ax1.

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

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue. **OCTOBER 7, 2022**

Ana Vazquez

Signature of Arbitrator

ICArbDec19(b)

PROCEDURAL HISTORY

This matter proceeded to arbitration on June 24, 2022, pursuant to Sections 19(b) and 8(a) of the Illinois Workers' Compensation Act ("the Act"). The issues in dispute are (1) accident, (2) notice, (3) causal connection, (4) unpaid medical bills, (5) prospective medical care, and (6) temporary total disability ("TTD") benefits. Arbitrator's Exhibit ("Ax") 1. All other issues have been stipulated. The Parties further stipulated that Respondent is entitled to a credit in the amount of $18,044.80 for TTD benefits paid to Petitioner. Ax1.

FINDINGS OF FACT

On July 29, 2019, Petitioner was employed as a driver/loader/unloader at Respondent. Transcript of Evidence on Arbitration ("Tr.") at 7-9. He had been employed in this position since approximately October 2012. Tr. at 8. Petitioner was a W-2 employee for Respondent. Tr. at 10. Respondent is in the business of delivering U.S. Mail and packages. Tr. at 8. Petitioner testified that he had to comply with DOT requirements and maintain a valid CDL license in order to drive for Respondent. Tr. at 10-11. Petitioner has had his CDL license for 24 years. Tr. at 11. Petitioner also owned his own trucking company which he managed, but did not drive for on a regular basis. Tr. at 35-39.

Petitioner's job duties

Petitioner's job duties as a driver/loader/unloader consisted of delivering and unloading U.S. federal mail. Tr. at 8-9. Petitioner testified that individuals that work at the post office load the mail and packages into cages. Tr. at 11, 13. Petitioner described the cages as being about five-and-a-half feet tall, steel, and having a chain link fence at the top and all the way around so that you can see through it when moving the cage. Tr. at 13. Petitioner testified that the cages have stationary wheels in the back and rolling wheels at the front, and that they also have a handle at the front. Tr. at 14. The front of the cage could only move forward and backwards, and the handle could be turned completely. Tr. at 15. Petitioner was not allowed to load the cages in the morning. Tr. at 12. Petitioner testified that most mornings his trailer was loaded before he arrived. Tr. at 12. Petitioner testified that after arriving at work and checking the truck, he strapped down the cages to make sure they were secure for transport. Tr. at 12. Petitioner then transported the cages with mail to another location, and then manually unloaded the cages from the truck once he arrived at the drop-off location. Tr. at 9-13. Petitioner's job description is outlined in Petitioner's Exhibit ("Px") 7, which was admitted without objection. Tr. at 98.

Accident

Petitioner testified that on July 29, 2019, he arrived at the North Riverside Post Office, his first drop-off, and began unloading the cages from his truck. Tr. at 13. Petitioner testified that the cages had been loaded into his truck incorrectly. Tr. at 13. Petitioner testified that the handles of the cages became stuck or locked together, and that he had to "yank" on the cages to separate them in order to roll them out of the trailer. Tr. at 15. Petitioner testified that the cages are very heavy, and that he "yanked" on the cages "a couple of times, and then like maybe the third or fourth, I don't remember exactly, second, third, or fourth time yanking on them, I just felt like

hot water or – yeah, hot water rushing down my back and my legs like if – I messed something up. I messed something up in my back." Tr. at 15. Petitioner described the pain as "[s]hooting pain, and like – like I guess when you – like kind of when you get in the shower, you turn the water on and it's rushing down from my back through my legs." Tr. at 16. Petitioner testified that this occurred at 3:00 a.m. or 3:30 a.m. Tr. at 16. Petitioner testified that it took him a while to collect himself because he could not stand upright and that the pain "was really, really bad" in his back. Tr. at 17. Petitioner continued with the remaining routes of his shift, however, the employees at the next three post offices unloaded the cages for him because his back was in too much pain. Tr. at 17-18. Petitioner did not unload any more mail after the incident occurred. Tr. at 17.

Petitioner went home after finishing his shift. Tr. at 18. Petitioner testified that he thought that he may have pulled a muscle, and that he was going to give himself some time to see what happened. Tr. at 18. Petitioner testified that he could not get out of bed the next day and that the pain had worsened. Tr. at 18, 56. Petitioner went to the Southlake Emergency Department on July 30, 2019. Tr. at 19.

Notice

Petitioner testified that after leaving the Southlake Emergency Department, he reported his injury to Robert Santiago, his terminal manager, in-person at the post office on July 30, 2019. Tr. at 20. Petitioner also filled out an incident report which was admitted into evidence as Px 6. Tr. at 20-21; Px 6. Petitioner agreed that the incident report indicates that Petitioner had low back pain after moving some heavy "APC's.". Tr. at 21. Petitioner testified that "APC's" are steel cages filled with mail. Tr. at 21. After reporting the incident to Mr. Santiago, Petitioner was sent to Concentra Medical Center. Tr. at 22.

Petitioner's condition prior to July 29, 2019

Petitioner testified that he never had any problems with his low back prior to the July 29, 2019 work accident. Tr. at 30. Petitioner never sought any medical treatment for his low back prior to the July 29, 2019 accident. Tr. at 30. Petitioner testified that he had never felt the sensation of "hot water running down his back" prior to July 29, 2019. Tr. at 30-31.

Medical treatment summary

Petitioner presented to Southlake Emergency Department on July 30, 2019. Px2 at 40. Petitioner complained of bilateral lumbar back pain. Px2 at 40. Petitioner reported that the pain began the day prior while pulling out a box from his truck. Px2 at 40. Petitioner reported that he was a mail carrier and frequently lifted and moved heavy boxes of mail. Px2 at 40. No radiation down the legs was noted. Px2 at 40. On exam, diffuse tenderness along the lumbar region bilaterally without point tenderness was noted. Px2 at 41. X-rays of the lumbar spine were obtained and demonstrated mild reversal of normal lumbar lordosis and mild spurring. Px2 at 38. No acute fractures, misalignment, or significant disc space narrowing was seen. Px2 at 38. The x-ray results were noted to be consistent with muscle spasm. Px2 at 43. Petitioner's diagnoses were muscle spasm of back and strain of abdominal wall. Px2 at 43. Petitioner was given a

Toradol injection, a Norflex injection, and was prescribed Lidocaine patches, Ibuprofen, and orphenadrine. Px 2 at 43, 44.

Petitioner presented to Concentra Medical Center ("Concentra") on July 30, 2019. Px1 at 5. Petitioner presented with a lower back injury. Px1 at 5. Petitioner reported that at 3 a.m. the previous day, he was pulling a mail cart out of the truck, and he felt pain in his lower back "like hot water going down the lower back." Px1 at 5. Petitioner tried to pull another cart, but felt increasing pain so he stopped. Px1 at 5. Petitioner felt worse pain after waking up, but went to work and completed his shift, and then went to the ER. Px1 at 5. Petitioner reported that he had pain across the lower back with some numbness/weakness in his bilateral legs. Px1 at 6. On physical exam, tenderness was present in level L3-L5 left paraspinal and level L3-L5 right paraspinal. Px1 at 6. Palpation revealed right-sided muscle spasms. Px1 at 6. Flexion and extension were noted to be limited with pain. Px1 at 6. Petitioner was diagnosed with strain of lumbar region. Px1 at 7. He was prescribed physical therapy and instructed to take Ibuprofen and use a muscle rub. Px1 at 7. Petitioner was released to return to work with the restrictions of lifting up to 20 pounds occasionally, pushing/pulling up to 30 pounds occasionally, no driving of a company vehicle, and no climbing ladders. Px1 at 8. Petitioner participated in eight sessions of physical therapy at Concentra from July 31, 2019 through August 19, 2019. Px1 at 9-14, 18-24, 28-29, 34-35.

Petitioner returned to Concentra on August 1, 2019 with unchanged symptoms. Px1 at 15. Petitioner's exam findings, diagnosis, and work restrictions were unchanged. Px1 at 16-17. Petitioner next presented at Concentra on August 8, 2019. Px1 at 25. Petitioner reported that he felt a little better. Px1 at 25. Petitioner also reported that the pain was mostly in the right-sided lower back, and it was made worse with lifting and sitting for long periods. Px1 at 25. Petitioner reported that the pain was worse in the mornings, and that he had to roll out of bed. Px1 at 25. Petitioner reported that he was participating in physical therapy, which was helping. Px1 at 25. On exam, tenderness was present in the L4 level, and flexion and extension were noted to be limited with pain. Px1 at 26. Petitioner's diagnosis was unchanged. Px1 at 26. At this visit, Petitioner was prescribed cyclobenzaprine in addition to Ibuprofen. Px1 at 26. Petitioner's work restrictions were maintained. Px1 at 26.

On August 14, 2019, Petitioner returned to Concentra. Px1 at 30. Petitioner's diagnosis was unchanged. Pz1 at 31. At this visit, Petitioner was prescribed Meloxicam and was instructed to stop use of Ibuprofen. Px1 at 31-32. Additional physical therapy was also prescribed. Px1 at 31-32. Petitioner's work restrictions were maintained. Px1 at 32. On August 21, 2019, physical therapy was discontinued, and Petitioner's work restrictions were maintained. Px1 at 38. On August 28, 2019, an MRI of Petitioner's spinal canal and lumbar spine was ordered, and his work restrictions were maintained. Px1 at 40-41. On September 5, 2019, Petitioner returned to Concentra and reported continued pain in the lower back and occasional tingling in the left leg. Px1 at 45. Petitioner's diagnosis was unchanged, and his work restrictions were maintained. Px1 at 46-47. Petitioner followed up at Concentra on September 11, 2019. Px1 at 48. Petitioner's complaints of low back pain continued, and he again reported occasional tingling in the left leg. Px1 at 48. Petitioner's diagnosis was unchanged. Px1 at 49. Petitioner was prescribed Ibuprofen at this visit, and his work restrictions were maintained. Px1 at 49-50.

Petitioner underwent an MRI of the lumbar spine on September 23, 2019 at Southlake MRI and Diagnostic Center. Px2 at 36. The MRI results demonstrated (1) multilevel, multifactorial acquired spinal stenosis from L2-L3 to L5-S1, (2) a disc protrusion in the left foramen at L2-L3 compressing the left L2 nerve root, with an annular tear measuring 12 to 13 mm in length, (3) disc protrusions in the right foramina compressing the right L3 nerve root at L3-L4, with an annular tear 15 mm in length, (4) disc degeneration and some disc bulging at L4-L5, with a protrusion into the right foramen with compression of the right L4 nerve root, and with an annular tear 17 mm in length that extended far anteriorly and peripherally, and (5) a disc bulge left paracentral at L5-S1, with an extruded fragment extending superiorly contained by the posterior longitudinal ligament, producing some impingement on the left S1 nerve root within the thecal sac before exiting into the subarticular recess. Px2 at 36-37. The protrusion at L3-L4 was noted to be larger than the one at L4-L5. Px2 at 36-37. Petitioner testified that after receiving the MRI results, he decided to seek treatment with a neurosurgeon/specialist. Tr. at 24.

Petitioner presented to Dr. Sean A. Salehi at Neurological Surgery & Spine Surgery, S.C. on October 7, 2019. Px2 at 9. Petitioner reported a consistent accident history. Px2 at 9, 13. Dr. Salehi noted that Petitioner complained of back pain and paresthesias. Px2 at 10. On exam, lumbosacral and bilateral posterior iliac crest tenderness was noted. Px2 at 11. Both the right and left sitting leg raise exams were positive in the back only. Px2 at 11. Decreased sensation in the left lateral thigh and calf was also noted. Px2 at 11. Dr. Salehi reviewed the lumbar spine MRI of September 23, 2019, and he noted that it demonstrated moderate to large foraminal herniation on the right at L3-L4 and moderate foraminal herniation on the right at L4-L5, and small foraminal herniation on the left at L2-L3 and moderate herniation on the left at L5-S1 with superior migration. Px2 at 12. Dr. Salehi's impression was herniated discs. Px2 at 12. Dr. Salehi noted that Petitioner had low back pain secondary to foraminal disc herniations at L2-L3, L3-L4, L4-L5, and L5-S1, which were causally related to the work accident. Px2 at 12. He recommended that Petitioner undergo one to two caudal injections, and that Petitioner continue with physical therapy. Px2 at 12. Dr. Salehi noted that Petitioner could work at a light duty capacity with no lifting more than 20 pounds, no pushing or pulling more than 35 pounds, no bending or twisting more than three times per hour, no driving a company vehicle, and alternating between sitting and standing as needed. Px2 at 12, 29. Petitioner was instructed to return to Dr. Salehi after undergoing the recommended caudal injections. Px2 at 12.

Petitioner presented to Dr. Thomas Pontinen on October 8, 2019 at Midwest Anesthesia and Pain Specialists. Px3 at 16. Petitioner presented with low back pain, following a work-related injury while pulling a large object out of a truck. Px3 at 16. Petitioner reported never having pain like the pain he was experiencing and that he had not sought treatment for a back injury in the past. Px3 at 16. Petitioner reported that he could not sleep more than a few hours at a time and that he could not stand for more than 5 minutes at a time. Px3 at 16. Petitioner reported that the pain radiated down both legs to the feet with tingling and pain present daily. Px3 at 16. On exam, bilateral lumbar paraspinal tenderness with muscle rigidity was noted. Px3 at 17. Facet loading and straight leg raise tests elicited positive results bilaterally. Px3 at 17. Light touch was noted for sensory loss at L5-S1. Px3 at 17. Dr. Pontinen's assessment was back pain s/p work-related injury. Px3 at 17. Dr. Pontinen recommended a lumbar epidural steroid injection at L5-S1. Px3 at 18. Dr. Pontinen ordered a lumbar orthotic brace and prescribed cyclobenzaprine, tramadol, Nalfon, ondansetron, eszopiclone, diclofenac, and lidocaine patches.

Px3 at 18. A muscle stimulator device for acute pain was recommended. Px3 at 18. Dr. Pontinen continued Petitioner on the restrictions of no lifting more than 20 pounds and no pushing/pulling more than 30 pounds. Px3 at 18. Dr. Pontinen noted that he felt that the injuries reported by Petitioner were due to the work incident and were not due to a preexisting condition. Px3 at 18. Petitioner underwent a lumbar interlaminar steroid injection under fluoroscopic guidance at L5-S1 on November 12, 2019. Px3 at 23.

Petitioner returned to Dr. Pontinen on November 19, 2019. Px3 at 27. Petitioner reported no relief following the November 12, 2019 injection. Px3 at 27. Petitioner's pain continued to travel down the right and left leg and was worse on the right compared to the left. Px3 at 27. Bending and standing were difficult due to the pain. Px3 at 27. Petitioner reported that the TENs unit was not helping. Px3 at 27. Dr. Pontinen's assessment was unchanged. Px3 at 29. Dr. Pontinen recommended an EMG/NCV of the bilateral lower extremities to evaluate for radiculopathy and neuropathy. Px3 at 29. He also recommended a 30-day trial of H-wave treatment to assist with pain relief, range of motion, and functionality, and to help wean Petitioner off medications. Px3 at 30. Dr. Pontinen recommended that Petitioner remain off work. Px3 at 30. Petitioner testified that the H-wave unit helped him a lot because it allowed him to sleep. Tr. at 26. Petitioner testified that he was still using the H-wave unit for pain relief and for sleep at the time of arbitration. Tr. at 27.

On November 25, 2019, Petitioner underwent an EMG/NCV with Dr. Oleh S. Paly. Px2 at 33. The results demonstrated mild irritability present on EMG needle insertion suggestive of mild right L3-L4 nerve root irritation. Px2 at 35. Dr. Paly noted that possible irritation to smaller sensory nerve branches in areas which had been subject to trauma may also be present, however, because of their smaller size, these sensory nerve branches could not be measured by standard electrodiagnostic methods. Px2 at 35.

Petitioner returned to Dr. Salehi on December 2, 2019. Px2 at 14. Petitioner had undergone one injection, and he reported that it helped his pain only for about two days. Px2 at 14. Petitioner reported that physical therapy and use of the H-wave unit only temporarily helped with his pain. Px2 at 14. Petitioner complained of low back pain with numbness radiating into the right leg. Px2 at 14. Petitioner reported taking two to three tabs of tramadol per day. Px2 at 14. On exam, lumbosacral and bilateral posterior iliac crest tenderness, right more than left, was noted. Px2 at 15. Both right and left sitting straight leg raises elicited positive results in the back only. Px2 at 15. Tenderness in the right sciatic notch, as well as decreased sensation in the left lateral thigh and calf were also noted. Px2 at 15. Dr. Salehi's assessment was unchanged. Px2 at 16. Dr. Salehi noted that Petitioner had ongoing pain in the low back and right leg paresthesias secondary to foraminal disc herniations at L3-L4 and L4-L5. Px2 at 16. Dr. Salehi recommended surgical intervention in the form of a right L3-L4 and L4-L5 lateral foraminotomy and discectomy. Px2 at 16. Petitioner's work restrictions were maintained. Px2 at 16, 30.

Petitioner next saw Dr. Salehi on January 8, 2020. Px2 at 19. Dr. Salehi noted that Petitioner continued to experience constant pain in the low back with occasional numbness/tingling into the left lateral thigh stopping at the knee. Px2 at 19. On exam, lumbosacral and left sciatic notch tenderness were noted. Px2 at 19. Both right and left sitting straight leg raises elicited negative results. Px2 at 19. Dr. Salehi reviewed the EMG report of

November 25, 2019, and he noted that the results demonstrated mild irritability of mild right L3-L4 nerve root irritation. Px2 at 21. Dr. Salehi's assessment was unchanged. Px2 at 21. Dr. Salehi noted that as the majority of Petitioner's symptoms were mechanical back pain, taken along with the EMG results, he no longer recommended surgical intervention. Px2 at 21. Instead, he recommended that Petitioner undergo a trial of a spinal cord stimulator ("SCS") to see if it provided symptomatic relief. Px2 at 21. Petitioner's work restrictions were maintained. Px2 at 21, 27. Dr. Salehi also noted that he had reviewed Dr. Graf's IME of November 25, 2019, and that he disagreed with Dr. Graf's opinion that Petitioner only sustained a lumbar strain as a result of the accident; and he further noted that if it was truly a lumbar strain, Petitioner's symptoms would have resolved within six to eight weeks. Px2 at 21.

On February 20, 2020, Petitioner saw Dr. Salehi for follow up. Px2 at 22. Dr. Salehi noted that Petitioner continued with pain in the lower back and was taking tramadol. Px2 at 22. He also noted that Petitioner had been in the ER the week prior due to pain and numbness in the right foot. Px2 at 22. Petitioner reported that the tingling and numbness in his right foot was intermittent. Px2 at 22. Both right and left sitting straight leg raises elicited positive results in the back only. Px2 at 23. Diffuse lumbar tenderness and decreased sensation in the right dorsal foot were noted. Px2 at 23. Dr. Salehi's assessment was unchanged. Px2 at 23. Dr. Salehi continued to recommend a trial SCS, and Petitioner's work restrictions were maintained. Px2 at 24, 28.

Petitioner returned to Dr. Salehi's office on January 25, 2022 and was seen by Natalie Nehart, PA. Px2 at 3. She noted that Petitioner had not had any additional treatments, that Petitioner was taking Tylenol #3 prescribed by his primary care physician, and that Petitioner was using a TENs unit. Px2 at 3. Petitioner complained of pain in the lower back, especially with standing for long periods, and occasional radiation into the bilateral posterior thighs with tingling. Px2 at 3. It was noted that Petitioner was employed by Pure as a driver. Px2 at 3. It was also noted that the June 26, 2021 x-rays of the lumbar spine were reviewed and that they demonstrated normal alignment and no scoliosis. Px2 at 4. It was also noted that the August 6, 2021 MRI of the lumbar spine was reviewed, and it demonstrated (1) large right-sided far lateral herniated disc at L3-L4, (2) large left L2-L3 far lateral herniated disc, (3) T2 signal loss of L2-L3 through L5-S1, and (4) small right L4-L5 far lateral herniated disc. Px2 at 4. Petitioner's assessment was "[o]ther intervertebral disc displacement, lumbar region." Px2 at 4. PA Nehart noted that Petitioner continued with low back pain and intermittent lower extremity symptoms as a result of the July 29, 2019 work accident. Px2 at 4. A trial SCS continued to be recommended due to the multilevel disc disease/disc herniations. Px2 at 4. Petitioner was referred to Dr. Pontinen. Px2 at 4.

On January 28, 2022, Petitioner was seen by William Sideras, PA-C, at Midwest Anesthesia and Pain Specialists for follow up of low back pain. Px 3 at 35. Petitioner reported radiating pain and occasional numbness and tingling into the bilateral lower extremities. Px3 at 35. Petitioner described his pain as throbbing and intermittent and worsened with standing. Px3 at 35. Petitioner also reported using Tylenol #3 two to three times per week, as well as the H-wave unit which provided him some pain relief. Px3 at 35. Petitioner was instructed to continue using the H-wave unit, and a psych consult was recommended followed by a SCS trial. Px3 at 37. It was noted that "[p]er ODG, CMS, and FDA guidelines, a spinal cord stimulator is indicated at this time." Px3 at 38. Petitioner was allowed to continue his normal work duties. Px3

at 38. On March 1, 2022, Petitioner saw Dr. Adarsh Shukla at Midwest Anesthesia and Pain Specialists for follow up. Px3 at 40. Petitioner was instructed to follow up with Dr. Salehi, continue using the H-wave unit, and discontinue use of tramadol. Px3 at 43. Petitioner was allowed to continue his normal work duties, was discharged from care, and was instructed to follow up as needed. Px3 at 43.

Petitioner's sole proprietorship business

Petitioner testified that while working at Respondent, he also owned and leased semi-trucks. Tr. at 33. Petitioner testified that he owned a sole proprietorship business, operating as RNE Express, prior to his work accident. Tr. at 35. It was a general freight truck delivery business. Tr. at 34. Petitioner began the registration process for his business in August or September 2018. Tr. at 34-35. In November 2018, Petitioner purchased his first "lease to own" semi-truck. Tr. at 35-36. Petitioner testified that he had drivers for this truck and that he also made some runs himself. Tr. at 33, 36-37. While he was driving for his own sole proprietorship, Petitioner was also a W-2 employee of Respondent. Tr. at 33, 37, 63.

Petitioner purchased a second truck for his sole proprietorship in February or March 2019. Tr. at 38. Petitioner testified that he would also drive the second truck, "[e]very blue moon," for his own business while employed with Respondent. Tr. at 39. Petitioner, however, testified that he mostly had drivers for this truck. Tr. at 39.

Petitioner testified that he was not a W-2 employee for any of the companies that he was under contract for under his sole proprietorship. Tr. at 39. Petitioner was always an independent contractor or a 1099 employee for his sole proprietorship business. Tr. at 39.

Petitioner testified that his terminal manager, Robert Santiago, was aware of his sole proprietorship business because Mr. Santiago's friend was a driver for Petitioner's sole proprietorship business and because Petitioner would sometimes drive to and park his truck at the yard that Respondent used to park Respondent's trucks and Mr. Santiago would be at the yard when the drivers arrived to begin their shifts. Tr. at 40-41.

On cross examination, Petitioner testified that his sole proprietorship business had contracts with the following companies since 2018: Drake, VL Express, QFS, and Pure, Tr. at 63-72, 88. Petitioner began working for Pure in July 2020. Tr. at 71. Petitioner was paid per run. Tr. at 72. It involved between 20 hours and 30 hours a week. Tr. at 72. Petitioner had drivers for the Pure contract as well. Tr. at 75. While contracting with Pure, Petitioner agreed that his sole proprietorship business earned approximately $85,000. Tr. at 72. Petitioner, however, had to pay his drivers and cover the fuel, insurance, license plate fees, maintenance, and repairs for the trucks. Tr. at 72-73, 89-90. Petitioner testified that he was sometimes left with a deficit and lost money after paying for the necessary expenses. Tr. at 90. Petitioner's sole proprietorship business still had a contract with Pure at the time of arbitration and Pure was its only contract. Tr. at 74, 76. Petitioner had drivers for the Pure contract at the time of arbitration and he was not driving. Tr. at 74-75. Petitioner testified that he does not occasionally drive a truck to drop off or pick stuff up, and maybe just drives it a half block to the repair shop. Tr. at 74. Petitioner was not working at the time or arbitration. Tr. at 75.

TTD benefits

Petitioner received TTD benefits from July 30, 2019 through December 16, 2019. Tr. at 31-33. Respondent could not accommodate Petitioner's restrictions. Tr. at 31-33. Petitioner testified that he received TTD benefits prior to seeing Dr. Graf. Tr. at 42. Petitioner testified that after he saw Dr. Graf, he stopped receiving TTD benefits. Tr. at 42. Petitioner testified that he has continued to run his sole proprietorship business since November 2018 through the date of arbitration. Tr. at 44. Petitioner testified that he did not drive a truck for his sole proprietorship while he was on the work restrictions given to him by Concentra and Dr. Salehi. Tr. at 42.

Petitioner testified that he did not ever return to work at Respondent after his exam by Dr. Graf. Tr. at 44. Petitioner tried to return to work for Respondent, with the restrictions imposed by his treating physicians. Tr. at 44, 45. Respondent, however, did not take him back. Tr. at 44.

Petitioner testified that after his TTD benefits were terminated, he continued to manage his sole proprietorship business, and at times, drove his own trucks. Tr. at 43, 45. Petitioner testified that he had to pick up runs in order to support himself and pay his bills, even though his back was still in pain. Tr. at 45. Petitioner testified that he never had to load or unload any product onto his truck, as it "was all 100 percent no-touch freight." Tr. at 45-46. There was no physical labor, carrying, or lifting involved with driving for his sole proprietorship business. Tr. at 46. Petitioner testified that when his back hurt while driving, he was able to pull over or lay down in the sleeper in the back and rest. Tr. at 47. Petitioner testified that he has not worked for another company as a W-2 employee since July 29, 2019. Tr. at 47. Petitioner agreed that any money or profits he has made from his sole proprietorship were through 1099 independent contractorship. Tr. at 47.

Petitioner testified that he was not ever considering leaving his employment at Respondent permanently. Tr. at 48. Respondent offered Petitioner a steady salary, benefits, and job security. Tr. at 48.

Petitioner testified that at the time of arbitration, he was not working and that he had last worked two or three months prior to arbitration. Tr. at 75. Petitioner has a valid CDL. Tr. at 78.

Petitioner's current condition

Petitioner's current pain is located on both sides of his lumbar spine. Tr. at 52-53. At times, his right leg goes to sleep. Tr. at 53. Petitioner testified that the pain is worsened by standing too long or sitting too long. Tr. at 43. Petitioner testified that he is unable to pick up his grandchildren and has difficulty with lifting his laundry basket if he lets his laundry sit for a week. Tr. at 53-54. Petitioner agreed that he has problems with lifting heavy objects. Tr. at 54. Petitioner testified that he has to be careful with lifting everything. Tr. at 55. Petitioner testified that laying down in a certain position with the H-wave machine on his back makes the pain better. Tr. at 53. Petitioner takes Advil, Tylenol, and Excedrin for pain relief. Tr. at 53. Petitioner testified that he smokes, that Dr. Salehi told him he needed to "slow it down," and that he has slowed it down. Tr. at 57. Petitioner testified that he wanted to try the SCS that Dr. Salehi was recommending because he wanted to get rid of his back pain and get back to a normal life. Tr. at

51-52. If workers' compensation had approved the SCS, he would have gone through with it over a year and a half ago. Tr. at 52. Petitioner wishes to continue his treatment for his low back, including seeing his pain management specialist. Tr. at 53-54.

Evidence deposition testimony of Dr. Sean Salehi.

Dr. Sean Salehi testified by way of evidence deposition on July 14, 2020. Px5. Dr. Salehi testified as to his education and credentials. Px5 at 5-6. Dr. Salehi is board certified in neurological surgery. Px 5 at 5.

Dr. Salehi first saw Petitioner on October 7, 2019. Px5 at 6. Dr. Salehi testified that he was aware that Petitioner was involved in a workers' compensation matter at his initial visit on October 7, 2019, and that he considers secondary gain issues when evaluating patients involved in workers' compensation claims. Dr. Salehi testified that he took a history of illness from Petitioner on October 7, 2019, and that Petitioner reported that he felt a sharp pain in his lower back as he was trying to unload the truck and unlock two carts that had become locked together during transport. Px 5 at 7.

Dr. Salehi examined Petitioner and reviewed the images of Petitioner's September 23, 2019 lumbar spine MRI. Px 5 at 9. Dr. Salehi testified that the pertinent positive of his exam included the lumbar sacral examination, which showed tenderness in the iliac crest region. Px5 at 9. Dr. Salehi also testified that Petitioner's range of motion was moderately limited in flexion, extension, and mildly limited in lateral bending. Px5 at 9. Petitioner also had increased sensation on the left lateral thigh and the calf, and Petitioner's reflexes were diminished in the ankles, but was symmetric. Px5 at 9. He testified that the MRI images showed moderate to lower foraminal herniation on the right side at L3-L4, moderate foraminal herniation on the right side at L4-L5, small foraminal herniation at L2-L3 on the left side, and a moderately sized herniation at L5-S1 with superior migration on the left side. Px 5 at 9-10. Dr. Salehi's diagnosis was lumbar herniated disc with annular tears at multiple sacral levels. Px 5 at 10. Dr. Salehi's treatment recommendation was for Petitioner to continue conservative care by way of one to two caudal epidural injections in addition to physical therapy, and he provided the work status of light duty, no lifting more than 20 pounds, no pushing or pulling more than 35 pounds, no repeated bending or twisting more than three times an hour, and no driving of a company vehicle. Px5 at 10-11. Dr. Salehi agreed that he referred Petitioner to a pain management specialist for the caudal epidural injections. Px 5 at 11.

Dr. Salehi testified that he next saw Petitioner on December 2, 2019, and that Petitioner had undergone the recommended injections. Px5 at 11. Dr. Salehi testified that Petitioner reported that the injection had helped with the pain for two days. Px5 at 11. Dr. Salehi testified that Petitioner's main complaint on December 2, 2019 was pain in the lower back, and that his second complaint was numbness with radiation into the right leg. Px5 at 11-12. Petitioner's subjective complaints were consistent with his physical exam findings. Px5 at 12. Dr. Salehi testified that at that time, he recommended a lumbar microdiscectomy on the right side at L3-L4 and L4-L5. Px5 at 12. Dr. Salehi testified that the purpose of this surgery was to treat the radicular symptoms and had nothing to do with Petitioner's low back pain. Px 5 at 12. Dr. Salehi

kept Petitioner on a light duty work status, and Dr. Salehi's intention was to keep Petitioner on light duty until the surgery was approved. Px5 at 12.

Petitioner's next visit with Dr. Salehi was on January 8, 2020. Px5 at 13. Dr. Salehi testified that Petitioner's complaints on that date were that he had constant pain in the lower back, which Petitioner rated as an 8 out of 10. Px5 at 13. Petitioner also reported occasional numbness and tingling in the left lateral thigh stopping at the knee. Px5 at 13. Dr. Salehi performed a physical examination and did not find any symptom magnification or positive Waddell's signs on exam. Px5 at 13. Dr. Salehi had an opportunity to review an EMG at this visit and testified that the results showed mild irritability suggestive of mild light L3-L4 nerve root irritation. Px5 at 13-14. Dr. Salehi testified that his diagnosis remained the same at this visit, but his treatment recommendation had changed. Px5 at 14. Dr. Salehi explained that the reason for the change in his surgical recommendation was that as treatment progressed, the majority of Petitioner's complaints were in the lower back and his complaints in the right and left legs were secondary. Px5 at 14. Dr. Salehi further explained that the microdiscectomy he had recommended was not going to address the mechanical back pain due to the annular tear. Px5 at 14. Dr. Salehi testified that because of these changes, he did not want to perform any surgical intervention that was not going to help Petitioner. Px5 at 14-15.

Dr. Salehi testified that treatment for low back pain would include a lumbar fusion. Px5 at 15. Dr. Salehi testified that he felt that because Petitioner had findings at multiple levels on the MRI, a multilevel lumbar fusion was too aggressive of a recommendation. Px5 at 15. Dr. Salehi testified that instead, a SCS has emerged as a good alternative in cases for a patient with mechanical back pain that is not a good candidate for a lumbar fusion. Px5 at 15. Dr. Salehi explained that with the stimulation, the underlying cause is being masked and not treated. Px5 at 15. He further explained that a SCS sends a very low current of electricity to the spinal cord, which prevents the pain signal from reaching the brain, thereby masking the patient's pain. Px5 at 15-16. Dr. Salehi agreed that a SCS is less invasive than undergoing surgical intervention. Px5 at 16. Dr. Salehi explained that if he could limit a lumbar fusion to one or two discs, he would probably still recommend a fusion, but because Petitioner had issues on three or four levels, he did not feel that a fusion was a good option, and it was too aggressive. Px5 at 16.

Petitioner next saw Dr. Salehi on February 20, 2020, and Dr. Salehi testified that he continued to recommend a SCS at that time. Px5 at 16-17. Dr. Salehi testified that it would be a six-week period of healing following the implantation of the SCS and that Petitioner would have to be off work for the first four weeks following the procedure. Px5 at 17. Petitioner could return to work at a light duty status for the final two weeks of the healing period. Px5 at 17.

Dr. Salehi testified that he reviewed Dr. Graf's IME report and that he disagreed with Dr. Graf's diagnosis. Px5 at 18. Dr. Salehi testified that in his practice, if a patient sustains a lumbar strain, there is usually a focal pain in the lumbar spine, and it is typically not associated with a radicular set of symptoms. Px5 at 18. Dr. Salehi explained that it is not unusual to have a diagnosis of lumbar strain early on, and that diagnosis can exist with other diagnoses, however, if the symptoms have not resolved after a few weeks of conservative care, then the possibility of a strain becomes difficult to justify. Px 5 at 18. Dr. Salehi testified that based on his examinations of Petitioner, Petitioner's MRI scans, and his EMG study, the proper diagnosis is annular tear,

herniation, and radicular symptoms. Px 5 at 18-19. Dr. Salehi explained that Petitioner's low back pain along with the early right leg complaints, fit perfectly with the large herniation at L3-L4 and the moderate herniation at L4-L5, which was clearly shown on the MRI. Px5 at 19. Dr. Salehi further explained that the EMG showed irritability at the L3-L4 nerve root distribution as well. Px5 at 19. Dr. Salehi testified that it was still his opinion that Petitioner requires the trial for the SCS. Px5 at 19.

Dr. Salehi testified that usually herniations happen as a result of either loading, flexion, or rotation or a combination of all of those three in the lumbar spine. Px5 at 20. Dr. Salehi testified that if Petitioner was trying to unlock the carts from each other, he probably did some bending and twisting, which resulted in the herniation. Px5 at 20. Dr. Salehi testified that the act of pulling apart the carts would be a competent cause of Petitioner's symptoms, as long as it involved loading, flexion, or rotation, and that any of those mechanisms would be consistent with annular tear and herniation. Px5 at 20. Dr. Salehi testified that he was not aware of there being any preexisting symptoms that Petitioner was having before the July 2019 accident. Px5 at 21. Dr. Salehi testified that Petitioner's necessity for the SCS trial is causally related to the July 2019 accident. Px5 at 21.

On cross examination, Dr. Salehi testified that he comes up with his own work status recommendations. Px5 at 25-26. Dr. Salehi agreed that it was his understanding that Petitioner was not driving a semi-truck at the time of his October 7, 2019 visit. Px5 at 26. Dr. Salehi testified that if Petitioner had been driving a semi-truck at that time, he would tell Petitioner that he should not be. Px5 at 26. Dr. Salehi testified that his work recommendation of no driving of a company vehicle would not change, and that he would advise Petitioner not to drive because that would aggravate his back. Px5 at 27. Dr. Salehi testified that he did not have any records of any treatment of Petitioner prior to the July 29, 2019 accident date. Px5 at 28. Petitioner denied any preexisting symptoms. Px5 at 29. Dr. Salehi testified that he did recommend that Petitioner stop smoking. Px5 at 29. Dr. Salehi testified that if Petitioner's symptoms have abated since his February 20, 2020 visit, then Petitioner does not need any further treatment via SCS. Px5 at 29-30.

On redirect examination, Dr. Salehi testified that if Petitioner was following the restrictions that he gave Petitioner, then it would be okay for Petitioner to work within those capacities. Px5 at 30-31. Dr. Salehi explained that working with restrictions is an important part of recovery because it increases the movement of the spine, stretches the muscles, and increases the overall blood flow to the spine. Px 5 at 31.

Evidence deposition testimony of Respondent's Section 12 Examiner, Dr. Carl Graf

Dr. Carl Graf testified by way of evidence deposition on September 2, 2020 and June 10, 2022. Rx2; Rx3. Dr. Graf testified as to his education and credentials. Rx2 at 5-6; Rx3 at 5-6. Dr. Graf is board-certified and specializes in spine surgery. Rx2 at 6.

Dr. Graf evaluated Petitioner on November 25, 2019. Rx2 at 8. Dr. Graf took Petitioner's history. Rx2 at 9. Dr. Graf testified that at the time of the November 25, 2019 evaluation, Petitioner was 43 years old, worked for Respondent as a truck driver, and that he would drive

and unload mail at the post office. Rx2 at 10. Petitioner reported a consistent accident history. Rx2 at 10. Petitioner denied any prior or preexisting lumbar spine complaints or treatment. Rx2 at 11. Dr. Graf testified that on exam, Petitioner complained of low back pain with extension. Rx2 at 13. Dr. Graf testified that it was noted on exam that Petitioner's right leg had an obvious clubfoot reconstruction, and that Petitioner had chronic atrophy of his right leg and his right calf. Rx2 at 13. The atrophy of Petitioner's right leg and calf predated the July 29, 2019 accident. Rx2 at 13. Dr. Graf testified that there were two nonorganic pain findings, pain in the low back with simulated axial rotation and pain out of proportion to the evaluation. Rx2 at 14.

Dr. Graf reviewed a job description for a tractor-trailer driver. Rx2 at 16. Dr. Graf also reviewed medical records of Petitioner's treatment. Rx2 at 16. Dr. Graf testified that he reviewed plain view x-rays of the lumbar spine of July 30, 2019 and the lumbar spine MRI report of September 23, 2019. Rx2 at 16. Dr. Graf testified that the actual MRI scans of September 23, 2019 were not provided to him. Rx2 at 17. Dr. Graf testified that the plain view x-rays of July 30, 2019 demonstrated mild straightening of the normal lumbar lordosis and no significant degeneration, fracture, instability, or otherwise. Rx2 at 17. Dr. Graf testified that his assessment of the MRI report was essentially multilevel spondylosis or degeneration with multilevel stenosis. Rx2 at 17. Dr. Graf noted that the MRI report also noted a disc protrusion at L2-L3 on the left, an annular tear in the right foramen on the right, a protrusion at L4-L5, and an extruded disc fragment at L5-S1. Rx2 at 17. Dr. Graf testified that the significance of these findings on MRI was "[j]ust basically significant degeneration, disc protrusions at every single level. So, like I said, rather significant preexisting arthritis and degeneration." Rx2 at 17-18.

Dr. Graff testified that at the time of his examination, Petitioner demonstrated no hard neurologic signs with no nerve root tension signs, and that Petitioner had no subjective complaints of radiating leg pain. Rx2 at 18. Dr. Graf testified that he considered Petitioner's diagnosis to be a lumbar strain with preexisting lumbar spondylosis. Rx2 at 18. Dr. Graf testified that it was his opinion that the initial lumbar strain was causally related to the injury, but that because he was not able to objectively substantiate Petitioner's ongoing subjective complaints, Petitioner's ongoing subjective complaints were not related to the injury. Rx2 at 22. Dr. Graf testified that he noted that Petitioner listed his pain into the severe level, while only occasionally taking nonnarcotic pain medication, which would not be consistent with such severe complaints of pain. Rx2 at 19. Dr. Graf testified that it was his opinion that Petitioner was at maximum medical improvement ("MMI") as of November 25, 2019, and that no further care or treatment was necessary or warranted. Rx2 at 19, 23. Dr. Graf testified that at that time, it was his opinion that Petitioner's initial care and treatment was reasonable and medically necessary, though he questioned the need for an epidural steroid injection as Petitioner had no current complaints of radiating leg pain or nerve root tension signs. Rx2 at 22. Dr. Graf testified that based on his physical examination, there was no objective reason why Petitioner could not return to his full-duty level job. Rx2 at 19, 20, 23.

Dr. Graf testified that additional records were provided to him for his review following the November 25, 2019 evaluation, and that he prepared a records review report on March 18, 2020. Rx2 at 23. Dr. Graf did not examine Petitioner on this date. Rx2 at 24. Dr. Graf testified that he opined that the November 12, 2019 lumbar interlaminar steroid injection was not reasonable or necessary, and that he further noted in the March 18, 2020 report that it did not

appear to improve Petitioner's symptomatic pain. Rx2 at 25. Dr. Graf testified that following his review of the additional records, his opinion as to Petitioner's diagnosis was unchanged. Rx2 at 25. Dr. Graf testified that he did not agree with Dr. Salehi's recommendation of a trial SCS and that it was his opinion that it was not reasonable. Rx2 at 26. Dr. Graf testified that it is his opinion that the trial SCS would not help a patient like Petitioner, given Petitioner's exam findings and subjective complaints. Rx2 at 26. Dr. Graf testified that he reviewed an EMG report, and that it did not show electrodiagnostic evidence of a radiculopathy. Rx2 at 26. Dr. Graf testified that the EMG showed mild irritability present on needle insertion study suggestive of mild right L3-L4 nerve root irritation. Rx2 at 26. Dr. Graf testified that this was an odd finding, because "typically an EMG doesn't have something saying mild irritability." Rx2 at 26-27. Dr. Graf testified that the EMG finding of mild irritability "doesn't say much" and was "a very mild finding or a very soft call." Rx2 at 27.

Dr. Graf testified that he would not recommend a trial SCS because it is meant to help a certain subset of patients with spinal conditions or complex regional pain syndrome. Rx2 at 28. Dr. Graf explained that the FDA indication for spinal cord stimulators is to help neuropathic pain, which is typically an injured nerve root from a disc herniation or some sort of nerve root impingement after a surgery to help with radicular leg symptoms, which Petitioner did not have. Rx2 at 28. Dr. Graf testified that Petitioner has solely axial back pain, which is not an indication for a SCS. Rx2 at 28. Dr. Graf testified that it was his opinion that there was no aggravation of any preexisting condition by the July 29, 2019 work accident. Rx2 at 29. His opinion as to further medical treatment and Petitioner's work status were unchanged. Rx2 at 29. Dr. Graf testified that at the time of his deposition of September 2, 2020, he was not aware of any treatment Petitioner had undergone since February 20, 2020. Rx2 at 28.

On cross examination, Dr. Graf testified that it was possible for a patient to present with complaints of radiating pain running down their legs at one visit, present for a follow up weeks later without those complaints, and then present again weeks later with reoccurrence of those complaints. Rx2 at 31. Dr. Graf testified that while it is not typical, it is possible and that he has seen this before. Rx2 at 31. Dr. Graf testified that an MRI scan could not substantiate or correlate pain complaints. Rx2 at 38. Dr. Graf testified that his opinion as to there not being more than a lumbar strain, was "based upon the fact that he had so severe subjective complaints of pain yet he apparently wasn't doing anything about it, only taking occasional tramadol[,]" and there was no numbness recorded on testing of each nerve root distribution. Rx2 at 40-41.

On June 10, 2022, Dr. Graf provided evidence deposition testimony regarding his evaluation of Petitioner on May 9, 2022. Rx3. Petitioner denied any intervening accidents or injuries since his initial examination on November 25, 2019. Rx3 at 9. Dr. Graf testified that at that time, Petitioner reported that he could not stand for longer than 10 minutes. Rx3 at 9. Petitioner also reported that he could not lift greater than 20 pounds and reported increased pain with activity. Rx3 at 9. Petitioner reported that he had returned to work as a driver, that he did not load or unload, and that he had stopped working approximately one month prior to the evaluation secondary to low back pain. Rx3 at 9. Dr. Graf reviewed the June 26, 2021 lumbar x-ray report and the scan of the August 2, 2021 MRI. Rx2 at 14-15. Dr. Graf testified that the MRI scan demonstrated mild disc degeneration L2-S1, small left-sided disc protrusion at L2-L3 with mild foraminal stenosis, and small left-sided disc bulge at L5-S1 with no nerve root compression.

Rx3 at 15. Dr. Graf testified that the Petitioner's lack of radicular complaints correlated with the MRI findings. Rx3 at 15. Dr. Graf testified that after his May 9, 2022 evaluation and review of additional records, it was his opinion that his prior opinions of November 25, 2019 and March 18, 2020 were unchanged. Rx3 at 16-18. Dr. Graf agrees with Dr. Salehi's decision not to perform a foraminotomy discectomy at L3-L4 and L4-L5. Rx3 at 19.

Dr. Graf explained that a SCS tries to shut down signals from the lower extremities to the brain. Rx3 at 20. It tries to dull symptoms of radiating leg pain. Rx3 at 20. A SCS is indicated for someone who has some sort of nerve root compression who had surgery and has ongoing neuropathic pain. Rx3 at 20. It is indicated for radiating leg symptoms, and it is not indicated for axial low back pain. Rx3 at 20-21. Dr. Graf agreed that neuropathic pain is typically due to an injured nerve root from a disc herniation. Rx3 at 22. Dr. Graf testified that an MRI scan can "potentially" substantiate a patient's pain complaints. Rx3 at 22. Dr. Graf testified that it is a possibility that annular tears and disc herniations are a cause of axial back pain. Rx3 at 22. Dr. Graf disagrees that spinal cord stimulators are an effective tool in alleviating axial chronic back pain which has been nonresponsive to conservative treatment. Rx3 at 22-23. Dr. Graf testified that "[i]t's really putting everything together…Somebodies subjective complaints, the objective findings on the physical examination, the fact of inconsistencies or not. Imaging studies, basically putting everything like that together[,]" when asked what he would refer to when trying to objectively substantiate a patient's subjective complaints. Rx3 at 23.

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission,* 44 Ill. 2d 214 (1969).

Credibility is the quality of a witness which renders his evidence worthy of belief. It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. *O'Dette v. Industrial Commission*, 79 Ill.2d 249, 253 (1980); *Hosteny v. Workers' Compensation Commission*, 397 Ill. App. 3d 665, 674 (2009). Where a claimant's testimony is inconsistent with his actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972).

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds him to be a credible witness. The Arbitrator observed Petitioner alternate between sitting and standing while testifying. 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 at 203.

The Arbitrator finds that Petitioner has established that an accident occurred on July 29, 2019 that arose out of and in the course of his employment with Respondent. The Arbitrator relies on Petitioner's credible testimony that (1) his duties consisted of delivering and unloading mail, which was loaded into cages, (2) on July 29, 2019, while unloading cages with mail from the truck, he attempted to pull apart two cages that had become stuck together, in order to roll them out of the trailer, and (3) as he tried multiple times to pull on them, he injured his low back and felt an immediate sensation of hot water running down his back and legs. The Arbitrator also relies on the treatment records in evidence, which document and reflect treatment beginning on July 30, 2019, as well as corroborate Petitioner's testimony.

Issue E, whether timely notice of the accident was given to Respondent, the Arbitrator finds as follows:

Pursuant to the Act, notice of a work-related accident must be reported to the employer within 45 days of the accident. 820 ILCS 305/6(c). The purpose of the notice requirement is to give employers the opportunity to investigate the accident and gather evidence related to same. *Seiber v. Industrial Comm'n*, 82 Ill. 2d 87, 96, 411 N.E.2d 249, 252 (1980). A claimant's failure to report an accident on the day it occurred is not a reasonable basis for disputing a claim. See *Oliver v. Ill. Workers' Comp. Comm'n*, 2015 IL App (1st) 143836WC, ¶39-¶47 (2015).

Petitioner testified that he provided notice of the July 29, 2019 work accident to his terminal manager, Mr. Robert Santiago, on July 30, 2019. Petitioner also testified that he completed an incident report, Px6, which was admitted into evidence without objection. Tr. at 97. The incident report was completed on July 30, 2019. Px6. Respondent did not offer any contrary evidence.

Based on the record as a whole, the Arbitrator finds that Petitioner provided timely notice to Respondent of the July 29, 2019 work accident within the 45-day notice requirement.

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

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). 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. *Id.* 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. *Id.* "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Industrial Com.*, 93 Ill. 2d 59 (1982).

The Arbitrator finds that Petitioner established a causal connection between the accident of July 29, 2019 and his current lumbar spine condition of ill-being. In so finding, the Arbitrator relies on the following: (1) Petitioner's credible description of the mechanics of his work accident and the abrupt onset of symptoms, (2) Petitioner's credible denial of any problems with or treatment for his lumbar spine prior to July 29, 2019, (3) Dr. Salehi's testimony and records, (4) Dr. Pontinen's records, and (5) the fact that none of the records in evidence reflect any pre-accident lumbar spine problems or treatment. The Arbitrator notes that the evidence demonstrates a condition of good health prior to July 29, 2019, consistent complaints and continuous symptomology of the lumbar spine following the July 29, 2019 work accident, and that Petitioner was able to work full duty and without restrictions immediately prior to the work accident.

Further, the Arbitrator has considered the opinions of Dr. Graf, but finds that they do not outweigh the opinions of Dr. Salehi. The Arbitrator finds that the record supports Dr. Salehi's opinion that Petitioner suffered annular tears and multilevel disc herniations. The Arbitrator calls into question the opinions of Dr. Graf, as they are inconsistent with Petitioner's treatment records. Dr. Graf testified that his diagnosis of a lumbar strain was premised on Petitioner not having radicular leg symptoms, yet Petitioner's treatment records consistently document Petitioner's reports of numbness, weakness, and tingling into the bilateral extremities. Additionally, while Dr. Graf opined that the MRI findings of September 23, 2019 were "just basically significant degeneration, disc protrusions at every single level," and that these findings were "rather significant preexisting arthritis and degeneration," Dr. Graf did not review the actual diagnostic images, nor did he review any pre-accident treatment records. Moreover, Dr. Graf conceded that it was a possibility that annular tears and disc herniations are a cause of axial back pain. Rx3 at 22. Accordingly, the Arbitrator finds the opinions of Dr. Salehi more persuasive, where Dr. Salehi reviewed the actual diagnostic images and relied upon same in his assessment. Further, Dr. Salehi credibly explained that Petitioner had a mechanism of injury that was consistent with the disc herniations and annular tears seen on MRI, and that Petitioner's symptoms and EMG findings were also consistent with his diagnoses.

Based on the record as a whole, the Arbitrator finds that Petitioner has met his burden in proving a causal connection between the July 29, 2019 accident and his current lumbar spine condition of ill-being.

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, 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: Neurological Surgery and Spine Surgery-Dr. Salehi ($448.00), Midwest Anesthesia and Pain Specialists-Dr. Pontinen ($325.02); Hyde Park Surgical Center ($11,750.00); Dr. Oleh Paly ($5,400.00); Electronic Waveform Lab, Inc.-H-wave unit ($5,423.00). Px 4. As the Arbitrator has found that Petitioner's treatment was reasonable and necessary, the Arbitrator further finds that all bills, as provided in 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, including those reflected in Rx1, 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, the Arbitrator finds that Petitioner is entitled to prospective medical care for his lumbar spine as recommended by Dr. Salehi and Dr. Pontinen.

On January 8, 2020, Dr. Salehi recommended a spinal cord stimulator trial for Petitioner as an alternative treatment for his lumbar spine condition. Dr. Salehi's recommendation is based on the centrality of Petitioner's low back pain, reduced and intermittent radiating pain, and EMG results. Dr. Salehi also credibly testified that a spinal cord stimulator was the best treatment option for Petitioner because Petitioner had findings on three or four disc levels, and a fusion would be aggressive. Dr. Salehi credibly explained that a spinal cord stimulator has emerged to be a good alternative for patients with mechanical back pain that are not candidates for lumbar fusions. Further, on January 28, 2022, it was recommended that Petitioner undergo a psychological consult/evaluation prior to undergoing the trial SCS procedure.

Based on the record as a whole, the Arbitrator finds that Petitioner is entitled to prospective lumbar spine treatment, including a spinal cord stimulator trial and the required psychological consult and/or evaluation, 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 benefits, 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 July 30, 2019 through June 24, 2022, the date of arbitration. Respondent disputes Petitioner's claim for TTD benefits, and relies on its accident, causal connection, and employment/wages disputes. Ax1. The Arbitrator notes that the Parties' stipulated to an average weekly wage of $1,351.91. Ax1.

In determining eligibility for TTD, "[t]he dispositive test is whether the claimant's condition has stabilized, that is, whether the claimant has reached maximum medical improvement." *Mechanical Devices v. Industrial Comm'n,* 344 Ill. App. 3d 752, 759 (2003). The fact that an employee can do some light duty work or other useful tasks does not mean that he is ineligible to receive TTD benefits. *Shafer v. Illinois Workers' Compensation Comm 'n,* 2011 IL App (4th) 100505WC, §47. As the Arbitrator has found that Dr. Graf's opinions do not outweigh those of Petitioner's treating physicians, the Arbitrator further finds that Petitioner has not reached MMI.

Petitioner testified that he received TTD benefits until his evaluation with Dr. Graf. Tr. at 42. Respondent offered its Exhibit 1, which reflects TTD benefits payments to Petitioner from July 30, 2019 through December 16, 2019. Rx1. Petitioner also testified that he has not returned to work for Respondent since July 29, 2019 and that Respondent has not accommodated Petitioner's restrictions. Petitioner also testified that after his benefits were terminated, he worked for his sole proprietorship business to make ends meet. The Arbitrator acknowledges that while Petitioner admittedly worked for his sole proprietorship after his benefits were terminated, Petitioner testified that he did not work often and that it did not involve any loading, unloading, lifting, or carrying. The Arbitrator notes that Respondent did not offer any contrary evidence.

Based on the record as a whole, the Arbitrator finds that Petitioner is entitled to TTD benefits from July 30, 2019 through June 24, 2022, the date of arbitration. Further, based on the Parties' stipulation, Respondent is entitled to a credit in the amount of $18,044.80 for TTD benefits paid by Respondent to Petitioner. Ax1.

Ana Vazquez

ANA VAZQUEZ, ARBITRATOR

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC014407
Case Name	Robert Berndt v. Keenan Transit Company
Consolidated Cases	16WC006712; 16WC020206; 16WC020211;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0448
Number of Pages of Decision	26
Decision Issued By	Kathryn Doerries, Commissioner, Amylee Simonovich, Commissioner

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Jennifer Kiesewetter

DATE FILED: 10/16/2023

/s/Amylee Simonovich, Commissioner

Signature

DISSENT: /s/Kathryn Doerries, Commissioner

Signature

23IWCC0448

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Berndt,

Petitioner,

vs. NO: 15 WC 14407

Keenan Transit,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering all issues, and being advised of the facts and law, modifies the Decision of the Arbitrator. The Commission otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Initially, the Commission notes that prior to the arbitration hearing the parties consolidated this case with four additional cases for hearing. The cases involve two separate dates of accident and three separate employers. In the current case, Petitioner alleged he sustained a work-related injury on March 23, 2015, and named Keenan Transit (Keenan) as his employer. In case 16 WC 20206, Petitioner alleged he sustained a work-related injury on March 23, 2015, and named Phoenix Logistics (Phoenix) as his employer. In case 17 WC 35300, Petitioner alleged he sustained a work-related injury on March 23, 2015, and named Amerisafe Consulting & Safety (Amerisafe) as the employer.[1] In case 16 WC 20211, Petitioner alleged he sustained a work-related injury on October 15, 2014, and named Phoenix as his employer. Finally, in case 16 WC 6712, Petitioner alleged he sustained a work-related injury on October 15, 2014, and named Keenan as his employer. While the parties addressed all five cases during the arbitration hearing, the Arbitrator issued separate Arbitration Decisions in 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 conclusions regarding the issues of employer/employee relationship, Section 1(a)4 liability, accident, notice, causal connection, wages, medical expenses, temporary total disability (TTD) benefits, and

1 No review was filed in case 17 WC 35300.

permanent total disability benefits. However, the Commission modifies the award of penalties and fees.

Additional Modification to the Decision

The Commission makes the following modification to the Decision of the Arbitrator. On page six (6) of the Arbitration Decision, the Arbitrator wrote: "Given the findings on accident and causation, Respondent shall pay Petitioner for all treatment related to the bilateral knees…" The Commission modifies this sentence to read as follows:

> Given the findings on accident and causation, Respondent shall pay Petitioner for all treatment related to the bilateral knees, left shoulder, lower back, headaches, and anxiety after the March 23, 2015, accident, including treatment required to address the infection to the left knee, as submitted into evidence as PX 14, pursuant to Sections 8(a) and 8.2 of the Act.

Penalties and Fees

The Arbitrator awarded Petitioner penalties pursuant to Section 19(l) in the amount of $10,000.00, Section 19(k) in the amount of $151,739.85, and Section 16 in the amount of $60,695.94. The Commission agrees with the Arbitrator's conclusion that Respondent's behavior in this case warranted an award of penalties pursuant to Sections 16, 19(k), and 19(l) of the Act. However, the Commission modifies the Arbitrator's reasoning regarding the appropriateness of an award of penalties. The Commission also modifies the Arbitrator's calculation of penalties pursuant to Sections 16 and 19(k) of the Act.

The intent of Sections 16, 19(k), and 19(l) of the Act is to "…implement the Act's purpose to expedite the compensation of industrial workers and to penalize employers who unreasonably, or in bad faith, delay or withhold compensation due an employee." *Centeno v. Ill. Workers' Comp. Comm'n*, 2020 IL App (2d) 180815WC at ¶55 (citation omitted). Penalties pursuant to Section 19(l) of the Act are applicable when an employer fails to pay benefits without good and just cause. *Id*. Courts have likened Section 19(l) penalties to a late fee. However, an award of penalties pursuant to Sections 16 and 19(k) of the Act requires a claimant meet a much higher burden. Section 19(k) of the Act addresses "…situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose. This is apparent in the statute's use of the terms 'vexatious,' 'intentional' and 'merely frivolous.'" *McMahan v. Indus. Comm'n.*, 183 Ill. 2d 499, 515 (1998). Section 16 of the Act uses the same language and applies to the same situations as Section 19(k) penalties.

The Arbitrator concluded that penalties were appropriate due to Respondent's refusal to pay benefits due to its dispute with Amerisafe regarding liability for the payment of benefits related to the March 23, 2015, work accident. However, the evidence shows that while Respondent disputed its liability pursuant to Section 1(a)4 of the Act, it did not refuse to pay benefits due to that dispute. Instead, Respondent paid a limited amount of TTD benefits and medical expenses before it terminated all benefits in August 2015. A review of the evidence shows that Respondent relied on the opinions of its Section 12 examiners to support its termination of benefits in the case.

After considering the totality of the evidence, the Commission finds Respondent's decision to terminate Petitioner's benefits was unreasonable and vexatious.

An employer may rely on an expert opinion to show that its belief that the claimant was no longer entitled to benefits was objectively reasonable. However, the critical question is "…whether the employer's conduct in relying on the medical opinion to contest liability is reasonable under all the circumstances presented." *Continental Distributing Co. v. Indus. Comm'n*, 98 Ill. 2d 407, 415-16 (1983). After considering the totality of the evidence, the Commission finds Respondent's reliance on the opinions of its Section 12 examiners, Drs. Gleason and Belich, to terminate TTD and medical benefits was not reasonable.

Dr. Gleason examined Petitioner on June 30, 2015. By then, Petitioner had undergone a right knee partial meniscectomy and chondroplasty in early May 2015. Notably, in June 2015 no doctor had recommended a right knee total arthroplasty. Dr. Gleason opined that the March 23, 2015, work injury aggravated Petitioner's pre-existing right knee condition. The doctor also opined that Petitioner could return to full duty work with significant permanent restrictions relating to his right knee condition. The doctor also opined that no further treatment was needed. In late August 2015, Dr. Gleason wrote an addendum report that solely addressed Petitioner's ability to return to his regular job with the permanent restrictions Dr. Gleason recommended. After only reviewing the extremely vague job description written by Bill Keenan, Dr. Gleason opined that Petitioner's normal job duties were consistent with the permanent restrictions.

When Dr. Gleason's opinions are considered within the larger context of the evidence, Respondent's termination of medical and TTD benefits based on these opinions was unreasonable and vexatious. In the few months following Dr. Gleason's examination, Petitioner's right knee condition continued to deteriorate. After additional injections failed to improve Petitioner's complaints of increasing pain, Dr. Karlsson, Petitioner's treating doctor, formally recommended Petitioner undergo a total right knee arthroscopy in late August 2015. Despite this significant change in the trajectory of Petitioner's right knee condition, Respondent continued to rely on Dr. Gleason's opinions to deny further medical benefits. In January 2016, Dr. Gleason testified that the March 2015 work accident aggravated Petitioner's right knee condition and caused Petitioner's right knee symptoms. Dr. Gleason testified that when he examined Petitioner in June 2015, he did not believe Petitioner needed a right knee replacement. However, he admitted that he had no knowledge of Petitioner's right knee condition or treatment after his examination. Notably, Dr. Belich, Respondent's second Section 12 examiner, testified in December 2019 that the March 23, 2015 work accident at least minimally accelerated Petitioner's pre-existing right knee osteoarthritis. This means Respondent never had an opinion it could reasonably rely on to justify the denial of ongoing medical treatment for Petitioner's right knee condition. For the foregoing reasons, the Commission finds it was patently unreasonable for Respondent to rely on Dr. Gleason's opinion to deny the right total knee arthroplasty performed by Dr. Karlsson in October 2015 and Petitioner's subsequent right knee treatment.

The Commission also finds Respondent's reliance on Dr. Gleason's addendum to support its termination of TTD benefits was egregious. Dr. Gleason outlined permanent restrictions regarding Petitioner's right knee condition that significantly limited his ability to perform very physical work. As Respondent decided it did not want to continue paying TTD benefits, it provided

what can only be described as a sham job description to Dr. Gleason. Bill Keenan's job description blatantly misrepresented Petitioner's job duties. The credible evidence shows Petitioner's job involved very physical work including climbing into and out of his truck throughout each day and loading and unloading heavy cargo—sometimes by hand. Petitioner also had to move the hydraulic pump jack at each stop and regularly used pallet jacks. Petitioner also had to squat and bend when inspecting the truck each day. However, Bill Keenan's job description did not even mention the heavy lifting Petitioner performed when moving cargo in and out of the truck. Remarkably, during its oral argument Respondent acknowledged that Bill Keenan had no knowledge of Petitioner's actual job duties. Yet Respondent continued to rely on Dr. Gleason's opinion that Petitioner could return to work despite knowing the opinion was based on an inaccurate job description.

After considering the totality of the evidence, the Commission finds Respondent's termination of TTD benefits is a quintessential example of an employer acting in bad faith. The Commission has determined that Petitioner was entitled to TTD benefits for 139 weeks for a total amount of $74,016.11. The parties stipulated that Respondent paid $9,332.52 in TTD benefits through Acuity, its insurer. Therefore, the Commission finds Respondent vexatiously refused to pay Petitioner TTD benefits in the amount of $64,683.59.

Respondent's vexatious behavior in terminating Petitioner's TTD and medical benefits based on Dr. Gleason's opinions undoubtedly warrants an award of penalties. However, the Arbitrator's calculation of penalties pursuant to Sections 19(k) and 16 of the Act is incorrect. Illinois courts have held that Section 19(k) and 16 penalties apply only to the amount payable at the time of the penalty award. *See e.g.*, *Nat'l Mfg. v. Indus. Comm'n*, 331 Ill. App. 3d 1045, 1047-48 (2002) (holding that permanent disability benefits awarded simultaneously with an award of penalties should not be included in the calculation of penalties). The Commission cannot find Respondent delayed or refused to pay permanency benefits that had not yet been awarded. Thus, none of the permanent disability benefits awarded in this matter will be included in the penalty calculation.

Furthermore, the Commission's authority to award penalties for unpaid medical expenses is not limitless. Illinois courts have determined that to prove an entitlement to penalties regarding denied medical expenses, a claimant must submit evidence that the bills were previously submitted to Respondent and that Respondent did not pay them. *See Theis v. Ill. Workers' Comp. Comm'n*, 2017 IL App (1st) 161237WC ¶21-23. Therefore, despite Respondent's vexatious denial of medical expenses after Dr. Gleason's June 30, 2015, report, the Commission can only award penalties for expenses that the evidence shows were submitted for payment to and denied by Acuity.

After carefully reviewing the evidence, the Commission finds few bills were submitted to Acuity for payment. In fact, almost all the bills related to the March 23, 2015, work accident were submitted for payment solely through Petitioner's health insurance. A review of the evidence reveals that out of the bills submitted to Acuity for payment, the insurer only denied one. This is a bill from Adventist Health Partners in the amount of $534.00 for treatment Petitioner underwent on September 23, 2015. Therefore, the Commission will assess penalties for Respondent's unreasonable and vexatious denial of $534.00 in medical expenses.

For the foregoing reasons, the Commission finds Respondent vexatiously and

unreasonably withheld TTD and medical benefits in the total amount of $65,217.59. Pursuant to Section 19(1) of the Act, the Commission must award Petitioner additional compensation in the amount of $30 for each day Respondent unreasonably withheld benefits for a maximum penalty of $10,000.00. The Commission notes that Respondent refused to pay the outstanding TTD and medical benefits for over five years. Therefore, the Commission awards Petitioner Section 19(l) penalties in the amount of $10,000.00. Pursuant to Section 19(k) of the Act, the Commission may award Petitioner additional compensation equal to 50% of the amount payable at the time of this award. Thus, the Commission awards Petitioner Section 19(k) penalties in the amount of $32,608.80. Finally, pursuant to Section 16 of the Act, the Commission awards attorney fees in the amount of $13,043.52, which equals 20% of the total amount of benefits Respondent vexatiously withheld.

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 December 2, 2021, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary total disability benefits of $532.49/week for 139 weeks commencing March 23, 2015, through November 20, 2017, as provided in Section 8(b) of the Act. Pursuant to stipulation by the parties, Respondent is entitled to a credit for $9,332.52 in TTD benefits it previously paid.

IT IS FURTHER ORDERED that Respondent shall pay for all reasonable and necessary medical services related to the March 23, 2015, work accident submitted into evidence as PX 14, as provided in Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner permanent and total disability benefits of $532.49/week for life, commencing November 21, 2017, as provided in Section 8(f) of the Act.

IT IS FURTHER ORDERED that commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund*** as provided in Section 8(g) of the Act.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner penalties of $13,043.52, as provided in Section 16 of the Act; $32,608.80, as provided in Section 19(k) of the Act; and $10,000.00, as provided in Section 19(l) of the Act.

IT IS FURTHER ORDERED that Respondent shall receive credit for all amounts it paid, if any, to or on behalf of Petitioner on account of said accidental injury. However, Respondent is not entitled to a credit for any payments made by Petitioner's health insurer, as Petitioner received coverage through his wife's group insurance.

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 $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.

October 16, 2023
o: 8/15/23
AHS/jds
51

/s/ Amylee H. Simonovich
Amylee H. Simonovich

/s/ Maria E. Portela
Maria E. Portela

Dissent

I respectfully dissent from my colleagues on the issues of causal connection between Petitioner's left knee condition and the March 23, 2015, work-related accident, temporary total disability (TTD) after June 22, 2016, medical expenses for Petitioner's left knee condition, the permanent total disability award and penalties under §19(l) and §19(k) and attorneys' fees under §16. I would reverse the Arbitrator's finding of a causal connection between Petitioner's left knee condition and the March 23, 2015, work accident and find that Petitioner's left knee condition was not causally related; terminate TTD after June 22, 2016; vacate the award of medical expenses for Petitioner's left knee condition; vacate the award of permanent total disability and award 50% loss of use of a person under §8(d)2; and vacate the award of penalties and attorneys' fees, for the following reasons described below.

Causal Connection

Prior to the March 23, 2015 accident, Petitioner underwent a left knee surgery on November 18, 2008, consisting of a partial arthroscopic medial meniscectomy and chondroplasty of the patella which showed grade II chondromalacia of the patella and medial femoral condyle with a radial tear of the medial meniscus. Thereafter, Petitioner received treatment for his left knee. (RX1, DepX2, 2) In fact, his treating surgeon, Dr. Troy Karlsson testified at his evidence deposition, that Petitioner was treating fairly extensively getting a number of injections on "somewhat of an ongoing basis." (PX1, 31) Dr. Karlsson went on to explain that Petitioner had been getting injections in his left knee for "a couple of years" before the subject accident, both hyaluronic and cortisone injections. *Id.*

This treatment is corroborated by Dr. Paul Belich's October 14, 2018, §12 opinion report wherein he notes that he reviewed Dr. Karlsson's office notes. To wit, on August 20, 2013, Petitioner complained of left knee pain and an x-ray showed severe loss of the medial joint space to the left knee. Petitioner returned in October with increasing pain of the left knee and received a steroid injection. On December 17, 2013, Petitioner received a Synvisc One injection to the left knee for severe osteoarthritis of the left knee. Petitioner received a steroid injection into the left knee again in May 2014, and in June of 2014, Petitioner received a series of Euflexxa injections in the left knee. (RX2, DepX2, 2)

Further, Dr. Karlsson testified that his records confirm that Petitioner was actively receiving ongoing treatment for his left knee up to the date of accident. He had received Euflexxa injections to the left knee on March 19, 2015, literally 4 days prior to the work accident on March 23, 2015. (PX1, 49)

Dr. Belich opined that Petitioner had "prior longstanding problems with his left knee with advanced arthritis and treatment with multiple steroid injections and multiple courses of viscosupplementation in the left knee. He had had an arthroscopy in 2008 with partial arthroscopic medial meniscectomy. The left knee was in an advanced state of osteoarthritis before the accident in question and the accident in question did nothing to alter the course of this patient's advancing osteoarthritis of his left knee. The need for a left total knee arthroplasty was because of progressive degenerative osteoarthritis of his left knee caused by being a longstanding condition and by the fact that he weighs 360 pounds with a body mass index of 48." (RX2, DepX2, 5)

Petitioner's treating doctor, Dr. Karlsson, was specifically asked if he had an opinion as to whether or not the worsening of the left knee symptoms is causally related to a compensatory mechanism as a result of the pain that Petitioner expressed to Dr. Karlsson about his right knee. Dr. Karlsson testified that "it is certainly a possibility, but I don't know that I could go as far as to say that it's [a] medical certainty or even that it's more likely than not that the right knee caused the worsening in the left knee." (PX1, 37-38) He explained his opinion was, "[b]ecause there was so much osteoarthritis" already in the left knee. (PX1, 38) When asked again, Dr. Karlsson reiterated his opinion, "I would say that I cannot causally relate that [left knee] to any certain degree." *Id.*

When asked if any information would help him make that connection, Dr. Karlsson denied that any additional information would allow him to form an opinion. He testified, "I don't think that's something that anyone could honestly say you know more likely than not given the fact that he was having ongoing treatment for that left knee." (PX1, 38-39)

I would therefore find that Dr. Karlsson's causation opinion, in his own words, did not satisfy the level of reasonable medical certainty necessary to establish causation. In fact, Dr. Karlsson credibly testified he could not provide a causation opinion because of the amount of osteoarthritis in Petitioner's left knee.

Dr. Thomas Gleason performed a §12 evaluation of Petitioner on June 30, 2015, at the request of Respondent, only three months after the date of accident. (RX2, DepX2) Dr. Gleason took a history from the Petitioner, performed a physical examination of Petitioner, reviewed

Petitioner's treating medical records, and authored his opinion report on the same date. Dr. Gleason's diagnoses included "Post operative arthroscopy of the left knee in 2008 with residual well healed incisions and degenerative joint disease." (RX2, DepX2, 6) Dr. Gleason opined that Petitioner had "severe degenerative joint disease of the knees bilaterally, symptomatic on the right, while at least for the time being after Euflexxa injections, asymptomatic on the left." (RX2, DepX2, 7)

During his evidence deposition, Dr. Gleason opined that the only condition relative to Petitioner's knees and ankles related to the alleged work accident of March 23, 2015, "would be his symptomatic arthritic condition of his right knee due to an aggravation of his preexisting condition resulting in right knee pain and arthroscopy of the right knee and residual well-healed incisions and pain based upon subjective complaints." (RX2, 25-26)

The majority relies upon Dr. Andrew Kim's opinion that following Petitioner's March 23, 2015, accident and surgeries to his right knee, Petitioner "began to have problems with his left knee due to over compensation. Essentially, Petitioner overused the left knee to accommodate the right knee injuries and treatment - which led to an accelerated breakdown of the left knee and Petitioner's ultimate need for a total left knee replacement." (ArbDec. 5)

There is no evidence that Dr. Kim was aware of the extent of treatment Petitioner received before the March 2015 motor vehicle accident. I maintain that Dr. Kim's opinion is flawed. "Expert opinions must be supported by facts and are only as valid as the facts underlying them." *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87. "An expert opinion is only as valid as the reasons for the opinion." *Kleiss v. Cassida*, 297 Ill. App. 3d 165, 174, 696 N.E.2d 1271, 1277. *Gross v. Ill. Workers' Comp. Comm'n*, 2011 IL App (4th) 100615WC, 24, 960 N.E.2d 587, 594.

The majority determined Petitioner's left knee condition is causally related to the work accident without a single acknowledgement or mention of Dr. Karlsson's testimony and opinion. Instead, my colleagues rely on the November 2018 narrative provided by Dr. Kim. However, Dr. Karlsson was by far most familiar with Petitioner's left knee condition, its history, and the trajectory of his condition. After all, he treated Petitioner for his left knee condition beginning in 2013. The credible evidence shows that Petitioner was already undergoing regular injections due to his chronic left knee pain and severe osteoarthritis. Most importantly, Dr. Karlsson, despite his undeniable familiarity with Petitioner's chronic left knee condition and treatment, testified that he could not say the left knee total knee replacement was related to the work accident. Further, he specifically opined that this was precisely due to the severity of Petitioner's preexisting condition.

Based upon the foregoing, I would reverse the Arbitrator's finding of causal connection between the Petitioner's left knee condition and the March 2015 motor vehicle accident.

Temporary Total Disability

Petitioner did not treat for the right knee after June 22, 2016. Therefore, based upon my conclusions in the causation section above, incorporated herein, I would terminate TTD on June 22, 2016.

Medical Expenses

Based upon my conclusion that Petitioner's left knee is not causally related, as discussed in the causation section above and incorporated herein, I would reverse the award of medical expenses related to Petitioner's treatment of his left knee.

Nature and Extent of Petitioner's Disability

The majority finds that Petitioner is permanently and totally disabled due to his injuries from his March 23, 2015 work accident. The majority finds support for this finding by the Petitioner's unrebutted testimony, a preponderance of the medical evidence and the opinions of Petitioner's vocational expert. The majority also concludes:

> " Petitioner's testimony regarding his current physical limitations following his March 23, 2015 accident is corroborated by his treating physicians, including Dr. Karlsson and Dr. Kim's release of Petitioner with permanent work restrictions following the treatment. Further, the majority notes the restrictions prohibited Petitioner from activities placing significant impact on the knees, including kneeling, squatting, climbing, lifting beyond 15 lbs, or even standing or walking more than 45 mins without 15 min of rest. (PX3, 3) Dr. Kuhlman thought Petitioner could not return to work in any capacity. (PX2, DepX2, 4) Based on these opinions, Petitioner's vocational expert, Lisa Helma opined that Petitioner was unable to perform work of any kind, and he was totally disabled from a vocational standpoint." (PX2 10)

The Vocamotive report and testimony of the vocational counselor Lisa Helma (PX2; DepX2) concluding Petitioner was permanently and totally disabled is based upon two unreliable factors: 1. The left knee causation finding; and 2) Dr. Kuhlman's alleged opinion on June 13, 2017. (PX2, 10-11) Based upon my conclusions regarding the left knee causation findings above and incorporated herein, I disagree with the majority. Further, it does not appear that Dr. Kuhlman's June 13, 2017, opinion regarding Petitioner's ability to return to work is in evidence, and thus renders the majority's opinion regarding a finding of permanent and total disability misplaced at best. The Bolingbrook Family Medicine/Dr. Kuhlman records submitted into evidence end with a date of service May 25, 2017, confirming that the June 13, 2017, report is not in evidence. (PX11, 3, 8) The only evidence of Dr. Kuhlman's opinion is the vocational counselor's interpretation of a record not in evidence and this is not sufficient evidence of the entirety of Dr. Kuhlman's opinions or context.

Further, Ms. Helma relies upon Dr. Kim's permanent restrictions, however, those are pertinent to the unrelated left knee. On May 21, 2018, Dr. Kim wrote a "To whom it may concern" letter confirming Petitioner's left total knee replacement revision surgery. It was his opinion that Petitioner could not return to his job as a driver. (PX12) Nowhere in that letter, however, does Dr. Kim opine that Petitioner could not return to work.

Of far more significance, is the fact that Petitioner's treating surgeon, Dr. Karlsson testified that Petitioner is capable of gainful employment. (PX1, 28) Dr. Karlsson testified further, [p]eople

with a knee replacement can get back to work. *Id.* Dr. Karlsson testified that to determine Petitioner's level of capacity with respect to the right knee and his ability to work, there are formal ways of doing it with a functional capacity evaluation, but he did not feel that was needed in this case. Rather, the way it's determined most of the time is just discussing with the patient what they are doing at work and knowing what his limitations would be. (PX1, 29)

Based upon the record as a whole, significantly including Dr. Karlsson, the treating surgeon's opinion that Petitioner was capable of working, I would find that Petitioner is capable of returning to gainful employment, and finding instead, that because of his restrictions, that Petitioner has sustained a loss of trade. Because Petitioner did not produce evidence of any meaningful job search, or his potential earnings in a stable labor market, I would award permanency based upon a loss of trade, 50% loss of use of the person as a whole pursuant to §8(d)2.

§19(l) and §19(k) Penalties and §16 Attorneys' Fees

Respondent relied on Dr. Gleason's opinion to terminate TTD benefits on August 27, 2015. Dr. Gleason conducted his IME on June 30, 2015, and determined that Petitioner required no further treatment relating to the March 2015 accident. (RX2, DepX1) Respondent then requested an addendum specifically addressing Petitioner's ability to return to his regular job and included a job description from Bill Keenan. Although brief, there is no evidence that Bill Keenan's job description was not accurate. Based upon the job description, Dr. Gleason determined that Petitioner could return to work. (RX2, DepX3) Although Dr. Gleason's addendum is dated June 30, 2015, it is clear that he used the date of his original opinion report when he wrote the addendum. He notes within the addendum that Respondent requested the addendum on August 11, 2015, and it is clear that the addendum was faxed on August 26, 2015, as evidenced by the top of both pages. *Id.*

Respondent immediately began paying TTD benefits following the March 2015 accident and continued to timely pay those benefits through August 27, 2015. Contrary to the majority's opinion that the August 27, 2015, TTD cutoff was random, and another example of unreasonable or vexatious behavior, the date actually correlates with the timeline when Respondent finally received Dr. Gleason's addendum opinion regarding Petitioner's ability to return to his particular job. Hence, Respondent actually did not terminate TTD on June 30, 2015, but instead terminated TTD on August 27, 2015, based upon Dr. Gleason's opinion that Petitioner could return to work as it related to the March 23, 2015, injuries. Thus, I would reverse the award of penalties and attorneys' fees for the non-payment of TTD.

Likewise, I would reverse the award of penalties and attorneys' fees for the non-payment of medical expenses. Respondent paid some medical bills and further relied on all of the factors discussed in the causation section above, incorporated herein, including Dr. Karlsson's, Dr. Gleason's and Dr. Belich's opinions that Petitioner's left knee condition is not related to the work accident on March 23, 2015. Therefore, Respondent should not be assessed penalties for non-payment of bills regarding the left knee.

Further, there is evidence that Acuity began paying bills for treatment as early as April 21,

2015. The payment log shows Acuity regularly paid bills until around August 4, 2015. Then bills were paid in November 2015 and December 2015. The next bill wasn't paid until May 18, 2016. Subsequently two medical bills were paid on June 1, 2016. Finally, four medical bills were paid in May 2017. There were no payments made after that. Absent evidence to the contrary, it appears that Acuity paid bills (for treatment incurred no later than June 30, 2015) as they received them. However, Petitioner has the burden of proving that he made a demand for payment prior to the time of the arbitration hearing. In other words, he has to do more than just submit unpaid bills at the arbitration hearing to obtain penalties. Even if the bills are unpaid, that is no evidence that Respondent previously received the bills and refused payment. See *Theis v. Ill. Workers' Comp. Comm'n*, 2017 IL App (1st) 161237WC para. 21-23. *Theis* makes it clear that Respondent does not have the burden of actively requesting receipt of treating medical bills even if aware of ongoing treatment.

Therefore, considering the record as a whole, and for the reasons explained above, I dissent from the majority opinion. I would reverse the Arbitrator's finding of a causal connection between Petitioner's left knee condition and the March 2015 work accident and find that Petitioner's left knee condition was not causally related; terminate TTD after June 22, 2016; vacate the award of medical expenses for Petitioner's left knee condition; vacate the award of permanent total disability and award 50% loss of use of a person under §8(d)2; and vacate the award of penalties and attorneys' fees.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC014407
Case Name	BERNDT, ROBERT v. KEENAN TRANSIT
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	15
Decision Issued By	Gerald Granada, Arbitrator

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Jennifer Kiesewetter

DATE FILED: 12/2/2021

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

/s/Gerald Granada, Arbitrator

Signature

23IWCC0448

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

ROBERT BERNDT
Employee/Petitioner

v.

KEENAN TRANSIT
Employer/Respondent

Case # **15** WC **14407**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Wheaton**, on **9/28/21**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☒ What was Petitioner's age at the time of the accident?
I. ☒ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 **1(a)(4) liability**

FINDINGS

On **3/23/15**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondents in which Respondents Keenan Transit and Phoenix were the loaning employers and Respondent Amerisafe was the borrowing employer.

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

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

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

In the year preceding the injury, Petitioner earned $**41,533.76**; the average weekly wage was $**798.73**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $**9,332.52** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**9,332.52**.

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

ORDER

Respondents Keenan Transit and Phoenix Logistics are responsible for Petitioner's claims pursuant to Section 1(a)(4) of the Act.

Respondents shall pay reasonable and necessary medical services as outlined in the attached findings, as provided in Section 8(a) of the Act subject to the Fee Schedule.

Respondents shall pay Petitioner temporary total disability benefits of $532.49/week for 139 weeks, commencing 3/23/15 through 11/20/17, as provided in Section 8(b) of the Act.

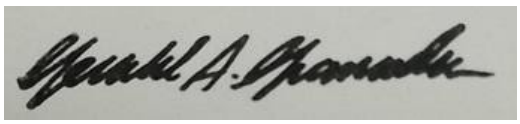
Respondents shall pay Petitioner permanent and total disability benefits of $532.49/week for life, commencing 11/21/17, as provided in Section 8(f) of the Act.

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.

Respondents shall pay to Petitioner penalties of $10,000.00 as provided in Section 19(l) of the Act, $151,739.85 as provided in Section 19(k) of the Act and $60,695.94 in attorney fees as provided in Section 16 of the Act.

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

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



Signature of **Arbitrator Gerald Granada**

DECEMBER 2, 2021

FINDINGS OF FACT

This case involves Petitioner Robert Berndt – a truck driver, who alleges to have been injured while working for Respondents Keenan Transit, Phoenix Logistics (Phoenix), and Amerisafe Consulting (Amerisafe) on October 15, 2014 (16 WC 6712 and 16 WC 20211) and on March 23, 2015 (15 WC 14407, 16 WC 20206, and 17 WC 35300). Petitioner has filed separate Applications for Adjustment of Claim for all of these accidents, and all the claims have been consolidated. Given the sequence of events, the issues in dispute, and for judicial economy, the findings in this case will also apply to the subsequent case filings. Although all these claims were heard together, this decision is focused on Petitioner's March 23, 2015 claim, in which all issues are in dispute, including the issue of liability in a borrowing/loaning situation under Section 1(a)(4) of the Act. The main point of contention at trial was the question of Petitioner's employment and which Respondent(s) is/are ultimately responsible for Petitioner's claim.

October 15, 2014 incident

On October 15, 2014, Petitioner was training a new driver in a truck owned by Respondent Amerisafe. They drove to a construction site in Chicago, Petitioner exited the cab, walked across an unpaved parking lot and stepped into a pothole, injuring his right leg. He had never experienced any problems with the right leg before this accident. Petitioner's job required him to exit the cab at the stops, open the cargo doors to unload the product, unload the produce and close the door and the lift gate. The job included loading and unloading pallets with a pallet jack, pushing and pulling loads weighing up to 2,000 to 3,000 lbs. (RX1 p.8)

Petitioner reported this incident to the Amerisafe Warehouse manager at that time, Evan Wollak. Mr. Wollak testified that after he was contacted by Petitioner regarding the October 15, 2014 incident, Wollak called Bill Keenan of Keenan Transit to advise him of the incident. Wollak later completed an accident report, which he sent to Keenan Transit.

On October 20, 2014, Petitioner went to Edwards Immediate Care, where x-rays revealed moderate degenerative changes of the right knee in the medial compartment and narrowing in the left knee that was much worse than the right knee. A November 7, 2014 MRI revealed medial meniscal tearing of the right knee along the junction of the posterior horn and posterior root ligament, mild peripheral extrusion of medial meniscal tissue, and osteoarthritis of the medial femorotibial compartment. (PX4 p.8) Dr. Karlsson performed a right knee arthroscopy at Edwards Hospital on November 19, 2014. (PX4 p.14) The meniscal tissue was intact, but he did find grade 3 changes over the patellar and femoral side with slight flaps on the femoral trochlea, which he shaved back to create a stable base of cartilage for the joint. (PX4 p.14) He also reported grade 3 chondromalacia over majority of medial joint line in the right knee. He debrided cartilage flaps to create a stable base of cartilage for the joint. (PX p.14) Dr. Karlsson noted that the joint had cartilage in it at the time of this surgery. (PX1 p.11) Post surgery, Petitioner reported that he still experienced some pain over the medial side, some pain in the hamstring, and that he was having difficulty getting back to the type of activities he would need to do at work where he pulls a pallet jack. Dr. Karlsson recommended that Petitioner remain off work and do some therapy, which took place at Edwards on January 20, 2015. (PX4 p.112) Petitioner experienced significant relief between the surgery and therapy and returned to full work duties on February 16, 2015. Petitioner noticed some continuing symptoms when getting in and out of the truck as they had not simulated that activity in therapy. He experienced minor pain when getting in and out of the truck and while pulling heavy cargo, but he was able to get through all his work duties and missed no time from work following this accident.

March 23, 2015 incident

On March 23, 2015, Petitioner was involved in a vehicle collision while driving an Amerisafe truck for work. A truck traveling alongside his vehicle lost control in the snow, hitting the side of Petitioner's truck and causing Petitioner's truck to travel sideways down the road. Petitioner jammed down on the brake repeatedly with both legs in a technique to get his vehicle back under control. When his truck came to a rest, Petitioner saw that the other driver was trapped in his own truck, so Petitioner pulled his door open and pulled the other driver out of the truck. When the adrenaline wore off, he noticed pain in the back, his left side and both knees, down both legs. Petitioner described feeling immobilized.

Following this incident, Petitioner called the Amerisafe Warehouse Manager Evan Wollak from his truck. Wollak testified at trial that he called Bill Keenan of Keenan Transit that same morning to advise him of Petitioner's incident.

The police arrived and Petitioner was taken by ambulance to Good Samaritan Hospital. (PX5) X-rays revealed mild joint space narrowing medially and mild degenerative change of patellofemoral joint space. The radiologist read the film as showing mild degenerative changes.

On March 24, 2015, Petitioner saw his primary care physician, Dr. Kuhlman presenting with back pain, shoulder pain, knee pain and anxiety. (PX11 p.85) Petitioner's back pain level was 6/10, persistent, improving and non-radiating. The left shoulder pain was 8/10, constant, aching and non-radiating. The right knee pain was 10/10, aching, non-radiating and worse with weight-bearing. The knee was swelling, he was limping, and it felt like it would give way that morning. Kuhlman also noted that Petitioner had felt anxious, had moderate frontal headaches, dizziness, shakiness and had not slept. Dr. Kuhlman suspected a labral tear in the left shoulder and sent Petitioner for an MRI arthrogram. (PX11 p.90) He also diagnosed Petitioner with internal derangement of the right knee, suspecting exacerbation of the medial meniscus, sending him out for a MRI on the knee. (PX11 p.90) He also diagnosed contusion of the left chest wall, acute stress reaction and acute post-traumatic headaches. (PX11 p.91) He fully restricted Petitioner from work. (PX11 p.120) Following that visit, Petitioner underwent a number of injections to his left knee. The right knee MRI taken on April 2, 2015 revealed a new medial meniscal tear, Grade 1 strain of the medial collateral ligament, more advanced arthritic changes in the medial compartment and moderate sized joint effusion. A subsequent MRI taken on April 10, 2015 revealed a complex tear with a large radial component of the posterior horn and root tearing of the medial meniscus, a 1x1 cm osteochondral lesion of the articular surface of med femoral condyle without any displaced fragment and mild joint effusion and synovitis. (PX11 p.93) Petitioner also had a left shoulder MRI arthrogram that revealed a SLAP tear with partial thickness tear of the anterior-inferior labral ligament complex, as well as tendinosis of the cuff ligaments. (PX11 p.96) Dr. Karlsson also noted Petitioner's complaints of radiating low back pain, for which he recommended a lumbar MRI and referral to Dr. Mather.

On May 6, 2015, Dr. Karlsson again operated on Petitioner's right knee. (PX4 p.184-185) Dr. Karlsson found a medial meniscal tear at the junction of the body and the posterior horn, with a flap which was displaceable into the joint. The tear was not there at the 2014 surgery. (PX1 p.10-11) Karlsson addressed this finding with a partial medial meniscectomy. (PX4 p.184) Dr. Karlsson noted that the complex tear and osteochondral lesion on the articular surface of the femoral condyle were new findings after the March 23, 2015 accident. (PX1 p.11-12) He thought those new findings were logically related to that accident. (PX1 p.11-12) There were no bone-on-bone areas found at the surgery following the October 15, 2014 accident. (PX1 p.11)

On May 15, 2015, Petitioner saw Dr. Mather for his back complaints. Dr. Mather noted that Petitioner's prior low back fusion was doing well before this March 23, 2015 collision. (PX3 p.108-109) Petitioner was using

Norco from Karlsson. Mather thought the low back pain was likely due to early spondylosis at the L4-5 facet joint and recommended that Petitioner get facet blocks for the pain. On May 27, 2015, Petitioner began his pain treatment with Dr. Fetzer, which included a number of injections, and ablations to relieve the back pain.

On June 13, 2017, Petitioner returned to Dr. Kuhlman, who opined that Petitioner was unable to perform work of any kind. (PX2 Ex.2 p.4)

On June 30, 2015, Respondent sent Petitioner to Thomas Gleason for an IME. Dr. Gleason testified via evidence deposition on January 26, 2016. (RX2) Dr. Gleason concluded that the only condition related to the accident was a symptomatic arthritic condition of the right knee due to aggravation of pre-existing condition resulting in right knee pain. New x-rays revealed severe bilateral degenerative joint disease medially with joint space obliteration, sclerosis, marginal spurring, mild lateral subluxation, moderate changes of the patellofemoral joint with marginal spurring and more mild changes of the lateral compartments bilaterally.

Respondent Keenan/Phoenix also retained Dr. Paul Belich as an IME, who testified via evidence deposition on December 13, 2019. (RX1) Dr. Belich disagreed with Dr. Gleason's opinion that the March 23, 2015 accident aggravated the pre-existing arthritic condition in the right knee. (RX1 p.29) Dr. Belich also did not agree with Dr. Gleason that Petitioner had finished treatment by the time of Gleason's evaluation or that Petitioner could return to the driving job at that point. (RX1 p.29-30) On cross-examination, Belich admitted he did not have enough information about the 2014 surgery to draw a valid causation analysis about that accident. (RX1 p.57) He also conceded he did not have much information about what damage was caused by the March 23, 2015 accident. (RX1 p.64) He did discuss the mechanics as to how a knee breaks down rapidly following a root detachment and meniscectomies. Dr. Belich summarized his understanding of the sequence for the right knee breakdown, noting that Petitioner's step into the hole in 2014 started the pain, leading to the steroid injection and then the surgery which accelerated the degeneration in the right knee. (RX1 p.88) The 2014 accident started the problem and everything after that just accelerated the breakdown in the knee. (RX1 p.88) He thought the March 23, 2015 accident had a minimal contributive impact to the knee. (RX1 p.88) The same was true for the left knee, with Belich contending that the March 23, 2015 accident had a minimal role in the breakdown of the left knee. (RX1 p.90)

Petitioner continued to have complaints of pain in both knees and his shoulder. On July 30, 2015, he underwent a second gel injection to the right knee. Petitioner informed Dr. Karlsson that his left knee was "starting to bother him". (PX3 p.67) Dr. Karlsson recommended a total knee arthroplasty and restricted Petitioner's work to sitting work only, with no pushing or pulling of heavy objects, and no unloading of trucks. He underwent Cortisone injections to both knees on September 15, 2015. On October 14, 2015, Petitioner underwent a total knee arthroplasty for the right knee. (PX4 p.273-635) The records show that Petitioner continued to have complaints related to his right knee following the total knee surgery, which lead to Petitioner undergoing a right knee synovectomy on April 28, 2016. Petitioner's complaints to his left knee ultimately lead to him undergoing a left knee total knee arthroplasty on June 22, 2016. (PX4, p.801-802) Petitioner had increasing problems with the left knee, including bursitis, swelling and pain that required him to undergo a revision surgery to the left knee on February 10, 2017. Petitioner underwent a second stage of his left total knee arthroplasty with Dr. Kim on May 15, 2017. (PX4, p.2712-2713) Petitioner's medical records document Petitioner's continued complaints in his right knee due to overcompensation from the left knee.

On September 7, 2017, Dr. Karlsson imposed permanent work restrictions on Petitioner of no high impacts to the knees, no kneeling, no squatting, no climbing, and no lifting beyond 15 lbs. (PX2 Ex.2 p.4) Dr. Karlsson testified via evidence deposition on January 19, 2017. He opined that Petitioner's right knee condition was

causally related to his March 23, 2015 motor vehicle accident.

On November 20, 1017, Dr. Kim also placed permanent work restrictions on Petitioner, agreeing with Karlsson's restrictions and adding limitations against standing or walking more than 45 mins without 15 min of rest. (PX3 p.3) In his reports, Dr. Kim opined that Petitioner's March 23, 2015 accident reinjured his right knee condition and caused the need for his right total knee replacement surgery. (PX12)

Petitioner explained that he was destined to take Penicillin for the rest of his life for the left knee. He was on Norco for an extended period but was now on Meloxicam. The March 23, 2015 incident had profoundly changed every aspect of his life. Before going anywhere, he had to plan out whether he had a place to sit, how long the ride would be and whether walking would be involved. He could not go with his wife to Menards or walk around ponds in the area due to the knees. Standing for more than 10 minutes brought on pain as did 15 to 20 minutes of sitting. Everything started to lock up on him. Petitioner found that he could only walk half a city block. Dr. Karlsson had not placed a walking or standing restriction on him, but Dr. Kim did restrict him from doing those activities more than 15 minutes.

Lisa Helma, a certified vocational rehabilitation specialist, evaluated Petitioner and testified via evidence deposition on November 2, 2018. (PX2) Ms. Helma provides vocational services to people with disabilities. (PX2 p.5) She collected information about Petitioner's medical, his doctor's opinions, his work and education history to determine overall employability. (PX2 p.8) Helma concluded that Petitioner had lost access to his usual and customary occupation as a delivery driver. (PX2 p.10) She also thought Petitioner was unable to perform work of any kind, so he was totally disabled from a vocational standpoint. (PX2 p.10) She based this conclusion on the treating doctor's belief that Petitioner was unable to work as well as the significant restrictions placed on Petitioner by his surgeons. (PX2 p.11-14) Taking his background information into account along with the work capacity opinions, she felt Petitioner did not have access to a reasonably stable labor market. (PX2 p.16)

Evan Wollak was called to testify at trial by counsel for Respondent Amerisafe. Mr. Wollak had worked for Amerisafe for 20 years prior to his retirement in 2019. In 2013, Mr. Wollak was the warehouse manager for Amerisafe. He described Amerisafe as being in the business of selling insulation products and using trucks to transport those products. In 2013, Mr. Wollak contacted Bill Keenan of Keenan Transit to obtain drivers for Amerisafe's operation. Amerisafe initially sent its own drivers over to Keenan Transit so that Keenan Transit could lease these drivers back to Amerisafe. Wollak only spoke with Bill Keenan and believed he was getting drivers from Keenan Transit. He identified a set of emails surrounding the arrangement. (RX8) Bill Keenan's emails came from a Keenan Transit email address. Keenan Transit was located in the same offices as Phoenix Logistics. Wollak called Keenan Transit for drivers rather than Phoenix. At some point, Bill Keenan told Wollak that he set up Phoenix to loan out nonunion drivers. Amerisafe Ex1 was a document between Amerisafe and Phoenix. Wollak went back and forth with Bill Keenan over the content of this document. (Amerisafe Ex1) Bill Keenan was going to sign the document, obligating Amerisafe to pay an hourly fee for drivers. Wollak testified that Bill Keenan was supposed to take care of fringe benefits and workers comp liability - which was precisely the intention of the document. (Amerisafe Ex1) Wollak obtained Berndt by calling Bill Keenan. Berndt used Amerisafe's equipment, delivered Amerisafe's products and kept a timecard at their facility. When payroll time arrived, Wollak faxed the timecard to Keenan Transit's payroll person at the Keenan Transit office and Phoenix would send the driver a check. The only people Wollak dealt with were Bill Keenan and his payroll person Dawn, also at Keenan Transit. When Petitioner suffered both his injuries, Wollak reported both injuries to Bill Keenan. The phone calls were made to Bill at the Keenan Transit office as Wollak was never given a phone number for Phoenix. Wollak also sent Keenan Petitioner's detailed written account of the accident. (PX15) TTD was paid for a short period after the second accident, and the checks

identified Keenan Transit as the employer.

CONCLUSIONS OF LAW

1. Regarding the issue of employment, the Arbitrator finds that there existed an employment relationship between the Petitioner and the Respondents in which the Respondents Keenan Transit and Phoenix were the loaning employers and Amerisafe was the borrowing employer for both Petitioner's October 15, 2014 accident and his March 23, 2015 accident. Petitioner thought he was working for Phoenix as he got checks from Phoenix. However, he was interviewed and hired for the job by Tom Keenan, who had a Keenan Transit email address and worked out of the Keenan Transit offices. The Phoenix checks also came out of the Keenan Transit offices. Petitioner admitted he was not sure whether Phoenix was a distinct company from Keenan Transit. The same defense counsel represented both Keenan Transit and Phoenix at trial, but only lodged the employer/employee dispute on behalf of Keenan Transit. Counsel ultimately claimed, near the end of trial, that both Keenan Transit and Phoenix were covered by the same workers compensation insurance carrier. Keenan Transit and Phoenix did not present any documentary evidence suggesting they were independent entities. The Arbitrator further relies the testimony of Mr. Wollak, whose unrebutted testimony was persuasive on this issue.

2. With regard to the issue of accident, the Arbitrator finds that the Petitioner met his burden of proving that he sustained an accident arising out of and in the course of his employment on both October 15, 2014 and on March 23, 2015. The facts clearly show that Petitioner sustained injuries while working on both days and there was no evidence offered to rebut Petitioner on this issue.

3. Regarding the issue of notice, the Arbitrator finds that the Petitioner met his burden of proving that he provided timely notice of both his October 15, 2014 accident and his March 23, 2015 accident to the Respondents by reporting the same to Mr. Wollak of Amerisafe. Mr. Wollak testified that he then reported the incidents to Keenan Transit on the same day. There was no evidence offered to rebut Petitioner or Mr. Wollak's testimony on this issue.

4. With regard to the issue of causation, the Arbitrator finds that the Petitioner has met his burden of proving that his current condition of ill-being is causally related to his work accidents. In support of this finding, the Arbitrator relies on Petitioner's unrebutted testimony and the preponderance of the medical evidence. Petitioner's October 15, 2014 accident, in which he stepped in a pothole, injured his right knee, and subsequently underwent arthroscopic surgery is clearly documented in the medical evidence and does not appear to be disputed. The Arbitrator finds persuasive the opinions of Petitioner's treating physicians that the Petitioner's March 23, 2015 accident aggravated his right knee condition to the extent that he needed knee replacement surgeries. Although Respondent had two IME opinions to address this issue, their opinions appear to support the fact that the Petitioner had at the very minimum an aggravation of a pre-existing right knee condition.

The Arbitrator further finds that the Petitioner's left knee condition is causally related to his March, 23, 2015 accident. This is supported by both the Petitioner's testimony and a preponderance of the medical evidence, particularly from Dr. Kim, that show that following Petitioner's March 23, 2015 accident and surgeries to his right knee, Petitioner began to have problems with his left knee due to over compensation. Essentially, Petitioner overused the left knee to accommodate the right knee injuries and treatment - which led to an accelerated breakdown of the left knee and Petitioner's ultimate need for a total left knee replacement.

The Arbitrator also finds that the Petitioner suffered additional injuries following his March 23, 2015 accident, including the left shoulder injury, an aggravation of his pre-existing low back condition, headaches and aggravation of the anxiety. These symptoms are clearly documented in Petitioner's medical evidence, which

corroborated Petitioner's testimony in that regard.

5. Regarding the issues of age, marital status and average weekly wage, the Arbitrator finds that the Petitioner was 47 years old, married and had an average weekly wage of $798.73 at the time of his accidents. There was no evidence offered to rebut the Petitioner on these issues.

6. Consistent with the findings above, the Arbitrator further finds that the Petitioner's medical treatment following both his October 15, 2014 accident and his March 23, 2015 accident have been reasonable and necessary in addressing his multiple conditions stemming from his work accidents. Respondent did pay some treatment related to the March 23, 2015 accident. (PX4) Petitioner's wife's insurance paid for the majority of Petitioner's treatment, including the multiple knee surgeries and all the related treatment and rehabilitation. Given the findings on accident and causation, Respondent shall pay Petitioner for all treatment related to the bilateral knees, left shoulder, lower back, headaches and anxiety after the March 23, 2015 accident, including treatment required to address the infection to the left knee. This includes the Humana payments totaling $131,766.74. (PX14)

7. The Arbitrator finds that the Petitioner was temporarily totally disabled following his March 23, 2015 accident from the date of accident through the date he was placed at MMI with permanent work restrictions by Dr. Kim on November 20, 2017. During this time period, the medical evidence clearly documents Petitioner being take off work completely by his treating physicians. Therefore Respondent shall pay Petitioner temporary total disability benefits of $532.49/week for 139 weeks, commencing March 23, 2015 through November 20, 2017, as provided in Section 8(b) of the Act. Respondents shall receive a credit for any TTD it has paid toward the period in question.

8. Regarding the issue of permanency, the Arbitrator finds that the Petitioner is permanently and totally disabled due to his injuries from his March 23, 2015 work accident. This finding is supported by the Petitioner's unrebutted testimony, a preponderance of the medical evidence and the opinions of Petitioner's vocational expert. Petitioner's testimony regarding his current physical limitations following his March 23, 2015 accident is corroborated by his treating physicians. Both Dr. Karlsson and Dr. Kim released Petitioner with permanent work restrictions following the treatment. In aggregate, those restrictions prohibited Petitioner from activities placing significant impact on the knees, including kneeling, squatting, climbing, lifting beyond 15 lbs, or even standing or walking more than 45 mins without 15 min of rest. (PX3 p.3) Dr. Kuhlman thought Petitioner could not return to work in any capacity. (PX2 Ex.2 p.4) Based on these opinions, Petitioner's vocational expert, Lisa Helma opined that Petitioner was unable to perform work of any kind, and he was totally disabled from a vocational standpoint. (PX2 p.10) Therefore, Respondent shall pay Petitioner permanent and total disability benefits of $532.49/week for life, commencing November 21, 2017, as provided in Section 8(f) of the Act. Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

9. Regarding the issue of liability under Section 1(a)(4) of the Act, the Arbitrator finds that the Respondents Keenan Transit and Phoenix are responsible for Petitioner's claims. The relevant provision of the Act states:

> Where an employer operating under and subject to the provisions of this Act loans an employee to another such employer and such loaned employee sustains a compensable accidental injury in the employment of such borrowing employer and where such borrowing employer does not provide or pay the benefits or payments due such injured employee, such loaning employer is liable to provide or pay all benefits or payments due such employee under this Act and as to such employee the liability of such loaning and borrowing employers is joint and several, provided that such loaning employer is in the absence of agreement to the contrary entitled to receive from such borrowing employer full reimbursement for all sums paid or incurred pursuant to this paragraph together with reasonable attorneys' fees and expenses in any hearings before the Illinois Workers' Compensation Commission or in any action to secure such reimbursement. 820 ILCS 305/1(a)(4)

The borrowing employer, Amerisafe, admits it never paid compensation for TTD or treatment for either of Petitioner's injuries. Under 1(a)(4) then, the loaning employer (Keenan Transit/Phoenix) became liable for all benefits or payments under the Act. Keenan Transit/Phoenix also did not pay TTD or benefits after the Gleason IME, nor did it pay for the years of treatment that followed. Keenan Transit/Phoenix is liable for the unpaid benefits and treatment awarded for both of Petitioner's accident dates as the borrowing employer did not pay.

Keenan Transit/Phoenix contends however, that liability should transfer to Amerisafe per 1(a)(4)'s clause that borrowing employers must fully reimburse "all sums paid or incurred" by the loaning employer. The caveat is that borrowing/lending employers can alter the borrowing employer's reimbursement obligation through "an agreement to the contrary". 820 ILCS 305/1(a)(4). This language permits the parties to reverse the payment priority as to who is responsible for accidents. See *Ill. Guar. Fund v. Va. Sur. Co.,* 2012 IL App (1st) 113758 *P5. Therefore, the 1(a)(4) dispute pivots on whether the Respondents entered into an agreement to reverse the payment priority.

Amerisafe offered into evidence a document which memorialized the respective obligations for the borrowing/lending arrangement. (Amerisafe EX1) Mr. Wollak, Amerisafe's warehouse manager explained that Amerisafe entered into the borrowing/lending arrangement with Keenan Transit/Phoenix specifically for the purpose of not having to pay workers compensation claims. Amerisafe sent the drivers it employed at the time to Keenan Transit/Phoenix so Keenan Transit/Phoenix could lend them back to Amerisafe, for the express purpose of Keenan Transit/Phoenix to provide workers compensation coverage. Keenan Transit/Phoenix apparently drafted the document, including a paragraph stating "Phoenix Logistics is not responsible for any damage caused by an accident or incident." (Amerisafe Ex.1). Amerisafe added a handwritten qualification to that paragraph, narrowing the paragraph's operation "to the extent of [Phoenix's] negligence unless covered by the vehicle policy". This handwritten qualification was added before both parties signed the document. Amerisafe's warehouse manager testified that the language "Phoenix is not responsible" only applied to property damage occurring to Amerisafe's vehicles and had nothing to do with workers compensation liability, since the main purpose of the agreement between the parties was that Amerisafe would not be responsible for workers compensation liability. Keenan Transit/Phoenix provided no testimony or evidence to rebut that claim. Thus, without rebuttal evidence, Amerisafe has proven that it had an agreement with Keenan Transit/Phoenix for the lending employer to bear the workers compensation liability for Petitioner's claims.

10. The Arbitrator finds that penalties and attorneys fees are warranted in this case. Penalties are warranted when the injured worker is denied benefits and treatment due to a fight between employers in a borrowing/lending setting or a fight between carriers. The appellate court has addressed both scenarios. *Bunnow v. IC*, 327 Ill.App.3d 1039, 1049 (2002) involved two separate employers disputing liability, each contending that claimant was an employee of the other, but neither contesting that claimant suffered injuries from the accident. The Commission awarded 19(k) penalties and Section 16 fees for their failure to pay TTD, and the appellate court extended the penalty and fee award to also cover the unpaid medical expenses. *Id.* at 1049. Two employers pointing the finger at each other to the detriment of the worker justified penalties and fees when there was no significant dispute over the injury occurring or the worker's need for treatment. The dispute between employers qualifies as unreasonable and vexatious misconduct. The same result came where two carriers were fighting over who would pick up liability for a case. *Central Rug & Carpet v. IC*, 361 Ill.App.3d 684, 693 (2005). Central Rug had different insurance carriers for the two accident dates and they were both denying liability and pointing at the other carrier. Even though they also promoted disputes in the evidence on causation, the delay was considered vexatious and unreasonable.

Petitioner was caught in the dispute between his employers as well as a dispute between the carriers. Our threshold concern is whether these actors acted unreasonably or vexatiously in declining to pay benefits under the Act. *Bunnow v. IC*, 327 Ill.App.3d 1039, 1049 (2002) On causation, there was never a real dispute about the right knee being injured in the March 23, 2015 accident. Two weeks after the MVA, the MRI identified the new cartilage tears, detachment of the meniscal root, new bone-on-bone findings in the knee and a new divot depression in the weight-bearing surface of the femoral condyle. Dr. Karlsson said these findings were not present during the surgery he performed four months before the March 23, 2015 accident and he explained why each of these things was causally related to the March 23, 2015 accident. Keenan Transit/Phoenix hired Dr. Gleason to evaluate the Petitioner, and Dr. Gleason related the March 23, 2015 accident to the arthroscope and documented the continuing symptoms Petitioner was having with his right leg. Gleason did declare MMI and released Petitioner to work with restrictions, but Keenan Transit/Phoenix did not provide work at that point. Keenan Transit/Phoenix also obtained the release from Dr. Gleason by providing him with a job description which failed to inform him of the weight demands Petitioner would have to handle in the job. And Dr. Gleason's work release and MMI claim were not persuasive following the Petitioner undergoing a total knee replacement within months of Gleason's evaluation. This was not simply a dispute between an IME doctor and all the treaters who had Petitioner off work at the time. Rather, Respondent's second IME, Dr. Belich, disagreed with Gleason that Petitioner would have been in shape to return to his job when Gleason saw him. (RX1 p.29-30) Yet Keenan Transport/Phoenix simply cut off benefits to Petitioner as of August 27, 2015, a date which corresponds with nothing. At that point, the treating surgeon had Petitioner restricted to "sitting work only with no pushing or pulling of heavy objects and no unloading of trucks" (PX3 p.67) and Petitioner would go for the total knee arthroplasty in October. (PX4 p.273-635) Keenan Transit/Phoenix offered no explanation as to why they cut off TTD or refused to pay for treatment with the exception of a pharmaceutical charge from July 15, 2015. (RX4)

Rather than taking care of their injured worker, Keenan Transit raised an employer/employee defense which lacked merit and failed to prove at hearing that Phoenix was a real (and legitimate) separate legal entity from Keenan Transit. More fundamentally, this shell corporation dispute was completely immaterial as counsel for Keenan Transit/Phoenix ultimately admitted that both were covered by the same insurance policy. That admission came six years after the accident at the end of trial after Amerisafe's witness was interrogated over the issue as well as Petitioner. That was a vexatious and unreasonable dispute over which employer was responsible for the case. Keenan Transit/Phoenix then jointly raised a meritless 1(a)(4) issue, again without presenting evidence to support their dispute. That was a vexatious and unreasonable dispute over which carrier

was responsible for the case.

820 ILCS 305/19(l) penalties are awarded when the employer cannot show that its delay in payment was objectively reasonable. See *R.D. Masonry v IC*, 215 Ill.2d 397, 409 (2005). Keenan Transit/Phoenix offered no objectively reasonable explanation as to its stopping of TTD and treatment. Thus 19(l) penalties are awarded against Keenan Transit and Phoenix Logistics in the maximum amount of $ 10,000.

820 ILCS 305/19(k) penalties demand a higher standard of misconduct, an "unreasonable or vexatious" delay or an "intentional underpayment of compensation." *Id*. 19(k) penalties are "intended to address the situation where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose." *McMahan v. IC*, 183 Ill.2d 499, 515 (1998). This penalty covers both unpaid compensation and medical bills, per *Bunnow*. The awarded amounts for the March 23, 2015 accident include: $107,029.82 for PTD to date, $131,766.74 for medical reimbursement; and $64,683.13 for TTD. A 50% penalty on those numbers totals $151,739.85. That is the 19(k) penalty against Keenan Transit and Phoenix Logistics.

The same standards of misconduct govern the award of attorney fees under 820 ILCS 305/16. Based on the reasoning outlined in this section, Section 16 penalties are awarded against Keenan Transit and Phoenix Logistics in the amount of $60,695.94.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC006712
Case Name	Robert Berndt vs. Keenan Transit Company
Consolidated Cases	15WC014407; 16WC020206; 16WC020211;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0449
Number of Pages of Decision	15
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Jennifer Kiesewetter

DATE FILED: 10/16/2023

/s/Amylee Simonovich, Commissioner

Signature

23IWCC0449

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Berndt,

Petitioner,

vs. NO: 16 WC 6712

Keenan Transit,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent and 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 four additional cases for hearing. The cases involve two separate dates of accident and three separate employers. In case the current case, Petitioner alleged he sustained a work-related injury on October 15, 2014, and named Keenan Transit (Keenan) as his employer. In case 16 WC 20211, Petitioner alleged he sustained a work-related injury on October 15, 2014, and named Phoenix Logistics (Phoenix) as his employer. In case 16 WC 20206, Petitioner alleged he sustained a work-related injury on March 23, 2015, and named Phoenix as his employer. In case 15 WC 14407, Petitioner alleged he sustained a work-related injury on March 23, 2015, and named Keenan as his employer. Finally, in case 17 WC 35300, Petitioner alleged he sustained a work-related injury on March 23, 2015, and named Amerisafe Consulting & Safety (Amerisafe) as the employer.[1] While the parties addressed all five cases during the arbitration hearing, the Arbitrator issued separate Arbitration Decisions in 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 conclusions regarding the issues of employer/employee relationship, Section 1(a)4 liability, accident, notice, causal connection, wages, and medical expenses. However, the Commission modifies the award

1 No review was filed in case 17 WC 35300.

of temporary total disability benefits (TTD), and vacates the award of permanent partial disability. The Commission also addresses Petitioner's request for penalties and fees in this matter, and vacates the credit the Arbitrator awarded to Respondent. Finally, the Commission modifies the Arbitrator's finding regarding the issue of maximum medical improvement (MMI).

Additional Modifications to the Decision

The Commission makes the following modifications to the Decision of the Arbitrator. On page three (3) of the Arbitration Decision, the Arbitrator wrote: "Given the findings on accident and causation, Respondent shall pay Petitioner for all treatment related to the right knee…" The Commission modifies this sentence to read as follows:

> Respondent shall pay Petitioner for all treatment related to the right knee, stemming from the October 15, 2014, accident, as submitted into evidence as PX 14, as provided in Sections 8(a) and 8.2 of the Act.

Additionally, in various parts of the Arbitration Decision, the Arbitrator awarded Respondent a credit for TTD benefits it paid regarding the October 15, 2014, accident. However, the parties stipulated that Respondent has paid no benefits relating to this work accident. Thus, the Commission strikes the following sentence from the Findings section of the Arbitration Decision Form:

> Respondent shall be given a credit of $9,332.52 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $9,332.52.

The Commission also strikes the following sentence from page three (3) of the Decision:

> Respondents shall receive a credit for any TTD it has paid toward the period in question.

Maximum Medical Improvement

Illinois courts consider several factors when determining whether a claimant has reached MMI, including: 1) a release to return to work; 2) medical testimony regarding the claimant's injury; 3) the extent of the injury; and 4) whether the injury has stabilized. *Mech. Devices v. Indus. Comm'n (Johnson)*, 344 Ill. App. 3d 752, 760 (2003). Courts have determined that the most important factor in the analysis is whether the claimant's condition has stabilized. *See id*. at 760. The Arbitrator determined that Petitioner's treating doctor, Dr. Karlsson, placed Petitioner at MMI on February 16, 2015. However, the Commission views the evidence differently.

After considering the evidence, the Commission finds Petitioner did not reach MMI before his subsequent work accident occurred on March 23, 2015. While Petitioner credibly testified that he returned to work on February 16, 2015, that alone does not mean he also reached MMI that day. The evidence shows Dr. Karlsson had not placed Petitioner at MMI before the subsequent work accident. Most importantly, the credible evidence shows that Petitioner's right knee condition had not stabilized before the subsequent work accident. While the relevant medical records are not in

evidence, it is undisputed that Petitioner continued to have right knee complaints after he returned to work. Petitioner admitted that his ongoing right knee complaints made it difficult to perform his job duties. Petitioner testified that after his return to work, he had trouble getting into and out of his truck. Petitioner also testified that his right knee condition made carrying and lifting certain items difficult when he returned to work.

The evidence further shows that Petitioner's right knee symptoms were significant enough that he returned to Dr. Karlsson for further treatment after his return to work. Dr. Karlsson testified that he administered a right knee injection on March 6, 2015. Petitioner testified that this injection provided only minimal relief. Furthermore, Petitioner testified that his right knee complaints continued until the March 23, 2015, work accident. For the foregoing reasons, the Commission finds Petitioner did not reach MMI before he sustained a subsequent injury to his right knee due to the March 23, 2015, work accident.

Finally, on page three (3) of the Arbitration Decision, the Arbitrator wrote that Petitioner "…was placed at MMI by his treating physician on February 16, 2015." As the Commission has concluded that Petitioner did not reach MMI regarding the October 15, 2014, work accident, the Commission strikes that language from the Arbitration Decision.

Temporary Disability Benefits

The Arbitrator concluded Petitioner met his burden of proving an entitlement to TTD benefits from October 16, 2014, through October 17, 2014, and from November 19, 2014, through February 16, 2015. After considering the evidence, the Commission modifies the Arbitrator's award of TTD benefits.

To establish an entitlement to TTD benefits, Petitioner must demonstrate not only that he did not work, but also that he was unable to work. *See Mech. Devices*, 344 Ill. App. 3d 752. The credible evidence shows that Petitioner sustained a significant injury to his right knee due to the October 15, 2014, work accident. However, the Commission finds there is no evidence that any medical professional determined that Petitioner was unable to work October 16-17, 2014. There are no medical records showing treatment on those days. Additionally, there are no work status notes regarding Petitioner's work capability on those days. Therefore, the Commission finds Petitioner failed to prove an entitlement to TTD benefits for the period of October 16-17, 2014. Similarly, Petitioner credibly testified that he returned to work on February 16, 2015. Thus, the Commission finds Petitioner failed to prove an entitlement to TTD benefits on February 16, 2015.

For the foregoing reasons, the Commission finds Petitioner was entitled to TTD benefits from November 19, 2014, through February 15, 2015 (12-5/7 weeks).

Permanent Disability

The Commission has found that Petitioner's right knee condition had not reached MMI before the March 23, 2015, work accident. A finding of permanent disability first requires that the claimant's condition of ill-being has stabilized. Therefore, the Commission vacates the Arbitrator's award of permanent partial disability benefits.

Penalties and Fees

The parties identified the issue of penalties and fees as in dispute at the arbitration hearing. However, the Arbitrator failed to address this issue. Accordingly, the Commission must determine whether Petitioner met his burden of proving an entitlement to penalties pursuant to Sections 19(l), 19(k), and 16 of the Act.

The Commission exercises original jurisdiction. *See, e.g.*, *Caterpillar Tractor Co. v. Industrial Comm'n*, 215 Ill. App. 3d 229, 238-39 (1991). This means it has the authority to determine all unsettled questions and is not bound by the Arbitrator's findings. The Commission's review of a case is not restricted to the information found in the Petition for Review or the reviewing party's Statement of Exceptions. Thus, the Commission has the authority to review all questions of law or fact which are evident in the record if a party's substantial rights are not prejudiced. In this case, Respondent is not prejudiced by the Commission's review of the issue of penalties because the parties had an opportunity to fully litigate the disputed issue during the arbitration hearing.

The intent of Sections 16, 19(k), and 19(l) of the Act is to "…implement the Act's purpose to expedite the compensation of industrial workers and to penalize employers who unreasonably, or in bad faith, delay or withhold compensation due an employee." *Centeno v. Ill. Workers' Comp. Comm'n*, 2020 IL App (2d) 180815WC at ¶55 (citation omitted). Penalties pursuant to Section 19(l) of the Act are applicable when an employer fails to pay benefits without good and just cause. *Id*. Courts have likened Section 19(l) penalties to a late fee. However, an award of penalties pursuant to Sections 16 and 19(k) of the Act requires a claimant meet a much higher burden. Section 19(k) of the Act addresses "…situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose. This is apparent in the statute's use of the terms 'vexatious,' 'intentional' and 'merely frivolous.'" *McMahan v. Indus. Comm'n.*, 183 Ill. 2d 499, 515 (1998). Section 16 of the Act uses the same language and applies to the same situations as Section 19(k) penalties.

After considering the totality of the evidence, the Commission finds Respondent unreasonably and vexatiously withheld benefits from Petitioner. It is undisputed that Respondent refused to pay any benefits to Petitioner regarding the October 15, 2014, work accident. The Commission finds Respondent did not prove it had a reasonable basis for its refusal to pay benefits in this matter. Respondent disputed several issues in this matter, including accident, notice, causal connection, medical expenses, and TTD. However, its dispute of those issues at the very least toes the line of frivolity. Respondent presented no credible evidence to support its dispute of these issues. Amerisafe, the borrowing employer and Petitioner's direct supervisor, undeniably had intimate knowledge of Petitioner's work duties and the details of the October 15, 2014, work accident. Mr. Wollack's testimony shows that Amerisafe agreed that Petitioner timely reported the work accident and his injury. His testimony also shows that Amerisafe did not question the compensability of Petitioner's accident.

Respondent's dispute of most of these issues appears to be based primarily on a non-existent requirement that Petitioner had to provide notice of the work accident directly to Respondent. In *Silica Sand Transport, Inc. v. Indus. Comm'n*, 197 Ill. App. 3d 640, 651-653

(1990), the Appellate Court considered the issue of notice when there is a borrowing employer and lending employer. In that case, the lending employer denied liability because the claimant only provided timely notice to the borrowing employer. The court rejected the lending employer's argument and determined that the claimant's notice to the borrowing employer constituted defective notice to the lending employer. Thus, Petitioner's timely notice to Amerisafe was also defective notice to Respondent. However, Respondent failed to provide any evidence that it was prejudiced in any way by Petitioner's defective notice.

Respondent also disputed medical expenses and TTD benefits, yet it did not obtain a Section 12 examination at any time before March 23, 2015, the date of Petitioner's subsequent work accident. In fact, the earliest Section 12 examination performed on Respondent's behalf did not occur until June 30, 2015. Respondent also did not obtain a utilization review regarding any of Petitioner's medical treatment related to this work accident. It is obvious that Respondent did not rely on anything other than its erroneous belief that Amerisafe should be liable for benefits related to this work accident when it refused to pay benefits to Petitioner.

Respondent's dispute with Amerisafe regarding Respondent's liability pursuant to Section 1(a)4 of the Act clearly was the real reason Respondent refused to pay benefits to Petitioner. Respondent's dispute with Amerisafe regarding liability for benefits owed to Petitioner is not a reasonable basis for its egregious behavior in this matter. After all, in a lending and borrowing employment situation, both employers are jointly and *separately* liable to the claimant pursuant to Section 1(a)4 of the Act. This provision of the Act is designed to prevent the exact situation Petitioner was forced to endure. Petitioner received no benefits related to his October 15, 2014, work accident during the almost seven year period until the September 2021 arbitration hearing, simply because Respondent refused to comply with the Act. Respondent cannot avoid its liability by blaming its contemptible refusal to comply with the Act and provide timely benefits to Petitioner on its dispute with Amerisafe.

After considering the evidence, the Commission finds Respondent's behavior in this matter was undeniably unreasonable and vexatious. Thus, Petitioner is entitled to penalties pursuant to Sections 16, 19(k), and 19(l) of the Act regarding the unpaid TTD benefits awarded to Petitioner. However, the Commission lacks the authority to award penalties regarding any medical expenses. To prove an entitlement to penalties regarding medical expenses, Petitioner must submit evidence that the bills were submitted to Respondent and that Respondent did not pay them. *See Theis v. Ill. Workers' Comp. Comm'n*, 2017 IL App (1st) 161237WC ¶21-23. A review of the evidence shows Petitioner failed to include any bills related to the October 15, 2014, work accident and certainly did not provide proof that any relevant bills were ever submitted to Respondent for payment.

The Commission has already determined that Petitioner was entitled to TTD benefits from November 19, 2014, through February 15, 2015 (12-5/7 weeks), for a total amount of $7,199.81. Pursuant to Section 19(l) of the Act, Petitioner is entitled to additional compensation in the amount of $30 for each day the benefits remained unpaid, not to exceed $10,000.00. The Commission notes that Respondent refused to pay TTD benefits for well over six years. Therefore, the Commission awards Petitioner Section 19(l) penalties in the amount of $10,000.00. Pursuant to Section 19(k) of the Act, the Commission may award additional compensation equal to 50% of the amount payable at the time of this award. Thus, the Commission awards Petitioner Section 19(k)

penalties in the amount of $3,599.91. Finally, pursuant to Section 16 of the Act, the Commission awards attorneys' fees in the amount of $1,439.96, which equals 20% of the awarded TTD benefits.

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 December 2, 2021, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary total disability benefits of $566.29/week for 12/5-7 weeks commencing November 19, 2014, through February 15, 2015, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED that Respondent shall pay for all reasonable and necessary medical services related to the October 15, 2014, work accident regarding Petitioner's right knee condition submitted into evidence as PX 14, as provided in Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED that the Arbitrator's award of permanent partial disability is vacated. The Commission finds Petitioner did not reach MMI before his subsequent March 23, 2015, work accident.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner penalties of $1,439.16, as provided in Section 16 of the Act; $3,599.91, as provided in Section 19(k) of the Act; and $10,000.00, as provided in Section 19(l) of the Act.

IT IS FURTHER ORDERED that Respondent is not entitled to any credit as it has paid no benefits relating to the October 15, 2014, work accident.

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 $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.

October 16, 2023
o: 8/15/23
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	16WC006712
Case Name	BERNDT, ROBERT v. KEENAN TRANSIT
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	Kurt Niermann
Respondent Attorney	Jennifer Kiesewetter

DATE FILED: 12/2/2021

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

/s/Gerald Granada, Arbitrator

Signature

23IWCC0449

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

ROBERT BERNDT
Employee/Petitioner

v.

KEENAN TRANSIT
Employer/Respondent

Case # **16** WC **6712**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Wheaton**, on **9/28/21**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☒ What was Petitioner's age at the time of the accident?
I. ☒ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 **1(a)(4) liability**

FINDINGS

On **10/15/14**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent in which Respondents Keenan Transit and Phoenix were the loaning employers and Respondent Amerisafe was the borrowing employer.

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

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

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

In the year preceding the injury, Petitioner earned $**44,170.94**; the average weekly wage was $**849.44**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $**9,332.52** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**9,332.52**.

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

ORDER

Respondents Keenan Transit and Phoenix Logistics are responsible for Petitioner's claims pursuant to Section 1(a)(4) of the Act.

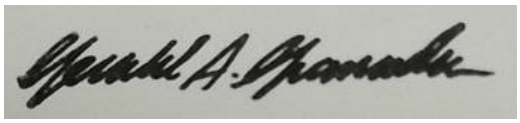
Respondent shall pay reasonable and necessary medical services as outlined in the attached findings, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $566.29/week for 13 weeks, commencing 10/16/14 to 10/17/14 and 11/19/14 to 2/1/15, as provided in Section 8(b) of the Act.

Based on the factors as set forth in Section 8.1(b) of the Act and described in greater detail in the attached findings, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 25% loss of use of right leg pursuant to §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.



Signature of **Arbitrator Gerald Granada**

DECEMBER 2, 2021

FINDINGS OF FACT

This case involves Petitioner Robert Berndt – a truck driver, who alleges to have been injured while working for Respondents Keenan Transit, Phoenix Logistics (Phoenix), and Amerisafe Consulting (Amerisafe) on October 15, 2014 (16 WC 6712 and 16 WC 20211) and on March 23, 2015 (15 WC 14407, 16 WC 20206, and 17 WC 35300). Petitioner has filed separate Applications for Adjustment of Claim for all of these accidents, and all the claims have been consolidated. Given the sequence of events, the issues in dispute, and for judicial economy, the findings in this case will also apply to the subsequent case filings. Although all these claims were heard together, this decision is focused on Petitioner's October 15, 2014 claim, in which all issues are in dispute, including the issue of liability in a borrowing/loaning situation under Section 1(a)(4) of the Act. The main point of contention at trial was the question of Petitioner's employment and which Respondent(s) is/are ultimately responsible for Petitioner's claim.

On October 15, 2014, Petitioner was training a new driver in a truck owned by Respondent Amerisafe. They drove to a construction site in Chicago, Petitioner exited the cab, walked across an unpaved parking lot and stepped into a pothole, injuring his right leg. He had never experienced any problems with the right leg before this accident. Petitioner's job required him to exit the cab at the stops, open the cargo doors to unload the product, unload the produce and close the door and the lift gate. The job included loading and unloading pallets with a pallet jack, pushing and pulling loads weighing up to 2,000 to 3,000 lbs. (RX1 p.8)

Petitioner reported this incident to the Amerisafe Warehouse manager at that time, Evan Wollak. Mr. Wollak testified that after he was contacted by Petitioner regarding the October 15, 2014 incident, Wollak called Bill Keenan of Keenan Transit to advise him of the incident. Wollak later completed an accident report, which he sent to Keenan Transit.

On October 20, 2014, Petitioner went to Edwards Immediate Care, where x-rays revealed moderate degenerative changes of the right knee in the medial compartment and narrowing in the left knee that was much worse than the right knee. A November 7, 2014 MRI revealed medial meniscal tearing of the right knee along the junction of the posterior horn and posterior root ligament, mild peripheral extrusion of medial meniscal tissue, and osteoarthritis of the medial femorotibial compartment. (PX4 p.8) Dr. Karlsson performed a right knee arthroscopy at Edwards Hospital on November 19, 2014. (PX4 p.14) The meniscal tissue was intact, but he did find grade 3 changes over the patellar and femoral side with slight flaps on the femoral trochlea, which he shaved back to create a stable base of cartilage for the joint. (PX4 p.14) He also reported grade 3 chondromalacia over majority of medial joint line in the right knee. He debrided cartilage flaps to create a stable base of cartilage for the joint. (PX p.14) Dr. Karlsson noted that the joint had cartilage in it at the time of this surgery. (PX1 p.11) Post surgery, Petitioner reported that he still experienced some pain over the medial side, some pain in the hamstring, and that he was having difficulty getting back to the type of activities he would need to do at work where he pulls a pallet jack. Dr. Karlsson recommended that Petitioner remain off work and do some therapy, which took place at Edwards on January 20, 2015. (PX4 p.112) Petitioner experienced significant relief between the surgery and therapy and returned to full work duties on February 16, 2015. Petitioner noticed some continuing symptoms when getting in and out of the truck as they had not simulated that activity in therapy. He experienced minor pain when getting in and out of the truck and while pulling heavy cargo, but he was able to get through all his work duties and missed no time from work following his return to work full duty on February 16, 2015. He continued to work full duty until his subsequent accident on March 23, 2015, which is the subject of his companion cases.

Evan Wollak was called to testify at trial by counsel for Respondent Amerisafe. Mr. Wollak had worked for Amerisafe for 20 years prior to his retirement in 2019. In 2013, Mr. Wollak was the warehouse manager for Amerisafe. He described Amerisafe as being in the business of selling insulation products and using trucks to

transport those products. In 2013, Mr. Wollak contacted Bill Keenan of Keenan Transit to obtain drivers for Amerisafe's operation. Amerisafe initially sent its own drivers over to Keenan Transit so that Keenan Transit could lease these drivers back to Amerisafe. Wollak only spoke with Bill Keenan and believed he was getting drivers from Keenan Transit. He identified a set of emails surrounding the arrangement. (RX8) Bill Keenan's emails came from a Keenan Transit email address. Keenan Transit was located in the same offices as Phoenix Logistics. Wollak called Keenan Transit for drivers rather than Phoenix. At some point, Bill Keenan told Wollak that he set up Phoenix to loan out nonunion drivers. Amerisafe Ex1 was a document between Amerisafe and Phoenix. Wollak went back and forth with Bill Keenan over the content of this document. (Amerisafe Ex1) Bill Keenan was going to sign the document, obligating Amerisafe to pay an hourly fee for drivers. Wollak testified that Bill Keenan was supposed to take care of fringe benefits and workers comp liability - which was precisely the intention of the document. (Amerisafe Ex1) Wollak obtained Berndt by calling Bill Keenan. Berndt used Amerisafe's equipment, delivered Amerisafe's products and kept a timecard at their facility. When payroll time arrived, Wollak faxed the timecard to Keenan Transit's payroll person at the Keenan Transit office and Phoenix would send the driver a check. The only people Wollak dealt with were Bill Keenan and his payroll person Dawn, also at Keenan Transit. When Petitioner suffered both his injuries, Wollak reported both injuries to Bill Keenan. The phone calls were made to Bill at the Keenan Transit office as Wollak was never given a phone number for Phoenix. Wollak also sent Keenan Petitioner's detailed written account of the accident. (PX15) TTD was paid for a short period after Petitioner's second accident on March 23, 2015, and the checks identified Keenan Transit as the employer.

CONCLUSIONS OF LAW

1. Regarding the issue of employment, the Arbitrator finds that there existed an employment relationship between the Petitioner and the Respondents in which the Respondents Keenan Transit and Phoenix were the loaning employers and Amerisafe was the borrowing employer for both Petitioner's October 15, 2014 accident and his March 23, 2015 accident. Petitioner thought he was working for Phoenix as he got checks from Phoenix. However, he was interviewed and hired for the job by Tom Keenan, who had a Keenan Transit email address and worked out of the Keenan Transit offices. The Phoenix checks also came out of the Keenan Transit offices. Petitioner admitted he was not sure whether Phoenix was a distinct company from Keenan Transit. The same defense counsel represented both Keenan Transit and Phoenix at trial, but only lodged the employer/employee dispute on behalf of Keenan Transit. Counsel ultimately claimed, near the end of trial, that both Keenan Transit and Phoenix were covered by the same workers compensation insurance carrier. Keenan Transit and Phoenix did not present any documentary evidence suggesting they were independent entities. The Arbitrator further relies the testimony of Mr. Wollak, whose unrebutted testimony was persuasive on this issue.

2. With regard to the issue of accident, the Arbitrator finds that the Petitioner met his burden of proving that he sustained an accident arising out of and in the course of his employment on October 15, 2014. The facts clearly show that Petitioner sustained injuries while working and there was no evidence offered to rebut Petitioner on this issue.

3. Regarding the issue of notice, the Arbitrator finds that the Petitioner met his burden of proving that he provided timely notice of his October 15, 2014 accident to the Respondents by reporting the same to Mr. Wollak of Amerisafe. Mr. Wollak testified that he then reported the incident to Keenan Transit on the same day. There was no evidence offered to rebut Petitioner or Mr. Wollak's testimony on this issue.

4. With regard to the issue of causation, the Arbitrator finds that the Petitioner has met his burden of proving that his current condition of ill-being is causally related to his work accidents. In support of this finding, the Arbitrator relies on Petitioner's unrebutted testimony and the preponderance of the medical evidence.

Petitioner's October 15, 2014 accident, in which he stepped in a pothole, injured his right knee, and subsequently underwent arthroscopic surgery is clearly documented in the medical evidence and does not appear to be disputed.

5. Regarding the issues of age, marital status and average weekly wage, the Arbitrator finds that the Petitioner was 47 years old, married and had an average weekly wage of $849.44 at the time of his accidents. There was no evidence offered to rebut the Petitioner on these issues.

6. Consistent with the findings above, the Arbitrator further finds that the Petitioner's medical treatment following his October 15, 2014 accident has been reasonable and necessary in addressing his right knee condition stemming from his work accident. Petitioner's wife's insurance paid for Petitioner's treatment, including the knee surgery and all the related treatment and rehabilitation. Given the findings on accident and causation, Respondent shall pay Petitioner for all treatment related to the right knee, stemming from the October 15, 2014 accident. This includes the Humana payments totaling $9,831.89. (PX14)

7. The Arbitrator finds that the Petitioner was temporarily totally disabled following his October 15, 2014 accident from October 16, 2014 through October 17, 2014, and from November 19, 2014 through the date he was placed at MMI by his treating physician on February 16, 2015. During this time period, the medical evidence documents Petitioner being take off work completely by his treating physicians. Therefore Respondent shall pay Petitioner temporary total disability benefits of $566.29/week for 13 weeks, for the aforementioned time period, as provided in Section 8(b) of the Act. Respondents shall receive a credit for any TTD it has paid toward the period in question.

8. Regarding the 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 AMA rating was introduced into evidence, so the Arbitrator gives this factor no weight; (ii) Petitioner was a driver and was able to return his job following this accident - a factor to which the Arbitrator gives considered weight; (iii) Petitioner was 47 years old at the time of injury - a factor to which the Arbitrator gives some weight; (iv) there was no evidence of future earnings due to this injury, and the Arbitrator gives no weight to this factor; (v) there was evidence of disability which show that the Petitioner sustained an injury to his right knee requiring injections, surgery, followed by physical therapy and resulting in continued complaints of pain his every day and work activities - the Arbitrator gives great weight to this factor. Based on the factors above, the Arbitrator concludes the injuries sustained by Petitioner caused a 25% loss of use of the right leg as a result of the October 15, 2014 work incident.

9. Regarding the issue of liability under Section 1(a)(4) of the Act, the Arbitrator finds that the Respondents Keenan Transit and Phoenix are responsible for Petitioner's claims. The relevant provision of the Act states:

> Where an employer operating under and subject to the provisions of this Act loans an employee to another such employer and such loaned employee sustains a compensable accidental injury in the employment of such borrowing employer and where such borrowing employer does not provide or pay the benefits or payments due such injured employee, such loaning employer is liable to provide or pay all benefits or payments due such employee under this Act and as to such employee the liability of such loaning and borrowing employers is joint and several, provided that such loaning employer is in the absence of agreement to the contrary entitled to receive from such borrowing employer full reimbursement for all sums paid or incurred pursuant to this paragraph together with reasonable attorneys' fees and expenses in any hearings before the Illinois Workers' Compensation Commission or in any action to secure such reimbursement. 820 ILCS 305/1(a)(4)

The borrowing employer, Amerisafe, admits it never paid compensation for TTD or treatment for either of Petitioner's injuries. Under 1(a)(4) then, the loaning employer (Keenan Transit/Phoenix) became liable for all benefits or payments under the Act. Keenan Transit/Phoenix also did not pay TTD or benefits after the Gleason IME, nor did it pay for the years of treatment that followed. Keenan Transit/Phoenix is liable for the unpaid benefits and treatment awarded for both of Petitioner's accident dates as the borrowing employer did not pay.

Keenan Transit/Phoenix contends however, that liability should transfer to Amerisafe per 1(a)(4)'s clause that borrowing employers must fully reimburse "all sums paid or incurred" by the loaning employer. The caveat is that borrowing/lending employers can alter the borrowing employer's reimbursement obligation through "an agreement to the contrary". 820 ILCS 305/1(a)(4). This language permits the parties to reverse the payment priority as to who is responsible for accidents. See *Ill. Guar. Fund v. Va. Sur. Co.,* 2012 IL App (1st) 113758 *P5. Therefore, the 1(a)(4) dispute pivots on whether the Respondents entered into an agreement to reverse the payment priority.

Amerisafe offered into evidence a document which memorialized the respective obligations for the borrowing/lending arrangement. (Amerisafe EX1) Mr. Wollak, Amerisafe's warehouse manager explained that Amerisafe entered into the borrowing/lending arrangement with Keenan Transit/Phoenix specifically for the purpose of not having to pay workers compensation claims. Amerisafe sent the drivers it employed at the time to Keenan Transit/Phoenix so Keenan Transit/Phoenix could lend them back to Amerisafe, for the express purpose of Keenan Transit/Phoenix to provide workers compensation coverage. Keenan Transit/Phoenix apparently drafted the document, including a paragraph stating "Phoenix Logistics is not responsible for any damage caused by an accident or incident." (Amerisafe Ex.1). Amerisafe added a handwritten qualification to that paragraph, narrowing the paragraph's operation "to the extent of [Phoenix's] negligence unless covered by the vehicle policy". This handwritten qualification was added before both parties signed the document. Amerisafe's warehouse manager testified that the language "Phoenix is not responsible" only applied to property damage occurring to Amerisafe's vehicles and had nothing to do with workers compensation liability, since the main purpose of the agreement between the parties was that Amerisafe would not be responsible for workers compensation liability. Keenan Transit/Phoenix provided no testimony or evidence to rebut that claim. Thus, without rebuttal evidence, Amerisafe has proven that it had an agreement with Keenan Transit/Phoenix for the lending employer to bear the workers compensation liability for Petitioner's claims.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC020206
Case Name	Robert Berndt v. Phoenix Logistics Inc
Consolidated Cases	15WC014407; 16WC006712; 16WC020211;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0450
Number of Pages of Decision	26
Decision Issued By	Amylee Simonovich, Commissioner, Kathryn Doerries, Commissioner

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Jennifer Kiesewetter

DATE FILED: 10/16/2023

/s/Amylee Simonovich, Commissioner

Signature

DISSENT: /s/Kathryn Doerries, Commissioner

Signature

23IWCC0450

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Berndt,

Petitioner,

vs. NO: 16 WC 20206

Phoenix Logistics Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering all issues, and being advised of the facts and law, modifies the Decision of the Arbitrator. The Commission otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Initially, the Commission notes that prior to the arbitration hearing the parties consolidated this case with four additional cases for hearing. The cases involve two separate dates of accident and three separate employers. In the current case, Petitioner alleged he sustained a work-related injury on March 23, 2015, and named Phoenix Logistics (Phoenix) as his employer. In case 15 WC 14407, Petitioner alleged he sustained a work-related injury on March 23, 2015, and named Keenan Transit (Keenan) as his employer. In case 17 WC 35300, Petitioner alleged he sustained a work-related injury on March 23, 2015, and named Amerisafe Consulting & Safety (Amerisafe) as the employer.[1] In case 16 WC 20211, Petitioner alleged he sustained a work-related injury on October 15, 2014, and named Phoenix as his employer. Finally, in case 16 WC 6712, Petitioner alleged he sustained a work-related injury on October 15, 2014, and named Keenan as his employer. While the parties addressed all five cases during the arbitration hearing, the Arbitrator issued separate Arbitration Decisions in 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 conclusions regarding the issues of employer/employee relationship, Section 1(a)4 liability, accident, notice, causal connection, wages, medical expenses, temporary total disability (TTD) benefits, and

1 No review was filed in case 17 WC 35300.

permanent total disability benefits. However, the Commission modifies the award of penalties and fees.

Additional Modification to the Decision

The Commission makes the following modification to the Decision of the Arbitrator. On page six (6) of the Arbitration Decision, the Arbitrator wrote: "Given the findings on accident and causation, Respondent shall pay Petitioner for all treatment related to the bilateral knees…" The Commission modifies this sentence to read as follows:

> Given the findings on accident and causation, Respondent shall pay Petitioner for all treatment related to the bilateral knees, left shoulder, lower back, headaches, and anxiety after the March 23, 2015, accident, including treatment required to address the infection to the left knee, as submitted into evidence as PX 14, pursuant to Sections 8(a) and 8.2 of the Act.

Penalties and Fees

The Arbitrator awarded Petitioner penalties pursuant to Section 19(l) in the amount of $10,000.00, Section 19(k) in the amount of $151,739.85, and Section 16 in the amount of $60,695.94. The Commission agrees with the Arbitrator's conclusion that Respondent's behavior in this case warranted an award of penalties pursuant to Sections 16, 19(k), and 19(l) of the Act. However, the Commission modifies the Arbitrator's reasoning regarding the appropriateness of an award of penalties. The Commission also modifies the Arbitrator's calculation of penalties pursuant to Sections 16 and 19(k) of the Act.

The intent of Sections 16, 19(k), and 19(l) of the Act is to "…implement the Act's purpose to expedite the compensation of industrial workers and to penalize employers who unreasonably, or in bad faith, delay or withhold compensation due an employee." *Centeno v. Ill. Workers' Comp. Comm'n*, 2020 IL App (2d) 180815WC at ¶55 (citation omitted). Penalties pursuant to Section 19(l) of the Act are applicable when an employer fails to pay benefits without good and just cause. *Id*. Courts have likened Section 19(l) penalties to a late fee. However, an award of penalties pursuant to Sections 16 and 19(k) of the Act requires a claimant meet a much higher burden. Section 19(k) of the Act addresses "…situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose. This is apparent in the statute's use of the terms 'vexatious,' 'intentional' and 'merely frivolous.'" *McMahan v. Indus. Comm'n.*, 183 Ill. 2d 499, 515 (1998). Section 16 of the Act uses the same language and applies to the same situations as Section 19(k) penalties.

The Arbitrator concluded that penalties were appropriate due to Respondent's refusal to pay benefits due to its dispute with Amerisafe regarding liability for the payment of benefits related to the March 23, 2015, work accident. However, the evidence shows that while Respondent disputed its liability pursuant to Section 1(a)4 of the Act, it did not refuse to pay benefits due to that dispute. Instead, Respondent paid a limited amount of TTD benefits and medical expenses before it terminated all benefits in August 2015. A review of the evidence shows that Respondent relied on the opinions of its Section 12 examiners to support its termination of benefits in the case.

After considering the totality of the evidence, the Commission finds Respondent's decision to terminate Petitioner's benefits was unreasonable and vexatious.

An employer may rely on an expert opinion to show that its belief that the claimant was no longer entitled to benefits was objectively reasonable. However, the critical question is "…whether the employer's conduct in relying on the medical opinion to contest liability is reasonable under all the circumstances presented." *Continental Distributing Co. v. Indus. Comm'n*, 98 Ill. 2d 407, 415-16 (1983). After considering the totality of the evidence, the Commission finds Respondent's reliance on the opinions of its Section 12 examiners, Drs. Gleason and Belich, to terminate TTD and medical benefits was not reasonable.

Dr. Gleason examined Petitioner on June 30, 2015. By then, Petitioner had undergone a right knee partial meniscectomy and chondroplasty in early May 2015. Notably, in June 2015 no doctor had recommended a right knee total arthroplasty. Dr. Gleason opined that the March 23, 2015, work injury aggravated Petitioner's pre-existing right knee condition. The doctor also opined that Petitioner could return to full duty work with significant permanent restrictions relating to his right knee condition. The doctor also opined that no further treatment was needed. In late August 2015, Dr. Gleason wrote an addendum report that solely addressed Petitioner's ability to return to his regular job with the permanent restrictions Dr. Gleason recommended. After only reviewing the extremely vague job description written by Bill Keenan, Dr. Gleason opined that Petitioner's normal job duties were consistent with the permanent restrictions.

When Dr. Gleason's opinions are considered within the larger context of the evidence, Respondent's termination of medical and TTD benefits based on these opinions was unreasonable and vexatious. In the few months following Dr. Gleason's examination, Petitioner's right knee condition continued to deteriorate. After additional injections failed to improve Petitioner's complaints of increasing pain, Dr. Karlsson, Petitioner's treating doctor, formally recommended Petitioner undergo a total right knee arthroscopy in late August 2015. Despite this significant change in the trajectory of Petitioner's right knee condition, Respondent continued to rely on Dr. Gleason's opinions to deny further medical benefits. In January 2016, Dr. Gleason testified that the March 2015 work accident aggravated Petitioner's right knee condition and caused Petitioner's right knee symptoms. Dr. Gleason testified that when he examined Petitioner in June 2015, he did not believe Petitioner needed a right knee replacement. However, he admitted that he had no knowledge of Petitioner's right knee condition or treatment after his examination. Notably, Dr. Belich, Respondent's second Section 12 examiner, testified in December 2019 that the March 23, 2015 work accident at least minimally accelerated Petitioner's pre-existing right knee osteoarthritis. This means Respondent never had an opinion it could reasonably rely on to justify the denial of ongoing medical treatment for Petitioner's right knee condition. For the foregoing reasons, the Commission finds it was patently unreasonable for Respondent to rely on Dr. Gleason's opinion to deny the right total knee arthroplasty performed by Dr. Karlsson in October 2015 and Petitioner's subsequent right knee treatment.

The Commission also finds Respondent's reliance on Dr. Gleason's addendum to support its termination of TTD benefits was egregious. Dr. Gleason outlined permanent restrictions regarding Petitioner's right knee condition that significantly limited his ability to perform very physical work. As Respondent decided it did not want to continue paying TTD benefits, it provided

what can only be described as a sham job description to Dr. Gleason. Bill Keenan's job description blatantly misrepresented Petitioner's job duties. The credible evidence shows Petitioner's job involved very physical work including climbing into and out of his truck throughout each day and loading and unloading heavy cargo—sometimes by hand. Petitioner also had to move the hydraulic pump jack at each stop and regularly used pallet jacks. Petitioner also had to squat and bend when inspecting the truck each day. However, Bill Keenan's job description did not even mention the heavy lifting Petitioner performed when moving cargo in and out of the truck. Remarkably, during its oral argument Respondent acknowledged that Bill Keenan had no knowledge of Petitioner's actual job duties. Yet Respondent continued to rely on Dr. Gleason's opinion that Petitioner could return to work despite knowing the opinion was based on an inaccurate job description.

After considering the totality of the evidence, the Commission finds Respondent's termination of TTD benefits is a quintessential example of an employer acting in bad faith. The Commission has determined that Petitioner was entitled to TTD benefits for 139 weeks for a total amount of $74,016.11. The parties stipulated that Respondent paid $9,332.52 in TTD benefits through Acuity, its insurer. Therefore, the Commission finds Respondent vexatiously refused to pay Petitioner TTD benefits in the amount of $64,683.59.

Respondent's vexatious behavior in terminating Petitioner's TTD and medical benefits based on Dr. Gleason's opinions undoubtedly warrants an award of penalties. However, the Arbitrator's calculation of penalties pursuant to Sections 19(k) and 16 of the Act is incorrect. Illinois courts have held that Section 19(k) and 16 penalties apply only to the amount payable at the time of the penalty award. *See e.g.*, *Nat'l Mfg. v. Indus. Comm'n*, 331 Ill. App. 3d 1045, 1047-48 (2002) (holding that permanent disability benefits awarded simultaneously with an award of penalties should not be included in the calculation of penalties). The Commission cannot find Respondent delayed or refused to pay permanency benefits that had not yet been awarded. Thus, none of the permanent disability benefits awarded in this matter will be included in the penalty calculation.

Furthermore, the Commission's authority to award penalties for unpaid medical expenses is not limitless. Illinois courts have determined that to prove an entitlement to penalties regarding denied medical expenses, a claimant must submit evidence that the bills were previously submitted to Respondent and that Respondent did not pay them. *See Theis v. Ill. Workers' Comp. Comm'n*, 2017 IL App (1st) 161237WC ¶21-23. Therefore, despite Respondent's vexatious denial of medical expenses after Dr. Gleason's June 30, 2015, report, the Commission can only award penalties for expenses that the evidence shows were submitted for payment to and denied by Acuity.

After carefully reviewing the evidence, the Commission finds few bills were submitted to Acuity for payment. In fact, almost all the bills related to the March 23, 2015, work accident were submitted for payment solely through Petitioner's health insurance. A review of the evidence reveals that out of the bills submitted to Acuity for payment, the insurer only denied one. This is a bill from Adventist Health Partners in the amount of $534.00 for treatment Petitioner underwent on September 23, 2015. Therefore, the Commission will assess penalties for Respondent's unreasonable and vexatious denial of $534.00 in medical expenses.

For the foregoing reasons, the Commission finds Respondent vexatiously and

unreasonably withheld TTD and medical benefits in the total amount of $65,217.59. Pursuant to Section 19(1) of the Act, the Commission must award Petitioner additional compensation in the amount of $30 for each day Respondent unreasonably withheld benefits for a maximum penalty of $10,000.00. The Commission notes that Respondent refused to pay the outstanding TTD and medical benefits for over five years. Therefore, the Commission awards Petitioner Section 19(l) penalties in the amount of $10,000.00. Pursuant to Section 19(k) of the Act, the Commission may award Petitioner additional compensation equal to 50% of the amount payable at the time of this award. Thus, the Commission awards Petitioner Section 19(k) penalties in the amount of $32,608.80. Finally, pursuant to Section 16 of the Act, the Commission awards attorney fees in the amount of $13,043.52, which equals 20% of the total amount of benefits Respondent vexatiously withheld.

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 December 2, 2021, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary total disability benefits of $532.49/week for 139 weeks commencing March 23, 2015, through November 20, 2017, as provided in Section 8(b) of the Act. Pursuant to stipulation by the parties, Respondent is entitled to a credit for $9,332.52 in TTD benefits it previously paid.

IT IS FURTHER ORDERED that Respondent shall pay for all reasonable and necessary medical services related to the March 23, 2015, work accident submitted into evidence as PX 14, as provided in Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner permanent and total disability benefits of $532.49/week for life, commencing November 21, 2017, as provided in Section 8(f) of the Act.

IT IS FURTHER ORDERED that commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund*** as provided in Section 8(g) of the Act.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner penalties of $13,043.52, as provided in Section 16 of the Act; $32,608.80, as provided in Section 19(k) of the Act; and $10,000.00, as provided in Section 19(l) of the Act.

IT IS FURTHER ORDERED that Respondent shall receive credit for all amounts it paid, if any, to or on behalf of Petitioner on account of said accidental injury. However, Respondent is not entitled to a credit for any payments made by Petitioner's health insurer, as Petitioner received coverage through his wife's group insurance.

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

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

October 16, 2023

o: 8/15/23
AHS/jds
51

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

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

Dissent

I respectfully dissent from my colleagues on the issues of causal connection between Petitioner's left knee condition and the March 23, 2015, work-related accident, temporary total disability (TTD) after June 22, 2016, medical expenses for Petitioner's left knee condition, the permanent total disability award and penalties under §19(l) and §19(k) and attorneys' fees under §16. I would reverse the Arbitrator's finding of a causal connection between Petitioner's left knee condition and the March 23, 2015, work accident and find that Petitioner's left knee condition was not causally related; terminate TTD after June 22, 2016; vacate the award of medical expenses for Petitioner's left knee condition; vacate the award of permanent total disability and award 50% loss of use of a person under §8(d)2; and vacate the award of penalties and attorneys' fees, for the following reasons described below.

Causal Connection

Prior to the March 23, 2015 accident, Petitioner underwent a left knee surgery on November 18, 2008, consisting of a partial arthroscopic medial meniscectomy and chondroplasty of the patella which showed grade II chondromalacia of the patella and medial femoral condyle with a radial tear of the medial meniscus. Thereafter, Petitioner received treatment for his left knee. (RX1, DepX2, 2) In fact, his treating surgeon, Dr. Troy Karlsson testified at his evidence deposition, that Petitioner was treating fairly extensively getting a number of injections on "somewhat of an ongoing basis." (PX1, 31) Dr. Karlsson went on to explain that Petitioner had been getting injections in his left knee for "a couple of years" before the subject accident, both hyaluronic and cortisone injections. *Id.*

This treatment is corroborated by Dr. Paul Belich's October 14, 2018, §12 opinion report wherein he notes that he reviewed Dr. Karlsson's office notes. To wit, on August 20, 2013,

Petitioner complained of left knee pain and an x-ray showed severe loss of the medial joint space to the left knee. Petitioner returned in October with increasing pain of the left knee and received a steroid injection. On December 17, 2013, Petitioner received a Synvisc One injection to the left knee for severe osteoarthritis of the left knee. Petitioner received a steroid injection into the left knee again in May 2014, and in June of 2014, Petitioner received a series of Euflexxa injections in the left knee. (RX2, DepX2, 2)

Further, Dr. Karlsson testified that his records confirm that Petitioner was actively receiving ongoing treatment for his left knee up to the date of accident. He had received Euflexxa injections to the left knee on March 19, 2015, literally 4 days prior to the work accident on March 23, 2015. (PX1, 49)

Dr. Belich opined that Petitioner had "prior longstanding problems with his left knee with advanced arthritis and treatment with multiple steroid injections and multiple courses of viscosupplementation in the left knee. He had had an arthroscopy in 2008 with partial arthroscopic medial meniscectomy. The left knee was in an advanced state of osteoarthritis before the accident in question and the accident in question did nothing to alter the course of this patient's advancing osteoarthritis of his left knee. The need for a left total knee arthroplasty was because of progressive degenerative osteoarthritis of his left knee caused by being a longstanding condition and by the fact that he weighs 360 pounds with a body mass index of 48." (RX2, DepX2, 5)

Petitioner's treating doctor, Dr. Karlsson, was specifically asked if he had an opinion as to whether or not the worsening of the left knee symptoms is causally related to a compensatory mechanism as a result of the pain that Petitioner expressed to Dr. Karlsson about his right knee. Dr. Karlsson testified that "it is certainly a possibility, but I don't know that I could go as far as to say that it's [a] medical certainty or even that it's more likely than not that the right knee caused the worsening in the left knee." (PX1, 37-38) He explained his opinion was, "[b]ecause there was so much osteoarthritis" already in the left knee. (PX1, 38) When asked again, Dr. Karlsson reiterated his opinion, "I would say that I cannot causally relate that [left knee] to any certain degree." *Id.*

When asked if any information would help him make that connection, Dr. Karlsson denied that any additional information would allow him to form an opinion. He testified, "I don't think that's something that anyone could honestly say you know more likely than not given the fact that he was having ongoing treatment for that left knee." (PX1, 38-39)

I would therefore find that Dr. Karlsson's causation opinion, in his own words, did not satisfy the level of reasonable medical certainty necessary to establish causation. In fact, Dr. Karlsson credibly testified he could not provide a causation opinion because of the amount of osteoarthritis in Petitioner's left knee.

Dr. Thomas Gleason performed a §12 evaluation of Petitioner on June 30, 2015, at the request of Respondent, only three months after the date of accident. (RX2, DepX2) Dr. Gleason took a history from the Petitioner, performed a physical examination of Petitioner, reviewed Petitioner's treating medical records, and authored his opinion report on the same date. Dr. Gleason's diagnoses included "Post operative arthroscopy of the left knee in 2008 with residual

well healed incisions and degenerative joint disease." (RX2, DepX2, 6) Dr. Gleason opined that Petitioner had "severe degenerative joint disease of the knees bilaterally, symptomatic on the right, while at least for the time being after Euflexxa injections, asymptomatic on the left." (RX2, DepX2, 7)

During his evidence deposition, Dr. Gleason opined that the only condition relative to Petitioner's knees and ankles related to the alleged work accident of March 23, 2015, "would be his symptomatic arthritic condition of his right knee due to an aggravation of his preexisting condition resulting in right knee pain and arthroscopy of the right knee and residual well-healed incisions and pain based upon subjective complaints." (RX2, 25-26)

The majority relies upon Dr. Andrew Kim's opinion that following Petitioner's March 23, 2015, accident and surgeries to his right knee, Petitioner "began to have problems with his left knee due to over compensation. Essentially, Petitioner overused the left knee to accommodate the right knee injuries and treatment - which led to an accelerated breakdown of the left knee and Petitioner's ultimate need for a total left knee replacement." (ArbDec. 5)

There is no evidence that Dr. Kim was aware of the extent of treatment Petitioner received before the March 2015 motor vehicle accident. I maintain that Dr. Kim's opinion is flawed. "Expert opinions must be supported by facts and are only as valid as the facts underlying them." *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87. "An expert opinion is only as valid as the reasons for the opinion." *Kleiss v. Cassida*, 297 Ill. App. 3d 165, 174, 696 N.E.2d 1271, 1277. *Gross v. Ill. Workers' Comp. Comm'n*, 2011 IL App (4th) 100615WC, 24, 960 N.E.2d 587, 594.

The majority determined Petitioner's left knee condition is causally related to the work accident without a single acknowledgement or mention of Dr. Karlsson's testimony and opinion. Instead, my colleagues rely on the November 2018 narrative provided by Dr. Kim. However, Dr. Karlsson was by far most familiar with Petitioner's left knee condition, its history, and the trajectory of his condition. After all, he treated Petitioner for his left knee condition beginning in 2013. The credible evidence shows that Petitioner was already undergoing regular injections due to his chronic left knee pain and severe osteoarthritis. Most importantly, Dr. Karlsson, despite his undeniable familiarity with Petitioner's chronic left knee condition and treatment, testified that he could not say the left knee total knee replacement was related to the work accident. Further, he specifically opined that this was precisely due to the severity of Petitioner's preexisting condition.

Based upon the foregoing, I would reverse the Arbitrator's finding of causal connection between the Petitioner's left knee condition and the March 2015 motor vehicle accident.

Temporary Total Disability

Petitioner did not treat for the right knee after June 22, 2016. Therefore, based upon my conclusions in the causation section above, incorporated herein, I would terminate TTD on June 22, 2016.

Medical Expenses

Based upon my conclusion that Petitioner's left knee is not causally related, as discussed in the causation section above and incorporated herein, I would reverse the award of medical expenses related to Petitioner's treatment of his left knee.

Nature and Extent of Petitioner's Disability

The majority finds that Petitioner is permanently and totally disabled due to his injuries from his March 23, 2015 work accident. The majority finds support for this finding by the Petitioner's unrebutted testimony, a preponderance of the medical evidence and the opinions of Petitioner's vocational expert. The majority also concludes:

> "Petitioner's testimony regarding his current physical limitations following his March 23, 2015 accident is corroborated by his treating physicians, including Dr. Karlsson and Dr. Kim's release of Petitioner with permanent work restrictions following the treatment. Further, the majority notes the restrictions prohibited Petitioner from activities placing significant impact on the knees, including kneeling, squatting, climbing, lifting beyond 15 lbs, or even standing or walking more than 45 mins without 15 min of rest. (PX3, 3) Dr. Kuhlman thought Petitioner could not return to work in any capacity. (PX2, DepX2, 4) Based on these opinions, Petitioner's vocational expert, Lisa Helma opined that Petitioner was unable to perform work of any kind, and he was totally disabled from a vocational standpoint." (PX2 10)

The Vocamotive report and testimony of the vocational counselor Lisa Helma (PX2; DepX2) concluding Petitioner was permanently and totally disabled is based upon two unreliable factors: 1. The left knee causation finding; and 2) Dr. Kuhlman's alleged opinion on June 13, 2017. (PX2, 10-11) Based upon my conclusions regarding the left knee causation findings above and incorporated herein, I disagree with the majority. Further, it does not appear that Dr. Kuhlman's June 13, 2017, opinion regarding Petitioner's ability to return to work is in evidence, and thus renders the majority's opinion regarding a finding of permanent and total disability misplaced at best. The Bolingbrook Family Medicine/Dr. Kuhlman records submitted into evidence end with a date of service May 25, 2017, confirming that the June 13, 2017, report is not in evidence. (PX11, 3, 8) The only evidence of Dr. Kuhlman's opinion is the vocational counselor's interpretation of a record not in evidence and this is not sufficient evidence of the entirety of Dr. Kuhlman's opinions or context.

Further, Ms. Helma relies upon Dr. Kim's permanent restrictions, however, those are pertinent to the unrelated left knee. On May 21, 2018, Dr. Kim wrote a "To whom it may concern" letter confirming Petitioner's left total knee replacement revision surgery. It was his opinion that Petitioner could not return to his job as a driver. (PX12) Nowhere in that letter, however, does Dr. Kim opine that Petitioner could not return to work.

Of far more significance, is the fact that Petitioner's treating surgeon, Dr. Karlsson testified that Petitioner is capable of gainful employment. (PX1, 28) Dr. Karlsson testified further, [p]eople with a knee replacement can get back to work. *Id.* Dr. Karlsson testified that to determine Petitioner's level of capacity with respect to the right knee and his ability to work, there are formal

ways of doing it with a functional capacity evaluation, but he did not feel that was needed in this case. Rather, the way it's determined most of the time is just discussing with the patient what they are doing at work and knowing what his limitations would be. (PX1, 29)

Based upon the record as a whole, significantly including Dr. Karlsson, the treating surgeon's opinion that Petitioner was capable of working, I would find that Petitioner is capable of returning to gainful employment, and finding instead, that because of his restrictions, that Petitioner has sustained a loss of trade. Because Petitioner did not produce evidence of any meaningful job search, or his potential earnings in a stable labor market, I would award permanency based upon a loss of trade, 50% loss of use of the person as a whole pursuant to §8(d)2.

§19(l) and §19(k) Penalties and §16 Attorneys' Fees

Respondent relied on Dr. Gleason's opinion to terminate TTD benefits on August 27, 2015. Dr. Gleason conducted his IME on June 30, 2015, and determined that Petitioner required no further treatment relating to the March 2015 accident. (RX2, DepX1) Respondent then requested an addendum specifically addressing Petitioner's ability to return to his regular job and included a job description from Bill Keenan. Although brief, there is no evidence that Bill Keenan's job description was not accurate. Based upon the job description, Dr. Gleason determined that Petitioner could return to work. (RX2, DepX3) Although Dr. Gleason's addendum is dated June 30, 2015, it is clear that he used the date of his original opinion report when he wrote the addendum. He notes within the addendum that Respondent requested the addendum on August 11, 2015, and it is clear that the addendum was faxed on August 26, 2015, as evidenced by the top of both pages. *Id.*

Respondent immediately began paying TTD benefits following the March 2015 accident and continued to timely pay those benefits through August 27, 2015. Contrary to the majority's opinion that the August 27, 2015, TTD cutoff was random, and another example of unreasonable or vexatious behavior, the date actually correlates with the timeline when Respondent finally received Dr. Gleason's addendum opinion regarding Petitioner's ability to return to his particular job. Hence, Respondent actually did not terminate TTD on June 30, 2015, but instead terminated TTD on August 27, 2015, based upon Dr. Gleason's opinion that Petitioner could return to work as it related to the March 23, 2015, injuries. Thus, I would reverse the award of penalties and attorneys' fees for the non-payment of TTD.

Likewise, I would reverse the award of penalties and attorneys' fees for the non-payment of medical expenses. Respondent paid some medical bills and further relied on all of the factors discussed in the causation section above, incorporated herein, including Dr. Karlsson's, Dr. Gleason's and Dr. Belich's opinions that Petitioner's left knee condition is not related to the work accident on March 23, 2015. Therefore, Respondent should not be assessed penalties for non-payment of bills regarding the left knee.

Further, there is evidence that Acuity began paying bills for treatment as early as April 21, 2015. The payment log shows Acuity regularly paid bills until around August 4, 2015. Then bills were paid in November 2015 and December 2015. The next bill wasn't paid until May 18, 2016.

Subsequently two medical bills were paid on June 1, 2016. Finally, four medical bills were paid in May 2017. There were no payments made after that. Absent evidence to the contrary, it appears that Acuity paid bills (for treatment incurred no later than June 30, 2015) as they received them. However, Petitioner has the burden of proving that he made a demand for payment prior to the time of the arbitration hearing. In other words, he has to do more than just submit unpaid bills at the arbitration hearing to obtain penalties. Even if the bills are unpaid, that is no evidence that Respondent previously received the bills and refused payment. See *Theis v. Ill. Workers' Comp. Comm'n*, 2017 IL App (1st) 161237WC para. 21-23. *Theis* makes it clear that Respondent does not have the burden of actively requesting receipt of treating medical bills even if aware of ongoing treatment.

Therefore, considering the record as a whole, and for the reasons explained above, I dissent from the majority opinion. I would reverse the Arbitrator's finding of a causal connection between Petitioner's left knee condition and the March 2015 work accident and find that Petitioner's left knee condition was not causally related; terminate TTD after June 22, 2016; vacate the award of medical expenses for Petitioner's left knee condition; vacate the award of permanent total disability and award 50% loss of use of a person under §8(d)2; and vacate the award of penalties and attorneys' fees.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC020206
Case Name	BERNDT, ROBERT v. PHOENIX LOGISTICS INC
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Gerald Granada, Arbitrator

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Jennifer Kiesewetter

DATE FILED: 12/2/2021

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

/s/Gerald Granada, Arbitrator

Signature

23IWCC0450

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

ROBERT BERNDT
Employee/Petitioner

v.

PHOENIX LOGISTICS INC
Employer/Respondent

Case # **16** WC **20206**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Wheaton**, on **9/28/21**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 **1(a)(4) liability**

FINDINGS

On **3/23/15**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondents in which Respondents Keenan Transit and Phoenix were the loaning employers and Respondent Amerisafe was the borrowing employer.

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

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

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

In the year preceding the injury, Petitioner earned $**41,533.76**; the average weekly wage was $**798.73**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $**9,332.52** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**9,332.52**.

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

ORDER

Respondents Keenan Transit and Phoenix Logistics are responsible for Petitioner's claims pursuant to Section 1(a)(4) of the Act.

Respondents shall pay reasonable and necessary medical services as outlined in the attached findings, as provided in Section 8(a) of the Act subject to the Fee Schedule.

Respondents shall pay Petitioner temporary total disability benefits of $532.49/week for 139 weeks, commencing 3/23/15 through 11/20/17, as provided in Section 8(b) of the Act.

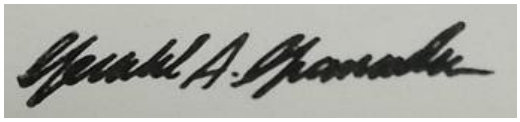
Respondents shall pay Petitioner permanent and total disability benefits of $532.49/week for life, commencing 11/21/17, as provided in Section 8(f) of the Act.

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.

Respondents shall pay to Petitioner penalties of $10,000.00 as provided in Section 19(l) of the Act, $151,739.85 as provided in Section 19(k) of the Act and $60,695.94 in attorney fees as provided in Section 16 of the Act.

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

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



Signature of **Arbitrator Gerald Granada**

DECEMBER 2, 2021

FINDINGS OF FACT

This case involves Petitioner Robert Berndt – a truck driver, who alleges to have been injured while working for Respondents Keenan Transit, Phoenix Logistics (Phoenix), and Amerisafe Consulting (Amerisafe) on October 15, 2014 (16 WC 6712 and 16 WC 20211) and on March 23, 2015 (15 WC 14407, 16 WC 20206, and 17 WC 35300). Petitioner has filed separate Applications for Adjustment of Claim for all of these accidents, and all the claims have been consolidated. Given the sequence of events, the issues in dispute, and for judicial economy, the findings in this case will also apply to the subsequent case filings. Although all these claims were heard together, this decision is focused on Petitioner's March 23, 2015 claim, in which all issues are in dispute, including the issue of liability in a borrowing/loaning situation under Section 1(a)(4) of the Act. The main point of contention at trial was the question of Petitioner's employment and which Respondent(s) is/are ultimately responsible for Petitioner's claim.

October 15, 2014 incident

On October 15, 2014, Petitioner was training a new driver in a truck owned by Respondent Amerisafe. They drove to a construction site in Chicago, Petitioner exited the cab, walked across an unpaved parking lot and stepped into a pothole, injuring his right leg. He had never experienced any problems with the right leg before this accident. Petitioner's job required him to exit the cab at the stops, open the cargo doors to unload the product, unload the produce and close the door and the lift gate. The job included loading and unloading pallets with a pallet jack, pushing and pulling loads weighing up to 2,000 to 3,000 lbs. (RX1 p.8)

Petitioner reported this incident to the Amerisafe Warehouse manager at that time, Evan Wollak. Mr. Wollak testified that after he was contacted by Petitioner regarding the October 15, 2014 incident, Wollak called Bill Keenan of Keenan Transit to advise him of the incident. Wollak later completed an accident report, which he sent to Keenan Transit.

On October 20, 2014, Petitioner went to Edwards Immediate Care, where x-rays revealed moderate degenerative changes of the right knee in the medial compartment and narrowing in the left knee that was much worse than the right knee. A November 7, 2014 MRI revealed medial meniscal tearing of the right knee along the junction of the posterior horn and posterior root ligament, mild peripheral extrusion of medial meniscal tissue, and osteoarthritis of the medial femorotibial compartment. (PX4 p.8) Dr. Karlsson performed a right knee arthroscopy at Edwards Hospital on November 19, 2014. (PX4 p.14) The meniscal tissue was intact, but he did find grade 3 changes over the patellar and femoral side with slight flaps on the femoral trochlea, which he shaved back to create a stable base of cartilage for the joint. (PX4 p.14) He also reported grade 3 chondromalacia over majority of medial joint line in the right knee. He debrided cartilage flaps to create a stable base of cartilage for the joint. (PX p.14) Dr. Karlsson noted that the joint had cartilage in it at the time of this surgery. (PX1 p.11) Post surgery, Petitioner reported that he still experienced some pain over the medial side, some pain in the hamstring, and that he was having difficulty getting back to the type of activities he would need to do at work where he pulls a pallet jack. Dr. Karlsson recommended that Petitioner remain off work and do some therapy, which took place at Edwards on January 20, 2015. (PX4 p.112) Petitioner experienced significant relief between the surgery and therapy and returned to full work duties on February 16, 2015. Petitioner noticed some continuing symptoms when getting in and out of the truck as they had not simulated that activity in therapy. He experienced minor pain when getting in and out of the truck and while pulling heavy cargo, but he was able to get through all his work duties and missed no time from work following this accident.

March 23, 2015 incident

On March 23, 2015, Petitioner was involved in a vehicle collision while driving an Amerisafe truck for work. A truck traveling alongside his vehicle lost control in the snow, hitting the side of Petitioner's truck and causing Petitioner's truck to travel sideways down the road. Petitioner jammed down on the brake repeatedly with both legs in a technique to get his vehicle back under control. When his truck came to a rest, Petitioner saw that the other driver was trapped in his own truck, so Petitioner pulled his door open and pulled the other driver out of the truck. When the adrenaline wore off, he noticed pain in the back, his left side and both knees, down both legs. Petitioner described feeling immobilized.

Following this incident, Petitioner called the Amerisafe Warehouse Manager Evan Wollak from his truck. Wollak testified at trial that he called Bill Keenan of Keenan Transit that same morning to advise him of Petitioner's incident.

The police arrived and Petitioner was taken by ambulance to Good Samaritan Hospital. (PX5) X-rays revealed mild joint space narrowing medially and mild degenerative change of patellofemoral joint space. The radiologist read the film as showing mild degenerative changes.

On March 24, 2015, Petitioner saw his primary care physician, Dr. Kuhlman presenting with back pain, shoulder pain, knee pain and anxiety. (PX11 p.85) Petitioner's back pain level was 6/10, persistent, improving and non-radiating. The left shoulder pain was 8/10, constant, aching and non-radiating. The right knee pain was 10/10, aching, non-radiating and worse with weight-bearing. The knee was swelling, he was limping, and it felt like it would give way that morning. Kuhlman also noted that Petitioner had felt anxious, had moderate frontal headaches, dizziness, shakiness and had not slept. Dr. Kuhlman suspected a labral tear in the left shoulder and sent Petitioner for an MRI arthrogram. (PX11 p.90) He also diagnosed Petitioner with internal derangement of the right knee, suspecting exacerbation of the medial meniscus, sending him out for a MRI on the knee. (PX11 p.90) He also diagnosed contusion of the left chest wall, acute stress reaction and acute post-traumatic headaches. (PX11 p.91) He fully restricted Petitioner from work. (PX11 p.120) Following that visit, Petitioner underwent a number of injections to his left knee. The right knee MRI taken on April 2, 2015 revealed a new medial meniscal tear, Grade 1 strain of the medial collateral ligament, more advanced arthritic changes in the medial compartment and moderate sized joint effusion. A subsequent MRI taken on April 10, 2015 revealed a complex tear with a large radial component of the posterior horn and root tearing of the medial meniscus, a 1x1 cm osteochondral lesion of the articular surface of med femoral condyle without any displaced fragment and mild joint effusion and synovitis. (PX11 p.93) Petitioner also had a left shoulder MRI arthrogram that revealed a SLAP tear with partial thickness tear of the anterior-inferior labral ligament complex, as well as tendinosis of the cuff ligaments. (PX11 p.96) Dr. Karlsson also noted Petitioner's complaints of radiating low back pain, for which he recommended a lumbar MRI and referral to Dr. Mather.

On May 6, 2015, Dr. Karlsson again operated on Petitioner's right knee. (PX4 p.184-185) Dr. Karlsson found a medial meniscal tear at the junction of the body and the posterior horn, with a flap which was displaceable into the joint. The tear was not there at the 2014 surgery. (PX1 p.10-11) Karlsson addressed this finding with a partial medial meniscectomy. (PX4 p.184) Dr. Karlsson noted that the complex tear and osteochondral lesion on the articular surface of the femoral condyle were new findings after the March 23, 2015 accident. (PX1 p.11-12) He thought those new findings were logically related to that accident. (PX1 p.11-12) There were no bone-on-bone areas found at the surgery following the October 15, 2014 accident. (PX1 p.11)

On May 15, 2015, Petitioner saw Dr. Mather for his back complaints. Dr. Mather noted that Petitioner's prior low back fusion was doing well before this March 23, 2015 collision. (PX3 p.108-109) Petitioner was using

Norco from Karlsson. Mather thought the low back pain was likely due to early spondylosis at the L4-5 facet joint and recommended that Petitioner get facet blocks for the pain. On May 27, 2015, Petitioner began his pain treatment with Dr. Fetzer, which included a number of injections, and ablations to relieve the back pain.

On June 13, 2017, Petitioner returned to Dr. Kuhlman, who opined that Petitioner was unable to perform work of any kind. (PX2 Ex.2 p.4)

On June 30, 2015, Respondent sent Petitioner to Thomas Gleason for an IME. Dr. Gleason testified via evidence deposition on January 26, 2016. (RX2) Dr. Gleason concluded that the only condition related to the accident was a symptomatic arthritic condition of the right knee due to aggravation of pre-existing condition resulting in right knee pain. New x-rays revealed severe bilateral degenerative joint disease medially with joint space obliteration, sclerosis, marginal spurring, mild lateral subluxation, moderate changes of the patellofemoral joint with marginal spurring and more mild changes of the lateral compartments bilaterally.

Respondent Keenan/Phoenix also retained Dr. Paul Belich as an IME, who testified via evidence deposition on December 13, 2019. (RX1) Dr. Belich disagreed with Dr. Gleason's opinion that the March 23, 2015 accident aggravated the pre-existing arthritic condition in the right knee. (RX1 p.29) Dr. Belich also did not agree with Dr. Gleason that Petitioner had finished treatment by the time of Gleason's evaluation or that Petitioner could return to the driving job at that point. (RX1 p.29-30) On cross-examination, Belich admitted he did not have enough information about the 2014 surgery to draw a valid causation analysis about that accident. (RX1 p.57) He also conceded he did not have much information about what damage was caused by the March 23, 2015 accident. (RX1 p.64) He did discuss the mechanics as to how a knee breaks down rapidly following a root detachment and meniscectomies. Dr. Belich summarized his understanding of the sequence for the right knee breakdown, noting that Petitioner's step into the hole in 2014 started the pain, leading to the steroid injection and then the surgery which accelerated the degeneration in the right knee. (RX1 p.88) The 2014 accident started the problem and everything after that just accelerated the breakdown in the knee. (RX1 p.88) He thought the March 23, 2015 accident had a minimal contributive impact to the knee. (RX1 p.88) The same was true for the left knee, with Belich contending that the March 23, 2015 accident had a minimal role in the breakdown of the left knee. (RX1 p.90)

Petitioner continued to have complaints of pain in both knees and his shoulder. On July 30, 2015, he underwent a second gel injection to the right knee. Petitioner informed Dr. Karlsson that his left knee was "starting to bother him". (PX3 p.67) Dr. Karlsson recommended a total knee arthroplasty and restricted Petitioner's work to sitting work only, with no pushing or pulling of heavy objects, and no unloading of trucks. He underwent Cortisone injections to both knees on September 15, 2015. On October 14, 2015, Petitioner underwent a total knee arthroplasty for the right knee. (PX4 p.273-635) The records show that Petitioner continued to have complaints related to his right knee following the total knee surgery, which lead to Petitioner undergoing a right knee synovectomy on April 28, 2016. Petitioner's complaints to his left knee ultimately lead to him undergoing a left knee total knee arthroplasty on June 22, 2016. (PX4, p.801-802) Petitioner had increasing problems with the left knee, including bursitis, swelling and pain that required him to undergo a revision surgery to the left knee on February 10, 2017. Petitioner underwent a second stage of his left total knee arthroplasty with Dr. Kim on May 15, 2017. (PX4, p.2712-2713) Petitioner's medical records document Petitioner's continued complaints in his right knee due to overcompensation from the left knee.

On September 7, 2017, Dr. Karlsson imposed permanent work restrictions on Petitioner of no high impacts to the knees, no kneeling, no squatting, no climbing, and no lifting beyond 15 lbs. (PX2 Ex.2 p.4) Dr. Karlsson testified via evidence deposition on January 19, 2017. He opined that Petitioner's right knee condition was

causally related to his March 23, 2015 motor vehicle accident.

On November 20, 1017, Dr. Kim also placed permanent work restrictions on Petitioner, agreeing with Karlsson's restrictions and adding limitations against standing or walking more than 45 mins without 15 min of rest. (PX3 p.3) In his reports, Dr. Kim opined that Petitioner's March 23, 2015 accident reinjured his right knee condition and caused the need for his right total knee replacement surgery. (PX12)

Petitioner explained that he was destined to take Penicillin for the rest of his life for the left knee. He was on Norco for an extended period but was now on Meloxicam. The March 23, 2015 incident had profoundly changed every aspect of his life. Before going anywhere, he had to plan out whether he had a place to sit, how long the ride would be and whether walking would be involved. He could not go with his wife to Menards or walk around ponds in the area due to the knees. Standing for more than 10 minutes brought on pain as did 15 to 20 minutes of sitting. Everything started to lock up on him. Petitioner found that he could only walk half a city block. Dr. Karlsson had not placed a walking or standing restriction on him, but Dr. Kim did restrict him from doing those activities more than 15 minutes.

Lisa Helma, a certified vocational rehabilitation specialist, evaluated Petitioner and testified via evidence deposition on November 2, 2018. (PX2) Ms. Helma provides vocational services to people with disabilities. (PX2 p.5) She collected information about Petitioner's medical, his doctor's opinions, his work and education history to determine overall employability. (PX2 p.8) Helma concluded that Petitioner had lost access to his usual and customary occupation as a delivery driver. (PX2 p.10) She also thought Petitioner was unable to perform work of any kind, so he was totally disabled from a vocational standpoint. (PX2 p.10) She based this conclusion on the treating doctor's belief that Petitioner was unable to work as well as the significant restrictions placed on Petitioner by his surgeons. (PX2 p.11-14) Taking his background information into account along with the work capacity opinions, she felt Petitioner did not have access to a reasonably stable labor market. (PX2 p.16)

Evan Wollak was called to testify at trial by counsel for Respondent Amerisafe. Mr. Wollak had worked for Amerisafe for 20 years prior to his retirement in 2019. In 2013, Mr. Wollak was the warehouse manager for Amerisafe. He described Amerisafe as being in the business of selling insulation products and using trucks to transport those products. In 2013, Mr. Wollak contacted Bill Keenan of Keenan Transit to obtain drivers for Amerisafe's operation. Amerisafe initially sent its own drivers over to Keenan Transit so that Keenan Transit could lease these drivers back to Amerisafe. Wollak only spoke with Bill Keenan and believed he was getting drivers from Keenan Transit. He identified a set of emails surrounding the arrangement. (RX8) Bill Keenan's emails came from a Keenan Transit email address. Keenan Transit was located in the same offices as Phoenix Logistics. Wollak called Keenan Transit for drivers rather than Phoenix. At some point, Bill Keenan told Wollak that he set up Phoenix to loan out nonunion drivers. Amerisafe Ex1 was a document between Amerisafe and Phoenix. Wollak went back and forth with Bill Keenan over the content of this document. (Amerisafe Ex1) Bill Keenan was going to sign the document, obligating Amerisafe to pay an hourly fee for drivers. Wollak testified that Bill Keenan was supposed to take care of fringe benefits and workers comp liability - which was precisely the intention of the document. (Amerisafe Ex1) Wollak obtained Berndt by calling Bill Keenan. Berndt used Amerisafe's equipment, delivered Amerisafe's products and kept a timecard at their facility. When payroll time arrived, Wollak faxed the timecard to Keenan Transit's payroll person at the Keenan Transit office and Phoenix would send the driver a check. The only people Wollak dealt with were Bill Keenan and his payroll person Dawn, also at Keenan Transit. When Petitioner suffered both his injuries, Wollak reported both injuries to Bill Keenan. The phone calls were made to Bill at the Keenan Transit office as Wollak was never given a phone number for Phoenix. Wollak also sent Keenan Petitioner's detailed written account of the accident. (PX15) TTD was paid for a short period after the second accident, and the checks

identified Keenan Transit as the employer.

CONCLUSIONS OF LAW

1. Regarding the issue of employment, the Arbitrator finds that there existed an employment relationship between the Petitioner and the Respondents in which the Respondents Keenan Transit and Phoenix were the loaning employers and Amerisafe was the borrowing employer for both Petitioner's October 15, 2014 accident and his March 23, 2015 accident. Petitioner thought he was working for Phoenix as he got checks from Phoenix. However, he was interviewed and hired for the job by Tom Keenan, who had a Keenan Transit email address and worked out of the Keenan Transit offices. The Phoenix checks also came out of the Keenan Transit offices. Petitioner admitted he was not sure whether Phoenix was a distinct company from Keenan Transit. The same defense counsel represented both Keenan Transit and Phoenix at trial, but only lodged the employer/employee dispute on behalf of Keenan Transit. Counsel ultimately claimed, near the end of trial, that both Keenan Transit and Phoenix were covered by the same workers compensation insurance carrier. Keenan Transit and Phoenix did not present any documentary evidence suggesting they were independent entities. The Arbitrator further relies the testimony of Mr. Wollak, whose unrebutted testimony was persuasive on this issue.

2. With regard to the issue of accident, the Arbitrator finds that the Petitioner met his burden of proving that he sustained an accident arising out of and in the course of his employment on both October 15, 2014 and on March 23, 2015. The facts clearly show that Petitioner sustained injuries while working on both days and there was no evidence offered to rebut Petitioner on this issue.

3. Regarding the issue of notice, the Arbitrator finds that the Petitioner met his burden of proving that he provided timely notice of both his October 15, 2014 accident and his March 23, 2015 accident to the Respondents by reporting the same to Mr. Wollak of Amerisafe. Mr. Wollak testified that he then reported the incidents to Keenan Transit on the same day. There was no evidence offered to rebut Petitioner or Mr. Wollak's testimony on this issue.

4. With regard to the issue of causation, the Arbitrator finds that the Petitioner has met his burden of proving that his current condition of ill-being is causally related to his work accidents. In support of this finding, the Arbitrator relies on Petitioner's unrebutted testimony and the preponderance of the medical evidence. Petitioner's October 15, 2014 accident, in which he stepped in a pothole, injured his right knee, and subsequently underwent arthroscopic surgery is clearly documented in the medical evidence and does not appear to be disputed. The Arbitrator finds persuasive the opinions of Petitioner's treating physicians that the Petitioner's March 23, 2015 accident aggravated his right knee condition to the extent that he needed knee replacement surgeries. Although Respondent had two IME opinions to address this issue, their opinions appear to support the fact that the Petitioner had at the very minimum an aggravation of a pre-existing right knee condition.

The Arbitrator further finds that the Petitioner's left knee condition is causally related to his March, 23, 2015 accident. This is supported by both the Petitioner's testimony and a preponderance of the medical evidence, particularly from Dr. Kim, that show that following Petitioner's March 23, 2015 accident and surgeries to his right knee, Petitioner began to have problems with his left knee due to over compensation. Essentially, Petitioner overused the left knee to accommodate the right knee injuries and treatment - which led to an accelerated breakdown of the left knee and Petitioner's ultimate need for a total left knee replacement.

The Arbitrator also finds that the Petitioner suffered additional injuries following his March 23, 2015 accident, including the left shoulder injury, an aggravation of his pre-existing low back condition, headaches and aggravation of the anxiety. These symptoms are clearly documented in Petitioner's medical evidence, which

corroborated Petitioner's testimony in that regard.

5. Regarding the issues of age, marital status and average weekly wage, the Arbitrator finds that the Petitioner was 47 years old, married and had an average weekly wage of $798.73 at the time of his accidents. There was no evidence offered to rebut the Petitioner on these issues.

6. Consistent with the findings above, the Arbitrator further finds that the Petitioner's medical treatment following both his October 15, 2014 accident and his March 23, 2015 accident have been reasonable and necessary in addressing his multiple conditions stemming from his work accidents. Respondent did pay some treatment related to the March 23, 2015 accident. (PX4) Petitioner's wife's insurance paid for the majority of Petitioner's treatment, including the multiple knee surgeries and all the related treatment and rehabilitation. Given the findings on accident and causation, Respondent shall pay Petitioner for all treatment related to the bilateral knees, left shoulder, lower back, headaches and anxiety after the March 23, 2015 accident, including treatment required to address the infection to the left knee. This includes the Humana payments totaling $131,766.74. (PX14)

7. The Arbitrator finds that the Petitioner was temporarily totally disabled following his March 23, 2015 accident from the date of accident through the date he was placed at MMI with permanent work restrictions by Dr. Kim on November 20, 2017. During this time period, the medical evidence clearly documents Petitioner being take off work completely by his treating physicians. Therefore Respondent shall pay Petitioner temporary total disability benefits of $532.49/week for 139 weeks, commencing March 23, 2015 through November 20, 2017, as provided in Section 8(b) of the Act. Respondents shall receive a credit for any TTD it has paid toward the period in question.

8. Regarding the issue of permanency, the Arbitrator finds that the Petitioner is permanently and totally disabled due to his injuries from his March 23, 2015 work accident. This finding is supported by the Petitioner's unrebutted testimony, a preponderance of the medical evidence and the opinions of Petitioner's vocational expert. Petitioner's testimony regarding his current physical limitations following his March 23, 2015 accident is corroborated by his treating physicians. Both Dr. Karlsson and Dr. Kim released Petitioner with permanent work restrictions following the treatment. In aggregate, those restrictions prohibited Petitioner from activities placing significant impact on the knees, including kneeling, squatting, climbing, lifting beyond 15 lbs, or even standing or walking more than 45 mins without 15 min of rest. (PX3 p.3) Dr. Kuhlman thought Petitioner could not return to work in any capacity. (PX2 Ex.2 p.4) Based on these opinions, Petitioner's vocational expert, Lisa Helma opined that Petitioner was unable to perform work of any kind, and he was totally disabled from a vocational standpoint. (PX2 p.10) Therefore, Respondent shall pay Petitioner permanent and total disability benefits of $532.49/week for life, commencing November 21, 2017, as provided in Section 8(f) of the Act. Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

9. Regarding the issue of liability under Section 1(a)(4) of the Act, the Arbitrator finds that the Respondents Keenan Transit and Phoenix are responsible for Petitioner's claims. The relevant provision of the Act states:

> Where an employer operating under and subject to the provisions of this Act loans an employee to another such employer and such loaned employee sustains a compensable accidental injury in the employment of such borrowing employer and where such borrowing employer does not provide or pay the benefits or payments due such injured employee, such loaning employer is liable to provide or pay all benefits or payments due such employee under this Act and as to such employee the liability of such loaning and borrowing employers is joint and several, provided that such loaning employer is in the absence of agreement to the contrary entitled to receive from such borrowing employer full reimbursement for all sums paid or incurred pursuant to this paragraph together with reasonable attorneys' fees and expenses in any hearings before the Illinois Workers' Compensation Commission or in any action to secure such reimbursement. 820 ILCS 305/1(a)(4)

The borrowing employer, Amerisafe, admits it never paid compensation for TTD or treatment for either of Petitioner's injuries. Under 1(a)(4) then, the loaning employer (Keenan Transit/Phoenix) became liable for all benefits or payments under the Act. Keenan Transit/Phoenix also did not pay TTD or benefits after the Gleason IME, nor did it pay for the years of treatment that followed. Keenan Transit/Phoenix is liable for the unpaid benefits and treatment awarded for both of Petitioner's accident dates as the borrowing employer did not pay.

Keenan Transit/Phoenix contends however, that liability should transfer to Amerisafe per 1(a)(4)'s clause that borrowing employers must fully reimburse "all sums paid or incurred" by the loaning employer. The caveat is that borrowing/lending employers can alter the borrowing employer's reimbursement obligation through "an agreement to the contrary". 820 ILCS 305/1(a)(4). This language permits the parties to reverse the payment priority as to who is responsible for accidents. See *Ill. Guar. Fund v. Va. Sur. Co.,* 2012 IL App (1st) 113758 *P5. Therefore, the 1(a)(4) dispute pivots on whether the Respondents entered into an agreement to reverse the payment priority.

Amerisafe offered into evidence a document which memorialized the respective obligations for the borrowing/lending arrangement. (Amerisafe EX1) Mr. Wollak, Amerisafe's warehouse manager explained that Amerisafe entered into the borrowing/lending arrangement with Keenan Transit/Phoenix specifically for the purpose of not having to pay workers compensation claims. Amerisafe sent the drivers it employed at the time to Keenan Transit/Phoenix so Keenan Transit/Phoenix could lend them back to Amerisafe, for the express purpose of Keenan Transit/Phoenix to provide workers compensation coverage. Keenan Transit/Phoenix apparently drafted the document, including a paragraph stating "Phoenix Logistics is not responsible for any damage caused by an accident or incident." (Amerisafe Ex.1). Amerisafe added a handwritten qualification to that paragraph, narrowing the paragraph's operation "to the extent of [Phoenix's] negligence unless covered by the vehicle policy". This handwritten qualification was added before both parties signed the document. Amerisafe's warehouse manager testified that the language "Phoenix is not responsible" only applied to property damage occurring to Amerisafe's vehicles and had nothing to do with workers compensation liability, since the main purpose of the agreement between the parties was that Amerisafe would not be responsible for workers compensation liability. Keenan Transit/Phoenix provided no testimony or evidence to rebut that claim. Thus, without rebuttal evidence, Amerisafe has proven that it had an agreement with Keenan Transit/Phoenix for the lending employer to bear the workers compensation liability for Petitioner's claims.

10. The Arbitrator finds that penalties and attorneys fees are warranted in this case. Penalties are warranted when the injured worker is denied benefits and treatment due to a fight between employers in a borrowing/lending setting or a fight between carriers. The appellate court has addressed both scenarios. *Bunnow v. IC*, 327 Ill.App.3d 1039, 1049 (2002) involved two separate employers disputing liability, each contending that claimant was an employee of the other, but neither contesting that claimant suffered injuries from the accident. The Commission awarded 19(k) penalties and Section 16 fees for their failure to pay TTD, and the appellate court extended the penalty and fee award to also cover the unpaid medical expenses. *Id.* at 1049. Two employers pointing the finger at each other to the detriment of the worker justified penalties and fees when there was no significant dispute over the injury occurring or the worker's need for treatment. The dispute between employers qualifies as unreasonable and vexatious misconduct. The same result came where two carriers were fighting over who would pick up liability for a case. *Central Rug & Carpet v. IC*, 361 Ill.App.3d 684, 693 (2005). Central Rug had different insurance carriers for the two accident dates and they were both denying liability and pointing at the other carrier. Even though they also promoted disputes in the evidence on causation, the delay was considered vexatious and unreasonable.

Petitioner was caught in the dispute between his employers as well as a dispute between the carriers. Our threshold concern is whether these actors acted unreasonably or vexatiously in declining to pay benefits under the Act. *Bunnow v. IC*, 327 Ill.App.3d 1039, 1049 (2002) On causation, there was never a real dispute about the right knee being injured in the March 23, 2015 accident. Two weeks after the MVA, the MRI identified the new cartilage tears, detachment of the meniscal root, new bone-on-bone findings in the knee and a new divot depression in the weight-bearing surface of the femoral condyle. Dr. Karlsson said these findings were not present during the surgery he performed four months before the March 23, 2015 accident and he explained why each of these things was causally related to the March 23, 2015 accident. Keenan Transit/Phoenix hired Dr. Gleason to evaluate the Petitioner, and Dr. Gleason related the March 23, 2015 accident to the arthroscope and documented the continuing symptoms Petitioner was having with his right leg. Gleason did declare MMI and released Petitioner to work with restrictions, but Keenan Transit/Phoenix did not provide work at that point. Keenan Transit/Phoenix also obtained the release from Dr. Gleason by providing him with a job description which failed to inform him of the weight demands Petitioner would have to handle in the job. And Dr. Gleason's work release and MMI claim were not persuasive following the Petitioner undergoing a total knee replacement within months of Gleason's evaluation. This was not simply a dispute between an IME doctor and all the treaters who had Petitioner off work at the time. Rather, Respondent's second IME, Dr. Belich, disagreed with Gleason that Petitioner would have been in shape to return to his job when Gleason saw him. (RX1 p.29-30) Yet Keenan Transport/Phoenix simply cut off benefits to Petitioner as of August 27, 2015, a date which corresponds with nothing. At that point, the treating surgeon had Petitioner restricted to "sitting work only with no pushing or pulling of heavy objects and no unloading of trucks" (PX3 p.67) and Petitioner would go for the total knee arthroplasty in October. (PX4 p.273-635) Keenan Transit/Phoenix offered no explanation as to why they cut off TTD or refused to pay for treatment with the exception of a pharmaceutical charge from July 15, 2015. (RX4)

Rather than taking care of their injured worker, Keenan Transit raised an employer/employee defense which lacked merit and failed to prove at hearing that Phoenix was a real (and legitimate) separate legal entity from Keenan Transit. More fundamentally, this shell corporation dispute was completely immaterial as counsel for Keenan Transit/Phoenix ultimately admitted that both were covered by the same insurance policy. That admission came six years after the accident at the end of trial after Amerisafe's witness was interrogated over the issue as well as Petitioner. That was a vexatious and unreasonable dispute over which employer was responsible for the case. Keenan Transit/Phoenix then jointly raised a meritless 1(a)(4) issue, again without presenting evidence to support their dispute. That was a vexatious and unreasonable dispute over which carrier

was responsible for the case.

820 ILCS 305/19(l) penalties are awarded when the employer cannot show that its delay in payment was objectively reasonable. See *R.D. Masonry v IC*, 215 Ill.2d 397, 409 (2005). Keenan Transit/Phoenix offered no objectively reasonable explanation as to its stopping of TTD and treatment. Thus 19(l) penalties are awarded against Keenan Transit and Phoenix Logistics in the maximum amount of $ 10,000.

820 ILCS 305/19(k) penalties demand a higher standard of misconduct, an "unreasonable or vexatious" delay or an "intentional underpayment of compensation." *Id*. 19(k) penalties are "intended to address the situation where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose." *McMahan v. IC*, 183 Ill.2d 499, 515 (1998). This penalty covers both unpaid compensation and medical bills, per *Bunnow*. The awarded amounts for the March 23, 2015 accident include: $107,029.82 for PTD to date, $131,766.74 for medical reimbursement; and $64,683.13 for TTD. A 50% penalty on those numbers totals $151,739.85. That is the 19(k) penalty against Keenan Transit and Phoenix Logistics.

The same standards of misconduct govern the award of attorney fees under 820 ILCS 305/16. Based on the reasoning outlined in this section, Section 16 penalties are awarded against Keenan Transit and Phoenix Logistics in the amount of $60,695.94.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC020211
Case Name	Robert Berndt v. Phoenix Logistics Inc
Consolidated Cases	15WC014407; 16WC006712; 16WC020206;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0451
Number of Pages of Decision	16
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Jennifer Kiesewetter

DATE FILED: 10/16/2023

/s/Amylee Simonovich, Commissioner

Signature

23IWCC0451

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Berndt,

Petitioner,

vs. NO: 16 WC 20211

Phoenix Logistics Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent and 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 four additional cases for hearing. The cases involve two separate dates of accident and three separate employers. In the current case, Petitioner alleged he sustained a work-related injury on October 15, 2014, and named Phoenix Logistics (Phoenix) as his employer. In case 16 WC 6712, Petitioner alleged he sustained a work-related injury on October 15, 2014, and named Keenan Transit (Keenan) as his employer. In case 16 WC 20206, Petitioner alleged he sustained a work-related injury on March 23, 2015, and named Phoenix as his employer. In case 15 WC 14407, Petitioner alleged he sustained a work-related injury on March 23, 2015, and named Keenan as his employer. Finally, in case 17 WC 35300, Petitioner alleged he sustained a work-related injury on March 23, 2015, and named Amerisafe Consulting & Safety (Amerisafe) as the employer.[1] While the parties addressed all five cases during the arbitration hearing, the Arbitrator issued separate Arbitration Decisions in 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 conclusions regarding the issues of employer/employee relationship, Section 1(a)4 liability, accident, notice, causal connection, wages, and medical expenses. However, the Commission modifies the award

1 No review was filed in case 17 WC 35300.

of temporary total disability benefits (TTD), and vacates the award of permanent partial disability. The Commission also addresses Petitioner's request for penalties and fees in this matter, and vacates the credit the Arbitrator awarded to Respondent. Finally, the Commission modifies the Arbitrator's finding regarding the issue of maximum medical improvement (MMI).

Additional Modifications to the Decision

The Commission makes the following modifications to the Decision of the Arbitrator. On page three (3) of the Arbitration Decision, the Arbitrator wrote: "Given the findings on accident and causation, Respondent shall pay Petitioner for all treatment related to the right knee…" The Commission modifies this sentence to read as follows:

> Respondent shall pay Petitioner for all treatment related to the right knee, stemming from the October 15, 2014, accident, as submitted into evidence as PX 14, as provided in Sections 8(a) and 8.2 of the Act.

Additionally, in various parts of the Arbitration Decision, the Arbitrator awarded Respondent a credit for TTD benefits it paid regarding the October 15, 2014, accident. However, the parties stipulated that Respondent has paid no benefits relating to this work accident. Thus, the Commission strikes the following sentence from the Findings section of the Arbitration Decision Form:

> Respondent shall be given a credit of $9,332.52 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $9,332.52.

The Commission also strikes the following sentence from page three (3) of the Decision:

> Respondents shall receive a credit for any TTD it has paid toward the period in question.

Maximum Medical Improvement

Illinois courts consider several factors when determining whether a claimant has reached MMI, including: 1) a release to return to work; 2) medical testimony regarding the claimant's injury; 3) the extent of the injury; and 4) whether the injury has stabilized. *Mech. Devices v. Indus. Comm'n (Johnson)*, 344 Ill. App. 3d 752, 760 (2003). Courts have determined that the most important factor in the analysis is whether the claimant's condition has stabilized. *See id*. at 760. The Arbitrator determined that Petitioner's treating doctor, Dr. Karlsson, placed Petitioner at MMI on February 16, 2015. However, the Commission views the evidence differently.

After considering the evidence, the Commission finds Petitioner did not reach MMI before his subsequent work accident occurred on March 23, 2015. While Petitioner credibly testified that he returned to work on February 16, 2015, that alone does not mean he also reached MMI that day. The evidence shows Dr. Karlsson had not placed Petitioner at MMI before the subsequent work accident. Most importantly, the credible evidence shows that Petitioner's right knee condition had not stabilized before the subsequent work accident. While the relevant medical records are not in

evidence, it is undisputed that Petitioner continued to have right knee complaints after he returned to work. Petitioner admitted that his ongoing right knee complaints made it difficult to perform his job duties. Petitioner testified that after his return to work, he had trouble getting into and out of his truck. Petitioner also testified that his right knee condition made carrying and lifting certain items difficult when he returned to work.

The evidence further shows that Petitioner's right knee symptoms were significant enough that he returned to Dr. Karlsson for further treatment after his return to work. Dr. Karlsson testified that he administered a right knee injection on March 6, 2015. Petitioner testified that this injection provided only minimal relief. Furthermore, Petitioner testified that his right knee complaints continued until the March 23, 2015, work accident. For the foregoing reasons, the Commission finds Petitioner did not reach MMI before he sustained a subsequent injury to his right knee due to the March 23, 2015, work accident.

Finally, on page three (3) of the Arbitration Decision, the Arbitrator wrote that Petitioner "…was placed at MMI by his treating physician on February 16, 2015." As the Commission has concluded that Petitioner did not reach MMI regarding the October 15, 2014, work accident, the Commission strikes that language from the Arbitration Decision.

Temporary Disability Benefits

The Arbitrator concluded Petitioner met his burden of proving an entitlement to TTD benefits from October 16, 2014, through October 17, 2014, and from November 19, 2014, through February 16, 2015. After considering the evidence, the Commission modifies the Arbitrator's award of TTD benefits.

To establish an entitlement to TTD benefits, Petitioner must demonstrate not only that he did not work, but also that he was unable to work. *See Mech. Devices*, 344 Ill. App. 3d 752. The credible evidence shows that Petitioner sustained a significant injury to his right knee due to the October 15, 2014, work accident. However, the Commission finds there is no evidence that any medical professional determined that Petitioner was unable to work October 16-17, 2014. There are no medical records showing treatment on those days. Additionally, there are no work status notes regarding Petitioner's work capability on those days. Therefore, the Commission finds Petitioner failed to prove an entitlement to TTD benefits for the period of October 16-17, 2014. Similarly, Petitioner credibly testified that he returned to work on February 16, 2015. Thus, the Commission finds Petitioner failed to prove an entitlement to TTD benefits on February 16, 2015.

For the foregoing reasons, the Commission finds Petitioner was entitled to TTD benefits from November 19, 2014, through February 15, 2015 (12-5/7 weeks).

Permanent Disability

The Commission has found that Petitioner's right knee condition had not reached MMI before the March 23, 2015, work accident. A finding of permanent disability first requires that the claimant's condition of ill-being has stabilized. Therefore, the Commission vacates the Arbitrator's award of permanent partial disability benefits.

Penalties and Fees

The parties identified the issue of penalties and fees as in dispute at the arbitration hearing. However, the Arbitrator failed to address this issue. Accordingly, the Commission must determine whether Petitioner met his burden of proving an entitlement to penalties pursuant to Sections 19(l), 19(k), and 16 of the Act.

The Commission exercises original jurisdiction. *See, e.g.*, *Caterpillar Tractor Co. v. Industrial Comm'n*, 215 Ill. App. 3d 229, 238-39 (1991). This means it has the authority to determine all unsettled questions and is not bound by the Arbitrator's findings. The Commission's review of a case is not restricted to the information found in the Petition for Review or the reviewing party's Statement of Exceptions. Thus, the Commission has the authority to review all questions of law or fact which are evident in the record if a party's substantial rights are not prejudiced. In this case, Respondent is not prejudiced by the Commission's review of the issue of penalties because the parties had an opportunity to fully litigate the disputed issue during the arbitration hearing.

The intent of Sections 16, 19(k), and 19(l) of the Act is to "…implement the Act's purpose to expedite the compensation of industrial workers and to penalize employers who unreasonably, or in bad faith, delay or withhold compensation due an employee." *Centeno v. Ill. Workers' Comp. Comm'n*, 2020 IL App (2d) 180815WC at ¶55 (citation omitted). Penalties pursuant to Section 19(l) of the Act are applicable when an employer fails to pay benefits without good and just cause. *Id*. Courts have likened Section 19(l) penalties to a late fee. However, an award of penalties pursuant to Sections 16 and 19(k) of the Act requires a claimant meet a much higher burden. Section 19(k) of the Act addresses "…situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose. This is apparent in the statute's use of the terms 'vexatious,' 'intentional' and 'merely frivolous.'" *McMahan v. Indus. Comm'n.*, 183 Ill. 2d 499, 515 (1998). Section 16 of the Act uses the same language and applies to the same situations as Section 19(k) penalties.

After considering the totality of the evidence, the Commission finds Respondent unreasonably and vexatiously withheld benefits from Petitioner. It is undisputed that Respondent refused to pay any benefits to Petitioner regarding the October 15, 2014, work accident. The Commission finds Respondent did not prove it had a reasonable basis for its refusal to pay benefits in this matter. Respondent disputed several issues in this matter, including accident, notice, causal connection, medical expenses, and TTD. However, its dispute of those issues at the very least toes the line of frivolity. Respondent presented no credible evidence to support its dispute of these issues. Amerisafe, the borrowing employer and Petitioner's direct supervisor, undeniably had intimate knowledge of Petitioner's work duties and the details of the October 15, 2014, work accident. Mr. Wollack's testimony shows that Amerisafe agreed that Petitioner timely reported the work accident and his injury. His testimony also shows that Amerisafe did not question the compensability of Petitioner's accident.

Respondent's dispute of most of these issues appears to be based primarily on a non-existent requirement that Petitioner had to provide notice of the work accident directly to Respondent. In *Silica Sand Transport, Inc. v. Indus. Comm'n*, 197 Ill. App. 3d 640, 651-653

(1990), the Appellate Court considered the issue of notice when there is a borrowing employer and lending employer. In that case, the lending employer denied liability because the claimant only provided timely notice to the borrowing employer. The court rejected the lending employer's argument and determined that the claimant's notice to the borrowing employer constituted defective notice to the lending employer. Thus, Petitioner's timely notice to Amerisafe was also defective notice to Respondent. However, Respondent failed to provide any evidence that it was prejudiced in any way by Petitioner's defective notice.

Respondent also disputed medical expenses and TTD benefits, yet it did not obtain a Section 12 examination at any time before March 23, 2015, the date of Petitioner's subsequent work accident. In fact, the earliest Section 12 examination performed on Respondent's behalf did not occur until June 30, 2015. Respondent also did not obtain a utilization review regarding any of Petitioner's medical treatment related to this work accident. It is obvious that Respondent did not rely on anything other than its erroneous belief that Amerisafe should be liable for benefits related to this work accident when it refused to pay benefits to Petitioner.

Respondent's dispute with Amerisafe regarding Respondent's liability pursuant to Section 1(a)4 of the Act clearly was the real reason Respondent refused to pay benefits to Petitioner. Respondent's dispute with Amerisafe regarding liability for benefits owed to Petitioner is not a reasonable basis for its egregious behavior in this matter. After all, in a lending and borrowing employment situation, both employers are jointly and *separately* liable to the claimant pursuant to Section 1(a)4 of the Act. This provision of the Act is designed to prevent the exact situation Petitioner was forced to endure. Petitioner received no benefits related to his October 15, 2014, work accident during the almost seven year period until the September 2021 arbitration hearing, simply because Respondent refused to comply with the Act. Respondent cannot avoid its liability by blaming its contemptible refusal to comply with the Act and provide timely benefits to Petitioner on its dispute with Amerisafe.

After considering the evidence, the Commission finds Respondent's behavior in this matter was undeniably unreasonable and vexatious. Thus, Petitioner is entitled to penalties pursuant to Sections 16, 19(k), and 19(l) of the Act regarding the unpaid TTD benefits awarded to Petitioner. However, the Commission lacks the authority to award penalties regarding any medical expenses. To prove an entitlement to penalties regarding medical expenses, Petitioner must submit evidence that the bills were submitted to Respondent and that Respondent did not pay them. *See Theis v. Ill. Workers' Comp. Comm'n*, 2017 IL App (1st) 161237WC ¶21-23. A review of the evidence shows Petitioner failed to include any bills related to the October 15, 2014, work accident and certainly did not provide proof that any relevant bills were ever submitted to Respondent for payment.

The Commission has already determined that Petitioner was entitled to TTD benefits from November 19, 2014, through February 15, 2015 (12-5/7 weeks), for a total amount of $7,199.81. Pursuant to Section 19(l) of the Act, Petitioner is entitled to additional compensation in the amount of $30 for each day the benefits remained unpaid, not to exceed $10,000.00. The Commission notes that Respondent refused to pay TTD benefits for well over six years. Therefore, the Commission awards Petitioner Section 19(l) penalties in the amount of $10,000.00. Pursuant to Section 19(k) of the Act, the Commission may award additional compensation equal to 50% of the amount payable at the time of this award. Thus, the Commission awards Petitioner Section 19(k)

penalties in the amount of $3,599.91. Finally, pursuant to Section 16 of the Act, the Commission awards attorneys' fees in the amount of $1,439.96, which equals 20% of the awarded TTD benefits.

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 December 2, 2021, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary total disability benefits of $566.29/week for 12/5-7 weeks commencing November 19, 2014, through February 15, 2015, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED that Respondent shall pay for all reasonable and necessary medical services related to the October 15, 2014, work accident regarding Petitioner's right knee condition submitted into evidence as PX 14, as provided in Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED that the Arbitrator's award of permanent partial disability is vacated. The Commission finds Petitioner did not reach MMI before his subsequent March 23, 2015, work accident.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner penalties of $1,439.16, as provided in Section 16 of the Act; $3,599.91, as provided in Section 19(k) of the Act; and $10,000.00, as provided in Section 19(l) of the Act.

IT IS FURTHER ORDERED that Respondent is not entitled to any credit as it has paid no benefits relating to the October 15, 2014, work accident.

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 $32,100.00. 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.

October 16, 2023

o: 8/15/23
AHS/jds
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/s/ *Amylee H. Simonovich*
Amylee H. Simonovich

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC020211
Case Name	BERNDT, ROBERT v. PHOENIX LOGISTICS INC
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Gerald Granada, Arbitrator

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Jennifer Kiesewetter

DATE FILED: 12/2/2021

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

/s/Gerald Granada, Arbitrator

Signature

23IWCC0451

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

ROBERT BERNDT
Employee/Petitioner

v.

PHOENIX LOGISTICS INC
Employer/Respondent

Case # **16** WC **20211**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Wheaton**, on **9/28/21**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 **1(a)(4) liability**

FINDINGS

On **10/15/14**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent in which Respondents Keenan Transit and Phoenix were the loaning employers and Respondent Amerisafe was the borrowing employer.

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

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

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

In the year preceding the injury, Petitioner earned $**44,170.94**; the average weekly wage was $**849.44**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $**9,332.52** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**9,332.52**.

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

ORDER

Respondents Keenan Transit and Phoenix Logistics are responsible for Petitioner's claims pursuant to Section 1(a)(4) of the Act.

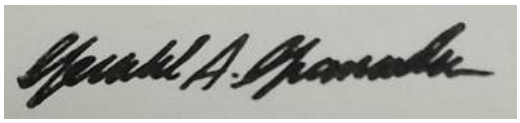
Respondent shall pay reasonable and necessary medical services as outlined in the attached findings, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $566.29/week for 13 weeks, commencing 10/16/14 to 10/17/14 and 11/19/14 to 2/1/15, as provided in Section 8(b) of the Act.

Based on the factors as set forth in Section 8.1(b) of the Act and described in greater detail in the attached findings, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 25% loss of use of right leg pursuant to §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.



Signature of **Arbitrator Gerald Granada**

DECEMBER 2, 2021

FINDINGS OF FACT

This case involves Petitioner Robert Berndt – a truck driver, who alleges to have been injured while working for Respondents Keenan Transit, Phoenix Logistics (Phoenix), and Amerisafe Consulting (Amerisafe) on October 15, 2014 (16 WC 6712 and 16 WC 20211) and on March 23, 2015 (15 WC 14407, 16 WC 20206, and 17 WC 35300). Petitioner has filed separate Applications for Adjustment of Claim for all of these accidents, and all the claims have been consolidated. Given the sequence of events, the issues in dispute, and for judicial economy, the findings in this case will also apply to the subsequent case filings. Although all these claims were heard together, this decision is focused on Petitioner's October 15, 2014 claim, in which all issues are in dispute, including the issue of liability in a borrowing/loaning situation under Section 1(a)(4) of the Act. The main point of contention at trial was the question of Petitioner's employment and which Respondent(s) is/are ultimately responsible for Petitioner's claim.

On October 15, 2014, Petitioner was training a new driver in a truck owned by Respondent Amerisafe. They drove to a construction site in Chicago, Petitioner exited the cab, walked across an unpaved parking lot and stepped into a pothole, injuring his right leg. He had never experienced any problems with the right leg before this accident. Petitioner's job required him to exit the cab at the stops, open the cargo doors to unload the product, unload the produce and close the door and the lift gate. The job included loading and unloading pallets with a pallet jack, pushing and pulling loads weighing up to 2,000 to 3,000 lbs. (RX1 p.8)

Petitioner reported this incident to the Amerisafe Warehouse manager at that time, Evan Wollak. Mr. Wollak testified that after he was contacted by Petitioner regarding the October 15, 2014 incident, Wollak called Bill Keenan of Keenan Transit to advise him of the incident. Wollak later completed an accident report, which he sent to Keenan Transit.

On October 20, 2014, Petitioner went to Edwards Immediate Care, where x-rays revealed moderate degenerative changes of the right knee in the medial compartment and narrowing in the left knee that was much worse than the right knee. A November 7, 2014 MRI revealed medial meniscal tearing of the right knee along the junction of the posterior horn and posterior root ligament, mild peripheral extrusion of medial meniscal tissue, and osteoarthritis of the medial femorotibial compartment. (PX4 p.8) Dr. Karlsson performed a right knee arthroscopy at Edwards Hospital on November 19, 2014. (PX4 p.14) The meniscal tissue was intact, but he did find grade 3 changes over the patellar and femoral side with slight flaps on the femoral trochlea, which he shaved back to create a stable base of cartilage for the joint. (PX4 p.14) He also reported grade 3 chondromalacia over majority of medial joint line in the right knee. He debrided cartilage flaps to create a stable base of cartilage for the joint. (PX p.14) Dr. Karlsson noted that the joint had cartilage in it at the time of this surgery. (PX1 p.11) Post surgery, Petitioner reported that he still experienced some pain over the medial side, some pain in the hamstring, and that he was having difficulty getting back to the type of activities he would need to do at work where he pulls a pallet jack. Dr. Karlsson recommended that Petitioner remain off work and do some therapy, which took place at Edwards on January 20, 2015. (PX4 p.112) Petitioner experienced significant relief between the surgery and therapy and returned to full work duties on February 16, 2015. Petitioner noticed some continuing symptoms when getting in and out of the truck as they had not simulated that activity in therapy. He experienced minor pain when getting in and out of the truck and while pulling heavy cargo, but he was able to get through all his work duties and missed no time from work following his return to work full duty on February 16, 2015. He continued to work full duty until his subsequent accident on March 23, 2015, which is the subject of his companion cases.

Evan Wollak was called to testify at trial by counsel for Respondent Amerisafe. Mr. Wollak had worked for Amerisafe for 20 years prior to his retirement in 2019. In 2013, Mr. Wollak was the warehouse manager for Amerisafe. He described Amerisafe as being in the business of selling insulation products and using trucks to

transport those products. In 2013, Mr. Wollak contacted Bill Keenan of Keenan Transit to obtain drivers for Amerisafe's operation. Amerisafe initially sent its own drivers over to Keenan Transit so that Keenan Transit could lease these drivers back to Amerisafe. Wollak only spoke with Bill Keenan and believed he was getting drivers from Keenan Transit. He identified a set of emails surrounding the arrangement. (RX8) Bill Keenan's emails came from a Keenan Transit email address. Keenan Transit was located in the same offices as Phoenix Logistics. Wollak called Keenan Transit for drivers rather than Phoenix. At some point, Bill Keenan told Wollak that he set up Phoenix to loan out nonunion drivers. Amerisafe Ex1 was a document between Amerisafe and Phoenix. Wollak went back and forth with Bill Keenan over the content of this document. (Amerisafe Ex1) Bill Keenan was going to sign the document, obligating Amerisafe to pay an hourly fee for drivers. Wollak testified that Bill Keenan was supposed to take care of fringe benefits and workers comp liability - which was precisely the intention of the document. (Amerisafe Ex1) Wollak obtained Berndt by calling Bill Keenan. Berndt used Amerisafe's equipment, delivered Amerisafe's products and kept a timecard at their facility. When payroll time arrived, Wollak faxed the timecard to Keenan Transit's payroll person at the Keenan Transit office and Phoenix would send the driver a check. The only people Wollak dealt with were Bill Keenan and his payroll person Dawn, also at Keenan Transit. When Petitioner suffered both his injuries, Wollak reported both injuries to Bill Keenan. The phone calls were made to Bill at the Keenan Transit office as Wollak was never given a phone number for Phoenix. Wollak also sent Keenan Petitioner's detailed written account of the accident. (PX15) TTD was paid for a short period after Petitioner's second accident on March 23, 2015, and the checks identified Keenan Transit as the employer.

CONCLUSIONS OF LAW

1. Regarding the issue of employment, the Arbitrator finds that there existed an employment relationship between the Petitioner and the Respondents in which the Respondents Keenan Transit and Phoenix were the loaning employers and Amerisafe was the borrowing employer for both Petitioner's October 15, 2014 accident and his March 23, 2015 accident. Petitioner thought he was working for Phoenix as he got checks from Phoenix. However, he was interviewed and hired for the job by Tom Keenan, who had a Keenan Transit email address and worked out of the Keenan Transit offices. The Phoenix checks also came out of the Keenan Transit offices. Petitioner admitted he was not sure whether Phoenix was a distinct company from Keenan Transit. The same defense counsel represented both Keenan Transit and Phoenix at trial, but only lodged the employer/employee dispute on behalf of Keenan Transit. Counsel ultimately claimed, near the end of trial, that both Keenan Transit and Phoenix were covered by the same workers compensation insurance carrier. Keenan Transit and Phoenix did not present any documentary evidence suggesting they were independent entities. The Arbitrator further relies the testimony of Mr. Wollak, whose unrebutted testimony was persuasive on this issue.

2. With regard to the issue of accident, the Arbitrator finds that the Petitioner met his burden of proving that he sustained an accident arising out of and in the course of his employment on October 15, 2014. The facts clearly show that Petitioner sustained injuries while working and there was no evidence offered to rebut Petitioner on this issue.

3. Regarding the issue of notice, the Arbitrator finds that the Petitioner met his burden of proving that he provided timely notice of his October 15, 2014 accident to the Respondents by reporting the same to Mr. Wollak of Amerisafe. Mr. Wollak testified that he then reported the incident to Keenan Transit on the same day. There was no evidence offered to rebut Petitioner or Mr. Wollak's testimony on this issue.

4. With regard to the issue of causation, the Arbitrator finds that the Petitioner has met his burden of proving that his current condition of ill-being is causally related to his work accidents. In support of this finding, the Arbitrator relies on Petitioner's unrebutted testimony and the preponderance of the medical evidence.

Petitioner's October 15, 2014 accident, in which he stepped in a pothole, injured his right knee, and subsequently underwent arthroscopic surgery is clearly documented in the medical evidence and does not appear to be disputed.

5. Regarding the issues of age, marital status and average weekly wage, the Arbitrator finds that the Petitioner was 47 years old, married and had an average weekly wage of $849.44 at the time of his accidents. There was no evidence offered to rebut the Petitioner on these issues.

6. Consistent with the findings above, the Arbitrator further finds that the Petitioner's medical treatment following his October 15, 2014 accident has been reasonable and necessary in addressing his right knee condition stemming from his work accident. Petitioner's wife's insurance paid for Petitioner's treatment, including the knee surgery and all the related treatment and rehabilitation. Given the findings on accident and causation, Respondent shall pay Petitioner for all treatment related to the right knee, stemming from the October 15, 2014 accident. This includes the Humana payments totaling $9,831.89. (PX14)

7. The Arbitrator finds that the Petitioner was temporarily totally disabled following his October 15, 2014 accident from October 16, 2014 through October 17, 2014, and from November 19, 2014 through the date he was placed at MMI by his treating physician on February 16, 2015. During this time period, the medical evidence documents Petitioner being take off work completely by his treating physicians. Therefore Respondent shall pay Petitioner temporary total disability benefits of $566.29/week for 13 weeks, for the aforementioned time period, as provided in Section 8(b) of the Act. Respondents shall receive a credit for any TTD it has paid toward the period in question.

8. Regarding the 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 AMA rating was introduced into evidence, so the Arbitrator gives this factor no weight; (ii) Petitioner was a driver and was able to return his job following this accident - a factor to which the Arbitrator gives considered weight; (iii) Petitioner was 47 years old at the time of injury - a factor to which the Arbitrator gives some weight; (iv) there was no evidence of future earnings due to this injury, and the Arbitrator gives no weight to this factor; (v) there was evidence of disability which show that the Petitioner sustained an injury to his right knee requiring injections, surgery, followed by physical therapy and resulting in continued complaints of pain his every day and work activities - the Arbitrator gives great weight to this factor. Based on the factors above, the Arbitrator concludes the injuries sustained by Petitioner caused a 25% loss of use of the right leg as a result of the October 15, 2014 work incident.

9. Regarding the issue of liability under Section 1(a)(4) of the Act, the Arbitrator finds that the Respondents Keenan Transit and Phoenix are responsible for Petitioner's claims. The relevant provision of the Act states:

> Where an employer operating under and subject to the provisions of this Act loans an employee to another such employer and such loaned employee sustains a compensable accidental injury in the employment of such borrowing employer and where such borrowing employer does not provide or pay the benefits or payments due such injured employee, such loaning employer is liable to provide or pay all benefits or payments due such employee under this Act and as to such employee the liability of such loaning and borrowing employers is joint and several, provided that such loaning employer is in the absence of agreement to the contrary entitled to receive from such borrowing employer full reimbursement for all sums paid or incurred pursuant to this paragraph together with reasonable attorneys' fees and expenses in any hearings before the Illinois Workers' Compensation Commission or in any action to secure such reimbursement. 820 ILCS 305/1(a)(4)

The borrowing employer, Amerisafe, admits it never paid compensation for TTD or treatment for either of Petitioner's injuries. Under 1(a)(4) then, the loaning employer (Keenan Transit/Phoenix) became liable for all benefits or payments under the Act. Keenan Transit/Phoenix also did not pay TTD or benefits after the Gleason IME, nor did it pay for the years of treatment that followed. Keenan Transit/Phoenix is liable for the unpaid benefits and treatment awarded for both of Petitioner's accident dates as the borrowing employer did not pay.

Keenan Transit/Phoenix contends however, that liability should transfer to Amerisafe per 1(a)(4)'s clause that borrowing employers must fully reimburse "all sums paid or incurred" by the loaning employer. The caveat is that borrowing/lending employers can alter the borrowing employer's reimbursement obligation through "an agreement to the contrary". 820 ILCS 305/1(a)(4). This language permits the parties to reverse the payment priority as to who is responsible for accidents. See *Ill. Guar. Fund v. Va. Sur. Co.,* 2012 IL App (1st) 113758 *P5. Therefore, the 1(a)(4) dispute pivots on whether the Respondents entered into an agreement to reverse the payment priority.

Amerisafe offered into evidence a document which memorialized the respective obligations for the borrowing/lending arrangement. (Amerisafe EX1) Mr. Wollak, Amerisafe's warehouse manager explained that Amerisafe entered into the borrowing/lending arrangement with Keenan Transit/Phoenix specifically for the purpose of not having to pay workers compensation claims. Amerisafe sent the drivers it employed at the time to Keenan Transit/Phoenix so Keenan Transit/Phoenix could lend them back to Amerisafe, for the express purpose of Keenan Transit/Phoenix to provide workers compensation coverage. Keenan Transit/Phoenix apparently drafted the document, including a paragraph stating "Phoenix Logistics is not responsible for any damage caused by an accident or incident." (Amerisafe Ex.1). Amerisafe added a handwritten qualification to that paragraph, narrowing the paragraph's operation "to the extent of [Phoenix's] negligence unless covered by the vehicle policy". This handwritten qualification was added before both parties signed the document. Amerisafe's warehouse manager testified that the language "Phoenix is not responsible" only applied to property damage occurring to Amerisafe's vehicles and had nothing to do with workers compensation liability, since the main purpose of the agreement between the parties was that Amerisafe would not be responsible for workers compensation liability. Keenan Transit/Phoenix provided no testimony or evidence to rebut that claim. Thus, without rebuttal evidence, Amerisafe has proven that it had an agreement with Keenan Transit/Phoenix for the lending employer to bear the workers compensation liability for Petitioner's claims.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC033428
Case Name	Michelle Vietmeyer v. Wahl Clipper Corporation
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0452
Number of Pages of Decision	16
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Stephen Martay
Respondent Attorney	Kevin Luther

DATE FILED: 10/18/2023

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF ROCK ISLAND)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHELLE VIETMEYER,

Petitioner,

vs. NO: 17 WC 33428

WAHL CLIPPER CORPORATION,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability (TTD) benefits 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 affirms the Arbitrator's finding that Petitioner proved accident and causal connection based on a repetitive trauma theory for her bilateral carpal tunnel syndrome and right elbow epicondylitis condition but writes to clarify and expound on the Arbitrator's findings and conclusions. "[A]n employee who alleges injury based on repetitive trauma must still meet the same standard of proof as other claimants alleging an accidental injury. There must be a showing that the injury is work related and not the result of a normal degenerative aging process." *Peoria County Belwood Nursing Home v. Indus. Comm'n*, 115 Ill. 2d 524, 530 (1987). In repetitive-trauma cases, "the claimant generally relies on medical testimony establishing a causal connection between the work performed and claimant's disability." *Nunn v. Indus. Comm'n*, 157 Ill. App. 3d 470, 477 (1987).

Here, Petitioner testified that prior to the manifestation date of September 11, 2017, she had worked for Respondent for approximately 13 to 15 years. She worked an estimated 20 different jobs for Respondent and some of the relevant duties included carrying and dumping tubs that weighed 30-40 pounds and using a powered screwdriver located overhead to assemble clippers. Petitioner testified to constantly using her right hand to pull down the screwdriver. Her unrebutted testimony was that she completed about a thousand or more parts a day. Around 2016-2017, Petitioner began making coils for the clippers. She lifted bins of coils that weighed about 30 to 50

pounds each. Petitioner testified that she would bend down to lift the bins chest high and place them on a table. The bins were between knee to waist high. Petitioner would again complete approximately a thousand plus per day. Petitioner is right-handed but she also used her left hand to set blades on a fixture or to grab parts. She testified that the clippers would vibrate during testing and so did the screwdriver. Petitioner further testified that she did a thousand plus on September 11, 2017. On this date, Petitioner testified that she began noticing a lot of pain in her elbow and numbness and tingling in her hands.

Petitioner commenced treatment on September 20, 2017 and the medical records thereafter documented Petitioner's complaints in both wrists and right elbow and also stated that Petitioner related her symptoms to repetitive motions at work including building blades for two to three months at work. Petitioner denied any similar problems in the past and denied any non-work-related cause for her symptoms. She was diagnosed with bilateral carpal tunnel syndrome and right elbow epicondylitis.

Petitioner began treating with Dr. Nacke on February 6, 2018. She presented with bilateral hand numbness and tingling as well as right elbow pain. Although Petitioner had denied similar problems in the past, the February 6, 2018 office visit note indicated that the onset of Petitioner's symptoms began in 2009 but that the symptoms were initially intermittent and had recently worsened. A review of the medical records demonstrated that Petitioner never received prior treatment for her bilateral wrists but may have received some prior physical therapy for her right elbow. The February 6, 2018 office visit note further stated that Petitioner related her symptoms to overuse at work and she described assembling up to 900 units per shift.

Dr. Nacke opined that by Petitioner's description, her occupation included repetitive use of her hands and he believed that her occupation likely contributed to or was an exacerbating or causative factor in her carpal tunnel syndrome. Dr. Nacke testified that heavy repetitive use would put an individual at more risk for developing carpal tunnel syndrome but he acknowledged that without seeing Petitioner perform her job duties, it was difficult to determine how much Petitioner strained to do her job. During cross-examination, Dr. Nacke testified that repetitive use of the hands involved gripping, grasping and forceful or heavy activities. He further testified that without seeing the job video, he could not comment on whether Petitioner's job duties were primarily fingertip manipulations.

Petitioner began treating with Dr. Thorsness for her right elbow on August 31, 2018. The office visit note also documented that Petitioner's onset of symptoms in her right elbow had been ongoing for nearly nine years, around 2009. Petitioner denied any acute injury but attributed her symptoms to repetitively lifting heavy objects at work. Dr. Thorsness believed Petitioner's right elbow injury could have been caused or exacerbated by her work duties, specifically repetitive use of the arm. Dr. Thorsness confirmed that he too did not review any written job description or job video and had relied on Petitioner to describe her job duties. He did not know the weight of the items that Petitioner lifted at work or the frequency of any hand or right arm movements.

Respondent had sent Petitioner for a Section 12 examination with Dr. Vender on November 9, 2017. Petitioner informed Dr. Vender that she began developing symptoms in both upper extremities in the summer of 2017, specifically numbness and tingling in both hands, pain in her

wrists and pain in the medial aspect of her elbow. Dr. Vender examined and diagnosed Petitioner with bilateral carpal tunnel syndrome and right elbow medial epicondylitis. He opined that Petitioner's conditions were not work-related and testified that she had various non-work-related risk factors for developing carpal tunnel syndrome including her age, gender and smoking history.

Dr. Vender also reviewed a written job description and video related to Petitioner's job duties and opined that the activities were not the type that would be contributory to carpal tunnel syndrome. Dr. Vender testified that the work consisted of very light assembly, fingertip manipulation of small parts that was not forceful and utilizing the overhead screwdriver intermittently with low force. Dr. Vender emphasized that force was the main factor to consider and not repetitive activity: " . . .not just exposure to force but how much force and over what period of time with duration." (RX4, pg. 16). Dr. Vender admitted that he did not review the job description or video with Petitioner and did not know if it was an accurate portrayal of her job duties. His knowledge of Petitioner's job duties from Petitioner was that she built blades and he did not go through any detailed description with her.

The Commission finds that Respondent's next two Section 12 physicians, Dr. Birman and Dr. Zelby, did not evaluate Petitioner for her claimed bilateral wrist and right elbow injuries. Dr. Birman confirmed that his Section 12 examination was solely for the right shoulder and Dr. Zelby evaluated Petitioner's cervical spine. Their causation opinions were limited to those body parts. By her Brief, Petitioner did not dispute the Arbitrator's Decision with respect to accident and causal connection for her bilateral wrist and right elbow injuries and Petitioner made no specific or further arguments related to the right shoulder or cervical spine.

Based on the foregoing, the Commission finds that the preponderance of the evidence supports Petitioner's repetitive trauma claim. The Commission notes that Petitioner was more symptomatic in her right upper extremity as she is right-hand dominant. The medical records further demonstrated that Petitioner consistently related her wrist and elbow complaints to her work. She made similar reports to her physicians as well as to the relevant Section 12 examiner, Dr. Vender. The medical evidence also indicated that while Petitioner may have had similar complaints in 2009 and some prior treatment for her right elbow, her symptoms worsened at the time she decided to seek treatment in 2017.

Both of Petitioner's treating physicians, Dr. Nacke and Dr. Thorsness, opined that based on Petitioner's description of repetitively using her hands and arms at work, that her occupation was likely a cause of her bilateral carpal tunnel syndrome and right elbow epicondylitis. Although Petitioner's physicians did not review any job description or video, Dr. Nacke was aware that Petitioner assembled up to 900 units per shift, "and that is a lot of repetitive use of the hands during the day. And there has been shown to be an association between repetitive use and development of carpal tunnel syndrome." (PX4, pg. 12). Dr. Nacke additionally testified that repetitive use of the hands involved gripping, grasping and forceful or heavy activities. Dr. Thorsness' opinion was also based on Petitioner's description of repetitively lifting heavy objects at work.

Dr. Vender's information was similarly limited to Petitioner building blades and his review of the written job description and video, which he admitted not knowing whether it was an accurate portrayal of Petitioner's job duties. He nevertheless opined that Petitioner's condition was not

work-related but also testified that repetition together with the amount of force and duration were factors to consider with respect to repetitive trauma injuries.

Petitioner testified to lifting up to 50 pounds as part of her job duties. The job video does not depict any of the carrying/lifting work that Petitioner had described but did depict workers using their fingers and hands to insert, place, press and push various small pieces while assembling the clippers at a fast pace. The workers were also seen gripping pliers, pulling down and using the overhead "high torque electric screwdriver" as described in Respondent's job description (Resp. Ex. 5). Petitioner's testimony with respect to her job duties were partly corroborated by the job video as well as Respondent's job descriptions (Resp. Exs. 5-7). With respect to weight, Respondent's Exhibit 7, stated that an employee was required to occasionally lift 15 to 40 pounds and rarely lift 50 pounds. This is consistent with Petitioner's testimony. There is further support for Petitioner's repetitive trauma claim given that she has been performing these duties for Respondent for 13-15 years and she completed approximately 1,000 parts per shift.

Based on the overall evidence, the Commission finds that Petitioner's job duties comprised of sufficient repetition and duration together with gripping, grasping, forceful and heavy activities to support a finding that her job duties were a cause in her bilateral carpal tunnel syndrome and right elbow epicondylitis condition.

The Commission next modifies the Arbitrator's Decision with respect to the award of PPD benefits. For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the five factors pursuant to Section 8.1b of the Act. *820 ILCS 305/8.1b*. The Commission has considered the five factors under Section 8.1b of the Act and finds as follows:

(i) Impairment Rating: The parties did not offer any impairment rating into evidence. The Commission gives this factor no weight.

(ii) Occupation of Injured Employee: Petitioner was released to full duty work on August 31, 2018. Petitioner testified that she has since moved to Arizona and had stopped working for Respondent. She is currently employed by Sterilite in Arizona where she molds garbage cans, baskets and totes. The Commission gives this factor some weight.

(iii) Petitioner's Age: Petitioner was 50 years old on the accident date; neither party submitted evidence into the record which would indicate the impact of the Petitioner's age on any permanent disability resulting from the September 11, 2017 accident. Nonetheless, the Commission finds that Petitioner must still live with this disability and gives some weight to this factor.

(iv) Petitioner's Future Earning Capacity: There is no evidence in the record as to reduced earning capacity. The Commission gives this factor no weight.

(v) Evidence of Disability: Evidence of Petitioner's disability is corroborated by the treating medical records. As a result of the September 11, 2017 work accident, Petitioner sustained injury to her bilateral wrists and right elbow. She was diagnosed

with bilateral carpal tunnel syndrome and right elbow epicondylitis. Petitioner received treatment by way of physical therapy, medication, an elbow band, elbow and wrist splints, and injections to the right elbow. She further underwent bilateral carpal tunnel releases. Petitioner's right arm was worse than her left as she was right-handed.

As of the arbitration date, Petitioner testified that once in a while, her fingers would lock in the middle and her thumbs ached especially in the cold. She would perform stretches that she learned in physical therapy. Petitioner's right elbow continued to feel tender and sore. She would also sometimes experience an electrical shock sensation. The Commission gives this factor great weight.

In light of the foregoing, with no single enumerated factor being the sole determinant of disability, the Commission affirms the Arbitrator's award of 15% loss of use of each hand and 10% loss of use of the right arm in PPD benefits. However, the Commission modifies the number of weeks for the bilateral carpal tunnel syndrome award. For accidental injuries after June 28, 2011 involving carpal tunnel syndrome due to repetitive or cumulative trauma, 100% of the hand is based off of 190 weeks. *820 ILCS 305/8(e)(9)*. Therefore, 15% loss of use of each hand equals 57 weeks. The Commission modifies the Arbitrator's Decision accordingly.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 12, 2022 is hereby modified as stated and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner permanent partial disability benefits of $417.07 per week for 82.3 weeks because the injuries sustained 15% loss of use of each hand (57 weeks) and 10% loss of use of the right arm (25.3 weeks) 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 $65,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

October 18, 2023
CAH/pm
O: 10/5/23
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	17WC033428
Case Name	Michelle Vietmeyer v. Wahl Clipper Corporation
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Kurt Carlson, Arbitrator

Petitioner Attorney	Stephen Martay
Respondent Attorney	Kevin Luther

DATE FILED: 12/12/2022

THE INTEREST RATE FOR THE WEEK OF DECEMBER 6, 2022 4.57%

/s/Kurt Carlson, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **ROCK ISLAND**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Michelle Vietmeyer
Employee/Petitioner
v.
Wahl Clipper Corporation
Employer/Respondent

Case # **17** WC **033428**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Rock Island**, on **09-28-22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **9/11/17**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**36,146.24**; the average weekly wage was $**695.12**.

On the date of accident, Petitioner was **50** years of age, ***single*** with **0** dependent children.

Petitioner ***has*** not received all reasonable and necessary medical services.

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

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

Respondent is entitled to a credit of $ **8,213.45** under Section 8(j) of the Act.

ORDER

Petitioner proved accident/exposure and causal connection for her bilateral carpal tunnel syndrome and right elbow epicondylitis. Petitioner is entitled to lost time benefits from June 11, 2018 to August 31, 2018 or 11.571 weeks at the rate of $463.41 or $5,362.12.

Petitioner has suffered the industrial loss of 15% of each hand (61.5 weeks) and 10% of the right arm (25.3 weeks) at the permanency rate of $ 417.07 or $36,201.68

Petitioner failed to prove accident and causal connection for her right shoulder and cervical (neck) condition. Therefore, is Respondent has no liability under the Act for these injuries.

Respondent is responsible for all outstanding medical charges related to Petitioner's bilateral carpal tunnel syndrome and right epicondylitis pursuant to Section 8(a) of the Act.

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

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

Kurt A. Carlson

Arbitrator

DECEMBER 12, 2022

STATE OF ILLINOIS)
) SS.
COUNTY OF ROCK ISLAND)

ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHELLE VIETMEYER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case # 17 WC 033428
	)	
WAHL CLIPPER CORPORATION,	)	
	)	
Respondent.	)	

ARBITRATION DECISION
ATTACHMENT

FINDINGS OF FACT

Petitioner's Arbitration Testimony

The Petitioner is currently a resident of Bullhead City, Arizona. On September 11, 2017, the date of the alleged accident/exposure, the Petitioner was working for Respondent WAHL CLIPPER CORPORATION. (T. 9.)

The Petitioner began working for WAHL 13-15 years ago. (T. 9.) She believes that she had several jobs for the Respondent: somewhere between 10 and 20 different positions. (T. 9.) The Petitioner described some of her physical work activity. She stated she would sit at an assembly line, and "We would have drivers up in the air, and come down with the drivers with their screws over and over again." (T. 11.) She described herself sitting at a table. (T. 11.) Although a time frame was not specifically identified, the Petitioner testified that she did approximately "thousands plus possibly." (T. 11.)

The Petitioner was asked to describe her job duties moving closer to 2016 and 2017. She described a job as "doing coils." She described work at a station where pans of coils for clippers would be lifted up onto and into a machine. She described this as a standing job. (T. 12.)

She stated that picking up the bins of parts and placing them near the machine required her to lift roughly 30-50 pounds. (T. 13.)
The Petitioner testified that she was right-handed. (T. 14.) She described obtaining a blade and setting it on fixtures, grabbing the next part, and then using the "driver" above her head. (T. 14.) The Petitioner testified that the "clippers" themselves would vibrate. She believes that other tools "do that." (T. 15.) The Petitioner testified that on September 11, 2017, she noticed pain in her shoulder and the elbow. She stated that the "hands would go numb." (T. 17.) She testified

on September 20, 2017, she presented to a place called Now Care for medical treatment. She claims she was directed there by her employer, WAHL CLIPPER. (T. 17.)

The Arbitrator notes that the Petitioner's testimony seemed credible and all of her work duties over the years required repetitive hand and arm movement.

Thereafter, on October 4, 2017, the Petitioner went to Physicians Immediate Care. She was given splints. She went to Dixon Physical Therapy for approximately 20 sessions of physical therapy. (T. 19.)

On September 6, 2018, she presented to Dr Nacke. Dr. Nacke allegedly diagnosed her with bilateral carpal tunnel syndrome and recommended splints. She was placed on work restrictions on February 20, 2018, which were accommodated by the Respondent. (T. 20.)

The Petitioner testified that she underwent right carpal tunnel release on June 11, 2018. (T. 21.) The Petitioner testified that she underwent left carpal tunnel surgery on July 16, 2018. (T. 22.) The Petitioner's physical therapy at Dixon Physical Therapy was on August 29, 2018. The Petitioner was released back to full work duty for the carpal tunnel surgeries on August 31, 2018. (T. 22.)

The Petitioner thereafter, on August 31, 2018, saw Dr. Thorsness for an examination. She was suggested to undergo an MRI of the right shoulder and had an injection to the right elbow. (T. 23.) The Petitioner believes she underwent a right shoulder injection on October 3, 2018. (T. 24.) Thereafter, the Petitioner underwent an MRI of the cervical spine on November 20, 2018. Dr. Thorsness released the Petitioner from medical care on December 28, 2018, and referred her to Dr. Malhotra for a possible epidural cervical spine injection. (T. 25-26.) The Petitioner underwent an epidural cervical injection on the right at the C6-7 level on January 24, 2019. (T. 26.) The Petitioner testified that she underwent a visit with Dr. Thorsness for the last time on March 20, 2019. She testified that following that event, the Petitioner left, moved to Arizona; ending her medical treatment. (T. 27.)

The Petitioner found new employment in Arizona and has held three jobs. The first job was with Sterilite which was a manufacturing job involving molding of garbage cans, baskets, totes, etc. (T. 28.) The Petitioner's other jobs included housekeeping activities. (T. 28.) She also testified she worked for a company called T & T Twist-Ems which required her to make labels for vegetables and other items that came off a machine. She would inspect them and put them in boxes and pack them. (T. 29.)

The Petitioner claims that she still has problems with her hands and that her "fingers will lock in the middle." (T. 31.) She claims her thumbs ache, and weather changes bother her. (T. 31.) She denied that she takes over-the-counter medications. (T. 31.)

The Petitioner testified that her right hand was more severe than her left when she worked at WAHL CLIPPER and began to make complaints. (T. 36.) She acknowledged she worked some overtime, but no further testimony or documentation was introduced to corroborate overtime. (T. 37.)

The Petitioner admitted that she resigned from WAHL CLIPPER CORPORATION on July 10, 2019. (T. 37.) The Petitioner has no future medical appointments for any of the conditions that she claims are related to her work with WAHL CLIPPER CORPORATION. (T. 37-38.) The Petitioner admitted that she has not had any treatment for any of her alleged work-related conditions from WAHL CLIPPER after she moved to Arizona. (T. 38.)

The Petitioner admitted that she alleged a work-related injury to her neck and her right shoulder on May 28, 2009. (T. 39.) She recalls alleging that the pain in her shoulder was the result of work duties, and she made this complaint on September 6, 2012. (T. 40.) The Petitioner recalls that she was allowed to resume full work duties on October 4, 2017, after a visit with Physicians Immediate Care. (T. 40.)

The Petitioner admitted that when she refers to a "driver" or "screwdriver," she is referring to a mechanical screwdriver, meaning that it is a powered screwdriver. (T. 41.)

The Petitioner admitted that she may have made a request for disability leave from WAHL CLIPPER on June 6, 2018, and that she claimed her injury or illness first occurred on May 29, 2019. (T. 42.)

The Petitioner admitted that that her neck and right shoulder pain related to earlier work duties and medical care in 2009. (T. 42.)

The Application for Adjustment of Claim filed by the Petitioner alleges a "date of accident of 9/11/17." When asked, "What part of the body was affected," the following was typed in: "Hands and right elbow."

The Arbitrator notes that Petitioner's initial medical treatment and claim relate strictly to her hands and right elbow.

Petitioner's Exhibits

Petitioner's Exhibit No. 1 are medical records and bills from Hinsdale Orthopaedics. These records include the initial office visit dated September 20, 2017, at Now Care LLC of Dixon, Illinois.

Her first visit at Hinsdale Orthopaedics was on February 6, 2018. She complained of bilateral hand numbness and tingling and right elbow pain, with an onset of symptoms in 2009. The Petitioner received a diagnosis of bilateral carpal tunnel syndrome. She underwent right carpal tunnel syndrome release on June 11, 2018. She underwent left carpal tunnel syndrome release on July 16, 2018. Her surgeon for both procedures was Dr. Elliott Nacke. On August 31, 2018, Dr. Nacke allowed the Petitioner to "continue to work full duty." It was noted that the "patient is overall doing well." She was instructed to return for a follow-up in two months but failed to do so.

Petitioner's Exhibit No. 2 are additional medical records from Hinsdale Orthopaedics. The first visit was with Dr. Thorsness on August 31, 2018, with a complaint of right shoulder and right elbow pain that "has been ongoing for nearly nine years." It was noted that she was a current, everyday smoker. A right shoulder MRI was performed on September 10, 2018. The MRI was

directed to the right shoulder and showed rotator cuff tendonitis without tear. The Petitioner also had mild subacromial/deltoid bursitis and moderate AC joint arthrosis. The Petitioner was allowed to work regular work duty with no restrictions as of September 19, 2018, by Dr. Thorsness. The Petitioner was again allowed to perform regular work duties as of Dr. Thorsness's note dated November 14, 2018. Another work status report allowed the Petitioner to be performing regular work/activity with no restrictions as of December 28, 2018.

In a March 20, 2019, note, the following was stated: "To reiterate the patient sustained her original injury to the cervical spine, parascapular musculature, right shoulder, and right elbow in 2009." At that time, Dr. Thorsness believed the majority of the Petitioner's pain symptoms were the result of cervical radiculopathy.

Dr. Thorsness continued the Petitioner's ability to work regular work/activity as of March 20, 2019.

Offered as Petitioner's Exhibit No. 3 is the evidence deposition transcript of Dr. Elliott Nacke taken on April 28, 2018. Dr. Nacke performed the Petitioner's bilateral carpal tunnel release surgeries. Dr. Nacke believes that the Petitioner's bilateral carpal tunnel syndrome and pain in the right elbow were related to the Petitioner's work duties. Dr. Nacke testified he does not recall exactly what the Petitioner was assembling. (Petitioner's Exhibit No. 3, p. 10.)

Dr. Nacke was asked whether or not he reviewed any DVD or video of the Petitioner's work duties. He stated that he had not been provided with that video. (Petitioner's Exhibit No. 3, pp. 16-17.) Dr. Nacke noted, "But again, without saying how much she has to strain to do her job, it's hard to say," when asked about whether or not the Petitioner performed heavy, repetitive work duties. (Petitioner's Exhibit No. 3, p. 17.)

Dr. Nacke agreed that his opinion on causal connection was based entirely on the description that the Petitioner gave to him, as opposed to a review of any other documents. He agreed that this was "subjective." (Petitioner's Exhibit No. 3, p. 22.) Dr. Nacke noted, "I think it's difficult without seeing, you know, her description of what she does, it's a lot of repetitive grasping, which can certainly lead to . . . carpal tunnel syndromes." (Petitioner's Exhibit No. 3, p. 23.) He also testified, "I think without seeing a video of her performing those activities, it's hard for me to say." (Petitioner's Exhibit No. 3, p. 23.)

Offered as Petitioner's Exhibit No. 4 is the evidence deposition transcript of Dr. Robert Thorsness taken on March 22, 2021. Dr. Thorsness did not see the Petitioner until August 31, 2018, for the first time. (Petitioner's Exhibit No. 4, p. 6.) The Petitioner complained of right shoulder and right elbow pain.

Dr. Thorsness testified that he allowed the Petitioner to work full duties on September 5, 2018. This was shortly after he injected the right elbow.

Dr. Thorsness testified the injection did help dull her right shoulder pain, but he was concerned that the Petitioner may have a cervical problem which required treatment. (Petitioner's Exhibit No. 4, p. 13.)

Dr. Thorsness did testify the Petitioner told him that she had suffered an injury in 2009 when she was lapping blades, and she felt a sharp pain shooting in her neck and right shoulder. (Petitioner's Exhibit No. 3, p. 16.) He testified that the Petitioner's complaints in 2019 could also be connected to her injury in 2009. (Petitioner's Exhibit No. 3, p. 17.) On cross-examination, Dr. Thorsness agreed that when he saw the Petitioner for the first time on August 31, 2018, she told him that she had right shoulder and right elbow pain for nine years. (Petitioner's Exhibit No. 4, p. 24.) He agreed that there was no history of any specific injury taking place. (Petitioner's Exhibit No. 4, p. 24.) Dr. Thorsness agreed that he never did review any written job description, and with respect to his opinion on the cause of the Petitioner's condition, all of his opinion is based on what the Petitioner told him. Dr. Thorsness did not review any job DVD, had no idea of the weights of any items the Petitioner lifted at WAHL CLIPPER, had no idea as to the frequency of any hand movements or right arm movements or neck movements at WAHL CLIPPER, and had no idea as to whether or not any of her job duties required her to lift or put her hands above her shoulders. (Petitioner's Exhibit No. 4, pp. 25-26.) His entire opinion was based on the Petitioner's sole statement that what she did at work was "repetitive and heavy." (Petitioner's Exhibit No. 4, p. 26.)

Petitioner's Exhibit No. 5 are records from Dixon Physical Therapy. On November 10, 2017, it was noted that the Petitioner's physical therapy was "determined not work related." (Petitioner's Exhibit No. 5.)

Introduced as Petitioner's Exhibit No. 6 are medical records from Expert Pain Physicians. When the Petitioner appeared on February 7, 2019, it was noted she was working full-time. The history given was that she was following up for neck and shoulder pain, and the following was noted: "Onset of pain is 2009."

Offered as Petitioner's Exhibit No. 7 are the medical records from Physicians Immediate Care. At the first visit on October 4, 2017, the Petitioner complained of pain in both wrists and the right elbow. The following was noted: "Patient reports it was the result of an injury that occurred on 9/12/17, which was work related, which had a sudden onset. Patient had not similar problems in the past."

Produced as Petitioner's Exhibit No. 8 are medical bills from Advanced Physicians. There is no indication as to what these charges were the result of.

Produced as Petitioner's Exhibit No. 9 are medical bills from Salt Creek Surgery Center. There is no indication as to what these charges were the result of.

Produced as Petitioner's Exhibit No. 10 is a one-page "Consolidated Statement of Benefits" from Blue Cross Blue Shield of Illinois, the Respondent's group medical provider. The total bills are $11,240.79. The benefits provided are $8,213.45.

Respondent's Exhibits

Respondent's Exhibit No. 1 was the evidence deposition transcript of Dr. Zelby, along with the Section 12 IME report, which was taken on May 3, 2021. Dr. Zelby was retained by the Respondent to perform an analysis with respect to the Petitioner's back/neck claim. Dr. Zelby's report dated July 3, 2019, was admitted into evidence at his evidence deposition. Dr. Zelby

concluded that the Petitioner's cervical degenerative disc disease, etc., were not caused by repetitive work duties. (Respondent's Exhibit No. 1, pp. 20-21.) Dr. Zelby reviewed job descriptions for the Petitioner's two positions of Operator II and Rotary Valve Stream and also Comfort Grip Pro Blade Assembly.

Offered as Respondent's Exhibit No. 2 was a voluntary written resignation statement of the Petitioner dated July 10, 2019.

Offered as Respondent's Exhibit No. 3 was the evidence deposition transcript of Dr. Michael Birman dated May 7, 2019. Included in the deposition transcript was Dr. Birman's CV and IME report. Dr. Birman performed a physical examination of the Petitioner. Dr. Birman asked the Petitioner to describe her specific work duties which she did for the Section 12 examination. (Respondent's Exhibit No. 2, p. 13.) Dr. Birman's opinion was that the Petitioner's work duties did not cause the repetitive trauma injury to the Petitioner's bilateral hands, right shoulder, or right upper extremity. (Respondent's Exhibit No. 2, pp. 14-15.)

Introduced as Respondent's Exhibit No. 4 was the evidence deposition transcript of Dr. Michael Vender dated August 3, 2018. Dr. Vender prepared a Section 12 IME report dated November 9, 2017, which was introduced into evidence at his evidence deposition. Dr. Vender noted that the Petitioner's age and gender were risk factors with respect to the development of carpal tunnel syndrome, and also noted that the Petitioner had one of the four risk factors in the way of the Petitioner's smoking history. (Respondent's Exhibit No. 4, p. 12.) Dr. Vender examined a job description, as well as a video demonstrating job activities. (Respondent's Exhibit No. 4, p. 13.) Dr. Vender did not believe the Petitioner's work activities would be considered contributory to carpal tunnel syndrome. (Respondent's Exhibit No. 4, p. 14.)

Offered as Respondent's Exhibit Nos. 5, 6, and 7 are written job duties of the Petitioner. Offered as Respondent's Exhibit No. 9 is a job DVD depicting various job duties of the Petitioner.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Arbitrator notes that the Petitioner filed one Application for Adjustment of Claim alleging accidental injuries as a result of "repetitive work" involving the "hands and right elbow" on November 13, 2017. No other Applications for Adjustment of Claim have been filed which might allege any other work accident/exposure date or body part.

The Petitioner is alleging a repetitive trauma theory. The Petitioner is alleging her work-related injury based upon the repetitive trauma theory and must meet the same standard of proof as those alleging a specific accidental injury. In other words, they must allege an appropriate accident date and must show that (1) the injury is work related, and (2) not the result of a normal degenerative aging process. These requirements constitute the burden of proof for the Petitioner. *Peoria County Bellwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 106 Ill. Dec. 235, 505 N.E.2d 1026 (1987).

In the present claim, not one of the Petitioner's treating physicians obtained or was shown a specific description (written) of the Petitioner's work duties, and none of them ever watched any DVD or video with respect to the work duties. Both of the treating physicians at depositions stated that any opinion they had on medical causal connection was based solely on the

Petitioner's statement to the doctors that she did "repetitive and heavy work." None of the Petitioner's descriptions of her work duties at arbitration contained any facts or evidence showing that her work was "heavy." In contrast, all of the Respondent's examining physicians (Dr. Vender, Dr. Birman, and Dr. Zelby) were provided with a specific description of the Petitioner's work duties, as well as a DVD of the Petitioner's work duties. All physicians retained as Section 12 examiners opined that the Petitioner's condition was not work related.

The Petitioner's description of her work duties is was mostly credible. In fact, she told all of her treating physicians, with the exception of PIC, that the Petitioner's symptoms had been going on for years, as far back as 2009. When the Petitioner started treating at PIC, she told PIC that all of her hand and elbow symptoms returned on September 11, 2017. Accordingly, the Petitioner's credibility can mostly be accepted.

For reasons as stated above, Petitioner's requests for workers' compensation benefits are accepted in relation to her hands and right elbow, but not the right shoulder and cervical spine (neck).

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	09WC037829
Case Name	Daniel Dewey v. IL Department of Transportation
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0453
Number of Pages of Decision	11
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Stephanie Seibold
Respondent Attorney	Dan Kallio

DATE FILED: 10/24/2023

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF WINNEBAGO)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DANIEL DEWEY,
Petitioner,

vs. NO: 09 WC 37829

IL DEPARTMENT OF TRANSPORTATION,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, notice, medical expenses, prospective medical care, 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 May 10, 2023 is hereby affirmed and adopted.

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

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

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

October 24,2023
O: 10/19/23
CMD/ma
045

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

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	09WC037829
Case Name	Daniel Dewey v. Il Department of Transportation
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Paul Seal, Arbitrator

Petitioner Attorney	Stephanie Seibold
Respondent Attorney	Dan Kallio

DATE FILED: 5/10/2023

THE INTEREST RATE FOR THE WEEK OF MAY 9, 2023 4.89%

/s/ Paul Seal, Arbitrator

Signature

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

May 10, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Daniel Dewey
Employee/Petitioner

v.

Case # **09 WC 037829**

Consolidated cases:

IL Department of Transportation
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 **Paul Seal**, Arbitrator of the Commission, in the city of **Rockford**, on **March 24, 2023.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the dates of accident, **May 27, 2009,** Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On these dates, Petitioner ***did*** sustain accidents that arose out of and in the course of employment.

Timely notice of these accidents ***was*** given to Respondent.09WC

Petitioner's current condition of ill-being ***is*** causally related to her accidents.

In the year preceding the Petitioner's injuries, Petitioner's average weekly wage was **$1,173.12.**

On the date of accident of **May 27, 2009**, Petitioner was **45** years of age, ***married*** with **4** dependent children.

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

ORDER

- The Respondent shall pay the Petitioner temporary total disability benefits of $ **782.47** /week for **68 and 2/7** weeks, from **October 1, 2018 through January 22, 2020**, as provided in Section 8(b) of the Act.

- The Respondent shall pay $ **3,042.65** for necessary medical services, as provided in Section 8(a) and 8.2 of the Act and consistent with the medical fee schedule.

- The Respondent shall pay 30% man as a whole in permanent partial disability benefits.

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 10, 2023

Signature of Arbitrator

STATEMENT OF FACTS

The parties appeared for a hearing before Arbitrator Seal on March 24, 2023. The parties stipulated that that the relationship between the parties was that of employee and employer and that petitioner was an employee of Respondent on May 27, 2009. Respondent disputed that petitioner sustained accidental injuries arising out of and in the course of his employment with Respondent. Respondent disputed that timely and proper notice was given under the Act. Petitioner responded that on or around May 27, 2009, he gave notice to Gerry Grimm, a supervisor and district engineer. TR. 4.

Respondent disputed causal connection of petitioner's current condition to the injury. The parties agreed that petitioner's average weekly wage calculated under Section 10 of the Act was $1,173.12. The parties agreed that at the time of the incident, petitioner was 46 years old and married with 4 dependent children.

Petitioner claimed TTD benefits from October 1, 2018, through January 22, 2020, representing 68 and 2/7th weeks. Respondent disputed liability.

Plaintiff testified that he worked for Illinois Department of Transportation (hereinafter "IDOT") since October 2002 as a highway maintainer. TR. 13 – 14. He explained that a highway maintainer performs emergency patch and repair to state property. Types of issues addressed included roadway blowups, pouring of blacktop, maintaining guardrails and ditches, and cutting trees on state property. TR. 14. His job duties varied depending on the season. TR. 14. In the winter, he would perform snow removal. In the spring, he would perform tree removal and trimming. In the summer, he would perform mowing and patch roads with blacktop, which was scooped at chin height off of the back of a truck with a shovel weighing 41 lbs. TR. 15.

Petitioner recalled trimming approximately 400 trees on average during tree trimming season. TR. 21-22. A danger of tree trimming was that trees could collapse, or blow out, if hollow on the inside. Petitioner recalled an incident in May 2007, where a whole tree collapsed and hit him in the side, throwing him about thirty feet.

Petitioner recalled presenting to his primary care doctor's office on May 27, 2009 with complaints of onset of acute left hip pain. TR. 23 – 24.

The records reflect petitioner sought medical care on May 27, 2009 with Dr. Marcia Jones. Petitioner reported hip pain with associated numbness in the left leg. PX. 2, pg. 58. X-ray imaging at that time disclosed moderately severe DJD of the left hip with flattening of the femur. PX. 2, pgs. 53, 57.
Petitioner testified he was unable to go into work for left hip pain, so he talked to his lead worker and notified him that he was unable to go into work. TR. 25. He recalled being out of work for approximately two days. TR. 26. He was told to contact Human Resources (HR), and he recalled speaking to a Jan Broderick. TR. 25-26. Petitioner testified:
"I let her know that I had injured my hip at work, and that, you know, what do I do, because the lead worker told me to call her. And she then informed me to hire a lawyer." TR. 26.

Petitioner's Exhibit 9 is a copy of an Accident Report completed for a May 27, 2009 injury date. PX. 9, pg. 1323. Petitioner testified he had completed several written reports of Injury. TR. 43. However, he was told he would be fired if he continued to file paperwork. TR. 45.

Petitioner testified he continued to perform his job duties unrestricted thereafter and did not seek medical attention until May 2011. When asked why he did not seek ongoing care between May 2009 and 2011, plaintiff stated that the short answer was that he was self-medicating with over-the-counter medicines. TR. 27. He also testified that he felt discouraged in seeking additional treatment by his employer. TR. 27 – 28. He felt he had been punished at times. TR. 28. So he would take a sick day or vacation day when needed to deal with his left hip pain. TR. 29.

On May 16, 2011, petitioner sought care with Dr. Vinje at Sterling Rock Falls Clinic. Petitioner reported left hip discomfort since May 27, 2009. PX. 2, pg. 53. On November 4, 2011, the petitioner underwent a left hip injection performed by Dr. Vinje. PX. 3, pg. 77.

Plaintiff testified that he recalled undergoing hip injection in November 2011. TR. 30. He also continued to self medicate with over-the-counter medicines. TR. 30.

On January 24, 2012, petitioner sought care with Dr. Marcia Jones at C.G.H. Medical center with reports of chronic left hip pain. He reported using over-the-counter medicines for pain relief. PX. 2, pg. 45. He was told to follow up with orthopedics as needed. PX. 2, pg. 48.

On June 12, 2013, petitioner returned to see Dr. Marcia Jones with complaints of left hip pain. PX. 2, pg. 32. On June 19, 2013, Dr. Vinje performed a left hip injection. PX. 3, pg. 66.

On October 14, 2015, petitioner sought evaluation by Dr. Sathoff for left hip pain. PX. 5, pg. 179. Petitioner reported pain for the past six years which was achy, sharp, and moderate to severe. He stated that the pain was aggravated by lifting and twisting. PX. 5, pg. 179. Dr. Sathoff recommended petitioner undergo a left hip replacement. PX. 5, pg. 181.
On March 1, 2017, petitioner was given an off-work note taking him off work for 10 days. PX. 5, pg. 86.

On April 19, 2017, petitioner saw Dr. Sathoff for evaluation of the left hip. He reported an 11 year history of hip pain which is a dull nagging ache. PX. 5, pg. 518. Dr. Sathoff recommended a left total hip placement. PX. 5, pg. 521.

Petitioner testified that he wanted to wait as long as he could to get his left hip replaced because he felt that he would get fired if he did get replaced earlier. TR. 33.

On October 2, 2018, petitioner underwent a left total hip replacement, performed by Dr. Sathoff. PX. 5, pg. 1168.

Subsequently, petitioner underwent physical therapy for his left hip. PX. 5, pgs. 974, 1032.

On January 2, 2019, petitioner was assessed restrictions of no lifting greater than 50 lbs, no climbing, and no uneven ground. PX. 5, pg. 98. Petitioner testified that he presented the restriction note to Respondent and was told there was no work available. TR. 35-36.

Petitioner testified that Dr. Brian Michalsen placed him on a lifting restriction of no lifting greater than 50 lbs and no jackhammer use on January 22, 2020. TR. 36.

Petitioner testified he was not able to return to work for Respondent. He sought and was approved for Social Security Disability. TR. 36. He has not returned to work for any other employer. TR. 36. He currently has nerve damage in the back of his left leg which radiates up to his back. TR. 37. He can stand for 20 minutes but then needs to sit down. TR. 37. He has discomfort when sitting for long periods. TR. 38. He can only lift 15-20 lbs. TR. 38.

Dr. Jeffrey Coe testified that he evaluated petitioner on July 27, 2011. PX. 7, pg. 1206. Dr. Coe testified that petitioner reported he had been working clearing trees in May 2009 in Ogle County, which involved a lot of bending and lifting. He had been struck on a number of occasions by falling tree limbs. PX. 7, pg. 1207. Dr. Coe testified petitioner recalled an incident in May 2009, where he awakened with severe pain in his low back and left hip region. Petitioner described taking several days off of work. PX. 7, pg. 1207. Dr. Coe testified that petitioner explained he did not seek treatment for a period of time and "carried on as best as he could." PX. 7, pg. 1209. Dr. Coe testified he found it significant that Dr. Vinje's records included a history of left hip discomfort. PX. 7, pg. 1209. Dr. Coe noted that that plaintiff had a severe amount of degenerative joint disease for his young age when he was first evaluated by Dr. Vinje. PX. 7, pgs 1210-1211. Dr. Coe testified that petitioner's right hip was completely normal and petitioner had significant left hip stiffness on examination. PX. 7, pg. 1215. Dr. Coe opined that plaintiff had degenerative arthritis in the left hip. PX. 7, pg. 1218. He opined that to a reasonable degree of medical certainty it was his conclusion that petitioner's “repetitive lifting, pulling and pushing of trees and tree limbs and trimming trees, was a factor aggravating preexistent symptomatic left hip arthritis causing that condition to become acutely symptomatic and then chronically symptomatic and to require medical treatment." PX. 7, pg. 1219.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE DISPUTED ISSUES

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

The Arbitrator adopts the statement of facts detailed above and finds that Petitioner sustained repetitive trauma injury manifesting on May 27, 2009 when he first sought care with Dr. Marcia Jones.

The Arbitrator notes that petitioner provided detailed testimony explaining the nature of his duties as a Highway Maintainer. Petitioner's testimony of the extent of lifting, pushing, and pulling required was uncontroverted by Respondent. Petitioner testified that he was involved in tree trimming in May 2009 when he had to take off several days of work due to increased hip pain. Respondent did not introduce contradictory evidence.

The Arbitrator accepts petitioner's explanation that he did not seek medical treatment continuously as he continued to self- medicate with over the counter medications.

As such, the Arbitrator finds that Petitioner sustained repetitive stress injuries manifesting on May 27, 2009 which arose out of and in the course of her employment with Respondent.

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

Though Respondent disputed that timely notice of injury was given, the Arbitrator notes that Respondent provided virtually no evidence to dispute that it received timely notice of injury. Petitioner submitted into evidence a copy of an accident report. Respondent did not provide any testimony disputing that timely notice was provided.

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

The Arbitrator adopts the findings of fact stated above and incorporates them herein by this reference. The Arbitrator finds that Petitioner's current condition of ill-being is causally related to her work injury on May 27, 2009. The Arbitrator relies upon Petitioner's treating records and his credible testimony.

The Arbitrator finds Dr. Coe's detailed testimony and opinion more credible than Dr. Nho's. The Arbitrator notes that Dr. Coe explained that Petitioner's work activities involved repetitive stress to his left hip, resulting in an abnormal amount of arthritis for an individual of petitioner's age.

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

The Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary for the injuries she sustained as a result of her injury. The Arbitrator notes that the medical records, diagnoses, treatment carried out, and treatment recommendations are noted in the Statement of Facts. The Arbitrator finds that Petitioner's treatment described in the statement of facts, including imaging, orthopedic treatment, and surgery were necessary given the failure of non-operative treatment and petitioner's ongoing symptoms.

As such, the Arbitrator finds that the Respondent is liable for the treatment provided, as set forth in Petitioner's Exhibit 8.

K. What temporary benefits are in dispute?

The Arbitrator finds that Petitioner is owed Temporary Total Disability benefits. The Respondent shall pay the Petitioner temporary total disability benefits of $ **782.47** /week for **68 and 2/7** weeks, from **October 1, 2018 through January 22, 2020**, as provided in Section 8(b) of the Act.

The Supreme Court of Illinois has held that "the determinative inquiry for deciding entitlement to TTD benefits remains, as always, whether the claimant's condition has stabilized. If the injured employee is able to show that he continues to be temporarily totally disabled as a result of his work-related injury, the employee is entitled to TTD benefits." Interstate Scaffolding v. Illinois Workers' Compensation Commission, 236 Ill. 2d 132 (2010).

"To establish entitlement to TTD benefits, a claimant must demonstrate not only that he or she did not work, but also that the claimant was unable to work. (Internal citation omitted). It is irrelevant whether the claimant could have looked for work. (Internal citation omitted). The dispositive test is whether the claimant's condition has stabilized, that is, whether the claimant has reached maximum medical improvement."

Mech. Devices v. Indus. Comm'n (Johnson), 344 Ill. App. 3d 752, 759 (4th Dist. 2003).

"The factors to be considered in determining whether a claimant has reached maximum medical improvement include: (1) a release to return to work; (2) the medical testimony concerning the claimant's injury; (3) the extent of the injury; and (4) "most importantly," whether the injury has stabilized."

Id. at 760.

Petitioner initially went off work on October 1, 2018 through January 22, 2020. Respondent did not dispute that petitioner required time off to recover from surgery. Respondent did not dispute that Petitioner's condition was not stabilized until January 22, 2020, when released to return to work with permanent restrictions.

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

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the petitioner has restrictions. This factor is given greater weight.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that the petitioner did not return to work for the respondent and receives social security disability. 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 there is no evidence provided regarding future earnings capacity presented other than the petitioner did not return to work for the respondent and has restrictions. The Arbitrator therefore gives less weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the petitioner's testimony and medical records. Accordingly, the Arbitrator gives greater weight to this factor.

The Arbitrator adopts the findings of fact stated above and incorporates them herein by this reference. The Arbitrator finds that Petitioner sustained 30% loss of use of the person as a whole given that petitioner had permanent restrictions, was unable to return to employment with Respondent, and qualified for Social Security Disability. The Arbitrator overall determines that 30% loss of use of the person as a whole is appropriate due to the treatment required and Petitioner's credible testimony about the impact of his pain on his daily activities.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC027783
Case Name	Andrew Klotzbucher v. Precision Injection, Inc, & IWBF
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0454
Number of Pages of Decision	15
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Brenton Schmitz
Respondent Attorney	Charlene Copeland

DATE FILED: 10/24/2023

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANDREW KLOTZBUCHER,

Petitioner,

vs. NO: 16 WC 27783

PRECISION INJECTION, INC. AND
INJURED WORKERS' BENEFIT FUND,

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 notice, permanent partial disability, and maintenance duration, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 13, 2023 is hereby affirmed and adopted.

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

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

The Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois

Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under §4(d) of the Act, in the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the injured Workers' Benefit Fund for any compensation obligations of Respondent-Employment that are paid to the Petitioner from the Injured Workers' Benefit Fund.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $71,200.00. 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.

October 24, 2023
O: 10/19/23
CMD/ma
045

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

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC027783
Case Name	Andrew Klotzbucher v. Precision Injection, Inc & IWBF
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Steven Fruth, Arbitrator

Petitioner Attorney	Brenton Schmitz
Respondent Attorney	Charlene Copeland

DATE FILED: 3/13/2023

/s/Steven Fruth, Arbitrator

Signature

INTEREST RATE WEEK OF MARCH 7, 2023 4.97%

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

Andrew Klotzbucher
Employee/Petitioner

v.

Case # **16 WC 027783**

Consolidated cases:

Precision Injection, Inc. and IWBF
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **12/29/2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **8/18/2016**, 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 $**n/a**; the average weekly wage was $**750.00**.

On the date of accident, Petitioner was **46** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

Pursuant to Commission Rule 9080.20, any payment of benefits pursuant to this award shall be paid to the office of the attorney of record for Petitioner.

Respondent shall pay reasonable and necessary medical services, adjusted in accord with the medical fee schedule, of $4,474.24 for Advocate Christ Hospital and $18,149.00 for MidAmerica Orthopaedics**,** as provided in §§ 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $500.00/week for 21 & 5/7 weeks, commencing 8/18/2016 through 1/17/2017, as provided in §8(b) of the Act.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disabilities to the extent of a 20% loss of use of the left middle finger and a 30% loss of use of the left arm pursuant to §8(d)(2) of the Act.

The Illinois State Treasurer, *ex-officio* custodian of the Injured Workers' Benefit Fund, was named as a Co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under §4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act.
Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to Petitioner from the Injured Workers' Benefit Fund.

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

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

Signature of Arbitrator

March 13, 2023

Andrew Klotzbucher v. Precision Injection, Inc. & IWBF
16 WC 27783

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were: ***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 accident?; ***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? TTD; ***L:*** What is the nature and extent of the injury?; ***N:*** Is Respondent due and credit?; ***O:*** Liability of IWBF

Injured Workers' Benefit Fund

The Illinois State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund, was named as a Co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under §4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing Petitioner pursuant to §5(b) and §4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to Petitioner from the Injured Workers' Benefit Fund.

STATEMENT OF FACTS

Petitioner's Exhibit #2, Certification by National Council of Compensation Insurance, verified that Respondent Precision Injection was not covered by Workers' Compensation insurance on the dates at issue, August 18, 2016.

Petitioner's Exhibit #1 verified that Respondent Precision Injection had been properly served with notice of the trial proceeding, in accord with the requirements of due process.

Petitioner Andrew Klotzbucher testified that his date of birth is September 22, 1969. On August 18, 2016 he was unmarried, with no children under the age of eighteen. Petitioner testified that on August 18, 2016 he was employed by Respondent Precision Injection, Inc., which was a business that repaired semi-trucks. He began working there approximately two years prior to August 2016. He obtained the job through a friend of his who was also acquainted with John Popp, the owner of Precision Injection. Petitioner did not have a specific job title, but worked as a truck mechanic, performing work on brakes, transmissions, engines, etc. He utilized some of his own wrenches, as well as tools provided by Precision Injection. These tools included power-operated equipment and sharp-edged cutting tools.

Petitioner testified that he was paid $750.00 per week, which is consistent with the pay stub entered into evidence as Petitioner's Exhibit #3. This stub is in the amount of $750.00, covering hours worked from February 28, 2016 to March 5, 2016, with taxes withheld, the net is $600.00.

Petitioner testified that the business consisted of himself, Mr. Popp, and another mechanic. Petitioner testified that Mr. Popp assigned him his tasks, as well as a set work schedule.

Petitioner testified that on August 18, 2016, he was removing shocks from the cab of a truck when the jack holding up the cab slipped, causing the cab to fall onto his left arm and hand. Petitioner was pinned in place until a co-worker could jack the cab back up and off of his arm. Mr. Popp did not see the incident but came out in response to shouting and cries for help. Petitioner's co-worker called an ambulance, which arrived and took the Petitioner to Advocate Christ Medical Center (Christ).

Petitioner listed Precision Injection, Inc., as his employer AT Christ. The EMS report indicates that Petitioner was picked up shortly after noon on August 18, 2016, from an address that matches the address identified by the Illinois Secretary of State for the Respondent. The EMS history indicates that Petitioner was picked up at a mechanic shop for a hand injury. Petitioner gave a history consistent with his testimony at trial. EMS personnel noted lacerations to the left forearm and middle finger. Petitioner was noted to be severely diaphoretic (PX #4).

Christ Emergency Department staff noted a similar consistent history and noted Petitioner's hands were covered in black dirt or grease. Dr. Ellen Omni noted a 4 cm laceration on the ulnar aspect of the left forearm, a 5 cm abrasion on the left forearm, and a 3 cm laceration on the left middle finger. X-rays demonstrated a fracture of the middle finger. Petitioner was referred to the hand clinic.

Petitioner was seen by Dr. Gary Kronen of MidAmerica Orthopaedics on August 18, 2016. Petitioner was diagnosed with a left hand crush injury with a fracture to the left ulnar shaft, a severe crush injury to the left middle finger with a nondisplaced fracture, and a left ulnar nerve injury.

On August 25, 2016, Dr. Kronen performed a surgical exploration of the left ulnar nerve, noting a 1 cm of severe contusion on the ulnar nerve, and an advanced flap closure of the 3rd digit.

Petitioner followed up on September 8, 2016. Dr. Kronen referred him to his partner for a likely open reduction and internal fixation of the ulnar fracture.

On September 16, 2016, Dr. Anton Fakhouri performed an irrigation and debridement of the left middle finger and the left forearm. Pre- and post-diagnoses were displaced left distal ulnar shaft fracture, abscess left middle finger, and infection left forearm.

On September 23, 2016, Dr. Fakhouri performed an irrigation and debridement of the left middle finger wound with tissue transfer from the small finger, and irrigation, debridement, and wound closure of left forearm. Pre-and post-operative diagnosis were abscess, left middle finger, and infection, left forearm.

On September 27 Dr. Fakhouri encouraged the patient to continue taking his antibiotics and to come in next week for a wound check and schedule surgery for the ulnar shaft fracture. On October 3 Dr. Fakhouri noted healing of the middle finger and scheduled the ORIF of the ulnar fracture.

On October 14, 2016, Dr. Fakhouri performed a corrective osteotomy of the left ulnar shaft with open reduction and fixation. Pre-and post-operative diagnosis were left ulnar shaft displaced fracture and malunion. In follow-up on October 25, Dr. Fakhouri noted a well healed incision. He noted Petitioner would be in a cast for the next month. He released Petitioner to light duty but with no use of the left arm. Petitioner testified that there was no work available for him with Respondent. A copy of this note was faxed to John Popp at Precision Injection, per Dr. Fakhouri's notes (PX #5).

On November 22, 2016, Dr. Fakhouri noted Petitioner was doing well. He issued restrictions of light duty of no greater than 5 pounds, but also recorded Petitioner's statement that Respondent was no longer in business. Full duty was anticipated in 2-3 months, and MMI within 3-4 months.

On January 17, 2016, Dr. Fakhouri noted Petitioner was "well enough that he can go back to work full duty with no restrictions." Dr. Fakhouri placed Petitioner at MMI and discharged him from care.

CONCLUSIONS OF LAW

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

The Arbitrator finds that Petitioner proved that on August 18, 2016 Respondent Precision Injection, Inc., was operating under and subject to the Illinois Workers' Compensation Act. Pursuant to §3 of the Illinois Workers' Compensation Act, the Act automatically applies to a Respondent who meets any one of the seventeen listed "ultra-hazardous" activities. Evidence at trial established Respondent was a paragraph (15) [a] any business or enterprise in which electric, gasoline or other power-driven equipment is used in the operation thereof. Petitioner testified that in the course of his employment, he utilized electric and gas-powered equipment, as well as sharp edged cutting tools.

B: *Was there an employee-employer relationship?*

The Arbitrator finds Petitioner proved there was an employer-employee relationship between Petitioner and Respondent Precision Injection on August 18, 2016.

Petitioner testified that he had been working for Respondent for approximately two years at the date of the accident. Petitioner testified that his work hours were set by Mr. Popp, and that Mr. Popp controlled and directed his work. In addition, Mr. Popp provided most, but not all, of the tools Petitioner used in his work.

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

The Arbitrator finds that Petitioner proved an accident did occur that arose out of and in the course of Petitioner's employment by Respondent Precision Injection. Petitioner testified credibly that on August 18, 2016, the cab of a truck crushed his hand at work. Petitioner was working for Respondent in the course of his employment, and his left hand and forearm were severely injured.

Additionally, Petitioner received medical treatment immediately thereafter, and gave a consistent history to all medical providers he saw in the course of treatment, including the initial ambulance transport from Respondent's location, and includes a detailed history of the accident.

D: *What was the date of the accident?*

Petitioner testified the accident occurred on August 18, 2016. The medical records confirm the accident occurred on August 18, 2016. The Arbitrator finds that the accident occurred on August 18, 2016.

E: *Was timely notice of the accident given to Respondent?*

Petitioner testified that the owner of Respondent Precision Injection, John Popp, was on site at the time of the accident, and while he did not see the accident occur, he was present immediately after and would presumably have been involved in calling the ambulance. The Arbitrator finds that timely notice of the accident was given orally on August 18, 2016.

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

The Arbitrator finds that Petitioner proved his condition of ill-being – a left hand and left forearm crush injury with a fractured ulna, fractured middle finger, and ulnar nerve damage - is causally related to the accident. Petitioner was taken by ambulance to the hospital where he was diagnosed with a fractured left ulna and middle finger. Drs. Kronen and Fakhouri later diagnosed ulnar nerve damage. Petitioner testified that he never had issues with his left hand or forearm before this incident. The medical histories are consistent with the traumatic incident as described by Petitioner in his testimony.

G: *What were Petitioner's earnings?*

Petitioner testified that he made $750.00 per week. An IRS 1099 from 2015 and a pay stub from 2016 were admitted in evidence and were consistent with this testimony. The Arbitrator relies on the credible testimony of Petitioner and the documentary evidence and finds an average weekly wage of $750.00

H: *What was Petitioner's age at the time of the accident?*

Petitioner testified his date of birth is September 22, 1969. The medical records confirm this. Thus, the Arbitrator finds that Petitioner was 46 years old on the date of the occurrence.

I: *What was Petitioner's marital status at the time of the accident?*

Petitioner testified that at the time of the accident he was unmarried with no dependent children. The Arbitrator finds that at the time of the accident, Petitioner was unmarried with no dependent children.

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 Petitioner proved the medical services rendered and the fees and charges for those services were reasonable and necessary, and that Respondent Precision Injection has not paid any of the fees and charges for medical services. Petitioner is entitled to payment for all medical bills presented at trial. Petitioner presented billing from Advocate Christ Hospital in the amount of $8,254.00. A workers' compensation allowance of $3,779.76 reduced the balance due to $4,474.24. All bills to be adjusted in accord with the Medical Fee Schedule.

K: *What temporary benefits are in dispute? TTD;*

Petitioner claims entitlement to TTD benefits from August 18, 2016 through January 17, 2017. Petitioner was unable to work following the accident. He was released to light duty on October 25, 2016, but there was no light duty was available. Petitioner was released to full duty and placed at MMI on January 17, 2017. The Arbitrator awards TTD benefits from August 18, 2016 through January 17, 2017 at a rate of $500.00 per week.

L: What is the nature and extent of the injury?

The Arbitrator evaluated Petitioner's Permanent Partial Disability in accord with §8.1b of the Act:

i) No AMA Impairment Rating was admitted in evidence. The Arbitrator cannot give any weight to this factor.

ii) Petitioner worked as an engine mechanic. The Arbitrator notes that this is a heavy-duty position. The Arbitrator gives weight to this factor.

iii) At the time of his accident, Petitioner was 46 years old. Petitioner suffered injuries which are likely to cause some discomfort and limitation for the rest of his life. The Arbitrator gives great weight to this factor.

iv) There was no evidence that Petitioner's earning capacity was adversely affected by his injuries. The Arbitrator gives little weight to this factor.

v) Petitioner sustained injuries which required emergent medical care and 4 surgical interventions, including an open reduction of a fracture with internal fixation. The Arbitrator gives great weight to this factor.

After review of all the evidence, including the above five factors, the Arbitrator finds that Petitioner has been permanently partially disabled to the extent of a 30% loss of use of the left arm, and 20% loss of use of the left middle finger, 83.5 weeks of benefits.

N: *Is Respondent due and credit?*

There was no evidence that Respondent was due any credit. The Arbitrator finds that Respondent is not due any credit.

O: *Liability of IWBF*

§4 of the Workers' Compensation Act provides that the Illinois Injured Workers' Fund is liable to pay benefits to an injured worker where the Respondent has failed to obtain insurance, and where a Respondent has failed to pay benefits due. Petitioner presented evidence at trial that Respondent Precision Injection, Inc., was not covered by a policy of workers' compensation insurance at the time of the accident. Therefore, all statutory requirements having been met, this award is entered against the State Treasurer as *ex officio* custodian of the Injured Workers' Benefit Fund to the extent permitted by law.

Steven J. Fruth, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC011948
Case Name	Christine Kenar v. Xylem
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0455
Number of Pages of Decision	18
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Matt Walker
Respondent Attorney	Shawn Biery

DATE FILED: 10/24/2023

/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

CHRISTINE KENAR,

Petitioner,

vs. NO: 21 WC 11948

XYLEM,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under Section 19(b) of the Act by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, medical expenses, prospective medical care and temporary total disability (TTD) benefits, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission hereby remands this case to the Arbitrator for further proceedings and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Indus. Comm'n*, 78 Ill. 2d 327 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 23, 2023 is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $59,700.00. 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 the Circuit Court.

October 24, 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	21WC011948
Case Name	Christine Kenar v. Xylem
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	15
Decision Issued By	Nina Mariano, Arbitrator

Petitioner Attorney	Matt Walker
Respondent Attorney	Shawn Biery

DATE FILED: 1/23/2023

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

/s/Nina Mariano, 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)

Christine Kenar
Employee/Petitioner

v.

Xylem
Employer/Respondent

Case # **21** WC **011948**

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 **Nina Mariano**, Arbitrator of the Commission, in the city of **Chicago**, on **9-26-2022**. 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, **4-19-2021**, 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 $**52,993.40**; the average weekly wage was $**1,039.09**.

On the date of accident, Petitioner was **66** 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 $**see order below** under Section 8(j) of the Act.

ORDER

RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS OF $692.73 / WEEK FOR 75 WEEKS, COMMENCING APRIL 20, 2021 THROUGH SEPTEMBER 26, 2022.

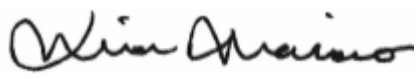
RESPONDENT SHALL PAY THE MEDICAL BILLS AS PUT FORTH IN PETITIONER'S EXHIBIT #5. ALL BILLS ARE TO BE PAID IN ACCORDANCE WITH SECTIONS 8(A) AND 8.2 OF THE ACT. RESPONDENT SHALL RECEIVE AN 8(J) CREDIT FOR PAYMENTS MADE BY PETITIONER'S GROUP INSURANCE CARRIER AND WILL HOLD PETITIONER HARMLESS FOR GROUP PAYMENTS.

RESPONDENT SHALL PAY FOR PROSPECTIVE MEDICAL CONSISTING OF A LUMBAR EPIDURAL STEROID INJECTION AND A FOLLOW UP VISIT WITH DR. AVI BERNSTEIN.

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 23, 2023

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

CHRISTINE KENAR,	)	
	)	
PETITIONER,	)	
	)	
v.	)	
	)	CASE NO. 21 WC 011948
XYLEM,	)	
	)	
	)	
RESPONDENT.	)	

FINDINGS OF FACT

Christine Kenar ("petitioner") was born in Poland on January 7, 1955. (Transcript, p. 8). She graduated high school in Poland and came to the United States in November of 1974. Since arriving in the United States, she has taken English classes and computer courses.

Petitioner has lived in Chicago for approximately 30 years. She was last employed at Xylem ("respondent"). The petitioner began working for Xylem on January 3, 1991. The petitioner described her work at Xylem as "a lot of heavy lifting, twisting, turning, pushing, pulling, 30 years of lifting." (Transcript, p. 49).

The petitioner retired from Xylem on May 21, 2021. She testified that she probably would not have retired but for the injuries she sustained while working for the respondent. (Transcript, p. 75).

In her last nine years at Xylem, the petitioner worked 7 years on the long line, and two years as a spider. (Transcript, pp. 9-10).

Long Line Job

Seven of petitioner's last nine years working for respondent were spent on the "Long Line". (Transcript, p. 10). The shift began at 5:00 a.m. and continued until 2:00 p.m. (Transcript, p. 11). There were three breaks during the day consisting of two ten-minute breaks plus a half hour for lunch.

The "long line" is a water pump assembly line that consists of four workers in four different positions. (Transcript, p. 10). The workers would switch positions every hour. (Transcript, p. 12). Petitioner would work each position for a total of two hours per shift.

The first position required the petitioner to fold boxes and push them through a tape machine. (Transcript, p. 12).

The second position required petitioner to put labels on the pumps. (Transcript, p. 13).

The third position required petitioner to take pumps off hooks and place them in boxes. (Transcript, p. 13).

The fourth position required the petitioner to take the pumps off the conveyor and stack them on a pallet. (Transcript, p. 13).

The petitioner testified that the most difficult positions were the third and fourth positions because they required heavy lifting. (Transcript, p. 14).

Position 3 on the Long Line (Pumps on Hooks)

When working the third position on the long line, petitioner stood in front of a conveyor belt. (Transcript, p. 14). A hanging hoist was two feet away. Behind the petitioner was a line of moving hooks with pumps hanging from the hooks. (Transcript, p. 15).

There were empty boxes on the conveyor belt. (Transcript, p. 15). The petitioner would grab a pump from the hooks behind her, turn and place the pump into the empty box on the conveyor belt. (Transcript, pp. 16-17). If the pump weighed in excess of 50 pounds, the petitioner used the hoist. (Transcript, p. 17).

If pumps are over 50 pounds, then I have to use a hoist. I grab the hoist with my right hand and I twist my body around me and with the belts which are hanging on this hoist, I grab pump all around, tie it, and then I grab with my left hand the head of the pump and with the right hand I push the button up so hoist goes up, and then I grab with my right hand the pump, make it level up, and I push it above the conveyor, and I press the button down and put it down to the box. (Transcript, p. 16-17).

The petitioner twisted her body while moving the pumps from the hooks behind her to the boxes on the conveyor belt in front of her. (Transcript, p. 19). In an hour, she boxed approximately 100 pumps.

When working with pumps that weigh less than 50 pounds, the petitioner moved the pumps by hand. (Transcript, p. 20). The petitioner would begin facing the conveyor belt. (Transcript, p. 21). Next, she would turn around and grab the head of the pump with her left hand. She would release the hooks and use both of her hands to hold the pump close to her chest, turn around and dump the pump inside of the box. (Transcript, p. 22). When moving pumps by hand, the pumps weighed anywhere from 5 pounds to 40 pounds. In an hour, she would move approximately 200 pumps.

Petitioner had problems when working with 100 series pumps. (Transcript, p. 23). These pumps weighed 25 pounds, and were hung on every other hook, which required the petitioner to work "really fast." (Transcript p. 23).

100 series. They are 25 pounds and why I don't like them because this is very, very fast job, every other hook, and I have to be really fast and swing it back and forth, grab them with my hands, and throw them in the box, put the parts inside, and push it forward through the tape machine and right away swing back,

grab it, take them up to release the hooks and grab them on top of my breast, hold them with my hands, and throw them to the box. So that's one job I don't like. (Transcript, pp. 23-24).

The petitioner also had trouble when working with Hoffman pumps. (Transcript, p. 25). The pumps weigh 45 pounds. The petitioner was unable to use the hoist because the Hoffman pumps are shaped differently than other pumps. (Transcript, p. 26). She had to move all the Hoffman pumps by hand.

Position Four on the Long Line (Pumps onto Pallets)

When working the fourth position on the long line, the petitioner took boxed pumps from the conveyor and stacked them on pallets. (Transcript, p. 26). The pallets were approximately 3 feet away from the conveyor. The petitioner had issues stacking Hoffman pumps on the pallets because she had to stack them three layers up, and the third layer required her to lift the pumps over shoulder level. (Transcript, p. 27).

Petitioner would always use the hoist when transferring pumps that weighed in excess of 50 pounds. (Transcript, p. 29). When moving pumps weighing less than 50 pounds, the petitioner would move the pumps by hand. This required her to grab the box with both hands and carry the box to the pallet. (Transcript, p. 29).

Spider Job

After 7 years of working the long line, the petitioner spent her last two years with the respondent working the spider job. (Transcript, p. 10 & p. 30). The spider job consisted of 6 different positions.

The housing job required petitioner to repetitively lift to 3 pounds. (Transcript, p. 32). She also twisted her body repetitively. (Transcript, p. 33).

When working with face plates, the petitioner was required to lift 4 boxes of 20 pounds each off a pallet and carry them 6 feet to her workstation. (Transcript, pp. 36-37). She would also push containers of plates weighing between 60-70 pounds. (Transcript, pp. 38-39).

In the press position, the petitioner would repetitively push heavy boxes. (Transcript, pp. 42-43). In the rollers position, the petitioner would push heavy carts 20 feet twice per shift. (Transcript, pp. 44-45). When working in the end belt position, the petitioner would lift 40-pound boxes overhead approximately 15 times per shift and would carry the 40-pound boxes 16 feet to her workstation 15 times per shift. (Transcript, pp. 46-47).

Petitioner was assigned to work the long line on April 12 - 13, 2021.

Prior to April 12, 2021, the petitioner had no issues with her back that kept her from working. (Transcript, p. 49). She was not on any restrictions for her back. (Transcript, p. 49). She was working full duty. (Transcript, p. 49). She did have physical therapy and massage around 2017 or 2018 for back pain which was offered by her employer.

On April 12, 2021, petitioner would normally have worked the spider job. However, due to a lack of parts, she was instead sent to work the long line. (Transcript, p. 48). On April 12, 2021, the petitioner was working in the fourth position on the long line. (Transcript, p. 50). She was taking Hoffman pumps off the conveyor and stacking them on pallets. (Transcript, p. 51). While stacking the pumps, she felt pain in her lower back. (Transcript, p. 51). She did not seek medical attention. She did not report the pain she felt in her back.

On April 13, 2021, the Petitioner returned to work again on the long line. She worked every position on the long line that day. (Transcript, p. 52). She noted pain increasing in her lower back as she performed her duties.

On April 14, 2021, the petitioner returned to the Spider job. The pain in her back continued to increase to the point that she "felt pain in my sciatic nerve in my butt on the right side." (Transcript, p. 54). On that date, she informed her boss, Alberto Vasquez, that she was having a lot of pain in her back. Vasquez nodded but did not respond verbally. (Transcript, p. 56).

The petitioner's last day at work was April 19, 2021.

On April 14, 2021, the petitioner returned to the spider job. (Transcript, p. 53). Between April 14 and April 19, 2021, petitioner's back pain continued to worsen. The pain "was going lower every day down on my right leg." (Transcript, p. 56). On April 19, 2021, Petitioner had begun limping due to her "dull and deep sciatic pain" (Transcript, p. 57). She worked all day as a spider. At 2:00 p.m., the petitioner told Alberto Vasquez (supervisor) and Jerry Mikes (Alberto's boss) that she had a lot of pain in her lower back, sciatic nerve and right leg. (Transcript, p. 59). Jerry Mikes replied "don't worry about it. It's nothing. I had it, too. Give it time. It will get better. That's not from job. You're just getting old. You're just getting old."

The petitioner was having trouble putting weight on her right leg. (Transcript, p. 60). She had difficulty walking and was leaning on the rails and walls while trying to leave work. Finally, she got to the point where she could no longer walk, even while leaning on the rails. (Transcript, p. 61).

The Petitioner's co-workers called out to Alberto Vasquez and Jerry Mikes. (Transcript, p. 62). Vasqez and Mikes called Kati Peterson, the safety woman., who came immediately. (Transcript, p. 63). Peterson said, "this is not work related, go home and not come back until you bring the doctor's paper to release you to regular duty. Then we will send you to our doctor who will have to release you to regular job. Then you can come back. Until then you don't even show here." (Transcript, p. 63).

A co-worker assisted the petitioner by taking her to her car using a wheelchair. (Transcript, p. 64). Petitioner then drove to Advocate for medical treatment. (Transcript, pp. 82-83).

Medical Treatment

On April 19, 2021, the petitioner was seen by Dr. Wichelmann at Advocate. (Petitioner's Exhibit #8, p. 3). The petitioner saw Dr. Wichelmann because he was the only doctor available on short notice and

without an appointment. (Transcript, pp. 65-66). Dr. Wichelmann recorded that on April 12, 2021, petitioner had increased lifting demands at work which consisted of lifting 10–45-pound objects for approximately 1 hour each day. This resulted in mild right lower back and buttock pain radiating to the right lateral hip. On the following day, the pain increased and progressively worsened to the pain the pain started to radiate down her right leg to the right knee, which prompted her to present for treatment at the clinic on April 19, 2021.

Dr. Wichelmann charted a positive straight leg raise on the right, negative on the left. Strength was 5/5. The diagnosis was lumbar radiculopathy, and acute buttock pain. Restrictions of no lifting, and light duty work only were imposed.

On April 27, 2021, petitioner followed up with Dr. Marco Palomo. (Petitioner's Exhibit #1, p. 20). Dr. Palomo noted an onset of pain on April 12, 2021, recording that petitioner worked in a factory performing assembly, lifting and refilling of boxes, and lifting 10–45-pound objects. Dr. Palomo ordered an MRI, noting that petitioner's complaints of right knee pain were most likely related to worsening lumbar pain.

Petitioner provided the off work note to the respondent along with a letter dated April 27, 2021. The letter described what happened to the petitioner at work from April 12, 2021, through her last day at work on April 19, 2021. (See Petitioner's Exhibit #6).

On May 3, 2021, an MRI of the lumbar spine revealed a soft, foraminal herniated disc on the right compressing the right L4 nerve root. (Petitioner's Exhibit #2, p. 6).

On May 4, 2021, physical therapy commenced at Advocate. (Petitioner's Exhibit #2, p. 18). On May10, 2021 petitioner was seen by Dr. Patil at the request of Dr. Palomo. (Petitioner's Exhibit #2, p. 37). Dr. Patil recommended a right L4 and L5 Transforaminal Epidural Steroid Injection. The injection was performed on May 13, 2021. (Petitioner's Exhibit #2, p. 59).

On May 21, 2021, the petitioner retired. The petitioner testified that she wanted to work longer, but that because of her injuries, she felt the need to retire in May of 2021.

I was already planning to retire. I just wasn't sure when I want to do this, but when I got this accident, I wasn't able to work. I wasn't able to kneel down. I wasn't able to sit on the lower chair. If I want to get up from the knees, I have to pull myself on the hands because my legs were completely numb. I didn't have any strength in my legs and I couldn't do any job. I couldn't even sweep the floor. (Transcript, pp. 68-69).

Physical therapy continued at Advocate. On May 27, 2021, Dr. Palomo noted that petitioner was improving, but that petitioner could require an ortho or neurospine referral. (Petitioner's Exhibit #1, p. 32).

On June 8, 2021, petitioner started therapy at ATI Physical Therapy. (Petitioner's Exhibit #3, p. 26). The therapist noted petitioner was a 66-year-old female with lumbar radiculopathy that was injured while working as a "spider" in a factor which required a PDL of medium with job duties including: lifting to 25-40 lb. from the floor, lifting / pushing from waist to table 40-50 lb., lifting overhead 30 lbs., carrying 30-40 pounds up to 10 feet, opening carts full of boxes and rolling carts around in excess of 50 pounds, opening 12 boxes at one time multiple times during a shift, and twisting / turning to put parts in proper place.

On July 20, 2021, the petitioner was seen by Dr. Nankervis at Advocate, who took over patients for Dr. Palomo, who had left the practice. (Transcript pp. 69-70, *see also* Petitioner's Exhibit #1, p. 37). Dr. Nankervis noted significant lower back pain and severely limited range of motion. Dr. Nankervis recommended a return to pain management for an additional epidural if necessary and referred petitioner for a surgical consult. Dr. Nankervis kept the petitioner off work.

On July 25, 2021, the petitioner was discharged from physical therapy due to issues with coverage. (Petitioner's Exhibit #3, p. 6).

On September 13, 2021, the petitioner was seen by Dr. Avi Bernstein. (Petitioner's Exhibit #4, p. 4). Dr. Bernstein noted that petitioner was a 66-year-old factory worker and was involved in a work-related injury related to lifting on [April] 19, 2021. He noted that she started to get low back pain and right leg pain radiating down her buttock and thigh in a sciatic distribution. She reported that her employer would not allow her to work unless she was 100%. She went on to retire, but is thinking about finding other employment. His physical exam was benign and straight leg raise was negative. He indicated that her MRI showed L4-5 spondylolisthesis with right neural foraminal stenosis with a bulge and disc protrusion. Dr. Bernstein opined that petitioner had suffered an aggravation of her pre-existing degenerative condition of the lumbar spine as a result of the work-related injury. He noted that her leg pain had resolved, but that her back pain had persisted. He recommended trial of facet injections versus epidural steroid injections. His notes indicate that Petitioner requested an off work note which was okayed by Dr. Bernstein and sent to Petitioner.

On October 14, 2021, Dr. Barry Rabin performed a fluoroscopic guided lumbar facet injection at the L4-L5 facet joint, bilaterally. (Petitioner's Exhibit #2, p. 118).

On March 30, 2022, petitioner was examined by the respondent's examining physician, Dr. Carl Graf. Dr. Graf opined that the petitioner was suffering with lumbar spondylolisthesis at L4-L5 that "is in no way causally related to the claimed injury in question and should be considered a preexisting condition with natural progression of her symptoms." Dr. Graf also opined that "the care and treatment overall has been reasonable and medically necessary." He indicated that she has no work-related restrictions since her condition was not work related and that she had gone on to retire. He did not provide opinions as to whether petitioner's work duties did or did not aggravate her pre-existing condition.

Petitioner testified that she underwent another injection on July 11, 2022. (Transcript, p. 71). She was seen at Advocate Health Care again on September 23, 2022 (Petitioner's Exhibit #7) and was scheduled to return for a repeat L4-L5 lumbar epidural steroid injection on October 17, 2022. (Transcript, p. 72 & Petitioner's Exhibit #7). She testified that she wants to return to Dr. Bernstein after this shot.

Petitioner testified that she is waiting for the pain to go away to get another job. She testified her leg pain has improved with the shots and that she has 50% less back pain, but that she still cannot walk to the end of the block without pain. She does not use painkillers.

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).

Arbitrator finds that Petitioner testified credibly, honestly and to the best of her ability. Her testimony was corroborated by the medical records in evidence. At trial, Petitioner did appear to move freely without apparent pain while demonstrating her job duties which involved twisting and other movements. That being said, she testified that her leg pain had fully resolved and her back pain was reduced by 50%.

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

The petitioner injured her back in the course and scope of her employment with the respondent. The petitioner's proposed accident / manifestation date of April 19, 2021 is supported by a preponderance of the credible evidence.

The Act is a remedial statute, which should be liberally construed to effectuate its main purpose of providing financial protection for injured workers. *McAllister v. Illinois Workers' Compensation Commission,* 2020 IL 124848 (2020). According to the Act, for a claimant to be entitled to workers' compensation benefits, the injury must "arise out of" and occur "in the course of" the claimant's employment. *Id.; see also* 820 ILCS 305/1(d). Both elements must be present at the time of the accidental injury in order to justify compensation. *Id.*

The Commission categorizes compensable injuries into two types – those arising from a single, identifiable event and those caused by repetitive trauma. *See Peoria County Belwood Nursing Home v. Industrial Commission,* 115 Ill. 2d 524, 530 (1987). An employee who alleges injury from repetitive trauma must still meet the same standard of proof as other claimants alleging accidental injury. *Three "D" Discount Store v. Industrial Commission,* 198 Ill.App.3d 43, 47 (1989). That is, the claimant 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 to a reasonable person. *Id.* The employee must still show that the injury is work related and not the result of a normal degenerative aging process. *Gilster Mary Lee Corp. V. Industrial Commission,* 326 Ill.App.3d 177 (2001). This date is known as the manifestation date. *Id.* As the same standards apply to repetitive trauma injuries, employment need only be a cause of a claimant's injury – it does not have to be the sole or primary cause. *Sisbro Inc., v. Industrial Commission,* 207 Ill.2d 193, 205 (2003).

The date on which the employee notices a repetitive-trauma injury is not necessarily the manifestation date. *Oscar Mayer & Co. V. Industrial Commission,* 176 Ill. App. 3d 607, 611 (1988). Rather, the date on which the employee became unable to work, due to physical collapse or medical treatment, helps determine the manifestation date. *Id. "*[C]ourts considering various factors have typically set the manifestation date on either the date on which the employee requires medical treatment or the date on which the employee can no longer perform work activities." *Durand v. Industrial Commission,* 224 Ill.2d 53, 72 (2006).

In this case, the petitioner testified that prior to April 12, 2021, she had no issues with her back that kept her from working. (Transcript, p. 49). She was not on any medical restrictions for her back on April 12, 2021. She was working full duty on April 12, 2021.

On April 12, 2021, the petitioner noticed pain in her lower back while working in the fourth position of the long line. (Transcript, p. 51). She did not think much of it. (Transcript, p. 51). The next day when the petitioner returned to work on the long line, the pain continued to worsen hour by hour. (Transcript, p. 52). By April 14, 2021, the pain had worsened to the point that the petitioner notified her boss, Alberto Vasquez. (Transcript, pp. 55-56). Petitioner continued to work despite the pain until April 19, 2021, when the pain became intolerable. The petitioner required a wheelchair and assistance from a co-employee to make it out to her car in the parking lot at the end of her shift. (Transcript, p. 64).

The petitioner's alleged manifestation date of April 19, 2021 is supported by the preponderance of credible evidence. The petitioner testified as to her condition prior to April 12, 2021 and her physical collapse and need for medical treatment on April 19, 2021. Dr. Wichelmann charted that on April 12, 2021 the petitioner had increased lifting demands at work, noting also that she worked in manufacturing of water pumps. (Petitioner's Exhibit #1, p. 3). Dr. Wichelmann recorded complaints of right buttock pain radiating down petitioner's leg which had grown progressively worse from April 12, 2021 to the date she presented for treatment on April 19, 2021. Dr. Wichelmann diagnosed lumbosacral radiculopathy, acute buttock pain and placed the petitioner on restrictions of no lifting and light duty work only.

Was timely notice of the accident given to the Respondent?

The petitioner provided timely notice of the accident to the Respondent.

The notice requirement applies to employees who suffer repetitive trauma injuries. *Three "D" Discount Store v. Industrial Commission,* 198 Ill. App. 3d 43, 48 (1989). In such cases, the employee must allege and prove a single, definable accident. *Id.* The date of such an accident, from which notice must be given, is the date when the injury manifests itself. *Peoria County Belwood Nursing Home v. Industrial Commission,* 115 Ill.2d 524, 531 (1987). The phrase "manifests itself" signifies "the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person." *Id.*

The Arbitrator adopts her reasoning as put forth above in her findings on accident and incorporates it herein. Petitioner established a repetitive trauma accident with a manifestation date of April 19, 2021. The petitioner also established by a preponderance of the credible evidence that timely notice was given to

Alberto Vasquez, Jerry Mikes and Kati Peterson. Despite placing notice in dispute, the Respondent did not offer any evidence in rebuttal.

Is the petitioner's current condition of ill-being causally related to the injury?

The petitioner has shown by a preponderance of the credible evidence that her current condition of ill-being is causally related to the injury sustained in the course and scope of her employment on April 19, 2021. The Arbitrator adopts the opinions of petitioner's treating neurosurgeon, Dr. Avi Bernstein.

A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury. *International Harvester v. Industrial Commission,* 93 Ill.2d 59, 63-64 (1982). The Appellate Court has instructed us that this principle is a common-sense, factual inference. *Schroeder v. Illinois Workers' Compensation Commission*, 2017 IL App (4th) 160192WC ¶26 (May 31, 2017). That is, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated; it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition; it is the resulting deterioration from whatever the previous condition had been. In fact, a claimant with a preexisting condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Commission,* 92 Ill. 2d 30, 36 (1982).

The medical records support a compensable work accident. On April 19, 2021, Dr. Wichelmann's history on April 19, 2021, supports causal connection. (Petitioner's Exhibit #1, p. 3). On April 27, 2021, Dr. Palomo charted that petitioner's pain began on April 12, 2021, that she works in a factory assembling, lifting and refilling boxes, that petitioner must move 10–45-pound objects and that petitioner believed her condition was work related. (Petitioner's Exhibit #1, p. 20).

The physical therapist recorded that the petitioner's pain began after she was lifting and twisted her back at work, that she thought the pain would subside but instead worsened, and that the petitioner worked in a factory packing heavy water pumps. (Petitioner's Exhibit #2, p. 18). Dr. Patil wrote that petitioner does a lot of heavy lifting for work and had been experiencing progressively worsening pain since April 12, 2021. (Exhibit #2, p. 37).

At the initial evaluation at ATI, the therapist noted that petitioner was injured working as a spider in a factory which required a PDL of medium with job duties including lifting 25-40 lbs. from the floor, lifting / pushing from waist to table 40-50 lbs., lifting overhead 30 lbs., carrying 30-40 lbs. up to 10 feet, and rolling carts in excess of 50 lbs. (Petitioner's Exhibit #3, p. 26). Dr. Nankervis wrote that petitioner experienced acute pain on April 12th, noting that petitioner does heavy lifting at work assembling water pumps. (Petitioner's Exhibit #1, p. 37).

Petitioner's treating surgeon, Dr. Avi Bernstein, charted that the petitioner was a factory worker who lifted and packed water pumps. (Petitioner's Exhibit #4, p. 4). He noted that she injured her back on [September] 19, 2021 related to lifting, and that she began to experience low back pain and right leg pain radiating down her buttock and thigh in a sciatic distribution. Dr. Bernstein read the May 3, 2021 MRI as showing

L4-5 spondylolisthesis with right neural foraminal stenosis as a result of bulging and disc protrusion. (Petitioner's Exhibit #4, p. 4). Dr. Bernstein opined that the petitioner suffered an aggravation of her preexisting degenerative condition of the lumbar spine as a result of a work-related injury. (Petitioner's Exhibit #4, p. 4)

Dr. Graf, Respondent's examining physician, opined that petitioner suffered with preexisting lumbar spondylolisthesis unrelated to work. However, Dr. Graf is basing his opinions in part on the absence of a well-documented work injury in the medical records. As put forth above, the records are replete with histories of the petitioner and her physicians in relationship to her work for the Respondent. Dr. Graf is silent as to whether the petitioner's job duties on the long line and as a spider might or could have aggravated the preexisting spondylolisthesis at L4-L5.

It is for the Commission to decide which medical view is to be accepted, and it may attach greater weight to the opinion of the treating physician. *International Vermiculite Co. v. Industrial Commission,* 77 Ill. 2d 1,4 (1979). Treating physicians acquire their facts and opinions, not in anticipation of trial, but as actors and viewers of the subject matter that gives rise to the litigation. *See Tzystuck v. Chicago Transit Authority,* 124 Ill. 2d 226, 235 (1988). It may be said that the connection between a medical expert who is "retained to render an opinion at trial" and the party to the suit may be litigation-related, rather than treatment-related. *Id.* at 234. Treating physicians, on the other hand, typically are not "retained to render an opinion at trial" but are consulted, whether or not litigation is pending or contemplated, to treat a patient's physical or mental problem. *Id.* While treating physicians may give opinions at trial, those opinions are developed in the course of treating the patient and are completely apart from any litigation. *Id.*

The Arbitrator accepts the opinion of Dr. Bernstein, the petitioner's treating neurosurgeon. Prior to the onset of pain on April 12, 2021, the petitioner had been working full duty without restrictions. By April 19, 2021, she had worked to the point of physical collapse and required immediate medical attention that resulted in restrictions along with additional treatment recommendations. This sequence of events is supported by petitioner's testimony and the histories in the treating records. Dr. Bernstein opined that petitioner's preexisting spondylolisthesis was aggravated as a result of her work accident. The preponderance of credible evidence supports Dr. Bernstein's opinion.

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 medical services provided to the petitioner were reasonable and necessary. The treatment to date has been conservative in nature. That petitioner's condition has improved as a result of treatment to date is supported by both the records and petitioner's testimony at the hearing. Dr. Graf, Respondent's examining physician, opined that the treatment rendered has been reasonable and necessary.

Respondent is ordered to pay the medical bills as put forth in Petitioner's Exhibit #5. Medical bills shall be paid in accordance with Sections 8 and 8.2 of the Act. Respondent shall receive an 8(j) credit for payments that were made by petitioner's group insurance and shall hold petitioner safe and harmless for any group payments for which Respondent claims the 8(j) credit.

What temporary benefits are in dispute?

Temporary Total Disability

The Arbitrator awards the petitioner temporary total disability benefits of $692.73 / week for 75 weeks commencing April 20, 2021 through September 26, 2022, as provided in Section 8(a) of the Act.

TTD is awarded for the period from the date of which the employee is incapacitated by injury to the date that his condition stabilizes, or he has recovered as far as the character of the injury will permit. *See Freeman United Coal Min. Co. v. Industrial Commission,* 318 Ill. App. 3d 170, 177 (2000). To be entitled to TTD benefits, the claimant must prove not only that he did not work but that he was unable to work. *Id.* The dispositive inquiry is whether the claimant has reached MMI. *Interstate Scaffolding Inc. V. Illinois Workers' Compensation Commission*, 236 Ill.2d 132, 142 (2010).

The petitioner has not yet reached MMI. She was initially placed on light duty by Dr. Wichelmann. (Petitioner's Exhibit #1, p. 3). Next, she was taken completely off work by Dr. Palomo on April 27, 2021. (Petitioner's Exhibit #1, p. 20). On July 20, 2021, Dr. Nankervis advised that petitioner remain off work. On September 13, 2021, Dr. Bernstein allowed petitioner to remain off of work. There have been no changes to her work status since September 13, 2021. The petitioner is still undergoing medical treatment as of the date of the hearing. The petitioner has not worked since her shift ended on April 19, 2021. None of petitioner's treating physicians have provided her with a work release. Dr. Graf only indicated that Petitioner does not have work-related restrictions, but did not address restrictions if he were to have agreed with causation, noting that she had retired.

TTD benefits may be suspended or terminated before an employee reaches MMI if she: (1) refuses to submit to medical surgical or hospital treatment essential to her recovery; (2) refuses to cooperate in good faith with rehabilitation efforts; or (3) refuses work falling within the physical restrictions prescribed by her doctor.

The petitioner has not refused any medical, surgical or hospital treatment essential to her recovery. The petitioner has not refused to cooperate in good faith with rehabilitation efforts. The petitioner has not refused work falling within the physical restrictions prescribed by her doctors.

The Arbitrator need not address the issue of the petitioner's retirement in relation to temporary total disability benefits, as there has been no offer of work from the Respondent. In fact, the evidence shows that the Respondent had no interest in offering light duty to the petitioner. (Transcript, p. 63 & p. 82). This evidence was unrebutted by the Respondent.

In any event, the petitioner's retirement was not voluntary. The petitioner testified that she wasn't sure when she was going to retire, "but when I got this accident, I wasn't able to work. I wasn't able to kneel down. I wasn't able to sit on the lower chair. If I want to get up from my knees, I have to pull myself on the hands because my legs were completely numb. I didn't have any strength in my legs and I couldn't do any job. I couldn't even sweep the floor." (Transcript, p. 69).

In response to the question, "If you had not hurt yourself during April of 2021, would you have retired in May?" the petitioner responded, "I was thinking probably not because I was thinking to work a little bit longer." (Transcript, p. 69). She also testified that she "decided to retire because I wasn't able to work." (Transcript, p. 75) She further testified that when her pain goes away, she wants to find another job.

Is the petitioner entitled to any prospective medical care?

The petitioner is entitled to prospective medical care.

Specific medical procedures or treatments that have been prescribed by a medical service provider have been "incurred" within the meaning of the statute, even if they have not yet been paid for. *See Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705 (2000). Upon establishing causal connection and the reasonableness and necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Id*. This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *See F&B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (1st Dist. 2001).

Petitioner's Exhibit #7 indicates that at the time of the hearing, petitioner was scheduled to have a repeat L4-L5 Lumbar Epidural Steroid Injection on October 17, 2022. (Petitioner's Exhibit #7). The petitioner also testified as to her intent to return to see Dr. Bernstein after the injection to determine what his treatment plan will be going forward. (Transcript, p. 75).

The Arbitrator awards prospective medical care in the form of the L4-L5 lumbar epidural steroid injection and the follow up with Dr. Avi Bernstein post injection.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC011966
Case Name	Efrain Sanchez v. Blachford, Inc.
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0456
Number of Pages of Decision	11
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Michelle Porro
Respondent Attorney	Jane Ryan

DATE FILED: 10/25/2023

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Efrain Sanchez,

Petitioner,

vs. No. 21 WC 11966

Blachford, Inc.,

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 wage calculations/benefit rates and permanent disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Regarding Petitioner's average weekly wage, the Commission agrees with the Arbitrator that Respondent's Exhibit 1 is the best evidence of Petitioner's earnings during the year preceding the injury. The Commission further agrees with the Arbitrator that the five pay periods after the accident must be excluded. To fine tune the remaining calculations, the Commission eliminates lines 5, 6, 9, 10, 24, 36 and 41 as there were zero days worked in those weeks. This leaves 40 weeks worked with varying hours. Adding up the regular and (mandatory) overtime hours, yields 1727 hours worked in those 40 weeks. Multiplying the 1727 hours by the straight hourly rate of $19.30 yields the total earnings of $33,331.10. Dividing the total earnings by the 40 weeks yields the average weekly wage of $833.28.

As it pertains to permanent partial disability benefits, the Arbitrator's Section 8.1b(b) analysis gave proper weight to the enumerated factors. The Commission, however, views the level of disability differently than the Arbitrator. The Commission modifies the Arbitrator's Decision to increase Petitioner's permanent partial disability award from 5% loss of use of the person as a whole to 7.5% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act.

All else is affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $555.52 per week for a period of 21 2/7 weeks, from April 23, 2021 through September 19, 2021, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay, pursuant to §§8(a) and 8.2 of the Act and subject to appropriate credit, the medical expenses of $210.00.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $499.97 per week for a further period of 37.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the permanent disability to the extent of 7.5 percent of the person as a whole.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of 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 $21,300.00. 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.

October 25, 2023

SJM/sk
o-9/20/2023
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	21WC011966
Case Name	Efrain Sanchez v. Blachford, Inc.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Stephen Friedman, Arbitrator

Petitioner Attorney	Michelle Porro
Respondent Attorney	Jane Ryan

DATE FILED: 8/31/2022

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

/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

Efrain Sanchez
Employee/Petitioner

v.

Blachford, Inc
Employer/Respondent

Case # **21** WC **011966**

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 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 **March 25, 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 $**43,058.08**; the average weekly wage was $**828.04**.

On the date of accident, Petitioner was **48** years of age, ***married*** with **1** dependent child.

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

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

Respondent shall be given a credit of $**9,578.57** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**9,578.57**.

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 of $210.00, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for all payments made.

Respondent shall pay Petitioner temporary total disability benefits of $552.03/week for 21 2/7 weeks, commencing April 23, 2021 through September 19, 2021, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $**9,578.57** for TTD paid.

Respondent shall pay Petitioner permanent partial disability benefits of $496.82/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.

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

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

AUGUST 31, 2022

/s/ Stephen J. Friedman
Signature of Arbitrator

Statement of Facts

Petitioner Efrain Sanchez testified in Spanish through an interpreter. Petitioner testified that on March 25, 2021, he was employed by Respondent Blachford as a machine operator. He had worked there for 29 years. He earned $19.30 per hour. He regularly worked 40 hours per week and overtime when it was required. He testified that overtime was mandatory. If you did not work the overtime, you received a warning. After 8 times, you would be terminated. He received 5 weeks paid vacation. He testified he averaged $855.23 per week in the year before the injury. Petitioner admitted his 2020 W-2 Form as PX 4 and his April 30, 2021 check stub showing earnings to date through April 25, 2021 as PX 5. Respondent offered a Wage Statement as RX 1.

On March 25, 2021, he was lifting molds and felt a lump in his stomach. This takes a lot of strength because there are 10 screws to take out and sometimes, they get stuck. The mold is 4 to 5 feet wide, 2 feet long and up to 2 feet high. It weighs 50 pounds. It is awkward to lift. He makes 8 to 10 molds per hours. It did not hurt right away, but when he went to the doctor, he explained it was a hernia. He testified he had pain in the belly button and the whole area that began on March 25, 2021. He had no prior injuries to his abdomen.

He testified he first saw Dr. Brunelle. He saw Dr. Brunelle on April 3, 2021 for follow up on lipidemia and also complained of umbilical pain due to a hernia. Physical examination noted no tenderness in the abdomen. A request for consultation with a general surgeon was made (PX 1). Petitioner saw Dr. Fremgen at Chicago Surgical Center on referral from Dr. Brunelle on April 22, 2021 about persistent umbilical hernia (PX 2). He reported pain had been present for the last 2-3 months but the bulging has become larger in size and more frequently uncomfortable. He also reported bilateral inguinal pain with heavy lifting. He reported the only physical labor he does is at work and that over time the constant heavy lifting has become more uncomfortable. Dr. Fremgen diagnosed non-recurrent bilateral inguinal hernia without obstruction or gangrene, and incarcerated umbilical hernia. He recommended surgical repair with mesh (PX 2). Petitioner was taken off work as of April 23, 2021 (PX 6).

Petitioner testified he did not report that he was injured to his employer until approximately one month after the injury, on April 23, 2021. It was not until after he saw Dr. Fremgen and had been recommended to have surgery. The First Report of Injury indicates the administrator was notified on April 26, 2021 (PX 8). Petitioner testified that he had performed his regular heavy physical job from March 25, 2021 through April 23, 2021. He testified it hurt during this time. He testified he did not tell anyone at work that he was experiencing pain from March 25, 2021 through April 23, 2021.

Petitioner underwent laparoscopic hernia repair surgery on May 18, 2021. Dr. Fremgen found left indirect inguinal hernia, right direct inguinal hernia, and incarcerated umbilical hernia. The operative report notes that mesh was inserted in both inguinal hernia repairs. The umbilical hernia defect measured 3 cm in diameter. Mesh was utilized in the closure of the defect (PX 2).

On June 3, 2021, Petitioner reported persistent discomfort. Dr. Fremgen limited him to 10 pound lifting and discussed further wound care. On July 8, 2021, Dr. Fremgen states Petitioner developed bilateral inguinal hernias and an incarcerated umbilical hernia while at work. Petitioner reported discomfort in the right groin with intermittent burning sensation. He was to continue light activity and stay off of work. On August 10, 2021, Petitioner reported discomfort in the lower abdomen while bending over or lifting anything over 10 pounds. The left side feels better. Petitioner was kept off work. Dr. Fremgen notes that the discomfort in the right groin needs to continue healing. On September 9, 2021, Petitioner reported the pain and swelling in the right groin

has improved. He has intermittent discomfort with movement. Petitioner was released to return to work on September 20, 2021 and discharged PRN. He was advised he can follow up with his primary care doctor (PX 2). Dr. Fremgen issued a return to work slip to full duty effective September 20, 2021 (PX 7). Petitioner testified he as not seen Dr. Fremgen or any other doctor for his hernia condition since September 9, 2021.

Petitioner testified that he returned to his full duty job as of September 20, 2021. Dr. Fremgen released him to full duty without restriction. He testified he sometimes does the same job if he is needed. Sometimes they have him detailing; sometimes they have him working with parts. For the most part he is detailing parts. It is lighter that the job he did before because the parts are not in the molds. He is currently earning $20.44 per hour.

Petitioner testified that he notices something as if it is moving. It is a little lump on the right side. It is painful only when he lifts something heavy, between 20 to 30 pounds. He does not have any pain or problems with his testicle area.

Conclusions of Law

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

A Workers' Compensation Claimant bears the burden of showing by a preponderance of credible evidence that his current condition of ill-being is causally related to the workplace injury. *Horath v. Industrial Commission*, 449 N.E.2d 1345, 1348 (Ill. 1983) citing *Rosenbaum v. Industrial Com.* (1982), 93 Ill.2d 381, 386, 67 Ill. Dec. 83, 444 N.E.2d 122). The Commission may find a causal relationship based on a medical expert's opinion that the injury "could have" or "might have" been caused by an accident. *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 182, 457 N.E.2d 1222, 1226, 75 Ill. Dec. 663 (1983). However, expert medical evidence is not essential to support the Commission's conclusion that a causal relationship exists between a claimant's work duties and his condition of ill-being. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63, 442 N.E.2d 908, 911, 66 Ill. Dec. 347 (1982). A chain of events suggesting a causal connection may suffice to prove causation. *Consolidation Coal Co. v. Industrial Comm'n*, 265 Ill. App. 3d 830, 839, 639 N.E.2d 886, 892, 203 Ill. Dec. 327 (1994). Prior good health followed by a change immediately following an accident allows an inference that a subsequent condition of ill-being is the result of the accident. *Navistar International Transportation Co. v. Industrial Comm'n*, 315 Ill. App. 3d 1197, 1205 (2000).

The parties stipulated that Petitioner suffered an accident arising out of and in the course of his employment with Respondent on March 25, 2021. His unrebutted testimony was that he had no prior injuries or issues with his abdomen or groin. On March 25, 2021, he felt increasing pain and a lump. He sought medical care beginning April 3, 2021 for these conditions reporting umbilical pain due to a hernia. Petitioner told Dr. Fremgen his pain had been present for the last 2-3 months but the bulging has become larger in size and more frequently uncomfortable. He also reported bilateral inguinal pain with heavy lifting. He reported the only physical labor he does is at work and that over time the constant heavy lifting has become more uncomfortable. Dr. Fremgen refers to the condition as work related.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that his condition of ill-being of bilateral inguinal hernia and umbilical hernia are causally related to the accident on March 25, 2021.

In support of the Arbitrator's decision with respect to (G) Average Weekly Wage, the Arbitrator finds as follows:

Section 10 of the Act states:

The compensation shall be computed on the basis of the "Average weekly wage" which shall mean the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury, illness or disablement excluding overtime, and bonus divided by 52; but if the injured employee lost 5 or more calendar days during such period, whether or not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted. 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.

Petitioner submitted his 2020 W-2, and his April 30, 2021 check stub as evidence of his earnings. These documents confirm that Petitioner did work overtime hours, but the amounts do not provide a basis for the calculation of average weekly wage. In contrast, Respondent offered a wage statement (RX 1) including regular hours and overtime hours worked and dates per week worked in each of the 52 weeks from May 8, 2020 through April 30, 2021. The Arbitrator does not include the 5 pay periods after the accident. The Arbitrator finds that is document provides the best evidence to calculate the average weekly wage. The wage statement confirms the regular week was 40 hours. There are some short weeks with less than 40 hours. The Arbitrator finds 13 calendar days lost and removes those parts of weeks. This results in regular earnings, excluding overtime of 40 hours x $19.30/hour or $772.00 per week.

In considering the overtime hours, the Arbitrator must determine if they should be excluded from the calculation. Overtime is excluded from the calculation of a claimant's average weekly wage unless the claimant is required to work overtime as a condition of his employment, or the overtime hours are part of the claimant's consistent weekly schedule. *Airborne Express, Inc. v. Illinois Workers' Compensation*, 372 III. App. 3d 549; 865 N.E. 2d 979; 2007 III. App. LEXIS 244; 310 III. Dec 259.

Petitioner testified that he made $19.30 per hour and his regular work week was 40 hours per week. He testified that he worked overtime when requested and that the overtime was mandatory. His unrebutted testimony was that he would be subject to disciplinary action for refusing overtime. Based upon this evidence the Arbitrator finds that the overtime hours should be included in the calculation of Petitioner's average weekly wage.

Petitioner worked 151 overtime hours in 14 weeks. The straight time earnings at $19.30 per hour totals $2,914.30. Divided by 52 weeks it would increase the average weekly wage by $56.04 per week.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proved by a preponderance of the evidence that the average weekly wage is $828.04 per week.

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

Petitioner submitted an undated bill of Chicago Surgical Clinic (PX 3) and is claiming a balance due of $210.00 representing a copay by Petitioner for the 4/22/21 visit of $30.00 and the $180.00 charge for the 8/10/21 office

visit. The bill is not reduced to fee schedule or negotiated rate. Respondent submitted its medical payment log as RX 3. The parties have stipulated that the services and charges of Chicago Surgical Clinic are reasonable and necessary to treat the Petitioner's hernia which the Arbitrator has found causally related to the accident on March 21, 2021. The only question was whether the bill was paid. The log does not show a payment for the $180.00 charge for the office visit on 8/10/21 or reimbursement to Petitioner for his copay.

Based upon the record as a whole, the Arbitrator finds that Respondent shall pay reasonable and necessary medical services of $210.00, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for all payments made.

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

The parties have stipulated that Petitioner was entitled to temporary total disability payment from April 23, 2021 through September 19, 2021 a period of 21 2/7 weeks. Petitioner received $9,578.57 in benefits for this period (RX 2). The only issue is whether the benefits were paid at the correct rate based upon the dispute over average weekly wage. Based upon the Arbitrator's finding that the correct Average Weekly Wage is $828.04, the temporary compensation rate is $552.03. Based upon this rate, the total benefits owed are $11,750.35 (21 2/7 x $552.03), resulting in an underpayment of $2,171.78.

In support of the Arbitrator's decision with respect to (L) Nature & Extent, the Arbitrator finds as follows:

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

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as an operator at the time of the accident and that he is able to return to work in his prior capacity as a result of said injury. The Arbitrator notes Petitioner testified that he currently has a lighter job assignment, but will fill in on his prior job if needed. Because of these facts, the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 48 years old at the time of the accident. Petitioner would be expected to remain in the workforce for many years. Because of this, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner has returned to unrestricted duty for Respondent and is currently earning more that he was at the time of the accident. Because of this, the Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Dr. Fremgen diagnosed non-recurrent bilateral inguinal hernia without obstruction or gangrene, and incarcerated umbilical hernia. Petitioner underwent laparoscopic repairs

with the insertion of mesh. Petitioner was returned to full duty work without restrictions. On September 9, 2021, Petitioner reported the pain and swelling in the right groin has improved. He has intermittent discomfort with movement. Because of these facts, the Arbitrator therefore gives greater weight to this factor.

The Arbitrator finds the Commission decisions in *Keith Miller v. City of Chicago*, 18 IWCC 0505 and *Klaled Karin v. H & M International*, 16 IWCC 0064 instructive.

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 person as a whole pursuant to §8(d)2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC000208
Case Name	Ian McKee v. State of Illinois - Centralia Correctional Center
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0457
Number of Pages of Decision	9
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Shannon Rieckenberg

DATE FILED: 10/26/2023

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

IAN MCKEE,

Petitioner,

vs. NO: 22WC000208

STATE OF IL/CENTRALIA C.C.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation and medical expenses, and being advised of the facts and law, reverses the Decision of the Arbitrator on the issue of causation as explained below but attaches the Decision of the Arbitrator, which is made a part hereof, for the Findings of Fact. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission finds it significant that when Petitioner was evaluated by Dr. Scott Geiger, a plastic surgeon, on April 27, 2022, Dr. Geiger opined that there was irregular healing of the tissues to the underlying muscle. Notwithstanding the fact that Petitioner informed Dr. Geiger of his use of super glue, Dr. Geiger did not causally relate the irregular healing or the development of the scar to said use. Accordingly, the Commission reverses on the issue of causation and finds there is no evidence that Petitioner's actions of super gluing his wound imperiled or retarded his recovery. Therefore, we find that Petitioner did not engage in an injurious practice under §19(d) of the Act.

Based on that finding, we modify the Decision to award the reasonable and necessary medical expenses in PX1, including Geiger's bill, along with the prospective scar revision procedure and attendant treatment.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the expenses in Px1, including Dr. Geiger's bill, for medical expenses under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay for the scar revision procedure and attendant treatment recommended by Dr. Geiger for medical expenses under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

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

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

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

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

October 26, 2023

SE/
O: 9/5/23
49

/s/ *Maria E. Portela*

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC000208
Case Name	Ian McKee v. State of IL/Centralia C.C.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	6
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Shannon Rieckenberg

DATE FILED: 1/5/2023

THE INTEREST RATE FOR THE WEEK OF JANUARY 4, 2023 4.63%

/s/ William Gallagher, Arbitrator
Signature

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

January 5, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Ian McKee
Employee/Petitioner

Case # 22 WC 00208

v.

Consolidated cases: n/a

State of IL/Centralia C.C.
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 Herrin, on November 21, 2022. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, October 13, 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.

The Arbitrator makes no determination if 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 $56,704.98; the average weekly wage was $1,090.48.

On the date of accident, Petitioner was 36 years of age, married with 3 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 paid under Section 8(j) of the Act.

ORDER

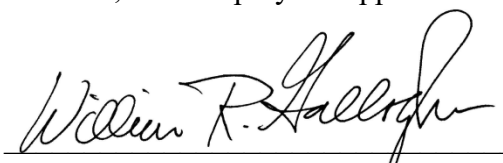
Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule, but excluding the medical services provided to Petitioner by Dr. Scott Geiger.

Based upon the Arbitrator's Conclusions of Law, Petitioner's petition for prospective medical treatment is denied.

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

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

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



JANUARY 5, 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 October 13, 2021. According to the Application, Petitioner was "Hit in chin by shield during tactical training" and sustained an injury to his "Face/chin" (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills as well as prospective medical treatment. Respondent stipulated Petitioner sustained a work-related accident, but disputed liability on the basis of causal relationship because Petitioner allegedly had engaged in an injurious practice as defined by Section 19(d) of the Act (Arbitrator's Exhibit 1).

The prospective medical treatment sought by Petitioner was surgery on Petitioner's chin, as recommended by Dr. Scott Geiger, a plastic surgeon. Respondent stipulated it was liable for the bills for the medical services provided to Petitioner with the exception of those of Dr. Geiger as well as the prospective medical treatment he recommended.

Petitioner worked for Respondent as a Correctional Officer. Petitioner was also a member of the facility's tactical team. On October 13, 2021, Petitioner was participating in a tactical team training exercise which involved Petitioner and other members of the tactical team using a plastic shield. They were participating in the training outside in an area which was muddy. A shield held by one of the other members of the tactical team accidentally struck Petitioner in the chin. As a result of the preceding, Petitioner sustained a laceration to his chin.

The accident was immediately reported to Respondent and it was determined Petitioner would require medical treatment. Petitioner sought medical treatment at the ER of Carle Richland Memorial Hospital on October 13, 2021. Petitioner testified he was at the hospital for over four hours. He said the doctor came in after about three hours, started to suture the wound, but then received a telephone call and left. The doctor returned approximately 45 minutes later and finished suturing the wound. Petitioner described the laceration as being horizontal across his chin and about 4 1/2 cm long, approximately as wide as his mouth.

According to the hospital records, Petitioner was treated by Dr. Napoleon Knight. Dr. Knight sutured the laceration with two layers of four sutures each (Petitioner's Exhibit 3).

Petitioner testified the stitches started coming out on the outer edges about four days after he had been treated at the hospital. Petitioner then removed the stitches on the outer edges of the wound and super glued it shut.

On cross-examination, Petitioner testified the stitches were supposed to be removed in approximately six weeks. About four or five days after Petitioner had removed the stitches from the outer edges, the other stitches were falling out. Petitioner then proceeded to remove all of the remaining stitches and applied superglue to the entire wound.

Petitioner subsequently developed symptoms in the scar, specifically, a lack of feeling in the site of the scar. He also stated there is a "bump" contained in the scar which makes it difficult for him

to shave. Petitioner also stated that when he pulls hair out of the scar, he experiences no feeling whatsoever.

Because of Petitioner's symptoms, he sought treatment from Dr. Scott Geiger, a plastic surgeon. Dr. Geiger evaluated Petitioner on April 27, 2022. At that time, Petitioner informed Dr. Geiger of the accident of September, 2021, and his use of superglue afterward. Dr. Geiger opined there was irregular healing of the tissues to the underlying muscle. He recommended Petitioner undergo a scar revision to excise and release the tissue (Petitioner's Exhibit 4). This is the prospective medical treatment being sought by Petitioner.

Conclusions of Law

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

The Arbitrator concludes Petitioner's current condition of ill-being is not causally related to the accident of October 13, 2021.

In support of this conclusion the Arbitrator notes following:

Section 19(d) of the Act, provides, in relevant part, the following:

"If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery or shall refuse to submit to such medical, surgical, or hospital treatment as is reasonably essential to promote his recovery, the Commission may, in its discretion, reduce or suspend the compensation of any such injured employee."

Shortly after the accident, Petitioner sought medical treatment and the laceration to his chin was sutured.

A few days after the laceration was sutured, the stitches on the outer edges of the wound started coming out. Rather than seek further medical treatment, Petitioner used super glue to close the outer edges of the wound shut.

Approximately four or five days after Petitioner removed the stitches from the outer edges of the laceration and applied super glue, the other stitches were falling out. Again, rather than seeking medical treatment, Petitioner proceeded to remove the remaining stitches and applied superglue to the entire wound.

Obviously, Petitioner is not a medical professional and his actions of removing the stitches and closing the wound with super glue resulted in an abnormal healing process. Even assuming the laceration was not properly sutured, a reasonable person would have scheduled an appointment with a medical professional when the problem with the stitches occurred.

The difficulties Petitioner has experienced which he has reported to Dr. Geiger are due to his own actions described herein.

Based on the preceding, the Arbitrator finds Petitioner engaged in an injurious practice as defined in Section 19(d) of the Act.

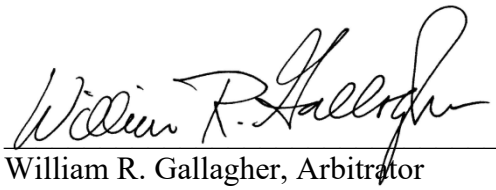
In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that the medical services provided to Petitioner immediately following the accident of October 13, 2021, were reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith, but excluding the bill for medical services Petitioner received after he engaged in the injurious practices described herein.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule, but excluding the medical services provided to Petitioner by Dr. Scott Geiger.

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

Based upon the Arbitrator's conclusion of law in disputed issue (F), the Arbitrator concludes Petitioner is not entitled to prospective medical treatment.



William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC028713
Case Name	Spenser Hansel v. Quality Rail Service
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0458
Number of Pages of Decision	16
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Nathan Lanter
Respondent Attorney	David Doellman

DATE FILED: 10/27/2023

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SPENSER HANSEL,
Petitioner,
vs. NO: 15 WC 28713

QUALITY RAIL SERVICE,
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, temporary total disability benefits and permanent partial disability, being advised of the facts and law, modifies the Decision of the Arbitrator as stated below.

I. FINDINGS OF FACT

Petitioner sustained a work-related accident on July 12, 2015, while employed full-time as a locomotive mechanic by Quality Rail Service. On July 12, 2015, Petitioner was removing flywheel bolts from a locomotive motor using a six-foot wrench and air compress rollover. He was re-adjusting the wrench on the inside of the motor when his co-worker hit the air compress rollover and the wrench came down on his right shoulder and collarbone. Petitioner tried holding it up, but as it pushed Petitioner down, he twisted to the right and was pushed out from under the wrench. He felt extreme pain in his lower back and pins and needles in his legs and feet.

Petitioner was taken by ambulance to the Emergency Room at Gateway Hospital. Petitioner eventually came under the care of Dr. Gornet in October of 2015 and eventually underwent a L5-S1 lumbar disc replacement on September 27, 2017. On January 8, 2018, a post-surgical CT scan of the lumbar spine showed 1. Anterior decompression and disc replacement at L5-S1 with hardware in satisfactory position and 2. Circumferential disc bulge at L4-5, resulting in left greater than right foraminal stenosis, stable in appearance since the prior exam. Regarding L5-S1, it was noted the previously visible central disc protrusion is no longer apparent and there is no residual central canal or foraminal stenosis.

Petitioner testified he had soreness and some pain in his legs, feet, tailbone and lower back at the time Dr. Gornet released Petitioner to full duty work in April 2018. The Commission notes that Dr. Gornet did not place Petitioner at MMI at that time, but rather scheduled Petitioner for follow-up in September 2018 for x-rays and a CT scan, noting if "things look good at that point, we will place him at maximal medical improvement." Petitioner testified he started working full-time for a new employer, Clarity Cleaning, a week after his release.

Petitioner testified that on July 3, 2018, he was working for Clarity Cleaning, a company that prepped homes for sale. On that date, he went down into the crawl space of a house to spray for mold and remove mold. Petitioner said the crawl space was about four and a half feet tall, "so you were in, like, a catcher's position." He testified that after crouching all day, he felt soreness in his lower back and tailbone. Petitioner testified that the following day his back was very bad, and it took him a long time to get out of bed. Petitioner also testified that the pain and grinding sensation he felt was in the same area as the lumbar pain he treated for with Dr. Gornet. When asked if he would describe "this as an aggravation, a new injury, a flare-up or something else," Petitioner testified, it was "an extreme aggravation."

On July 5, 2018, Petitioner returned to MultiCare Specialists and reported to Dr. Brooks that he had been under a house in a crawl space in a "crawled position" for eight hours. Petitioner did not notice an injury down there, but rather the pain had slowly been getting worse. He reported 10 out of 10 pain and tingling throughout his right posterior thigh. Positive exam findings included positive straight leg and figure four on the right, reduced range of motion, and palpable tenderness throughout the right lumbar spine. Dr. Brooks ordered physical therapy and an MRI of the lumbar spine. Petitioner was given work restrictions. Petitioner continued to treat at MultiCare Specialists in August and September of 2018.

On September 24, 2018, a CT scan of the lumbar spine was done and compared to the January 18, 2018, study. The radiologist's impressions were 1. Anterior decompression and disc replacement at L5-S1 with stable activL or similar disc replacement prosthesis in satisfactory position. There is completion [sic] pars defect since the prior exam with well-defined 2mm diastatic pars interarticularis fractures at L5 are no [sic] visible. No new spondylolisthesis is observed with the patient supine and nonweightbearing in the CT scanner and 2. circumferential disc bulges at L3-4 and L4-5 stable in appearance since the prior exam with no new central canal or foraminal stenosis.

On September 24, 2018, Petitioner returned to Dr. Gornet for his pre-scheduled follow up appointment. Dr. Gornet noted Petitioner had "a little flare-up in his back pain after some work activity recently." Dr. Gornet opined the CT scan taken that day showed increasing pars lysis bilaterally at L5, consistent with a stress fracture and increasing tightness in Petitioner's back was related to his pars lysis bilaterally. In his opinion, the pars lysis condition was present on the January 18, 2018 films but has progressed. Dr. Gornet explained at the time of the January 8, 2018 CT scan, he missed the pars fracture which was subtle at that time, and it wasn't until he compared it to the 2017 pre-operative scan that the pars fracture was obvious. Based on a comparison of the CT scans, Dr. Gornet opined that Petitioner was starting to develop the pars fracture in January 2018 following his 2017 surgery. Dr. Gornet further explained, "knowing that [Petitioner] was starting to develop these pars fractures back in January, I was very confident that the flare-up [July 2018 event] was related to the pars fracture and, therefore there was nothing here that caused me concern like that he had a new injury." Dr. Gornet also testified Petitioner had a good recovery after lumbar disc replacement surgery in 2017, except for the development of the stress fractures. Dr. Gornet further opined that the treatment rendered as a result of the flare-up event in July 2018 was reasonable and necessary for a duration of six to eight weeks. At the September 24, 2018 office visit, Dr. Gornet placed Petitioner at maximum medical improvement and returned Petitioner to without restrictions.

Dr. Mirkin, Respondent's Section 12 examining physician, testified he is a board-

certified orthopedic spine surgeon, who performed three Section 12 examinations of Petitioner. Dr. Mirkin testified he reviewed the CT scans, including a CT on January 8, 2018, which he opined showed no abnormality and no pars defect or fracture at all. Dr. Mirkin also testified he reviewed Dr. Gornet's January 2018 note and the radiologist's CT report, neither of which reference a pars defect. Based on his readings of the CT scans, Dr. Mirkin opined the pars fracture was related to and developed as a result of the July 3, 2018 incident. Dr. Mirkin also opined the incident Petitioner reported on July 5, 2018 was consistent with the development of a fracture and was an intervening injury.

Regarding his current condition, Petitioner testified he has never been symptom free since July 12, 2015. Petitioner has symptoms in the tailbone and low back, which wax and wane. He has difficulty tying his shoes and walking his dogs because when they pull quickly on the leash it is painful. Petitioner testified he is currently working and does not have difficulty performing the job duties due to his low back and tailbone symptoms. Petitioner takes over the counter ibuprofen and Tylenol for his symptoms.

II. CONCLUSIONS OF LAW

A. Causal Connection

The Arbitrator concluded Petitioner' condition of ill-being was causally related to the accident of July 12, 2015 through July 2, 2018. In so finding, the Arbitrator relied on the opinions of Dr. Mirkin who concluded the pars fracture or defect was related solely to the July 3, 2018 event. Accordingly, the Arbitrator found the July 2018 event to be an intervening accident severing causal connection between Petitioner's low back condition, including the pars defect, and the original 2015 accident. However, the Commission views the evidence differently and finds causal connection for Petitioner's condition of ill-being through September 24, 2018, finding the opinion of Dr. Gornet to be more persuasive than Dr. Mirkin on the issue of causation. When Dr. Gornet released Petitioner to full duty work in April 2018, Dr. Gornet did not place Petitioner at MMI. Rather the April 2018 record states Petitioner was to follow up in September 2018 for x-rays and a CT scan and if "things look good at that point, we will place him at maximal medical improvement." Petitioner credibly testified that he was never symptom free after the July 12, 2015 accident. Given that Petitioner continued to have some pain complaints, was not at MMI and Dr. Gornet had recommended additional scans, the Commission finds that Petitioner's lumbar condition and disc replacement surgery related to the July 12, 2015 work accident had not fully resolved as of the April 2018 release date.

Moreover, Petitioner credibly testified the July 2018 event was an aggravation of his lumbar condition and not a new injury. The medical record dated July 5, 2018 notes Petitioner reported he did not notice an injury while working under the house, but rather the pain had slowly been getting worse during the day and thereafter. Further, Dr. Gornet testified the pars fracture was related to the disc replacement surgery required by the July 2015 accident and that the July 2018 event did not sever causal connection. Dr. Gornet testified, "I was very confident that the flare-up [July 2018 event] was related to the pars fracture and, therefore there was nothing here that caused me concern like that [Petitioner]had a new injury." Specifically, Dr. Gornet explained a comparison of the CT scans from 2017 pre-surgery and January 2018 pos-surgery confirmed Petitioner was starting to develop the pars fracture in January 2018, leading him to conclude the pars fracture was present prior to the July 2018 work incident.

Where the issue involves whether an intervening accident broke the chain of causation between a work-related injury and an ensuing disability or injury, Illinois law states, work-related or not, it is irrelevant whether a subsequent incident may have aggravated the claimant's condition. *Id.* 354 Ill.App.3d at 786. Further, under an independent intervening cause analysis, compensability for an ultimate injury or disability is based on a finding that the employee's condition was caused by an event that would not have occurred "but for" the original injury. *PAR Elec. v. Ill. Workers' Comp. Comm'n*, 2018 IL App (3d) 170656WC, P56, 118 N.E.3d 681, 694, 2018 Ill. App. LEXIS 775, 427 Ill. Dec. 480, 493 (citing *International Harvester Co. v. Industrial Comm'n*, 46 Ill. 2d 238, 245, 263 N.E.2d 49 (1970)). Further, an employer is relieved of liability only if the intervening cause completely breaks the causal chain between the original work-related injury and the ensuing condition of ill-being. *Id.*, 118 N.E.3d at 694 (citing *Global Products v. Illinois Workers' Compensation Comm'n*, 392 Ill. App. 3d 408, 411, 911 N.E.2d 1042, 331 Ill. Dec. 812 (2009)).

Based on the foregoing, the Commission concludes that Petitioner did not sustain an intervening accident in July 2018 sufficient to sever causal connection to the original accident and injury of July 2015. Based upon a preponderance of the credible evidence at trial, the Commission finds that Petitioner's current condition of ill-being of the lumbar spine, including the pars fracture, is related to the July 12, 2015 work accident through September 24, 2018, the date on which Dr. Gornet found Petitioner to be at maximum medical improvement and released Petitioner back to full duty work.

B. Medical Expenses

Given the Commission's conclusions regarding causal connection, the Commission concludes that Petitioner is entitled to an award of the medical expenses incurred through September 24, 2018, the date of maximum medical improvement, as provided in Petitioner's Exhibit 10 pursuant to sections 8(a) and 8.2 of the Act.

C. Temporary Total Disability Benefits

Petitioner claims he is entitled to temporary total disability benefits from July 5, 2018 through September 24, 2018, because he was medically unable to work as a result of the pars fracture condition. Given the Commission's conclusions regarding causal connection, the Commission awards temporary total disability benefits from July 5, 2018 through September 24, 2018, the date of maximum medical improvement and full duty release set forth by Dr. Gornet.

D. Permanent Partial Disability Benefits

Lastly, the Commission addresses Petitioner's claim for an increased award of permanent partial disability (PPD) benefits. While the Commission concludes the pars fracture is related to the July 12, 2015 work accident and related disc replacement surgery, after an additional evaluation of the five factors of Section 8.1b, the Commission finds no measurable increase in Petitioner's permanent partial disability as a result of the pars fracture based on the minimal conservative treatment rendered and full duty release by the treating surgeon. As such, the Commission affirms the Arbitrator's permanent partial disability award of 15% loss of use of the person a whole.

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 March 7, 2022, is modified as stated herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services incurred through September 24, 2018 to the medical providers stated in Petitioner's Exhibit 10 pursuant to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $373.44 per week for the period from July 5, 2018 through September 24, 2018, a period of 11 and 5/7ths weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $336.10 per week for a period of 75 weeks, as provided in §8(d)2 of the Act, in that the injuries sustained caused a 15% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, including but not limited to the $5,000.00 PPD advance stipulated to at trial by the parties, to or on behalf of the Petitioner on account of said accidental injury.

IT IS FURTHER ORDERED BY THE COMMISSION 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 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.

October 27, 2023

o: 10/05/23
CMD/jjm
045

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

/s/ *Amylee Hogan Simonovich*
Amylee Hogan Simonovich

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC028713
Case Name	HANSEL, SPENSER v. QUALITY RAIL SERVICE
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	Nathan Lanter
Respondent Attorney	David Doellman

DATE FILED: 3/7/2022

THE INTEREST RATE FOR THE WEEK OF MARCH 1, 2022 0.67%

/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

Spenser Hansel
Employee/Petitioner

v.

Quality Rail Service
Employer/Respondent

Case # 15 WC 28713

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on December 29, 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 July 12, 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, in part, causally related to the accident.

In the year preceding the injury, Petitioner earned $29,128.32; the average weekly wage was $560.16.

On the date of accident, Petitioner was 21 years of age, single with 1 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $5,000.00 for other benefits (an advance for permanent partial disability), for a total credit of $5,000.00.

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 10, from July 12, 2015, through April 19, 2018, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Based upon the Arbitrator's conclusions of law attached hereto, no further temporary total disability benefits are awarded.

Respondent shall pay Petitioner permanent partial disability benefits of $336.10 per week for 75 weeks because the injury sustained caused the 15% loss of use of the person as a whole, as provided in Section 8(d)2 of the Act. Respondent shall receive a credit for the $5,000.00 advance payment of permanent partial disability benefits.

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

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

William R. Gallagher, Arbitrator

MARCH 7, 2022

ICArbDec p. 2

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment by Respondent on July 12, 2015. The Application alleged "Petitioner was injured during the course and scope of employment" and sustained an "Acute injury to the back, both lower extremities, MAW & other body parts" (Arbitrator's Exhibit 2).

Petitioner and Respondent stipulated Petitioner sustained a work-related accident on July 12, 2015; however, Respondent disputed liability on the basis of causal relationship. As noted herein, the primary basis for Respondent's position was that on July 3, 2018, Petitioner sustained a subsequent accidental injury which was an independent intervening cause. Respondent thereby disputed liability for any medical bills incurred after April 19, 2018 (the last medical treatment sought by Petitioner prior to July 3, 2018). Respondent also disputed liability for additional temporary total disability benefits of 11 5/7 weeks, commencing July 5, 2018, through September 24, 2018 (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a locomotive mechanic. On July 12, 2015, Petitioner and another employee were in the process of removing bolts from a motor. The bolts were large and required the use of a six foot long wrench and an air compressor. Petitioner was inside the motor and was adjusting the wrench when the other employee started the air compressor. This caused the wrench to come down striking Petitioner's right shoulder. Petitioner attempted to hold the wrench in place, but could not do so. He subsequently fell with the wrench pushing him down and causing a twisting of Petitioner's lower abdomen to the right. At that time, Petitioner experienced an immediate onset of low back pain.

Following the accident, Petitioner was seen in the ER of Gateway Regional Hospital on July 12, 2015. Petitioner provided a history of the accident at work and complained primarily of mid and low back pain. X-rays were obtained of the thoracic and lumbar spine which revealed degenerative changes, but were otherwise negative. Petitioner was given medication and discharged (Petitioner's Exhibit 3).

Petitioner was subsequently evaluated by Dr. Christopher Knapp, his family physician, on July 13, 2015. Dr. Knapp diagnosed Petitioner with an acute thoracic and lumbar strain. He prescribed medication and ordered physical therapy. Petitioner's condition did not improve and Dr. Knapp ordered an MRI scan of Petitioner's lumbar spine (Petitioner's Exhibit 1).

The MRI was performed on August 19, 2015. According to the radiologist, the MRI revealed an annular bulge and central disc protrusion at L5-S1 (Petitioner's Exhibit 7).

At the direction of Respondent, Petitioner was examined by Dr. James Doll, a physical medicine and rehabilitation specialist, on September 22, 2015. In connection with his examination of Petitioner, Dr. Doll was provided with medical records and the MRI scan of August 19, 2015. Dr. Doll opined Petitioner sustained a right thoracic and lumbosacral strain as a result of the accident of July 12, 2015. He recommended further physical therapy and imposed work restrictions which included no lifting over 20 pounds and no repetitive bending, twisting or squatting. He opined a surgical consultation was not indicated at that time (Respondent's Exhibit 1).

Dr. Knapp referred Petitioner to Dr. Matthew Gornet, an orthopedic surgeon, who evaluated Petitioner on October 26, 2015. At that time, Petitioner complained of low back pain on both sides/buttocks more on the right than left. Dr. Gornet reviewed the MRI of August 19, 2015, and opined it revealed a central herniation with an annular tear at L5-S1 which correlated with Petitioner's symptoms. Dr. Gornet opined Petitioner sustained a disc injury at L5-S1 related to the accident of July 12, 2015. He imposed light duty work restrictions of no lifting over 10 pounds

and no repetitive bending/lifting. He recommended Petitioner undergo steroid injections at L5-S1, but if Petitioner did not improve, discography at L4-L5 and L5-S1 might be indicated (Petitioner's Exhibit 2).

While being treated by Dr. Gornet, Petitioner underwent steroid injections, received additional physical therapy and had additional diagnostic tests performed. Ultimately, Dr. Gornet recommended Petitioner have disc replacement surgery at L5-S1. Dr. Gornet performed surgery on September 27, 2017, and the procedure consisted of a decompression and disc replacement at L5-S1 (Petitioner's Exhibits 2 and 9).

Following surgery, Dr. Gornet continued to treat Petitioner. When he saw Petitioner on January 8, 2018, he ordered physical therapy and opined Petitioner would need approximately three months of physical therapy and rehabilitation and Petitioner continued to be temporarily totally disabled. Dr. Gornet also ordered lumbar spine x-rays and a CT scan of the lumbar spine. Dr. Gornet reviewed the x-rays of the lumbar spine and opined they revealed excellent position of the device and "…no evidence of lucency or subsidence." (Petitioner's Exhibit 2).

The CT scan of Petitioner's lumbar spine was performed on January 8, 2018. According to the radiologist, Dr. Matthew Ruyle, it revealed an anterior decompression and disc replacement at L5-S1 with hardware in satisfactory position (Petitioner's Exhibit 6). Dr. Gornet also reviewed the CT scan and opined it revealed "…no evidence of erosion, lucency, heterotopic or facet abnormalities." (Petitioner's Exhibit 2).

At the direction of Respondent, Petitioner was examined by Dr. Peter Mirkin, an orthopedic surgeon, on November 16, 2016. In connection with his examination of Petitioner, Dr. Mirkin reviewed medical records and diagnostic studies provided to him by Respondent. Dr. Mirkin opined some of the diagnostic tests ordered/performed by Dr. Gornet were not medically necessary, but agreed Petitioner could undergo surgery at L5-S1, consisting of a decompression and fusion at that level (Respondent's Exhibit 2; Deposition Exhibit 2).

Dr. Mirkin again saw Petitioner on February 16, 2018. At that time, Dr. Mirkin received up-to-date medical records including the surgical report of September 27, 2017. Dr. Mirkin's findings on examination were benign and he opined Petitioner should continue his exercise program and could work with a 75 pound lifting restriction. He anticipated Petitioner could return to work without restrictions in two to four weeks and no further MRIs or CT scans were indicated, but follow-up x-rays would be appropriate. Dr. Mirkin had x-rays of Petitioner's lumbar spine performed in connection with his examination and opined they revealed the disc replacement at L5-S1, but were otherwise unremarkable (Respondent's Exhibit 2; Deposition Exhibit 3).

Dr. Gornet saw Petitioner on March 15, 2018. At that time, Dr. Gornet read Dr. Mirkin's report of February 16, 2018, and noted he disagreed with Dr. Mirkin's opinion regarding the need for some of the diagnostic tests he ordered. However, he observed Petitioner was doing "exceedingly well" and continued to improve. Dr. Gornet requested Petitioner have four more weeks of work conditioning (Petitioner's Exhibit 2).

Dr. Gornet again saw Petitioner on April 19, 2018. At that time, he released Petitioner to return to work without restrictions and observed Petitioner was doing "extremely well" and was "very pleased with his result." He anticipated Petitioner would be at MMI when he would see him again in September (Petitioner's Exhibit 2).

While Petitioner was being treated by Dr. Gornet, physical therapy and chiropractic treatment was provided to him by Multicare Specialists. When seen there on April 18, 2018, Petitioner stated he was "…90% improved overall" and was there for his last visit (Petitioner's Exhibit 9).

Petitioner did not return to work for Respondent after he was released by Dr. Gornet. Petitioner obtained employment with Clarity Cleaning, a company in the business of getting homes ready to be put on the market and sold. Petitioner's job duties for Clarity Cleaning included vacuuming/cleaning carpeting, cleaning windows and

whatever other tasks were needed to get the homes ready to be sold. On July 3, 2018, Petitioner was working on mold removal in a house and was in a crawlspace that was about four and one-half feet tall. Petitioner was in the crawlspace for approximately four to five hours. Because of its height, Petitioner was in a catchers' position for the entire time.

When Petitioner got out of the crawlspace, he testified that at that time he experienced soreness in his low back and tailbone. However, the following morning, the pain in his low back was much worse and it took him a long time to get out of bed. Petitioner described the pain as being a "grinding" type pain and he did not experience a "pop." Petitioner called the incident an "extreme aggravation."

On July 5, 2018, Petitioner was seen at Multicare Specialists, by Jonathan Brooks, a chiropractor. At that time, Petitioner advised he was under a house in a “crawled” position for eight hours and, when he got out, he had pain in his right lower back. Petitioner did not "notice" having sustained an injury, but advised his pain was 10/10 on a pain scale. Dr. Brooks ordered physical therapy and discussed the case with Dr. Gornet (Petitioner's Exhibit 9).

Petitioner attempted to contact Dr. Gornet on July 6, 2018. According to his medical records, an attempt was made to return Petitioner's call but it was not possible to leave a message for him (Petitioner's Exhibit 2).

Petitioner received physical therapy and chiropractic treatment from Multicare Specialists through the summer of 2018. Dr. Brooks ordered an MRI scan of Petitioner's lumbar spine (Petitioner's Exhibit 9).

The MRI was performed on July 9, 2018. According to the radiologist, it was not possible to interpret any findings at L5-S1 (Petitioner's Exhibit 5).

Dr. Brooks reviewed the MRI and opined it revealed post-op changes and a possible protrusion at L4-L5. He ordered further physical therapy and authorized Petitioner to remain off work. When Dr. Brooks saw Petitioner on August 20, 2018, Petitioner also complained of left sided neck pain (Petitioner's Exhibit 9).

Dr. Gornet evaluated Petitioner on September 24, 2018. At that time, Petitioner informed him he had a "little flare-up" of his back pain associated with some work activity. Dr. Gornet ordered x-rays of Petitioner's lumbar spine which he read as showing no evidence of any lucency or translation. He also ordered a CT scan of Petitioner's lumbar spine (Petitioner's Exhibit 2).

The CT scan was performed on September 24, 2018. According to the radiologist, Dr. Ruyle, it revealed the decompression and disc replacement at L5-S1 as well as a pars defects since the prior exam with "…pars intraarticularis fractures at L5 are now visible." (Petitioner's Exhibit 6).

Dr. Gornet reviewed the CT scan and agreed it revealed pars lysis bilaterally at L5 consistent with a stress fracture which was present on the prior films of January 8, 2018, but had progressed. He opined this condition was present prior to his authorizing Petitioner to return to work and was related to the accident of July 12, 2015. He found Petitioner to be at MMI and authorized him to return to work without restrictions (Petitioner's Exhibit 2).

Petitioner subsequently sought medical treatment at Multicare Specialists on November 21, 2018. At that time, Petitioner complained of pain in the low back and tailbone as well as the cervical spine. Petitioner received physical therapy and chiropractic care for the lumbar and cervical spine conditions, respectively. Petitioner continued to be treated at Multicare Specialists through May 5, 2019, for bilateral hip pain, low back pain and cervicalgia (Petitioner's Exhibit 9).

At the direction of Respondent, Dr. Mirkin again examined Petitioner on December 12, 2018. In connection with his examination of Petitioner, Dr. Mirkin reviewed up-to-date medical records and diagnostic tests, including the CT scan performed on September 24, 2018. When examined by Dr. Mirkin, Petitioner informed him of the incident of July 5, 2018, when he felt a "popping sensation" in his back when he got out from under the house. Dr. Mirkin reviewed the CT scan of September 24, 2018, and opined it revealed a complete lysis at L5 consistent with a fracture. He also noted both Dr. Gornet and the radiologist initially opined there was no evidence of a lysis or fracture at L5 revealed in the CT scan of January 8, 2018. Dr. Mirkin opined Petitioner developed the acute fracture in July, 2018, when he felt a pop and any treatment he received thereafter was related to that incident, and not the accident of July 12, 2015 (Respondent's Exhibit 2; Deposition Exhibit 4).

Dr. Gornet saw Petitioner on March 25, 2019. At that time, Dr. Gornet noted Petitioner developed a "spontaneous stress fracture" at L5-S1 following the disc replacement surgery. He opined this was not related to a new event, but may have been slightly aggravated by the event of July 5, 2018 (Petitioner's Exhibit 2).

Dr. Gornet again saw Petitioner on September 23, 2019. He noted Petitioner had a pars fracture post disc replacement, but was working full duty and had no complaints. He reaffirmed his opinion Petitioner was at MMI (Petitioner's Exhibit 2).

Petitioner again returned to Multicare Specialists on October 3, 2019, and was treated for depression, anxiety, and pain referable to the low back, tailbone and left SI joint. Petitioner continued treatment there through August 25, 2020 (Petitioner's Exhibit 9).

Dr. Gornet last saw Petitioner on September 21, 2020. He noted Petitioner was working full duty and doing "very well." (Petitioner's Exhibit 2).

Dr. Gornet was deposed on June 13, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Gornet's testimony regarding his diagnosis and treatment of Petitioner's low back condition was consistent with his medical records and he reaffirmed the opinions contained therein. Specifically, Dr. Gornet testified Petitioner informed him of the accident of July 12, 2015, he diagnosed a disc injury at L5-S1, performed disc replacement surgery at that level and, in April, 2018, released Petitioner to return to work without restrictions (Petitioner's Exhibit 11; pp 8-16).

In regard to the CT scan of September 24, 2018, Dr. Gornet testified it revealed a stress fracture which was not present on the preoperative CT. Based on his opinion that he is a "world authority" on lumbar disc replacement surgery, he testified the stress fracture was related to the surgery. He characterized the subsequent incident of July, 2018, as being a flare-up of Petitioner's back pain, but it did not cause the pars defect (Petitioner's Exhibit 11; pp 16-17).

On cross-examination, Dr. Gornet was interrogated about the CT of January 8, 2018, and that it did not reveal a pars fracture. Dr. Gornet's explanation was that it was "probably something developing" and that he "missed it" (Petitioner's Exhibit 11; pp 25-26).

In regard to the incident of July, 2018, Dr. Gornet agreed that the medical treatment provided to Petitioner immediately thereafter would be related to the incident. However, he reaffirmed his opinion the stress fracture was related to the original work injury (Petitioner's Exhibit 11; pp 33- 34).

Dr. Mirkin was deposed on July 29, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Mirkin's testimony was consistent with his medical reports and he reaffirmed the opinions contained therein. Specifically, Dr. Mirkin testified that, in regard to the incident of July 5, 2018, Petitioner felt a

"popping sensation" in his back when he got out from under the house and had increasing pain which Petitioner described as being 10/10 the following day. In regard to his review of the CT scans of January 8, 2018, and September 24, 2018, he testified the CT of January 8, 2018, did not reveal a pars fracture, but the CT scan of September 24, 2018, did reveal a pars fracture. Dr. Mirkin also took x-rays of Petitioner's lumbar spine at the time of his examination of Petitioner in December, 2018, and they also revealed a pars fracture. Based on the preceding, Dr. Mirkin testified the pars fracture was likely caused when Petitioner was working under the house in July, 2018 (Respondent's Exhibit 2; pp 16-22).

On cross-examination, Dr. Mirkin agreed pars fractures can occur spontaneously. However, he reaffirmed his opinion the fracture was related to the incident of July, 2018, based on the CT of January 8, 2018, not showing the fracture and Petitioner's level of pain the day after the July, 2018, incident (Respondent's Exhibit 2; pp 25-26).

Dr. Ruyle was deposed on November 4, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Ruyle was questioned about his reading of the CT scan of January 8, 2018. He testified there was a "discrepancy" in his report and said it revealed incomplete pars fractures which were developing. He testified the CT scan of September 24, 2018, revealed the fractures were more visible than they were in the CT of January 8, 2018, and were "complete fractures" which extended all the way across that portion of the bone or a progression of a stress fracture. He testified these can occur subsequent to disc replacement surgery (Petitioner's Exhibit 12; pp 9-13).

On cross-examination, Dr. Ruyle was interrogated about his reading of the CT of January 8, 2018, and the fact it did not reveal any pars fractures. He described this as a "clean miss" meaning it was detectable on the images but not detected by the radiologist (Petitioner's Exhibit 12; pp 17- 18).

Dr. Brooks was deposed on February 17, 2021, and his deposition testimony was received into evidence at trial. When questioned about the etiology of the pars fracture, he agreed with the opinions of Dr. Gornet and Dr. Ruyle (Petitioner's Exhibit 13; pp 11-12).

On cross-examination, Dr. Brooks agreed that when he saw Petitioner on April 18, 2018, Petitioner advised he was 90% improved and had no low back pain. He also agreed Petitioner had no medical treatment for three months and did not seek any medical care until after the accident of July 5, 2018 (Petitioner's Exhibit 13; pp 31-33).

At trial, Petitioner testified he continues to experience symptoms in his low back and tailbone. He described these as being pins and needles and said his tailbone feels like he fell down a flight of stairs and landed on his behind. Petitioner said he has good days and bad days and has difficulties performing various tasks such as tying his shoes or walking his dogs. Petitioner presently works at Tobacco Central and only performs minimal manual labor.

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, in part, causally related to the accident of July 12, 2015.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained a work-related injury on July 12, 2015, which caused him to sustained an injury to his lumbar spine at L5-S1.

Petitioner ultimately underwent disc replacement surgery at L5-S1 on September 27, 2017.

Petitioner recovered from the disc replacement surgery and was released to return to work without restrictions on April 19, 2018, by his treating physician, Dr. Gornet.

When seen at Multicare Specialists on April 18, 2018, Petitioner advised he was 90% improved.

Petitioner did not seek any medical treatment until he sustained another injury to his low back on July 5, 2018, when he experienced low back and tailbone pain while working in a crawlspace under a house.

When Petitioner sought medical treatment on July 6, 2018, he described the pain as being 10/10 on a pain scale.

Dr. Gornet and Dr. Ruyle both reviewed the CT scan performed on January 8, 2018, and initially opined it did not reveal a pars fracture at L5. They both subsequently reviewed the CT scan performed on September 24, 2018, and both opined it revealed a pars fracture at L5. They then changed their opinions about their interpretations of the CT scan of January 8, 2018, and opined that it did, in fact, revealed a pars fracture at L5 which they initially "missed."

Dr. Gornet opined the pars fracture was related to the disc replacement surgery he performed. This opinion was based, in part, on his description of being a "world authority" on disc replacement surgery.

Respondent's Section 12 examiner, Dr. Mirkin, also reviewed the CT scans of January 8, 2018, and September 24, 2018, and opined the CT scan of January 8, 2018, did not reveal a pars fracture, but the CT scan of September 24, 2018, did reveal a pars fracture. Dr. Mirkin opined the pars fracture was related to the accident of July 5, 2018. Dr. Mirkin's opinion was based, in part, on the fact that Petitioner had a significant amount of pain the day after the accident of July 5, 2018, with Petitioner rating it as a 10/10 on the pain scale.

Given the preceding, the Arbitrator is not persuaded by the opinions of Dr. Gornet and Dr. Ruyle as to the etiology of the pars fracture. Further, the fact that Dr. Brooks, a chiropractor, was in agreement with this opinion is not persuasive.

Based on the preceding, the Arbitrator finds the opinion of Respondent's Section 12 examiner, Dr. Mirkin, to be more persuasive than those of Dr. Gornet, Dr. Ruyle and Dr. Brooks in regard to the etiology of the pars fracture at L5.

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

Based upon the Arbitrator's conclusion of law in disputed issue (F) the Arbitrator concludes the medical treatment provided to Petitioner from July 12, 2015, through April 19, 2018, 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 10 for medical services provided to Petitioner from July 12, 2015, through April 19, 2018, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

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

Based upon the Arbitrator's conclusion of law in disputed issue (F) the Arbitrator concludes Petitioner is not entitled to any further temporary total disability benefits.

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

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of 15% loss of use of the person as a whole.

In support of this conclusion the Arbitrator notes the following:

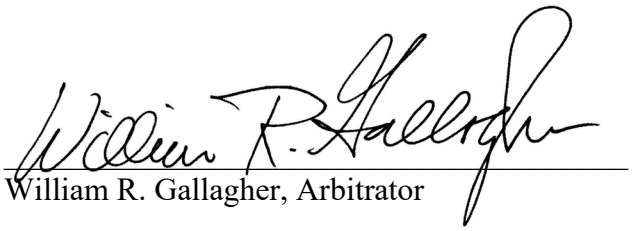
Neither Petitioner nor Respondent tendered an AMA impairment rating. The Arbitrator gives this factor no weight.

Petitioner was employed as a locomotive mechanic at the time he sustained the accident. This was a physically demanding job which Petitioner did not return to; however, he was released to return to work without restrictions by his treating physician, Dr. Gornet. The Arbitrator gives this factor moderate weight.

Petitioner was 21 years old at the time he sustained the injury. He will have to live with the effects of the injury for the remainder of his working and natural life. The Arbitrator gives this factor significant weight.

There was no evidence the injury had any effect on Petitioner's future earning capacity. The Arbitrator gives this factor moderate weight.

Following the disc replacement surgery, Petitioner made a good recovery and was released to return to work without restrictions. In April, 2018, Dr. Gornet noted Petitioner was doing "extremely well" and when seen at Multicare Specialists, Petitioner advised he was 90% improved. As a result of the subsequent accident of July 5, 2018, Petitioner sustained a new injury to his low back. The Arbitrator cannot determine with any certainty which of Petitioner's current complaints are related to the accident of July 12, 2015, and which are related to the accident of July 5, 2018. In any event, Petitioner did sustain an injury to his lumbar spine on July 12, 2015, which required disc replacement surgery. The Arbitrator gives this factor significant weight.



William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC014108
Case Name	Deborah Pitrack v. Northshore University Health Systems
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0459
Number of Pages of Decision	18
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Evan A Hughes
Respondent Attorney	Timothy O'Gorman

DATE FILED: 10/27/2023

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DEBORAH PITRACK,

Petitioner,

vs. NO: 22WC014108

NORTHSHORE UNIVERSITY
HEALTH SYSTEM,

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, temporary total disability and 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, but makes clarifications as outlined below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

We clarify that, in the Order section, the Arbitrator's award is for temporary total disability (TTD) through the date of the hearing on January 24, 2023. However, in the last sentence of the Conclusions of Law section, a clerical error indicates that Petitioner is entitled to TTD "through February 24, 2023." We correct this error to reflect that TTD is awarded through the date of hearing on January 24, 2023.

We also add, in the Order section, that Respondent shall pay for continued follow up treatment as recommended by Dr. Gregory Portland until Petitioner reaches maximum medical improvement.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed February 17, 2023, is hereby affirmed and adopted with the clarifications noted above.

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

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

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

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.

October 27, 2023

SE/
O: 10/17/23
49

/s/ *Maria E. Portela*

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC014108
Case Name	Deborah Pitrack v. Northshore University Health Systems
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	15
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Evan Hughes
Respondent Attorney	Timothy O'Gorman

DATE FILED: 2/17/2023

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 15, 2023 4.84%

/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)

Deborah Pitrack
Employee/Petitioner

v.

Northshore University Health Systems
Employer/Respondent

Case # **22** WC **14108**

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 **1/24/23**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **5/6/22**, 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 $**89,559.60**; the average weekly wage was $**1722.30**.

On the date of accident, Petitioner was **70** 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 $**21,441.50** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**21,441.50**.

Respondent is entitled to a credit of $**8117.61** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services of $87,637.25, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary partial disability benefits of $1148.20/week for 37 3/7 weeks, commencing 5/7/22 through 1/24/23, 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.

FEBRUARY 17, 2023

Signature of Arbitrator

ICArbDec19(b)

BEFORE THE ILLINOIS WORKERS COMPENSATION COMMISSION

Deborah Pitrack,	)	
	)	
Petitioner	)	
	)	
vs.	)	**No. 22 WC 014108**
	)	
	)	
Northshore University Health System,	)	
	)	
	)	
Respondent	)	

PETITIONER'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

An Application for Adjustment of Claim was filed in this matter. The Petitioner's Section 19(b) Petition was tried before the Honorable Charles Watts on January 24, 2023. After hearing the proofs and reviewing all the evidence presented, the Arbitrator hereby makes findings on disputed issues below and includes those findings and Conclusions of Law relating to disputed issues in this document. The Arbitrator's Conclusions regarding any remaining disputed issues are set forth on the attached Arbitration Decision Form.

FINDINGS OF FACT

The petitioner, Deborah Pitrack, is a 71-year-old mammographer employed by the respondent, Northshore Health System. (Transcript of Proceedings "TP" at p. 6). She has worked for the respondent for almost 27 years. (TP at 7). The petitioner was injured at work on May 6, 2022, and she went to see Dr. Gregory Portland, an orthopedic surgeon at Illinois Bone and Joint Institute, on May 10, 2022. (TP at 7-8).

Before her 5/6/22 work injury, the petitioner had seen Dr. Portland on 3/22/22 relating to some new pain that was developing in her right shoulder. (TP at 9). The petitioner had seen Dr. Portland in 1996, shortly after she started working as a mammographer. In 1996, she was having

issues with her right shoulder that she felt was due to the repetitive motion needed to operate the mammography apparatus. (TP at 9). In 1996, Dr. Portland gave her a shot in the right shoulder and the shot worked, and she was pain free for 25 years, so when the shoulder started bothering her in March, the petitioner thought she could do the same thing, *i.e.,* get another shot and she would be fixed up like she was 25 years earlier. (TP at 9-10).

Dr. Portland examined the petitioner on 3/22/22. (PX 1 at 24-27). He noted that he had not seen Ms. Pitrack for a number of years. He noted the complaints that while working as a mammographer, Ms. Pitrack had developed anterior laterally based pain with lifting patients and reaching and rotating the right shoulder. (PX 1 at 24). She reported that sometimes it felt like it would catch but the shoulder does not lock. She reported some night pain and had mild weakness. (PX 1 at 24). Dr. Portland noted that she has not had any physical therapy and that she had an injection to the joint over ten years ago. (PX 1 at 24).

On physical examination on 3/22/22, he noted no swelling or bruising in the shoulder and no atrophy in the infraspinatus. (PX 1 at 25). She had full active and full passive motion of the right shoulder. (PX 1 at 25). She had positive impingement, Hawkins and empty beer can signs. (PX at 25). She had 4/5 power of the supraspinatus. (PX at 25). All other physical findings were normal. (PX 1 at 25-26). Plain X-rays taken on 3/22/22 revealed a relatively normal-appearing right shoulder with minimal degenerative change. (PX 1 at 26).

On 3/22/22, Dr. Portland's impression was "Right rotator Cuff Tear." [sic] (PX 1 at 26). He discussed the petitioner's treatment options with her and they agreed that he would inject the shoulder and prescribe a course of physical therapy. (PX 1 at 26). He told the petitioner that if she did not feel better after the injection and four weeks of physical therapy, she should return Dr. Portland and he would order an MRI of the shoulder. (PX 1 at 26).

Petitioner testified that on 3/22/22 she was having some pain with moving patients and that her job is pretty physical. (TP at 11). She testified that she was having a little internal pain and hoped that Dr. Portland could just get rid of that minor pain. (TP at 11). At that time, she had no problems with range of motion. She could lift her harm over her head and could reach behind her back. (TP at 11). She received the injection from Dr. Portland on 3/22/22 and she began attending physical therapy twice a week at Northshore University Health System. (TP at 12). With the injection and physical therapy, the petitioner was improving and was feeling much better. (TP at 13). She was working full time throughout the physical therapy, and she was experiencing less pain with manipulation of patients. (TP at 13).

On May 6, 2022, the petitioner was giving a mammography to a tall fit woman who became light-headed during the procedure. (TP at 13-14). After positioning the patient for the third image, she went to do the exposure when she saw the patient moving, so she ran to the patient who had become non-responsive. (TP at 15) The petitioner grabbed the patient and tried to bring her down to the floor gently. (TP at 15). As she lowered the patient to the ground, she felt a pop in her right shoulder and felt a pull in the shoulder and tingling in the arm. (TP at 15). After setting the patient down, the petitioner left the room and asked for help from the other mammographer and the secretary. (TP at 15). They were able to finish the mammography on the patient. (TP at 15).

After the incident, the petitioner was in substantial pain after the incident, and she felt something was torn because she could not move the arm. (TP at 17). The incident happened on a Friday and petitioner was scheduled to work Saturday, but she could not work Saturday (TP at 17). Petitioner submitted an incident report before she left work on Friday. (TP at 18). Petitioner's supervisor told her to not go into work on Monday, May 9, 2022. (TP at 18).

Petitioner called Dr. Portland's office and she went in to see him on Tuesday May 10, 2022. (TP at 21).

When she saw Dr. Portland on 5/10/22 the nature of the pain and lack of movement in the right arm was drastically different from the way she felt when she saw Dr. Portland on 3/22/22 before the work accident. On 5/10/22, she was in such severe pain, and she was unable to lift her arm. (TP at 28). Everything hurt and it kept getting worse. (TP at 28). She was unable to sleep due to the pain and had to sleep on her back and be elevated. (TP at 28).

Dr. Portland prescribed an MRI of the shoulder, which she had on 5/12/22 and she returned to see Dr. Portland on 5/16/22 (TP at 22). Based on the visit of 5/16/22, Dr. Portland recommended surgery to repair the right rotator cuff and took the petitioner off work pending the surgery. (TP at 22). While waiting for approval of the surgery, the petitioner was sent to see Dr Garrigues for a Section 12 examination on 6/30/22. (TP at 22). Following the appointment with Dr. Garrigues, the respondent did not approve the proposed surgery. (TP at 23). The petitioner still believed that Dr. Portland's recommendation was correct, and she returned to see Dr. Portland on 8/1/22. (TP at 23). Based on that visit, she and Dr. Portland agreed that she would go forward with the recommended surgery. (TP at 23). Dr. Portland performed the surgery on 9/9/22. (TP at 23).

Petitioner was in a sling for a period after the surgery. (TP at 24). She has been attending physical therapy at Illinois Bone and Joint Institute and has attended her follow up visits with Dr. Portland. (TP at 24). Her most recent with Dr. Portland prior to the hearing was 12/8/22, and at that time he continued physical therapy, and she is attending physical therapy at the time of hearing. (TP at 26). She is also performing her home exercise program. (TP at 26). She is still progressing with range of motion. (TP at 26). She will continue in physical therapy at

least until she returns to see Dr. Portland early March 2023. (TP at 26). She remains off work until further notice with a return to work to be determined by Dr. Portland. (PX at 23).

A. OPINION OF GREGORY PORTLAND MD

When Dr. Portland saw the petitioner on 5/10/22, he noted that she had been doing well with her physical therapy. Her pain and functionality had improved, and she was almost pain free until a work incident where she caught a patient as she was fainting. (PX 1 at 90). Following the work accident, she felt and increase in pain and a pop in the shoulder. (PX 1 at 90). She reported acute weakness and pain and is having pain with sleeping and activities of daily living. (PX 1 at 90). The arm feels heavy and feels like she has a deep tooth ache in the shoulder. (PX 1 at 90) This was a new pain significantly worse than anything she had previously. (PX 1 at 90).

Dr. Portland saw the petitioner on 5/16/22 after she had an MRI. (PX 1 at 86). The petitioner reported pain and weakness and night pain. (PX 1 at 86). She has difficulty raising her arm to shoulder height. (PX 1 at 86). On physical examination, petitioner was unable to passively raise the arm above 80 degrees and she had new findings of substantial strength deficits in the infraspinatus muscle. (PX 1 at 87). Dr. Portland noted that the MRI revealed a full thickness tear of the supraspinatus and the infraspinatus as well as a large joint effusion and fluid in the bursa and that the bicep tendon was involved. (PX 1 at 87). He told the petitioner that she suffered a "massive acute" tear of the rotator cuff, and he recommended a surgical repair. (PX 1 at 88).

Dr. Portland next saw the petitioner after the respondent refused the proposed surgery based on the Section 12 report. (PX 1 at 80). The petitioner was still limited with range of motion and use of the right arm. (PX 1 at 80). On examination, she was unable to lift the arm up to shoulder height and even with assistance she could not raise the arm fully overhead. (PX 1 at

80). He looked at the MRI film and he noted the large tear of the supraspinatus and infraspinatus, which had retracted to the humeral head. (PX 1 at 80). His impression was that the petitioner suffered an acute on chronic rotator cuff tear. (PX 1 at 80).

Dr. Portland explained to the petitioner that he believes that she has an acute on chronic rotator cuff tear. (PX 1 at 80). He explained that when he saw petitioner in March, she had power with slight weakness of the supraspinatus only. (PX 1 at 80). She had a subsequent traumatic acute onset event with significant worsening of her symptoms, and she now has a very large rotator cuff tear. (PX 1 at 80). He stated that if she was suffering from a chronic condition, when he saw her in March, she would have had an obvious high riding humeral head and significant weakness in the shoulder, but she did not. (PX 1 at 80). He noted that she had done well for a number of years with only mild worsening evident in March. (PX 1 at 80). As a result, he stated his opinion that "she absolutely did have a traumatic event that worsened her symptoms causing increased [sic] in pain, tear size and progressive weakness. In my opinion, the described event is consistent with an acute event on top of a chronic tear. I therefore disagree with the opinions of Dr. Garrigues from his IME where he felt like all of her tear was chronic." (PX 1 at 80).

Dr. Portland recommended an arthroscopic rotator cuff repair and subacromial decompression. (PX 1 at 80). He also commented on the Section 12 examiners recommendation for additional cortisone injections, stating that he does not believe that further injections will significantly help and may put her a risk of further tearing her rotator cuff. (PX 1 at 80).

Dr. Portland performed the recommended surgery on 9/9/22. (PX 1 at 40). During surgery, Dr. Portland found a large tear involving the entire supraspinatus and a portion of the infraspinatus. He also found the bicep tendon to be significantly damaged and necessitated a

tenodesis procedure. (PX 1 at 40). In his operative report, Dr. Portland confirms his opinion that he repaired an acute on chronic rotator cuff tear and further that the acute portion of the tear was traumatic. (PX 1 at 40).

CONCLUSIONS OF LAW

The Arbitrator adopts the findings of fact in support of the Conclusions of Law.

Decisions of an Arbitrator should be based exclusively on the evidence in the record of 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 to 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 vs. Industrial Commission*, 44 Ill.2d 214 (1969).

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 inconsistences with his 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 Arbitrator finds, after observing Petitioner testify at trial and a review of the records, that Petitioner was completely credible. Petitioner's demeanor at trial and manner in which she

answered questions exhibited forthrightness because her answers were easily and quickly made. Petitioner never seemed to search for answers or appear rehearsed.

F. In support of the Arbitrator's Decision regarding the issue of whether the Petitioner's current condition of ill being is causally related to the injury, the Arbitrator finds the following.

To obtain compensation under the Act, an employee must show by a preponderance of the evidence that he has suffered a disabling injury arising out of and in the course of his employment. *Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193, 203 (2003)*. The "arising out of" component addresses the causal relationship between the work injury and the employee's condition of ill being. *Id.* A work 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. *Id at 205.* Whether causation exists is to be decided by the Commission. *Land and Lakes Co. v. Industrial Commission, 359 Ill.App.3d 582, 592 (2nd Dist. 2005).* In deciding issues of causation, it is the Commission's responsibility to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine the weight to give to testimony and resolve conflicts in the evidence, particularly medical opinion evidence. *Id.*

This case involves a conflict between the opinions of the treating surgeon and the Section 12 examiner. The treating orthopedic surgeon is of the opinion that the petitioner presented on May 10, 2022, with an acute over chronic tear of the right rotator cuff which was caused by the work accident that the petitioner described in her testimony at hearing. After reviewing an MRI study performed on May 16, 2022, the treating surgeon confirmed his diagnosis of a massive acute rotator cuff tear. He believes that the tear caused significant pain and weakness and necessitated surgical repair.

The treating surgeon expressed his opinions in his chart note of August 1, 2022 regarding the medical causation of the petitioner's shoulder condition. His opinion was based the fact that he examined the petitioner six weeks prior to the work accident, and she had only mild complaints of shoulder pain with no objective reduction in either active or passive range of motion. He acknowledged that he had treated the petitioner for shoulder pain many years ago, and he was impressed that the petitioner's complaints in March of 2022 were quite mild evidencing only a slight progression of degenerative wear in the shoulder.

The treating surgeon noted that she had responded very well to the injection and physical therapy prescribed in March 2022 and had very little pain and excellent range of motion prior to the May 6, 2022 work accident. Dr. Portland was able to compare the petitioner's presentation on 3/22/22 and then on 5/10/22 and he noted in his records the significant difference between the petitioner's pain complaints and loss of motion. He also noted the differences on physical examination conducted during the 5/16/22 visit, where during the 3/22/22/ examination petitioner exhibited only slight weakness in the supraspinatus, but on 5/16/22 he found significant weakness in the infraspinatus as well as the supraspinatus. This finding on examination was consistent with the surgical findings of full thickness tears in both the supraspinatus and infraspinatus as well as the bicep tendon.

Moreover, Dr. Portland found the fluid collections that had formed in the shoulder joint found during the MRI as evidence of an acute injury.

In contrast, the Section 12 opines that the petitioner's shoulder injury presented to Dr. Portland on 5/10/22 was entirely chronic in nature. He obviously never saw the petitioner prior to the work accident, unlike the treating physician. He did not see how the petitioner presented on 3/22/22 or on 5/10/22 or 5/16/22. His opinion of the solely chronic nature of the rotator cuff tear

seems to be based in great part, or entirely, on his belief that the MRI study performed on 5/12/22 showed "fatty infiltration." Neither Dr. Portland nor the radiologist commented a finding of fatty infiltration in the joint. The Section 12 examiner does not comment on the possibility of the petitioner's injury as an "acute over chronic tear." Instead, he suggests that the petitioner suffered only a temporary exacerbation of a preexisting chronic tear. He does not allow for the possibility that the rather tiny petitioner suffered an enhanced tear as a result of her efforts to catch a fainting patient.

In resolving conflicts in medical opinion evidence, the Commission is permitted to attach greater weight to the opinions of the Petitioner's treating physicians than to the opinions of the employer's retained examiners. *International Harvester Co. v. Industrial Commission, 169 Ill.App.3d 809, 815 (3rd Dist. 1988).* Nonetheless, a better practice is to balance all of the evidence to determine which opinion(s) should be given more weight when deciding medical issues.

For instance, in *Edgcomb v. Industrial Commission, 181 Ill.App.3d 398 (3rd Dist. 1989)*, the appellate court reversed a decision of the Commission, when it relied on the opinions of a physician, who had examined the Petitioner only once and for a short period of time, in deciding that the employee had reached MMI and was capable of returning to work. *181 Ill.App.3d at 407.* The court found that it was unreasonable for the Commission to rely entirely the opinion of an examining doctor, who saw the employee on only one occasion and to essentially ignore the opinions of three treating physicians "gleaned from extensive examination of and contact with the claimant." *Id at 404-5.* The court took particular issue with the Commission's failure to consider the opinion of the operating surgeon, who was the only doctor to internally examine the

employee's cervical spine and who found objective evidence of pressure on the nerve root. *Id at 405*.

In this case, the treating physician saw the petitioner several times both before and after the work accident. He was able to note her presentation and the results of physical examination before and after the work accident. Moreover, he was able to examine the injury directly during surgery he performed on 9/9/22, and his operative report confirms his opinion that he repaired an acute over chronic tear of the right rotator cuff.

On balance, the Arbitrator finds that the evidence obtained from the records of Dr. Portland, derived from extensive contact and surgical examination of the petitioner outweighs the opinion of Dr. Garrigues.

Further, the Arbitrator finds that the Petitioner has established through credible evidence that her current condition of ill being is causally related to her work injury of May 6, 2022.

J. In support of the Arbitrator's Decision regarding the issue of whether the medical services were provided to petitioner reasonable and necessary.

Based on the findings above, regarding the causal connection between the work injury and the petitioner's current condition of ill-being, the Arbitrator finds that the medical care performed and prescribed by Dr. Portland has been reasonable and necessary. The respondent is to satisfy all reasonable related past medical bills in accordance with the Medical Fee Schedule or by agreement with the provider.

K. In support of the Arbitrator's Decision regarding the issue of whether the Petitioner is entitled to any prospective medical care, The Arbitrator finds the following:

The petitioner is currently treating for her right shoulder injury and following the treatment plan prescribed by Dr. Portland. She has not yet reached maximum medical

improvement and she continues to incur medical expenses. The respondent shall pay for all reasonable and necessary prospective medical care for the right shoulder injury in accordance with the Medical Fee Schedule or by agreement with the provider.

L. In support of the Arbitrator's Decision regarding what temporary benefits are in dispute, the Arbitrator finds as follows:

The petitioner has not yet reached maximum medical improvement, and the Act provides that she is entitled to TTD benefits until such time as her condition stabilizes, i.e., reaches MMI. *Land of Lakes Co. v. Industrial Commission, 359 Ill.App.3d 582, 594 (2nd Dist. 2005)*. For the reasons stated above the Arbitrator accepts the medical opinions of the treating surgeon and finds that the Petitioner is entitled to payment of Temporary Total Disability benefits, in the amount of $1,148.20 per week from May 7, 2022 through February 24, 2023.

Date:_____

_____
Arbitrator Charles Watts

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC024892
Case Name	Martin Maxey v. City of Decatur
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0460
Number of Pages of Decision	26
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Mary Massa, Todd Schroader
Respondent Attorney	Mark Jackson

DATE FILED: 10/27/2023

/s/Amylee Simonovich, Commissioner

Signature

23IWCC0460

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Martin Maxey,

Petitioner,

vs. NO: 21 WC 24892

City of Decatur,

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 causal connection, medical expenses, and prospective medical treatment, and after being advised of the facts and law, reverses the Decision of the Arbitrator for the reasons stated below. The Commission finds Petitioner's current condition of ill-being regarding his right shoulder is causally related to the work injury. The Commission also finds Petitioner's treatment has been reasonable, necessary, and causally related to the work injury. The Commission further finds Petitioner is entitled to prospective treatment in the form of the recommended right shoulder arthroplasty. 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).

Findings of Fact

The parties stipulated that Petitioner sustained a right shoulder injury due to a compensable accident on February 14, 2019. The parties also stipulated that Petitioner's condition of ill-being regarding his right shoulder was causally related to the work accident through September 23, 2019. Finally, the parties stipulated to Respondent's liability for medical expenses for reasonable and related medical treatment Petitioner underwent through September 23, 2019.

Petitioner is an equipment operator with Respondent's forestry department. His work duties include tree removal, tree trimming, using chain saws, lifting logs, dragging brush, and putting logs in a woodchipper. On February 14, 2019, he injured his right arm and shoulder when he fell while walking down a slope to the work truck. Petitioner fell backwards and placed his right arm behind his back to brace his fall. He testified that he immediately felt pain and some numbness

in the arm.

A March 19, 2019, right shoulder MRI revealed: 1) partial articular sided tears of the supraspinatus and infraspinatus with no full-thickness rotator cuff tear, tendon retraction, or atrophy; 2) irregular tears in the superior labrum, with degenerative signal throughout the anterior labrum; and 3) moderate arthritis in the glenohumeral joint with small joint effusion. After reviewing the MRI, Dr. Kefalas diagnosed Petitioner with a right shoulder rotator cuff strain, biceps tendinitis, and a possible aggravation of Petitioner's underlying osteoarthritis. Petitioner's complaints did not resolve with physical therapy and an injection into the glenohumeral joint.

On July 23, 2019, Dr. Kefalas performed a right shoulder arthroscopy with biceps tenotomy and extensive debridement. The postoperative diagnoses were a tear of the long head right biceps tendon and chondral wear of the glenohumeral joint. Dr. Kefalas noted that intra-operative pictures showed articular wear to both the humeral head and the glenoid. Dr. Kefalas cleared Petitioner to return to work without restrictions on September 9, 2019. On September 23, 2019, Petitioner reported that his right shoulder was better and that he was working full duty. Dr. Kefalas wrote that Petitioner had responded well to the surgery. He determined Petitioner had reached maximum medical improvement (MMI) and told Petitioner to return as needed. Petitioner testified that while the surgery helped, his right shoulder pain worsened as he continued to work.

Petitioner testified that he did not seek additional treatment until May 2020 because he initially thought his shoulder condition was the best it could be. He testified that he returned to Dr. Kefalas on May 11, 2020, because his right shoulder condition had worsened. That day, Petitioner reported that he continued to work regular duty and intermittently took Tylenol for his symptoms. He complained of limited external rotation weakness with overhead activity and right shoulder discomfort at night. Dr. Kefalas wrote that Petitioner's next step would be to consider right shoulder arthroplasty. Petitioner was to continue his regular activities. Dr. Kefalas wrote that once Petitioner's shoulder symptoms increased to the point where he wanted to proceed with the surgery, he would refer Petitioner to a shoulder surgeon. On August 27, 2021, Petitioner reported his right shoulder had good and bad days. He reported that he used naproxen as needed and continued to work full duty. Dr. Kefalas wrote: "He does have right shoulder glenohumeral arthritis which was aggravated by recent injury sustained at work on February 14, 2019." (PX 1). The doctor wrote that Petitioner would continue to consider the recommended shoulder replacement and would contact the office if he decided to proceed.

In late October 2021, Dr. Kefalas referred Petitioner to Dr. Greatting for a total right shoulder arthroplasty. Petitioner returned to Dr. Kefalas on February 16, 2022, and reported that he continued to work and his right shoulder symptoms remained unchanged. In late March 2022, Petitioner reported continued right shoulder symptoms. Dr. Kefalas last examined Petitioner on June 29, 2022. The visit addressed Petitioner's unrelated left elbow complaints. Petitioner did not mention any right shoulder symptoms.

Regarding his right shoulder condition since this work accident, Petitioner testified:

> It has been painful. Everything I do is painful. Picking up a mug of coffee, changing the station on the radio, sleeping is really the worst. Everything I do basically that

involves that arm I have had to alter.

(Tr. at 13-14). Petitioner wants to proceed with the recommended right shoulder arthroplasty.

Prior Condition and Treatment

Under cross-examination, Petitioner agreed that Dr. Kefalas treated him for various conditions before his February 14, 2019, work accident. On February 17, 2009, Dr. Kefalas performed a right shoulder arthroscopy with subacromial decompression and an AC resection. The postoperative diagnoses were right shoulder impingement syndrome, AC joint synovitis, and a superior-posterior labrum tear.

On April 17, 2017, Petitioner complained of right shoulder discomfort. Dr. Kefalas noted tenderness in the subacromial space and told Petitioner to return for possible x-rays and an injection if his symptoms continued. On December 11, 2017, Petitioner returned to Dr. Kefalas with complaints of right shoulder pain for the past year without any known injury. He reported that his pain was located at the front of the shoulder and worsened with pulling and pushing. Petitioner rated his pain at 8/10 and reported it kept him up at night. He described the pain as stabbing. Dr. Kefalas diagnosed right shoulder pain with a possible supraspinatus tendon tear. He prescribed an MRI to rule out an acute rotator cuff tear given Petitioner's lack of strength and complaints of pain.

The December 20, 2017, right shoulder MRI noted a history of right shoulder pain for around one year that had become more severe two months earlier. It had the following impression: 1) moderate tendinosis of the supraspinatus; 2) mild tendinosis and tear of the infraspinatus; 3) mild tendinosis of the superior distal fibers of the subscapularis; 4) diffusely degenerated and torn labrum; 5) moderate to severe degenerative changes of the AC joint; 6) severe subchondral cystic degenerative changes of the glenoid with no acute fracture identified; and 7) mild subacromial bursitis and mild subcoracoid bursitis. Dr. Kefalas interpreted the MRI as showing evidence of glenohumeral arthritis without an obvious rotator cuff tear. He believed this was the cause of Petitioner's discomfort. Dr. Kefalas wrote that Petitioner's symptoms were secondary to osteoarthritis developing in the right shoulder. He administered an injection into the right glenohumeral joint.

On April 16, 2018, Dr. Kefalas administered another injection into the right glenohumeral joint due to Petitioner's continued pain. He recommended Petitioner take Aleve or Advil for any inflammation. Petitioner believed that before this work accident, he last saw Dr. Kefalas regarding his right shoulder condition in July 2018.

Expert Opinions

Dr. John Kefalas—Treating Physician

Dr. Kefalas testified via evidence deposition on behalf of Petitioner on June 17, 2022. (PX 6). He is a board-certified orthopedic surgeon. Dr. Kefalas testified:

> …I think that the mechanical fall that he sustained aggravated his right shoulder and it irritated the long head of his biceps tendon and it aggravated the arthritis in his shoulder.

(PX 6 at 17). He testified that Petitioner's need for additional care for his right shoulder is related to the work accident.

Dr. Kefalas agreed that some patients are more prone to developing arthritis and agreed that Petitioner's 2016 right total knee arthroplasty was also due to osteoarthritis. Dr. Kefalas agreed that Petitioner's primary issue regarding the right shoulder is glenohumeral arthritis. Dr. Kefalas agreed that Petitioner's underlying right shoulder osteoarthritis could account for his continued pain. He also agreed that the underlying arthritis is the reason Petitioner needed the recommended right shoulder replacement.

Dr. Kefalas agreed that the December 2017 right shoulder MRI findings included evidence of arthritic changes, moderate to severe degenerative changes in the AC joint, and severe subchondral cystic degenerative changes in the glenoid. The doctor also agreed that when he examined Petitioner on December 27, 2017, he believed Petitioner's right shoulder pain was due to his glenohumeral arthritis. Dr. Kefalas agreed that in December 2017, he recommended the same injection he administered in March 2019 after the work accident. He testified that Petitioner's right shoulder complaints in April 2018 were most likely caused by Petitioner's glenohumeral arthritis. Dr. Kefalas agreed that in the two years preceding to Petitioner's work accident, Petitioner complained of right shoulder pain due to his underlying arthritis.

Dr. Kefalas agreed that except for the biceps tendon tear, the July 2019 operative findings were arthritic. He agreed that Petitioner's arthritis could account for Petitioner's complaints after September 23, 2019, and is the reason for the recommended shoulder replacement. Under further questioning, Dr. Kefalas denied recommending a right shoulder total replacement before Petitioner's February 2019 work accident. He agreed that the accident accelerated or aggravated Petitioner's right shoulder arthritic condition.

Dr. Mitchell Rotman—Respondent's Section 12 Examiner

Dr. Rotman examined Petitioner on behalf of Respondent on January 3, 2022. (RX 2). Petitioner complained of right shoulder pain, stiffness, pain with overhead use, pain at night, weakness, and trouble sleeping on the right side. Petitioner reported that in his current position, 6.5 hours of his day involved hands-on physical activities. Petitioner reported that his work put stress on his right shoulder.

Dr. Rotman reviewed medical records, including some pre-accident records. He opined that the operative report from Petitioner's March 2009 right shoulder surgery revealed tears of the labrum and changes on the glenoid surface consistent with very early arthritis. Dr. Rotman diagnosed Petitioner with end-stage glenohumeral joint arthritis that had been progressing since 2009. He wrote:

> His symptoms were aggravated in 2017 and at that point an MRI scan clearly

> showed glenohumeral joint arthritis and diffuse degenerative tearing in the labrum similar to what was noted in 2019. Except, the arthritis changes were much more significant than compared to what was seen in his original surgery back in 2009…All of his problems have been related to glenohumeral joint arthritis, which is associated always with degenerative labral changes. It is no surprise that he has had progression of his arthritis since his surgery in 2019. That is the natural history of shoulder arthritis, which is obviously pre-existing…

(RX 2). The doctor opined that the February 14, 2019, accident merely triggered discomfort from the preexisting arthritis. Dr. Rotman wrote that Petitioner only received temporary relief from the July 2019 right shoulder surgery. He opined that Petitioner's glenohumeral joint arthritis continued to progress after the July 2019 surgery. He wrote:

> …His triggering event did not advance his arthritis in any way or cause an aggravation. It was merely just a triggering event based on the findings noted in the 2017 MRI report and the findings noted in 2019 at the time of the arthroscopic cleanup procedure.

(RX 2). Finally, Dr. Rotman agreed that the recommended right shoulder arthroplasty is reasonable and necessary; however, he opined the surgery is related to Petitioner's progressive glenohumeral arthritis. He opined that Petitioner reached MMI for the February 2019 work accident on September 23, 2019.

Dr. Rotman testified via evidence deposition on Respondent's behalf on August 9, 2022. (RX 1). He is a board-certified orthopedic surgeon with a subspeciality in the upper extremities. He testified that arthritis in the shoulder could worsen due to lifting certain weights, or stressing the shoulder each day. He testified that extra stress on one's shoulder could make it worse, but one's osteoarthritis will progressively worsen regardless of any other factors.

Dr. Rotman testified that the pre-accident operative report and right shoulder MRI showed Petitioner had severe arthritis before the February 2019 work accident. He testified that the work accident did not accelerate or advance Petitioner's preexisting glenohumeral arthritis. He testified that the necessity of Petitioner's right shoulder arthroplasty is not related to the work accident.

Under cross-examination, Dr. Rotman testified that the February 2019 work accident triggered pain from Petitioner's arthritis, but did not change or worsen Petitioner's right shoulder condition. He testified that Petitioner continued to have pain after his fall because of his severe arthritis.

Conclusions of Law

After carefully considering the totality of the evidence, the Commission reverses the Arbitrator's finding that Petitioner's current condition of ill-being is not causally related to the February 14, 2019, work accident. The Commission also reverses the Arbitrator's denial of the disputed medical expenses. Finally, the Commission reverses the Arbitrator's determination that the recommended right shoulder arthroplasty is not related to the work accident.

Causal Connection

The Arbitrator concluded that Petitioner's right shoulder condition was causally related to the work accident only through September 23, 2019. In reaching this conclusion, the Arbitrator determined the opinions of Dr. Rotman, Respondent's Section 12 examiner, were more credible than those of Dr. Kefalas, Petitioner's treating physician. The Commission views the evidence quite differently. After considering the evidence, the Commission finds Petitioner's current condition of ill-being regarding his right shoulder is causally related to the February 14, 2019, work accident.

It is undisputed that Petitioner suffered from osteoarthritis in his right shoulder long before this work accident. When a claimant suffers from a preexisting condition, the claimant must show that a work-related injury aggravated or accelerated the preexisting condition "…such that the [claimant'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." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 204 (2003). After reviewing the evidence, the Commission finds the February 14, 2019, work accident aggravated Petitioner's preexisting right shoulder osteoarthritis.

Drs. Kefalas and Rotman provided expert opinions regarding the issue of causal connection. After considering the totality of the evidence, the Commission finds the opinions of Dr. Kefalas most persuasive. Dr. Kefalas is intimately familiar with Petitioner's extensive history of right shoulder complaints and the progression of Petitioner's underlying osteoarthritis. Notably, Dr. Kefalas performed Petitioner's February 2009 right shoulder arthroscopy and cared for Petitioner's occasional right shoulder complaints in the two years preceding this work accident. Dr. Kefalas credibly testified that the February 2019 work accident aggravated Petitioner's preexisting right shoulder condition. His opinion was based on his prolonged history of treating Petitioner's right shoulder. Contrarily, Dr. Rotman only examined Petitioner once, almost three years after the work accident. His knowledge about Petitioner's pre-accident right shoulder condition was limited to the medical records Respondent provided. Unlike Dr. Kefalas, Dr. Rotman did not have an opportunity to personally observe and treat the progression of Petitioner's right shoulder condition over the years.

Dr. Kefalas' opinion that Petitioner's right shoulder condition is causally related to the work accident is fully supported by the evidence. Pre-accident medical records reveal Petitioner periodically sought treatment for his right shoulder complaints during the two years before the February 2019 work accident. However, his pre-accident episodes of right shoulder pain resolved with minimal conservative care. In December 2017, Dr. Kefalas administered an injection into Petitioner's right glenohumeral joint due to Petitioner's complaints of severe right shoulder pain. Following that injection, Petitioner did not complain of any right shoulder symptoms until April 2018. In April 2018, Dr. Kefalas administered another injection into Petitioner's glenohumeral joint.

Although the corresponding medical record is not in evidence, Dr. Kefalas credibly testified that Petitioner next sought treatment for right shoulder pain in July 2018. The doctor testified that he recommended Petitioner attend physical therapy. There is no evidence that

Petitioner complained of or sought treatment for any right shoulder symptoms between July 2018 and the February 2019 work accident. There is also no evidence that Petitioner was unable to perform any of his job duties or missed any work due to his preexisting right shoulder condition in the two years preceding the work accident. Instead, the credible evidence shows that until the February 14, 2019, work accident, Petitioner was able to perform even the most physical aspects of his job duties without complaint.

The trajectory of Petitioner's right shoulder treatment and ongoing symptoms after the February 2019 work accident was markedly different than that of his pre-accident episodes of right shoulder pain. Following the work accident, conservative treatment failed to provide relief to Petitioner. Instead of his complaints quickly resolving as they had in the past, Petitioner underwent a right shoulder arthroscopy in July 2019. The evidence shows that Petitioner recovered well from the surgery and was able to return to his regular job without restrictions. However, Petitioner credibly testified that while the surgery improved his condition, his right shoulder symptoms never fully resolved. Petitioner also credibly testified that he finally returned to Dr. Kefalas in May 2020 because his right shoulder pain worsened. Furthermore, the credible evidence shows that Petitioner's complaints worsened as he continued to perform his physically demanding job duties.

Dr. Rotman's testimony also supports a finding that Petitioner's current right shoulder condition is causally related to the work accident. Notably, Dr. Rotman testified that the February 2019 work accident triggered Petitioner's underlying arthritis to become symptomatic. While he testified that Petitioner's need for the recommended surgery was inevitable given his advanced osteoarthritis, there is no evidence that Petitioner would need the recommended right shoulder arthroplasty at this time absent the work accident. After all, despite Petitioner's periodic pre-accident episodes of right shoulder pain, there is no evidence that any doctor recommended that Petitioner undergo a right shoulder arthroplasty before the work accident. Thus, the work accident at the very least aggravated Petitioner's preexisting right shoulder osteoarthritis.

For the foregoing reasons, the Commission finds Petitioner met his burden of proving his current condition of ill-being regarding his right shoulder is causally related to the February 14, 2019, work accident.

Medical Expenses

As Petitioner's current condition of ill-being is causally related to the February 14, 2019, work accident, the Commission must reverse the Arbitrator's denial of medical expenses incurred after September 23, 2019. There is no credible evidence that any of the disputed treatment Petitioner received has been unreasonable or unnecessary. Therefore, the Commission finds Petitioner's medical treatment after September 23, 2019, has been reasonable, necessary, and causally related to the work accident. Thus, Respondent must pay all outstanding reasonable and necessary medical expenses identified in Petitioner's Exhibit 7, pursuant to Sections 8(a) and 8.2 of the Act.

Prospective Treatment

As Petitioner's current condition of ill-being is causally related to the work accident, the

Commission also must reverse the Arbitrator's denial of the recommended right shoulder arthroplasty. There is no credible evidence that the recommended surgery is neither reasonable nor necessary. In fact, Dr. Rotman agreed the procedure is necessary. Thus, the Commission finds Petitioner is entitled to the recommended right shoulder arthroplasty. The Commission further finds Respondent shall authorize and pay for the recommended right shoulder arthroplasty.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on September 22, 2022, is hereby reversed.

IT IS FURTHER ORDERED that Petitioner's current condition of ill-being regarding his right shoulder is causally related to the work accident.

IT IS FURTHER ORDERED that Respondent shall pay for reasonable and necessary medical services identified in Petitioner's Exhibit 7 as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

IT IS FURTHER ORDERED that Respondent shall approve and pay for prospective medical treatment in the form of the right shoulder arthroplasty recommended by Dr. Kefalas.

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

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

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

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

October 27, 2023

o: 9/5/23

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	21WC024892
Case Name	Martin Maxey v. City of Decatur
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Maureen Pulia, Arbitrator

Petitioner Attorney	Todd Schroader
Respondent Attorney	Mark Jackson

DATE FILED: 9/22/2022

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 20, 2022 3.78%

/s/Maureen Pulia, Arbitrator

Signature

95

)SS.

COUNTY OF **SANGAMON**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MARTIN MAXEY,
Employee/Petitioner

v.

CITY OF DECATUR,
Employer/Respondent

Case # **21** WC **24892**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **8/26/22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **2/14/19**, 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 through 9/23/19.

In the year preceding the injury, Petitioner earned $**47,244.60**; the average weekly wage was $**908.55**.

On the date of accident, Petitioner was **58** years of age, ***married*** with **no** dependent children.

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

Respondent ***has or will pay*** all appropriate charges for all reasonable and necessary medical services to petitioner's right shoulder incurred through 9/23/19.

Respondent shall be given a credit of $**13,325.42** for TTD, $**00** for TPD, $**00** for maintenance, and $**00** for other benefits, for a total credit of $**13,325.42**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

Respondent shall only pay for the reasonable and necessary medical services for petitioner's right shoulder from 2/14/19 through 9/23/19, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit for medical benefits for petitioner's right shoulder 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.

Petitioner's claim for prospective medical expenses 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 22, 2022

Maureen H. Pulia

Signature of Arbitrator

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 58 year old Equipment Operator in the Forestry Division, sustained an accidental injury to his right shoulder, that arose out of and in the course of his employment by respondent on 2/14/19. Prior to this accident petitioner had pre-existing osteoarthritis of his right shoulder and treatment for his right shoulder. Also prior to the accident petitioner's duties included tree removal, tree trimming, using a chain saw, lifting heavy logs, dragging brush, and putting logs in the chipper.

On 2/14/19, petitioner removed a stumped and then started walking back to put his tools in his truck. His truck was down a slope. Petitioner testified that the slope was a bit slippery and his feet slipped causing him to fall. Petitioner fell backwards onto his right hand. This resulted in his shoulder being yanked straight up in the air. As he fell he also threw his tools all over the place. Petitioner experienced immediate pain in his right shoulder. He also mentioned some temporary numbness for a few minutes.

On 3/19/19 petitioner underwent an MRI of his right shoulder. The impression was partial articular sided tears of the supraspinatus and infraspinatus; no full thickness rotator cuff tear, tendon retraction or atrophy; irregular tears in the superior labrum with degenerative signal throughout the anterior labrum; and moderate arthritis in the glenohumeral joint with small glenohumeral joint effusion.

On 3/29/19 petitioner presented to Dr. John Kefalas. He reported that on 2/14/19 while working for respondent he was loading his tools in his work truck. When doing this he was standing on a grassy boulevard when he slipped on the grass injuring his right shoulder. He stated that he landed with his elbow above shoulder height and noted pain in his right shoulder. Dr. Kefalas reviewed the MRI of the right shoulder and noted a concern for biceps tendon injury and partial rotator cuff tear. Dr. Kefalas noted that petitioner had underlying osteoarthritis in the glenohumeral joint, and had previously undergone treatment for his right shoulder that included an intra-articular injection and formal therapy. Following an examination, Dr. Kefalas' impression was that petitioner fell while working with right shoulder injury with rotator cuff strain, biceps tendinitis, and possible aggravation of the underlying osteoarthritis of the right shoulder. Dr. Kefalas injected petitioner's right glenohumeral joint. He told him to continue therapy, remain on light duty, and return in a month.

On 4/8/19 petitioner underwent a physical therapy initial evaluation performed at Central Illinois Bone and Joint Center. This physical therapy was ordered by Dr. Kefalas. Petitioner underwent 12 sessions between 4/8/19 and 5/10/19.

On 4/29/19 petitioner returned to Dr. Kefalas and reported that his right shoulder was about the same, and therapy was helping. Following an examination, Dr. Kefalas continued petitioner in physical therapy. He noted that he believed petitioner was improving. He continued him on light duty with the hope of returning him to full duty in 3 weeks.

On 6/3/19 petitioner followed-up with Dr. Kefalas. He reported that his right shoulder was feeling pretty good. Following an examination Dr. Kefalas released petitioner to return to regular duty work and follow up in a month. On 7/1/19 petitioner reported that he was working and was experiencing right shoulder pain, mainly in the region of the long head of the biceps. Dr. Kefalas examined petitioner and recommended a right shoulder arthroscopy to perform a biceps tenotomy. He continued petitioner working full duty until surgery authorization was provided.

On 7/23/19 petitioner underwent an arthroscopy of the right shoulder with biceps tenotomy and extensive debridement, performed by Dr. Kefalas. His post-operative diagnosis was a tear of the long head of the right biceps tendon, and chondral wear of the glenohumeral head. Petitioner followed-up post-operatively with Dr. Kefalas.

On 7/31/19, Dr. Kefalas instructed petitioner to continue a self-directed rehab program from the handout of exercises he provided. On 8/28/19 petitioner returned and reported that his right shoulder continued to improve. Dr. Kefalas returned petitioner to regular work effective 9/9/19. Petitioner was also instructed to continue his self-directed exercise program for his right shoulder.

Petitioner testified that as soon as he started working again his right shoulder began hurting again. However, on 9/23/19 petitioner returned to Dr. Kefalas and reported that his right shoulder was better. His right shoulder abduction was 165 degrees, internal rotation was to L3, external rotation was to 45 degrees, and petitioner reported no pain. Dr. Kefalas was of the opinion that petitioner had responded well to the right shoulder arthroscopic biceps tenotomy, and was at maximum medical improvement. He released him on an as needed basis.

Petitioner continued to work his regular duty job and did not follow-up again with Dr. Kefalas until 5/11/20, nearly 8 months later. Petitioner reported ongoing right shoulder pain. Dr. Kefalas noted that petitioner had right shoulder glenohumeral arthritis. Petitioner reported that he takes intermittent Tylenol for his symptoms. His main complaint was limited external rotation weakness with overhead activity. He also noted discomfort in the right shoulder at night. He inquired regarding stem cell injections, but Dr. Kefalas told petitioner there were no signs to medically support these injections. Dr. Kefalas was of the opinion that

petitioner's next option would be a right shoulder arthroplasty, and that he would refer him to a shoulder surgeon for this. An examination of the right shoulder revealed external rotation at the side at 40 degrees, abduction to 160 degrees, and internal rotation to L4. Petitioner was able to keep his arm in an abducted position at 90 degrees, but fatigued quite easily. Dr. Kefalas instructed petitioner to continue his regular activities, and return to full duty work. He also told him that once his shoulder increased to a point where he is interested in surgical treatment, he would refer him to a shoulder surgeon for the right shoulder arthroplasty. Petitioner told Dr. Kefalas he would call when he wished to proceed.

Petitioner continued working full duty work and did not return to Dr. Kefalas until 8/27/21, over 15 months later. He reported that he had good and bad days with his right shoulder, and takes Naproxen as needed. Dr. Kefalas noted that petitioner had right shoulder glenohumeral arthritis that was aggravated by the injury of 2/14/19. A referral to a surgeon for a right total shoulder arthroplasty was again made available. An examination showed external rotation at the sides above 30 degrees, abduction to 120 degrees, and internal rotation to L4. Petitioner indicated that he would consider Dr. Kefalas's treatment options, and call if he needed further consultation.

On 10/29/21 Dr. Kefalas issued a Letter of Medical Necessity to Whom It May Concern indicating that petitioner was under his care, and his diagnosis was right shoulder acute on chronic rotator cuff tear, and right shoulder osteoarthritis. It was also noted that he prescribed a referral to Dr. Greatting for a shoulder replacement and that this treatment was medically necessary. This Letter had a stamped signature by Dr. Kefalas, but was not accompanied by any office note.

On 1/3/22 petitioner underwent a Section 12 examination performed by Dr. Mitchell Rotman, an orthopedic surgeon, with respect to his right shoulder. Petitioner presented complaining of a lot of right shoulder pain, stiffness, pain with overhead use, pain at night, weakness, and trouble sleeping on the right side. He gave a history of his treatment and job duties. He reported that 6.5 hours out of his 8 hour day involves actual hands on type activities, that was fairly strenuous on his shoulder. Petitioner reported a left shoulder arthroscopy in 2008; a right shoulder arthroscopy in 2009; a right knee meniscus repair in 2012; a right knee meniscus repair in 2013; a hernia repair in 2014; a right knee replacement in 2016; a right shoulder arthroscopy in 2019; and a spinal fusion in 2021.

Following a record review of records before and after the accident, Dr. Rotman performed an examination of petitioner that revealed 10 degrees of external rotation, bone on bone grind with certain maneuvers; 120 degrees of abduction, and internal rotation to L1. He demonstrated about 4+/5 strength, and discomfort with

stretching and with grinding that was felt on occasion during the exam. X-rays of the right shoulder were taken that revealed bone on bone arthritis, and inferior humeral head spur. There was no significant glenoid wear.

Following his examination, Dr. Rotman opined that petitioner had end stage glenohumeral joint arthritis, that had been progressing ever since 2009. He was of the opinion that his symptoms were aggravated in 2017, and at that point the MRI clearly showed glenohumeral joint arthritis and diffuse degenerative tearing in the labrum similar to what was noted in 2019, except that the arthritis changes were much more significant than compared to what was seen in his original surgery back in 2009. Dr. Rotman was of the opinion that the findings noted on the arthroscopic procedure performed in 2019 were pretty similar to the findings noted in the 2017 MRI. He noted that there had never been any significant rotator cuff issues.

Dr. Rotman opined that all of petitioner's problems have been related to the glenohumeral joint arthritis, which is always associated with degenerative labral changes, and it is no surprise that petitioner has had progression of his arthritis since his surgery in 2019. He was of the opinion that this is the natural history of shoulder arthritis, which obviously preexisted the incident at work on 2/14/19. Dr. Rotman opined that when petitioner fell and pushed his elbow into his right shoulder he merely triggered discomfort from his pre-existing arthritis, and there were no acute findings at the time of his surgery, and as he stated, were not much different than what had been previously noted in the 2017 MRI. He noted that Dr. Kefalas' concern was the rotator cuff, which at the time of surgery showed no rotator cuff tears of any significance. He was of the opinion that the surgery performed in 2019 was generally a standard procedure for arthritis surgery. Dr. Rotman noted that every shoulder replacement he had done over the past 30 years had been done with a concomitant biceps tenodesis because the superior labrum is always degenerative, and that is what the origin of the biceps is. He was of the opinion that it is not a good idea to leave a diseased biceps when performing shoulder arthritis surgery. He was further of the opinion that the biceps tendon was not released because it was injured, but rather because it was attached to the degenerative labral tissue, and at times one can get a little bit of relief from removing the biceps off the degenerative labral tissue. Dr. Rotman opined that the accident of 2/14/19 did not advance petitioner's arthritis in anyway or cause an aggravation. It was merely just a triggering event based on the findings noted in the 2017 MRI report and the findings noted in 2019 during the 7/23/19 surgery.

Dr. Rotman was of the opinion that petitioner does require a right total shoulder replacement, but the need for the surgery is based on petitioner's progressive glenohumeral joint arthritis over the last 13 years, and not related to anything that occurred on 2/14/19. Dr. Rotman agreed with Dr. Kefalas' diagnosis and treatment to date, as well as Dr. Kefalas' recommendations to proceed with a shoulder replacement. However, Dr. Rotman

could not relate the need for the shoulder replacement to the accident on 2/14/19, and that petitioner would have been considered at MMI for the triggering event on 2/14/19 at the time of his initial discharge on 9/23/19.

Petitioner continued regular duty work and next returned to Dr. Kefalas on 2/16/22. At that time he reported that his right and left hands felt tight and he had some left lateral elbow pain. He noted that his right shoulder symptoms were unchanged. Dr. Kefalas examined petitioner's left upper extremity and injected the left lateral epicondylar area. He told petitioner to continue using his resting night splint for his right and left carpal tunnel syndrome. He also instructed petitioner to follow up in 6 weeks for evaluation of his left elbow and carpal tunnel syndrome. On 3/30/22 petitioner returned and told Dr. Kefalas that his left elbow improved following the injection. He reported that he was still working regular duty, but still had right shoulder symptoms. Petitioner was instructed to follow-up in two months for his bilateral carpal tunnel syndrome and left elbow.

On 6/17/22 the evidence deposition of Dr. John Kefalas, an orthopedic surgeon, was taken on behalf of petitioner. Dr. Kefalas testified that prior to 2/14/19 petitioner had a prior right shoulder arthroscopy. He further testified that when he performed surgery on 7/23/19, petitioner's rotator cuff tendons were well attached to his proximal humerus, and he did not need to repair any of his rotator cuff tendon. He noted that the surgery showed petitioner had articular cartilage wear (arthritis), which he did not do a lot with arthroscopically, since there is not much you can do arthroscopically for arthritis.

Dr. Kefalas opined that the right shoulder arthroscopy performed on 7/23/19 was causally related to the accident on 2/14/19. Dr. Kefalas was of the opinion that the mechanics of the fall on 2/14/19 aggravated his right shoulder and it irritated the long head of his biceps tendon and the arthritis in his shoulder. He was of the opinion that petitioner continued to have symptoms in his right shoulder and the ultimate treatment for shoulder arthritis is a shoulder replacement, and petitioner had reached that point. Dr. Kefalas was of the opinion that since petitioner had gotten to this point, was the reason for the referral for a shoulder arthroplasty. Dr. Kefalas did not agree with Dr. Rotman's opinions regarding causal connection. Dr. Kefalas opined that petitioner's ongoing treatment and treatment recommendations is due to the accident on 2/14/19.

On cross examination Dr. Kefalas testified that petitioner had a right shoulder surgery on 7/23/19. When asked if it is unusual for a person who has surgery on the shoulder similar to what he performed in 2009, to develop arthritis in the glenohumeral joint, Dr. Kefalas testified that just like any other joint he did not know why the articular cartilage wears away. He testified that there are a lot of reasons why, but the ultimate trigger is unknown. He testified that some patients are more prone to having arthritis than others, and petitioner has

indicated that he is prone to arthritis in other areas of his body besides the shoulder. He stated that petitioner had a total knee replacement in 2016 in part due to osteoarthritis. He was of the opinion that petitioner's current primary problem with his shoulder is glenohumeral arthritis, or the osteoarthritis in his shoulder, and that is the cause of his pain, and the need for a right total shoulder replacement.

On cross examination Dr. Kefalas testified that prior to 3/29/19, and after his surgery in 2009, he had seen petitioner on several occasions for pain in his right shoulder. Dr. Kefalas agreed that on 4/17/17, when petitioner followed up after his knee replacement, petitioner mentioned that he was having discomfort in his right shoulder, and he told him he could return for further tests and treatment if it remained symptomatic. He also agreed that petitioner returned on 12/11/17 with right shoulder pain of an 8/10, and was doing some heavy work. He noted that petitioner did not report a specific injury to the right shoulder. Dr. Kefalas testified that as a result of that visit he ordered an MRI of petitioner's right shoulder. This was performed on 12/20/17 and it showed evidence of arthritic changes in petitioner's right shoulder. He was of the opinion that the moderate to severe degenerative changes in the acromioclavicular joint the radiologist noted was the area where he had previously performed the arthroscopic resection on petitioner. He also agreed that the MRI showed severe subchondral cystic degenerative changes in the glenoid with no fracture identified. Dr. Kefalas testified that when petitioner returned on 12/27/17 he told petitioner that the MRI revealed evidence of glenohumeral arthritis, which was causing his discomfort in his right shoulder at that time. He stated that he recommended an injection.

On cross examination Dr. Kefalas testified that after 12/27/17 he next saw petitioner on 4/16/18 again for his right shoulder pain, as well as some other complaints. Dr. Kefalas opined that petitioner's right shoulder complaints at that time were most likely being caused by the glenohumeral arthritis. He provided another injection. Dr. Kefalas testified that he next saw petitioner on 7/11/18, and one of his problems continued to be his right shoulder. Dr. Kefalas stated that he mentioned to petitioner that he had right shoulder glenohumeral arthritis at that time, and recommended physical therapy for the condition.

On cross examination Dr. Kefalas testified following the injury on 2/14/19, and the surgery on 7/23/19, he found petitioner had reached maximum medical improvement for his right shoulder on 9/23/19. Dr. Kefalas was of the opinion that the loose pieces of the articular cartilage he found during surgery on 7/23/19 that had come off both the humeral head and the glenoid, were due to a degenerative issue. Dr. Kefalas was of opinion that the biceps anchor that was markedly frayed was red and inflamed when he saw it during the surgery and therefore, he was of the opinion that it was more of an acute problem rather than a chronic, given his current symptoms and injury. Dr. Kefalas was of the opinion that this was the only finding in the right shoulder that

appeared to be acute, rather than chronic. Dr. Kefalas testified that following his treatment of petitioner and releasing petitioner at MMI on 9/23/19, petitioner still had osteoarthritis in his right shoulder, which was the same pathology, the same problem he had when he saw petitioner in 2017 and 2018. He further testified that it was the same thing that could account for petitioner's pain when he saw him after 9/23/19, and the same arthritis that gives him reason to need a shoulder replacement.

On redirect examination, Dr. Kefalas testified that he did not recommend a shoulder replacement for petitioner in April of 2017, December of 2017, or April of 2018, and that the first time he recommended it was in May of 2020, and that the accident petitioner had accelerated or aggravated his right shoulder arthritic condition.

Petitioner continued working full duty and returned to Dr. Kefalas on 6/29/22 for his left lateral elbow. He reported that it continued to be symptomatic, but the injection in February really helped. Following an examination, Dr. Kefalas reinjected petitioner's left lateral epicondylar area, and instructed him to use his arm as tolerated and return as needed.

The evidence deposition of Dr. Mitchell Rotman, an orthopedic surgeon with a subspecialty in upper extremity, was taken on behalf of respondent on 8/9/22. Dr. Rotman opined that all of petitioner's problems are related to glenohumeral joint arthritis, which is always associated with degenerative labral changes. He noted that the shoulder joint is the ball and socket, with the ball called the humeral part, and the socket called the glenoid. He stated that the glenohumeral joint is the ball and joint socket. He stated that glenohumeral joint arthritis is always related to degenerative labral changes because when the labrum (cushion of the shoulder joint) wears out you get arthritis of the shoulder joint. He was of the opinion that most arthritis of the shoulder joint is like arthritis of the knee or hip. He was of the opinion that you can get it from an old injury, or you can get genetic osteoarthritis from family history of it, which is the most common. Based on petitioner's knee replacement due to osteoarthritis, Dr. Rotman was of the opinion that this showed petitioner already had osteoarthritis, and that it was in his DNA. Dr. Rotman was of the opinion that if you have osteoarthritis every year you get older it gets a little worse, and the cartilage wears out a little bit more each year, until the point where you need a shoulder or knee replacement.

Dr. Rotman opined that petitioner's arthritis preexisted his alleged injury on 2/14/19. He was of the opinion that during the surgery on 2/17/09, three of the four quadrants of the labrum had fraying and tears, which show it was degenerating back then. With respect to the glenoid, Dr. Rotman noted that the surgery on

2/17/09 showed the cartilage was wearing out on the bottom part of his socket, which is also a degenerative finding. Dr. Rotman was of the opinion that these findings showed early arthritis of the glenohumeral joint.

Dr. Rotman was of the opinion that the 12/20/17 MRI of the right shoulder was performed based on a history of shoulder pain for about a year, more severe the past 2 months. He was further of the opinion that the MRI showed the labrum (lining of the joint) was diffusely degenerative and torn, which meant he had arthritis at that time in the socket. He noted that this was indicative of degeneration over the past 10 years. He also noted that the MRI showed severe subchondral cystic degenerative changes of the glenoid, which also means petitioner has severe arthritis of the socket. Dr. Rotman opined that the MRI findings of the 12/20/17 and the MRI findings on 3/19/19 were the same.

Dr. Rotman was of the opinion that petitioner's loss of motion in his right shoulder on exam was not causally related to the injury on 2/14/19, but rather to his arthritis. Dr. Rotman further opined that petitioner's accident on 2/14/19 and his subsequent surgery on 7/23/19 did not accelerate or advance his glenohumeral arthritis in any way. He also opined that the accident on 2/14/19 did not cause or contribute to cause in any way petitioner's need for a right total shoulder arthroplasty.

On cross examination, Dr. Rotman opined that none of the treatment performed by Dr. Kefalas after 2/14/19 was related to the accident on 2/14/19. He opined that all treatment was related to his ongoing arthritis. Although Dr. Rotman was of the opinion that the fall triggered pain from his arthritis; the treatment is not related because the findings on the MRI on 12/20/17 and 3/19/19 were exactly the same; and, the findings during Dr. Kefalas' surgery suggested nothing new occurred to his shoulder after the fall that did not already exits. He was of the opinion that all the pain petitioner had after the fall on 2/14/19 was related to his preexisting severe arthritis of his glenoid. Dr. Rotman opined that the only way to get rid of the pain petitioner had after the fall is with a total shoulder replacement. He also agreed that the fall was a triggering event.

On redirect examination, Dr. Rotman opined that petitioner's pain was not related to the accident on 2/14/19, because there was no evidence of trauma after the accident, only degenerative findings similar to those before the accident. Dr. Rotman further opined that when Dr. Kefalas placed petitioner at MMI on 9/23/19 petitioner's pain was under control.

On recross examination Dr. Rotman was of the opinion that petitioner's pain complaints stayed consistent throughout his treatment, and those complaints occurred when he fell on 2/14/19. He also agreed that in the three years preceding the accident on 2/14/19, Dr. Kefalas did not recommend a surgery or total replacement.

On redirect examination, Dr. Rotman noted that Dr. Kefalas did not perform a total shoulder replacement up to the time he found the petitioner had reached maximum medical improvement on 9/23/19 for his accident on 2/14/19.

The surgery petitioner underwent on 2/17/09 performed by Dr. Kefalas was a right shoulder arthroscopy with arthrscopic subacromial decompression. The post-operative diagnosis was right shoulder impingement syndrome, right shoulder acromioclavicular joint synovitis, and tear of the superior posterior labrum.

On 12/20/17 petitioner underwent an MRI of his right shoulder that revealed moderate tendinosis of the supraspinatus; mild tendinosis and rim rent tear of the infraspinatus; mild tendinosis of the superior distal fibers of the subscapularis; diffusely degenerated and torn labrum; moderate to severe degenerative changes of the acromioclavicular joint; severe subchondral cystic degenerative changes of the glenoid with no acute fracture; mild subacromial bursitis; and, subcoracoid bursitis.

Petitioner testified that since the accident on 2/14/19 his right shoulder has been painful. He reported difficulty picking up a mug of coffee, sleeping, and changing the station on the radio. Petitioner testified that he wants the right total shoulder replacement.

Petitioner testified that his prior right and left shoulder arthroscopies were related to prior workers' compensation claims.

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

The parties stipulate that petitioner's current condition of ill-being as it relates to his right shoulder is causally connected to the injury on 2/14/19 through 9/23/19. Thereafter, a dispute exists as to whether or not petitioner's current condition of ill-being is causally related to the injury he sustained to his right shoulder on 2/14/19.

It is unrebutted that petitioner had an arthroscopic surgery to his right shoulder in 2009. Dr. Kefalas noted that at that time the anterior, superior, and posterior labrum were fraying, and there was chondral wear at the inferior portion of the anterior labrum. As a result, both Dr. Kefalas and Dr. Rotman were of the opinion that there was clear evidence of arthritis in petitioner's right shoulder in 2009.

In 2017 and 2018 petitioner had additional treatment for his right shoulder. On 12/11/17 reported that the pain in his right shoulder was 8/10. An MRI performed 12/20/17 showed severe subchondral degenerative changes in the glenoid. On 12/27/17 Dr. Kefalas performed an injection into petitioner's right shoulder. He performed a repeat injection on 4/16/18. Then in July of 2018 he ordered physical

therapy for petitioner's right shoulder. At that time Dr. Kefalas told petitioner that his pain was being caused by his glenohumeral arthritis.

Following the injury on 2/14/19 petitioner had immediate pain in his shoulder. He underwent an MRI of the right shoulder. The findings on the MRI were the same as those on the MRI of the right shoulder taken in 2017. Dr. Kefalas was of the opinion that petitioner's fall on 2/14/19 resulted in a rotator cuff strain, biceps tendinitis, and possible aggravation of his underlying osteoarthritis of the right shoulder. He injected the shoulder and ordered physical therapy. By 6/3/19 petitioner reported that the right shoulder was feeling petty good. As a result, Dr. Kefalas returned him to full duty, instead of light duty. After a month of full duty work petitioner told Dr. Kefalas that he was experiencing right shoulder pain mainly in the region of the long head of the biceps. Dr. Kefalas then performed a right shoulder arthroscopy and biceps tenotomy. Following this surgery and physical therapy Dr. Kefalas released petitioner to regular duty work on 9/9/19. On 9/23/19 petitioner returned to Dr. Kefalas and reported that his right shoulder was better. Dr. Kefalas placed petitioner at maximum medical improvement, and released him from his care.

Petitioner did not return to Dr. Kefalas until 8 months later on 5/11/20, with complaints of continued right shoulder pain. Dr. Kefalas diagnosed right shoulder glenohumeral arthritis, and told petitioner that his next option would be a right shoulder arthroplasty. He told petitioner to let him know when the pain in his right shoulder increased to a point where he was interested in having the right shoulder arthroplasty and he would refer him to Dr. Greatting. Petitioner said he would, and continued working full duty without restrictions. Petitioner did not next follow-up with Dr. Kefalas for his right shoulder until 8/27/21, over 15 months later. At that time, he reported good and bad days. He stated that he takes Naproxen as needed. Petitioner told Dr. Kefalas he would consider his treatment options, and call if he needed further consultation. Petitioner followed up with Dr. Kefalas on 2/16/22, and 3/30/22 for his hands and left elbow, and mentioned that his right shoulder was the same.

Two doctors offered opinions as to whether or not petitioner's current condition of ill-being as it relates to his right shoulder is causally related to the injury he sustained on 2/14/19. While both agree a right shoulder arthroplasty is reasonable and necessary, they dispute whether or not it is related to the injury on 2/14/19. The arbitrator finds that petitioner clearly had arthritis in his right shoulder in 2009, and had additional treatment for his right shoulder in 2017, and as recently as July 2018 when he was prescribed a course of physical therapy.

Dr. Rotman was of the opinion that the findings on right shoulder MRI in 2017 were similar to the findings noted on the arthroscopic procedure performed in 2019, and did not include any significant rotator cuff issues. He related all of petitioner's right shoulder problems to his glenohumeral joint arthritis, that had progressed since his surgery in 2009. Dr. Rotman was of the opinion that the injury on 2/14/19 did not advance petitioner's arthritis in anyway or cause an aggravation. He opined that any causal connection between the petitioner's right shoulder condition and the injury on 2/14/19 ended when petitioner was released to full duty work at maximum medical improvement on 9/23/19 by Dr. Kefalas.

Dr. Rotman opined that petitioner's ongoing treatment and treatment recommendations are not causally related to the injury on 2/14/19, but instead are related to his preexisting arthritis. He further opined that nothing new happened to the right shoulder as a result of the 2/14/19 that did not already exist given the comparison between the 2017 and 2019 right shoulder MRI's. Dr. Rotman was of the opinion that given petitioner's prior knee replacement due to osteoarthritis, that osteoarthritis was in petitioner's DNA. He opined that if you have osteoarthritis, every year you get older, it will get little worse, and the cartilage will wear out a little more each year until you nee a shoulder or knee replacement. Although Dr. Rotman was of the opinion that the fall on 2/14/19 triggered an aggravation of petitioner's preexisting arthritis, that aggravation ha resolved by 9/23/19 when petitioner was released to full duty work, placed at maximum medical improvement, and released on an as needed basis. Dr. Rotman's opinion is also supported by the fact that following his maximum medical improvement finding by Dr. Kefalas on 9/23/19, over the next 2 years petitioner only followed up twice with Dr. Kefalas, with one visit in May of 2020, and another in August of 2021. Petitioner also saw Dr. Kefalas in 2022 for unrelated upper extremity problems and simply noted in passing that his right shoulder was the same. The arbitrator finds it significant that when petitioner followed-up with Dr. Kefalas in May of 2020 and August of 2021, he had the same complaints to his right shoulder he had in 2017 and 2018 before the injury on 2/14/19.

Dr. Kefalas was of the opinion that petitioner is a person that is more prone to arthritis given that that he has it in other areas of his body besides the shoulder. Dr. Kefalas was of the opinion that petitioner's current primary problem with his shoulder is glenohumeral arthritis, and that is the cause of his pain, and the need for a right total shoulder replacement. Dr. Kefalas testified that when he saw petitioner in 2017 and 2018 it was for pain being caused by his glenohumeral arthritis, and even recommended physical therapy in July of 2018. Dr. Kefalas testified that the only acute finding during the surgery on 7/23/19 was the biceps anchor that was markedly frayed, red, and inflamed. He was of the opinion that when he released petitioner from his care at maximum medical improvement on 9/23/19

petitioner still had osteoarthritis in his right shoulder, which was the same pathology, and the same problem petitioner had when he saw him in 2017 and 2018, and the same thing that could account for petitioner's pain after 9/23/19.

Despite these opinions, Dr. Kefalas testified that since he did not recommend a shoulder replacement for petitioner in 2017 or 2018, and the first time he recommended it was in May of 2020, the injury of 2/14/19 had accelerated or aggravated his right shoulder arthritic condition. The arbitrator gives little weight to this opinion given the fact that from 2/14/19, until Dr. Kefalas released petitioner to full duty work and maximum medical improvement on 9/23/19, Dr. Kefalas did not recommend a shoulder replacement either. It was not until after petitioner worked an additional 8 months at full duty without restrictions that Dr. Kefalas recommended a right shoulder replacement. The arbitrator finds the fact that petitioner did not recommend a shoulder replacement in 2017 and 2018, no different from Dr. Kefalas not recommending a shoulder replacement from 2/14/19 through 9/23/19, given that petitioner's arthritic condition at both times was the same.

Based on the above, as well as the credible evidence, the arbitrator finds the opinions of Dr. Rotman more persuasive, given the credible medical evidence. As a result, the arbitrator adopts the findings of Dr. Rotman and finds the petitioner has failed to prove by a preponderance of the credible evidence that his current condition of ill-being as it relates to his right shoulder is not causally related to the injury on 2/14/19, but rather a continuation of the pre-existing severe arthritis petitioner had of his glenoid as far back as 2009, during the 2 years preceding his injury on 2/14/19, and recurring 8 months after he reached maximum medical improvement on 9/23/19 for his injury on 2/14/19. The arbitrator finds the right shoulder complaints petitioner had in May of 2020 were the same as petitioner had prior to 2/14/19, and the same complaints petitioner still has today, all of which are related to his pre-existing severe osteoarthritis.

For these reasons the arbitrator finds the petitioner's current condition of ill-being as it relates to his right shoulder is causally related to the injury on 2/14/19, only through 9/23/19, the date petitioner reached maximum medical improvement and was released to full duty work, and released from Dr. Kefalas' care.

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 have stipulated that all medical treatment petitioner received for his right shoulder from 2/14/19 through 9/23/19 was reasonable and necessary to cure or relieve petitioner from the effects

of the accident he sustained on 9/23/19. The parties further stipulated that all medical bills related to treatment of petitioner's right shoulder from 2/14/19 through 9/23/19 have been paid pursuant to Section 8(a) and Section 8.2 of the Act.

The petitioner has offered into evidence as PX7 unpaid medical bills only after 9/23/19. Given that the arbitrator has found the petitioner's current condition of ill-being as it relates to his right shoulder after 9/23/19 is not causally related to the injury on 2/14/19, the arbitrator denies payment of these bills.

Based on the above, as well as the credible evidence, the arbitrator finds the medical services that were provided to petitioner for his right shoulder from 2/14/19 through 9/23/19 were reasonable and necessary to cure or relieve petitioner from the effects of the injury he sustained on 2/14/19.

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

N. IS PETITIONER ENTITLED TO PROSPECTIVE MEDICAL EXPENSES?

Petitioner claim's he is entitled to medical expenses associated with a referral to Dr. Greatting and medical expenses related to any total right shoulder arthroplasty he may recommend. Respondent disputes this, claiming petitioner is not entitled to any prospective medical expenses.

Having found the petitioner's current condition of ill-being as it relates to his right shoulder is causally related to the injury on 2/14/19, only through 9/23/19, the arbitrator finds the petitioner is not entitled to any prospective medical expenses related to the referral to Dr. Greatting, and/or any treatment related to a total right shoulder arthroplasty.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC037289
Case Name	Shawn Daniels v. Continental Tire
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0461
Number of Pages of Decision	14
Decision Issued By	Amylee Simonovich, Commissioner, Maria Portela, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	James Keefe Jr

DATE FILED: 10/27/2023

/s/Maria Portela, Commissioner

Signature

DISSENT: /s/Amylee Simonovich, Commissioner

Signature

23IWCC0461

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SHAWN DANIELS,

Petitioner,

vs. NO: 18WC037289

CONTINENTAL TIRE,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of nature and extent, and being advised of the facts and law, 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.

We are mindful that the Commission, in its previous §19(b) decision, affirmed the Arbitrator's finding in this case that:

> Having determined that Petitioner has permanent restrictions which are causally connected to his injury, and **those restrictions preclude him from returning to work for Respondent**, he is entitled to vocational rehabilitation benefits from the date he was released at MMI with respect to the injury which necessitated such restrictions. Dr. Gornet released Petitioner with permanent restrictions on 7/20/20 with respect to his cervical spine.

Px9 at 20 (Commission Decision. 8/30/22), T.198 (emphasis added). Dr. Gornet's restrictions were "no lifting greater than 20 pounds and no overhead work." *Id. at 18, T.196*.

However, the Commission's decision also noted that, due to a prior workers' compensation injury, Petitioner already had permanent restrictions of "no lifting greater than 50 pounds below

waist, 25 pounds to shoulder level, and 20 pounds overhead" at the time he sustained his accident at Respondent. *Px9 at 12 (Commission Decision. 8/30/22), T.190.* Therefore, this is not a situation where Petitioner had been working a heavy-duty job with no restrictions and is now limited to lifting 20 pounds. Instead, although his current accident did result in greater restrictions, Petitioner already had significant restrictions before his accident. We take this into consideration regarding factor (ii), Petitioner's occupation, but otherwise affirm the Arbitrator's analysis and give this factor some weight.

Petitioner argues that the permanency award should be increased to 50% of the person-as-a-whole (PAW) because he suffered a loss of trade and cites *Knafelc v. Practical Builders Const.*, 19 I.W.C.C. 0542 (2019). That Commission decision is not binding precedent but it is also distinguishable because: 1) *Knafelc* involved a pre-9/1/11 accident so the five permanency factors were not applied and 2) that claimant had been asking for a permanent total award and was given 50% person-as-a-whole (PAW) award instead. In the case at bar, Petitioner was able to obtain suitable employment within his restrictions and, in our calculation of his permanency award, we have considered the fact that he is unable to return to his previous occupation.

For the fourth factor, although Petitioner is currently earning less than he was at his previous job, we find that he has not proven his future earning capacity as a licensed radon technician. Although $15 per hour was his starting salary, there is no evidence that Petitioner's future earning capacity will *remain* below that of his previous job at Respondent. Therefore, it is speculative to say that Petitioner's future earning capacity has been significantly reduced.

Regarding factor (v), evidence of Petitioner's disability that is corroborated by the treating medical records, the Arbitrator found that he "takes Tramadol, Meloxicam and Gabapentin twice per day." *Dec. 5 (numbered), T.20*. However, the most recent medical record from Dr. Gornet, on August 4, 2022, only reflects a prescription for Tramadol. A year earlier, on July 19, 2021, Petitioner had been prescribed Meloxicam and Cyclobenzaprine but there is no medical evidence that these prescriptions were continued. Therefore, only Petitioner's use of Tramadol is corroborated by the medical records.

Based on the above, we reduce the Arbitrator's award to 35% PAW. Although Petitioner sustained both a cervical injury and post-concussion syndrome, he apparently has no residual symptoms from the concussion (headaches, dizziness, etc.) since his occipital nerve resection surgery. Petitioner's only residual symptoms are from his cervical condition, for which he underwent a single-level fusion at C3-4. Applying the five permanency factors, we find that Petitioner's cervical injury and subsequent fusion supports an award of 30% PAW. For Petitioner's post-concussion syndrome with no residual symptoms, we find that he is entitled to an additional 5% PAW.

We, therefore, find that Petitioner is entitled to a permanent partial disability award of 35% loss of Petitioner as a whole as provided in §8(d)2 of the Act.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to

Petitioner the sum of $492.52 per week for a period of 175 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 35% loss of Petitioner as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the expenses contained in Petitioner's Group Exhibit 4, except the invoice dated 10/20/21 in the amount of $168.00. Respondent shall further pay the medical expenses contained in Petitioner's Group Exhibit 1, pursuant to the stipulation of the parties, for medical expenses under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent 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.

October 27, 2023

/s/ *Maria E. Portela*

SE/

O: 9/26/23

/s/ *Kathryn A. Doerries*

49

DISSENTING OPINION

I disagree with the majority's decision to reduce the permanent partial disability awarded by the Arbitrator. In my view, the Arbitrator's analysis of the five factors was well-reasoned and should be affirmed.

The law is clear that you take the Petitioner as you find him, which includes any prior permanent restrictions. Petitioner's prior restrictions do not change the fact that it was the more limiting restrictions of no lifting greater than 20 pounds and no overhead work caused by this injury on August 3, 2018, which preclude him from returning to his usual and customary employment for Respondent.

Further, the Arbitrator correctly analyzed Petitioner's future earning capacity. To suggest Petitioner will have increased long-term earning capacity is pure speculation and not supported by any of the vocational evidence.

For the reasons set forth above, I respectfully dissent.

/s/ *Amylee H. Simonovich*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC037289
Case Name	Shawn Daniels v. Continental Tire
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	James Keefe Jr

DATE FILED: 5/8/2023

THE INTEREST RATE FOR THE WEEK OF MAY 2, 2023 4.90%

/s/Linda Cantrell, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Shawn Daniels
Employee/Petitioner

v.

Continental Tire
Employer/Respondent

Case # **18** WC **037289**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Herrin, Illinois**, on **3/8/23**. 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 **Vocational rehabilitation expenses**

FINDINGS

On **8/3/18**, 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 $**17,921.38**; the average weekly wage was $**820.86**.

On the date of accident, Petitioner was **47** 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 vocational services.

Respondent shall be given a credit of $**78,020.79** for TTD, $**0** for TPD, $**41,355.70** for maintenance, and $**0** for other benefits, for a total credit of $**119,376.49**.

Respondent is entitled to a credit of $**135,996.24** under Section 8(j) of the Act, as stipulated by the parties.

ORDER

The Arbitrator finds that Mr. Kaver's report dated 10/12/21 is virtually identical to his report dated 9/10/21 and does not reflect what services he provided from 9/12/21 through 10/12/21, representing 1.20 hours. (Invoice dated 10/20/21) The Arbitrator finds that these expenses are not reasonable and necessary. Having found the remaining expenses incurred by Mr. Kaver are reasonable and necessary, Respondent shall pay the expenses contained in Petitioner's Group Exhibit 4, except the invoice dated 10/20/21 in the amount of $168.00. Respondent shall further pay the medical expenses contained in Petitioner's Group Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, pursuant to the stipulation of the parties.

Respondent shall pay Petitioner permanent partial disability benefits of $**492.52**/week for **225** weeks, because the injuries sustained caused permanent partial disability to the extent of **45%** loss of Petitioner's body as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from 7/20/20 through 3/8/23 as it relates to his cervical spine, and 5/10/21 through 3/8/23 as it relates to his post-concussion syndrome, 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.

MAY 8, 2023

Arbitrator Linda J. Cantrell

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

SHAWN DANIELS,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 18-WC-037289
	)	
CONTINENTAL TIRE,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on March 8, 2023. On August 19, 2021, this Arbitrator entered a Decision in the above-captioned case pursuant to Section 19(b) of the Act. (PX6) Arbitrator Cantrell found Petitioner's current conditions of ill-being were causally related to his work injury on 8/3/18 and awarded medical expenses, vocational rehabilitation, including computer literacy training and job search services, specifically excluding a formal educational program recommended by Dr. Kaver, and maintenance benefits from 5/6/21 through 6/23/21. On 8/30/22, the Commission modified the Arbitrator's award and found Petitioner was not entitled to vocational rehabilitation services prior to 5/6/21 as Petitioner had not been released at MMI by several of his treating physicians prior to that date. The Commission otherwise affirmed and adopted the Decision of the Arbitrator.

The issues in dispute are vocational rehabilitation expenses and the nature and extent of Petitioner's injuries. The parties stipulated that Respondent is entitled to a credit of $135,996.24 in medical expenses paid through its group medical plan, under Section 8(j) of the Act. The parties stipulated that Petitioner was entitled to TTD benefits from 8/6/18 through 6/9/19 and 6/17/19 through 5/5/21, and maintenance benefits from 5/6/21 through 10/16/22, and that Respondent is entitled to a credit of $78,020.79 in TTD benefits paid and $41,355.70 in maintenance benefits paid.

TESTIMONY

Petitioner was 47 years old, married, with two dependent children at the time of accident. Petitioner testified he underwent a vocational rehabilitation evaluation with Tim Kaver of England & Company. He testified that prior to the evaluation he was not computer literate and could not prepare a resume for job search purposes. Petitioner identified job search logs he prepared from 8/24/20 through May 2022. (PX5) Petitioner completed a certification program to

become a radon inspector and was hired by WIN Home Inspection as a licensed radon technician. He completes continuing education every two years to maintain his license. Petitioner testified that his job duties do not require lifting or physical activity. His equipment weighs 5 to 8 pounds, and his duties are within his permanent 20-pound lifting and no overhead restrictions. Petitioner currently earns $15.00 per hour and he does not work overtime. He works up to 40 hours per week and sometimes less. He testified he earned between $20.00 to $21.00 per hour working for Respondent and worked a minimum of eight hours of overtime per week.

Petitioner testified he underwent a cervical fusion at C3-4 by Dr. Gornet. He described the surgery performed by Dr. Hagan as cutting 4 out of 6 nerves in the back of his head. Petitioner takes Tramadol, Meloxicam, and Gabapentin twice per day. He has numbness over the scar on the back of his head. Petitioner testified he can no longer engage in physical activities with his children, and he has become a spectator. He does not sleep well due to neck pain at C2-3 which was not operated on. Petitioner testified he has pain while driving due to bumps in the road. His job duties require him to drive, and he has to pull over and take breaks. Petitioner's 21-year-old son helps him with home maintenance.

On cross-examination, Petitioner testified he was not submitting any paystubs from his employment with WIN Home Inspection or Respondent into evidence. He agreed that prior to being hired by Respondent he had permanent restrictions from a left shoulder and elbow injury that prevented him from returning to work in the coal mines. Petitioner testified he has not been offered employment by anyone since he was hired by WIN Home Inspection, and he has not looked for employment since he was hired. He agreed that his job duties of driving and entering computer data requires some concentration. He agreed it took him quite some time to complete the radon classes and testing. Petitioner agreed that his ability to concentrate improved after his surgery by Dr. Hagan.

MEDICAL HISTORY

On 7/19/19, Dr. Gornet performed an anterior discectomy and fusion at C3-4. The surgery improved Petitioner's condition. However, he continued to have ongoing headaches, pressure, and dizziness and was referred to neurologist Dr. Robert Hagan for evaluation.

On 2/13/20 and 7/16/20, Petitioner underwent vestibular treatment and occipital nerve block injections with Dr. Blake.

On 7/20/20, Dr. Gornet released Petitioner at MMI with permanent restrictions of no lifting greater than 20 pounds and no overhead work.

Petitioner underwent another occipital injection on 10/29/20 for dizziness and occipital symptoms. On 2/2/21, Dr. Hagan performed an occipital nerve resection of the greater, third, and lesser occipital nerves, decompression, and neurolysis. Petitioner experienced significant improvement in his headaches, dizziness, and pressure and was released by Dr. Hagan at MMI on 5/10/21.

On 7/19/21, Petitioner returned to Dr. Gornet and reported that since his surgery with Dr. Hagan, he felt "somewhat better," with improved dizziness, but he still had neck pain. (PX3) Dr. Gornet opined Petitioner had facet changes at C2-3. He reiterated that Petitioner's restrictions of no overhead work and no lifting over 20 pounds were permanent. Dr. Gornet did not believe Petitioner would improve substantially moving forward.

On 8/4/22, Petitioner returned to Dr. Gornet's office and reported increased pain in his neck at times; however, he was able to tolerate his symptoms as long as he stayed within his restrictions. Examination and restrictions remained unchanged. Petitioner was prescribed Tramadol and instructed to follow up in one year.

Petitioner admitted into evidence job search logs dated 8/24/21 through May 2022. (PX5) Petitioner also admitted vocational rehabilitation reports from England & Company dated 8/5/21 through 9/29/22 into evidence. (PX4) On 11/26/21, England & Company recommended computer training classes that were approved and paid for by Respondent in the amount of $168.00. On 6/20/22, vocational specialist Tim Kaver noted Petitioner had an interview with WIN Home Inspection. They agreed to hire Petitioner if he passed a certification test. On 8/25/22, Mr. Kaver noted Petitioner passed the radon test. On 10/13/22, Mr. Kaver noted Petitioner was scheduled to start full-time employment with WIN Home Inspection on 10/17/22, earning $15.00 per hour, plus benefits.

CONCLUSIONS OF LAW

Issue (O): Were vocational rehabilitation expenses reasonable and necessary?

On 8/30/22, the Commission held, "We agree that once Respondent terminated TTD benefits as of May 5, 2021, Petitioner was then entitled to receive maintenance benefits and vocational rehabilitation became reasonable and necessary at that time." (PX6, p. 5) The Commission affirmed the Arbitrator's award of prospective vocational services "to aid him with computer literacy and his job search efforts, including short-term training and computer literacy tutoring, but specifically excluding a formal educational program as recommended by Mr. Kaver."

Petitioner submitted invoices from England & Company for services dated 6/28/21 through 10/13/22. (PX4) Respondent argues that England & Company's invoices dated 8/19/21, 9/29/21, and 10/20/21 are not reasonable or necessary or ordered by the Commission. (PX4, p. 4-5, 8, 11) Respondent alleges the services associated with the expenses reiterate that the vocational rehabilitation plan was not approved, and Petitioner needed to complete computer skills training, and there was no effort to obtain approval of the computer training. Respondent also argues that the invoice dated 10/3/22 is not reasonable or necessary because the correspondent report states the exact same thing as the 8/25/22 report.

Respondent admits that England & Company's invoices dated 12/8/21, 2/16/22, 6/2/22, 6/28/22, 7/26/22, 8/30/22, 10/20/22 are reasonable and necessary as the services provided reflect arrangements and follow-ups for computer training skills and job placement efforts.

With respect to the four disputed invoices, Mr. Kaver's report dated 8/5/21 indicates he recontacted possible computer training venders and found two appropriate classes at Rend Lake College beginning 10/27/21 and 11/10/21. The classes focused on Microsoft Word and Excel. Mr. Kaver stated that upon completion of the computer training courses, he would move forward with job placement. (Invoice dated 8/19/21) The Arbitrator finds these expenses reasonable and necessary.

Mr. Kaver's report dated 9/10/21 indicates he provided Petitioner with free computer tutorials to prepare for his upcoming computer training classes. (Invoice dated 9/29/21) The Arbitrator finds these expenses reasonable and necessary.

Mr. Kaver's report dated 10/12/21 is virtually identical to his report dated 9/10/21 and does not reflect what services he provided from 9/12/21 through 10/12/21, representing 1.20 hours. (Invoice dated 10/20/21) The Arbitrator finds these expenses are not reasonable and necessary.

Mr. Kaver's report dated 9/29/22 reflects his involvement in Petitioner's job offer from WIN Home Inspection, specific job duties, start date, and communication with Petitioner regarding same. (Invoice dated 10/3/22) The Arbitrator finds these expenses reasonable and necessary.

Therefore, Respondent shall pay the expenses incurred by England & Company contained in Petitioner's Exhibit 4, except the invoice dated 10/20/21 in the amount of $168.00. Respondent shall further pay the medical expenses contained in Petitioner's Group Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, pursuant to the stipulation of the parties.

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

Petitioner has elected to recover permanent partial disability benefits under Section 8(d)2 of the Act.

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**: On 7/20/20, Dr. Gornet released Petitioner at MMI with permanent restrictions of no lifting greater than 20 pounds and no overhead activities. Petitioner remained off work from the date of accident through 10/16/22, at which time he began working for WIN Home Inspection after undergoing vocational rehabilitation and becoming a licensed radon technician. Petitioner testified that his current job

duties are within his permanent restrictions. His job duties of driving increase his neck pain and he has to take breaks. Petitioner earns $15.00 per hour and works up to 40 hours per week, sometimes less, with no overtime. The Arbitrator places some weight on this factor.

(iii) **Age**: Petitioner was 47 years of age 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**: Petitioner did not submit payroll records from his current employer into evidence. The parties stipulated that Petitioner's average weekly wage in the year preceding his injury was $820.86, which is consistent with his testimony that he earned between $20.00 to $21.00 per hour. Petitioner testified he worked a minimum of 8 hours of overtime per week while working for Respondent. Petitioner testified he currently earns $15.00 per hour and works 40 hours per week or less at WIN Home Inspection. Mr. Kaver testified on 6/3/21 and opined that if Petitioner did not obtain the recommended two-year small business management degree, he would be limited to entry-level employment that paid between $22,880 and $27,040. Petitioner obtained certification as a licensed radon technician, resulting in annual wages of approximately $30,000. The Arbitrator places some weight on this factor.

(v) **Disability**: As a result of the accident, Petitioner sustained injuries to his cervical spine and post-concussion syndrome. He underwent an anterior discectomy and fusion at C3-4, and occipital nerve resection surgery of the greater, third, and lesser occipital nerves, decompression, and neurolysis. Petitioner was prescribed permanent restrictions of no lifting greater than 20 pounds and no overhead work.

Petitioner testified he still has neck pain and numbness in the back of his head. His injuries have negatively affected his ability to engage in activities with his children. His neck condition affects his ability to sleep and drive. Petitioner's current job duties require him to drive, and he takes breaks due to increased neck pain. Petitioner relies on his oldest son to assist with activities around the house. Petitioner takes Tramadol, Meloxicam, and Gabapentin twice per day. 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 45% loss of his body as a whole, pursuant to Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from 7/20/20 through 3/8/23 as it relates to his cervical spine, and 5/10/21 through 3/8/23 as it relates to his post-concussion syndrome, 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	21WC003323
Case Name	Vince David Gurski v. Capitol Storage LLC & Carole Keating dba Capitol Stable Farms dba Egizii Electirc & IWBF
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0462
Number of Pages of Decision	17
Decision Issued By	Kathryn Doerries, Commissioner, Amylee Simonovich, Commissioner

Petitioner Attorney	Francis Lynch
Respondent Attorney	Joseph L. Moore, Martin Haxel, R Mark Cosimini, Kenneth Bima

DATE FILED: 10/30/2023

/s/Kathryn Doerries, Commissioner

Signature

DISSENT: /s/Amylee Simonovich, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
X Correct a scrivener's error, top of page 5	☐ PTD/Fatal denied
☐ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

VINCE DAVID GURSKI,

Petitioner,

vs. NO: 21 WC 03323

CAPITOL STORAGE, LLC, CAROLE KEATING, CAPITOL STABLE FARMS, CAPITOL CONSTRUCTION GROUP, dba EGIZZI ELECTRIC, and STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND,

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of employer/employee relationship, accident, causal connection, temporary total disability, medical expenses, and permanent partial disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission, herein, corrects a scrivener's error in the Arbitrator's decision, top of page 5, to strike "10/14/21", to replace with "10/14/20".

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 22, 2022, is hereby, otherwise, affirmed and adopted.

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

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

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

October 30, 2023

o- 9/5/23
KAD/jsf

/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 reverse the Decision of the Arbitrator on the issue of employer-employee relationship.

As the Arbitrator states, Ms. Keating owned several businesses and Petitioner performed tasks at each of these businesses. The elements of control could not be established against one business entity. Ms. Keating was in the business of owning businesses. Petitioner was not hired to complete a particular task, but furnished recurring services to Ms. Keating at each of her holdings. As his work was spread across all of Ms. Keating's interests, he was given credit cards from Menards with Mr. Keating's name on it, a Thornton's card with Egizii Electric on it, and most importantly a Capitol Storage card with his name on it. It is axiomatic that Petitioner would not be given a business credit card with his name on it if he was not an employee. Petitioner was also given a van and tools from Egizii Electric, and paid out of the account for Capitol Storage.

Of the six factors identified by the Illinois Supreme Court in *Roberson*, only one factor in this case cuts against an employer-employee relationship: withholds income taxes and social security from a person's compensation. *Roberson v. Indus. Comm'n*, 225 Ill. 2d 159, 175 (2007). Several additional factors under *Roberson*, are clearly met and require no further explanation: Petitioner was paid hourly, Ms. Keating was free to discharge him at will, and he was supplied with materials and equipment. *Id*.

As to the factor determining whether the employer dictates the person's schedule, the evidence is rife with examples showing Petitioner consulted with Ms. Keating for approval when

he was going to miss work. Ms. Keating also dictated when and where he was to appear for work. For example, on February 20, 2020, Petitioner texted Ms. Keating that he had to leave early because his mother was taken to the hospital via ambulance; Ms. Keating relied, "Oh no. Ok." On March 16, 2020, Petitioner asked Ms. Keating if it was okay if he could "return Wednesday" so he could take his mother to the doctor; Ms. Keating replied, "Sounds good." When he was not able to attend the surgery, he texted Ms. Keating to find out where she wanted him to report to work. On March 23, 2020, Ms. Keating asked Petitioner to take off a couple of days because she did not have work for him until the toilets came in. He followed-up the following day to see if they came in. When Ms. Keating texted him on August 3, 2020 at 2:40pm to "take off the countertops in the kitchen please," Petitioner confirmed with her that the task could wait until the following morning. On Saturday, August 8, 2020, Ms. Keating texted Petitioner where to start first thing Monday morning. These text messages directly contradict the testimony that Petitioner could come and go as he pleased. He was in constant contact with Ms. Keating regarding his schedule.

The final factor is control. Ms. Lynch testified that Ms. Keating would go and check on the status of Petitioner's work. The Arbitrator found that Petitioner was not directed on how to accomplish the specific job. Yet, Ms. Keating testified that had she known Petitioner was cutting down the tree, she would have instructed him to use an Egizii Electric bucket truck. Ms. Keating admitted she wanted to direct Petitioner how to do the specific task that injured him and would have done so if given the opportunity.

The text messages between Petitioner and Ms. Keating show that she did in fact direct and control his tasks with specific instructions. On January 29, 2020, Petitioner asked if he should move on to the bathroom, yet Ms. Keating directed him to keep doing the nail holes instead. On February 2, 2020, she directed him to "Grab the boxes and vanity out of the office then let's get the rest of the units emptied please." On February 10, 2020, she directed him to "Measure the outside of normas windows please. We need the blinds to meet in the middle." On February 25, 2020, when he had finished what was needed at the Capitol office, Ms. Keating directed him to go to Morgan's to measure the floor. There are numerous other messages showing that Ms. Keating and Petitioner were in constant contact about various measurements so that supplies for projects could be ordered. On February 27, 2020, she directed him to remove cabinets from Bob's office and put them out back. Petitioner further consulted with Ms. Keating on the precise location so they were out of work area. Ms. Keating then asked him to come to "boondocks" as soon as possible.

On April 2, 2020, Petitioner asked Ms. Keating, "Where would you like me this morning." Ms. Keating instructed him to "Get 4 gallons of the light blue pain and we will start on the new office." Petitioner checked with Ms. Keating that she gets the paint at Menards, but she instructed him to go to Sherwin. On April 6, 2020, Ms. Keating sent Petitioner a detailed instruction: "Get the truck and trailer and go to the apartments and get the furniture out. Then get the mower and mow rosemore and the other one. Bud can week eat. Bring a chainsaw. I want to cut down some bushes." On June 1, 2020, Ms. Keating directed Petitioner to "get new blades in the morning for the zero turn and put them on. It's at the farm." On June 21, 2020, Ms. Keating texted, "I left the keys and list for Decatur at Dirksen. Please bring ur chainsaw. There is a small vine that has a base that is too big for my whoppers."

On August 5, 2020, Ms. Keating texted, "Can u mount the TVs at the gun club in the morning. We need to Grab 2 tv out of the loft at boondocks. U will have to get 2 mounts. I'll be out at 815 to show u where to put them." On September 1, 2020, Ms. Keating texted Petitioner to make sure he was using mollies when mounting closets at the apartments.

On October 12, 2020, Ms. Keating sent a detailed directive: "See if u can get her garage door opening going first. If not go grab a ½ horse opener. Put her smoke detectors one by her door in the hallway and the 2nd where u think. Change out her can lights and put the ceiling light upstairs in the hallway. If there r 2 call me and I'll go get another. I want to change the ones in my house too. Call me when u start mine. Also there is a outside motion detector light on my counter for the garage man door. I want to put up my storm door too." She followed-up to instruct him to "Do the opener first." She sent another message, "I'd like to put leds in her outside lights There is a ladder by the horse trailer. I'd like to do that high porch light too. I have a box of bulbs I'll bring back in the morning. The little house too. Bring ur chain saw too." Ms. Keating actually directed Petitioner to bring his own chainsaw, which caused his injury.

These messages are more than a list of the work to be completed. Ms. Keating frequently directed Petitioner on the timing and manner in which to perform tasks, and which supplies and equipment to use. On multiple occasions, Petitioner was directed on how to accomplish a specific job. He would not leave to care for his mother without checking in with Ms. Keating first. With these facts, Petitioner established the element of control.

For these reasons, I would reverse the Decision of the Arbitrator and find the existence of an employer-employee relationship.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC003323
Case Name	Vince David Gurski v. Capitol Storage LLC & Carole Keating dba Capitol Stable Farms dba Egizii Electirc & IWBF
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	Francis Lynch
Respondent Attorney	Chelsea Grubb, Kenneth Bima, Martin Haxel, R. Mark Cosimini

DATE FILED: 8/22/2022

/s/Edward Lee, Arbitrator

Signature

INTEREST RATE WEEK OF AUGUST 16, 2022 3.02%

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Vince David Gurski
Employee/Petitioner

v.

Capitol Storage, LLC, and Carole Keating, d/b/a Capitol Stable Farms, d/b/a Egizii Electric and State Treasurer and ex Officio-Custodian of the Injured Workers' Benefit Fund
Employer/Respondent

Case # **21** WC **003323**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Springfield**, on **6/27/2022**. 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 **10/14/2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

ORDER

Petitioner failed to meet his burden on the issue of employee/employer relationship. Petitioner's claim is denied. Determination of other disputed issues is moot.

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

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

Edward Lee_____
Signature of Arbitrator

August 22, 2022

THE ARBITRATOR FINDS THE FOLLOWING FACTS:

Testimony of Carole Keating

Ms. Keating testified that she is an entrepreneur. On 10/14/2020, she owned several businesses consisting of Capitol Storage, Egizii Electric, Boondock's Pub, Boondock's Gun Club, and Capitol Stables. Petitioner also owned a 60-acre tract of land in Sherman, Illinois. On this land, Ms. Keating had her personal residence, a residence where her daughter lives, and Capitol Stables.

Capitol Storage, in October of 2020, consisted of four storage unit locations, and an apartment complex called Rosemoore Apartments that consist of two locations. Ms. Keating testified that she purchased Rosemoore Apartments in April of 2020. On 10/14/2020, Capitol Storage had two employees. Suzie Lynch was the office manager and William Durham was a maintenance employee, who had previously worked for the prior owners of Rosemoore Apartments. Ms. Keating testified that Ms. Lynch and Mr. Durham were paid a salary, had set hours, had taxes and social security deducted from their pay and were paid vacation and sick time. Ms. Keating testified that she would use the Capitol Storage checking account for items unrelated to Capitol Storage.

Ms. Keating testified that she purchased Egizii Electric in November of 2019. Egizii Electric performs commercial and highway lighting and electrical. Egizii Electric has 40+ employees. Of the employees, Egizii Electric has a shop manager, three office workers, and the rest are union electricians. Taxes are deducted for Egizii employees.

Ms. Keating testified that Capitol Stables is an active horse farm. A person leases the barn from Ms. Keating and he works as a horse trainer.

Ms. Keating testified that she has known Petitioner for 12-15 years. They are friends. Ms. Keating and her husband would go places with Petitioner and his girlfriend. Ms. Keating owned a mobile home park which she sold to a company out of Florida called Brando Management. Brando Management kept Ms. Keating on for one year. During this time, she worked with Petitioner.

In November of 2019, Ms. Keating purchased Egizii Electric and offered Petitioner a job as a shop manager with Egizii Electric. This was a salaried position with benefits (401(k), health insurance, vacation and sick time). Ms. Keating testified that Petitioner declined this offer and stated that he did not want to perform this type of work.

Ms. Keating could not recall the exact date, but based on text messages, believes that in January of 2020, or a little earlier, she started having Petitioner perform work for her businesses and family. Ms. Keating testified that as a business professional and a personal landowner, she needed someone who could perform all types of duties. She knew that Petitioner was handy and could perform all types of tasks.

Subsequently and up until 10/14/2020, Ms. Keating testified that Petitioner performed work at all of her businesses, her personal residence, and at the residences of her son and daughter. Petitioner was paid $30.00 an hour. Petitioner put in flooring at the Gun Club, cut grass at Capitol Stables, put in flooring in a kitchen at Egizii Electric, put in carpet at her son's house, and performed work at Ms. Keating's personal residence. After she purchased the apartments in April of 2020, Ms. Keating testified that Petitioner would spend more of his time working at the apartments. However, he continued to perform work at her other businesses and for herself and family members. Ms. Keating testified that the arrangement was always the same. Petitioner would get paid on Fridays. Originally, Ms. Keating paid Petitioner cash, but started paying Petitioner with a check written out of

her Capitol Storage account in September of 2020. Ms. Keating testified that she started writing checks as it was more convenient than paying cash. Nothing else changed in their business relationship.

Ms. Keating testified that the primary method that she communicated with Petitioner was by text. She would advise Petitioner of various jobs that she wanted completed. She jobs varied each week depending on the need. There came a point where Ms. Keating was just trying to keep Petitioner busy. Ms. Keating did not require that Petitioner complete a task in a certain time period. She did not preclude Petitioner from working elsewhere. Ms. Keating would not advise Petitioner how to complete his tasks. Ms. Keating would not supervise Petitioner's work. Ms. Keating testified that she had no expertise in the tasks that Petitioner would perform. Petitioner would come and go as he pleased. During this time period, Petitioner took vacations and days off of work, taking care of his mother. Ms. Keating testified that there were weeks where she would not see Petitioner.

Ms. Keating testified that during this period, Petitioner's personal truck broke down. As such, she allowed Petitioner to drive an Egizii Electric work van for both business and personal use. Ms. Keating testified that Petitioner kept his tools in the van, along with the tools and equipment that belonged to her. Ms. Keating testified that she did not instruct Petitioner about cleaning out the van or tools or anything like that. Prior to allowing Petitioner to use a van, Petitioner had used his own tools.

Ms. Keating also testified that she provided credit cards to Petitioner for purchases needed to complete his job tasks. Petitioner used a CEFCU card which listed Capitol Storage, LLC on it, a Menards card which listed Patrick Keating on it, and a Thornton's fuel card that listed Egizii Electric on it (See PX5). Petitioner used these credit cards for materials and supplies.

Ms. Keating testified that just prior to 10/14/2020, she had a conversation with Petitioner. Petitioner advised her that he now wanted to get on the payroll with Egizii Electric. Petitioner wanted health insurance. Ms. Keating testified that the situation with Egizii Electric changed and she no longer had a salaried position available.

Ms. Keating testified that on Monday, 10/12/2020, she sent a text message to Petitioner asking him to fix a garage door opener, lights, and a smoke detector at her daughter's residence. Ms. Keating testified that in the past, she had advised Petitioner that a tree on her daughter's residence needed to be cut down. Ms. Keating testified that she was no aware that Petitioner was taking down that tree on 10/14/2020. Ms. Keating testified that had she known Petitioner was cutting down the tree, she would have instructed him to use an Egizii Electric bucket truck. Petitioner used his own chainsaw. Ms. Keating testified that the property where Petitioner was injured on had no business connection to Capitol Stables. After Petitioner fell, he called Ms. Keating and told her he was going to the emergency room. Petitioner advised Ms. Keating that he was up on a ladder cutting the tree. Ms. Keating testified that the ladder belonged to one of her businesses. She was not sure which one. After the incident, Ms. Keating testified that she did not speak to Petitioner often. Petitioner's girlfriend would update her on Petitioner's condition. Ms. Keating was aware that Petitioner was having difficulty standing on his leg. Ms. Keating did not offer Petitioner light duty work as she did not know that that was an option.

Testimony of Patrick Keating

Mr. Keating testified that he is an operating engineer and works as a superintendent for Egizii Electric. He performs outside, traffic signal, and underground work. In this capacity, Mr. Keating works as a general foreman in which he would supervise various crews. Mr. Keating testified that at the Egizii facility, Petitioner put in flooring, replaced the kitchenette, and plumbed the sink and microwave in addition to hanging cabinets. Mr. Keating testified that Petitioner did not work for Egizii Electric. When someone comes to work for Egizii Electric, they receive an employee packet, safety materials and complete a W-4 tax form. Petitioner did not receive this information. Mr. Keating never gave Petitioner any work assignments. Egizii Electric was not

involved with the tree trimming activities of 10/14/2021. Mr. Keating had nothing to do with Petitioner using an Egizii Electric van and had no knowledge of the tools in the van.

Testimony of Petitioner, Vince Gurski

Petitioner testified that in the past he has done plumbing, flooring, minor electrical work, bathroom and kitchen remodeling, mounted TVs, installed shelves and sinks, painting, replaced hot water heaters, and performed repair work on small engines.

Petitioner testified that in 2019, he worked at a mobile home park called Grand Valley Village. He performed plumbing and repair work. Ms. Keating owned Grand Valley Village but sold it to Time Out Communities, a Brando Corporation, in July of 2019. After Ms. Keating left, Petitioner testified that he continued to work for Brando Corporation for several months. Petitioner believes he left in December of 2019 and then started doing work for Ms. Keating. Petitioner would do remodels, mow grass, and work at Egizii Electric, the apartment complex and the stables. Petitioner did not perform work for anyone else but Ms. Keating. She would assign him tasks to complete. Petitioner testified that Ms. Keating would not tell him how to do a job. He would do the job that he was told to perform.

Petitioner testified that at some point he started receiving checks from Capitol Storage, LLC instead of cash. He was not sure why. Petitioner testified that at that time, Ms. Keating told Petitioner what needed to be done more frequently. After he began receiving checks, Petitioner testified that he started doing more apartment work, more stuff at the stable like replacing toilets, work at Egizii Electric, the Gun Club and work at Ms. Keating's personal residence. Petitioner testified that Ms. Keating wanted him to work 40 hours per week. Petitioner testified that in performing his work, he would use cutting tools, knives, saw blades, weed eaters, power equipment and lawn maintenance machines. Petitioner used Ms. Keating's mower and used her truck and trailer to transport it. Petitioner testified that he would use Ms. Keating's tools. Petitioner testified that he did not own any of the material that was in the Egizii Electric van that he had used. Petitioner testified that he started using an Egizii Electric vehicle a month before he started receiving checks. Prior to that, Petitioner had his own truck and would use his own tools. Petitioner's truck broke down and Ms. Keating told him to take an Egizii Electric van. Petitioner testified that he did not use this van for personal use, nor was he asked to bring the vehicle back. Petitioner testified that the ladder on top of the vehicle came with the van. Petitioner testified that all of the material in the van belonged to Egizii Electric. At no time did Petitioner have to use his own power equipment.

Petitioner testified that there was never a shortage of work to do. At the completion of a task, Petitioner would call Ms. Keating to see what was next on the list. Ms. Keating was the only person who instructed Petitioner on what to do. Petitioner testified that when he was working on Ms. Keating's son's house, she told him how to fill in nail holes and to make sure that they were clean and cut. In September/October of 2020, Ms. Keating told him that there was a tree to cut on the farm and that she received a bid from a tree service that was too high. A few days prior to the incident, Ms. Keating offered to put Petitioner in the bucket of a Bobcat, but Petitioner advised her that he would rather be on a ladder.

Petitioner testified that he used his own chainsaw to cut down the tree. The ladder did not belong to him. At around 3:00 p.m., Petitioner testified that he did two cuts on the tree and the last thing he remembers is waking up on the ground. Petitioner testified that the ladder was 20' high and not tied on.

On 7/17/2020, Petitioner completed an application for a Paycheck Protection Plan (PPP) loan through Security Bank. Petitioner received a loan in the amount of $12,502.50 that was eventually forgiven. Petitioner agreed that under the terms of the loan, he was to use the amount for his salary for the next 24 weeks. Subsequently, after the expiration of the 24 weeks, Petitioner testified that he completed a document asking for the loan

forgiveness in which he stated that he was still self-employed. In the application, when Petitioner signed for the loan, he noted that he was self-employed as a plumber. Petitioner testified that he never filled out an employment application for Ms. Keating or any of her businesses, nor did Petitioner fill out any forms to have any taxes withheld from his checks. In March of 2020, Petitioner took a vacation to Florida. Also, in the summer, Petitioner took a vacation to Branson. When Petitioner wanted to go on vacation, he let Ms. Keating know.

Petitioner testified that starting in early 2020, Ms. Keating would send him all over the place doing all types of jobs and that remain the same up until his injury. At the end of the week, he would tell her how many hours he worked and she had no idea if he actually worked those hours. Ms. Keating would just pay him. Petitioner testified that his whole method of doing work for Ms. Keating remained the same from the beginning until the end.

Petitioner testified that when he was cutting down the tree on October 14, 2020, he was working under Ms. Keating for Egizii Electric. Petitioner testified that he performed work at all of Ms. Keating's businesses. Petitioner agreed that he asked to go on the payroll at Egizii Electric. Petitioner called Ms. Keating and told her that he needed the fuel card for Egizii Electric.

Testimony of Susie Lynch

Ms. Lynch testified that for the last seven months, she has worked as a production controller for the Springfield Housing Authority. Prior to that, she worked for Capitol Storage. From April of 2020, for approximately one year, her office was located at the Rosemoore Apartments. Ms. Lynch testified that she drove a Capitol Storage truck. She testified that Ms. Keating told her what to do and did more than just check up on her. Ms. Lynch testified that she and Mr. Durham had set work hours, taxes were taken out of their checks, and they were not allowed to take time off whenever they wanted. Ms. Lynch testified that Ms. Keating would give Petitioner a list, or tell him what needed to be done. Ms. Lynch testified that Petitioner's hours working at the apartments varied. Some days he would be there all day and other days he would not be there at all.

Ms. Keating had Petitioner at other locations. Ms. Lynch did not know how Petitioner got paid. She handed Petitioner a sealed envelope every Friday. Ms. Lynch would not have much communication with Petitioner. Ms. Lynch would not know what work Petitioner was performing. Ms. Lynch testified that she never supervised Petitioner or told him what to do. Ms. Lynch testified that Ms. Keating would go and check on the status of job but Ms. Lynch was not aware of Ms. Keating supervising or telling Petitioner what to do. Ms. Lynch testified that Petitioner was free to come and go as he wished. He liked being his own boss and left work early and took vacations whenever he wanted. Ms. Lynch testified that there was never a change in the work arrangement between Petitioner and Ms. Keating for the time she started at Rosemoore Apartments in April until the time Petitioner got hurt.

Text messages between Ms. Keating and Petitioner was admitted into evidence as Respondent Keating's Exhibit 2. The text messages take place during the period of 1/28/2020 – 12/04/2020. These messages document that Ms. Keating would advise Petitioner of work that she wanted completed at her businesses, her personal residence and for her family members including her son, daughter, and sister. These include the following:

1/28/2020 – Petitioner was performing work at Ms. Keating's son's house
2/10/2020 – Petitioner was measuring windows at Norma's
2/18/2020 – Petitioner was painting and putting flooring in at an office
2/24/2020 – Petitioner was scheduled to work at Ms. Keating's daughter's house tomorrow
2/25/2020 – Petitioner finished up work at the Capitol office and was measuring Ms. Keating's daughter's floor

2/27/2020 – Petitioner was hanging cabinets in Bob's office and was also requested to work at Boondock's
2/28/2020 – Petitioner was asked to fix a latch at Dirksen
3/16/2020 – Petitioner was asked to tear out the kitchen and work on the floor at Egizii Electric
3/31/2020 – Petitioner was asked to measure the broken window at the motor home
4/01/2020 – Petitioner was going to replace the battery and belt from motor the following morning
4/02/2020 – Petitioner was going to paint and put in a sink
4/06/2020 – Petitioner was asked to get the furniture out and mow the Rosemoore complex
4/19/2020 – Petitioner was asked to remove the tile from Ms. Keating's garage
5/08/2020 – Petitioner was going to perform work at the Gun Club
5/12/2020 – Petitioner was asked to repair the four-wheeler and a motorcycle for Ms. Keating's nephew
5/27/2020 – Petitioner was asked to finish work at the Gun Club
6/01/2020 – Petitioner was asked to replace the blades in the zero-turn mower which was located at the farm
7/30/2020 – Petitioner was asked to perform work at Ms. Keating's son's house
8/05/2020 – Petitioner was asked to take TVs from Boondock's and put them in the Gun Club. Petitioner was also asked to perform work at Ms. Keating's son's house.
8/08/2020 – Petitioner was asked to check a water leak at Ms. Keating's son's basement
8/16/2020 – Petitioner was asked to repair a faucet at Ms. Keating's sister's
8/21/2020 – Petitioner was asked to perform work at Ms. Keating's son's house
9/01/2020 – Petitioner was asked to repair the closets at Ms. Keating's son's house
9/17/2020 – Petitioner was asked to replace the trim at 559b
10/04/2020 – Petitioner was asked to finish work at Ms. Keating's son's house and to put a new kitchen faucet in Ms. Keating's daughter's house.
10/06/2020 – Petitioner was asked to go to Ms. Keating's daughter's house to perform work
10/12/2020 – Petitioner was asked to perform work at Ms. Keating's daughter's house. Petitioner was also asked to change out lights in Ms. Keating's house.

On four occasions the text messages note that Petitioner reported his hours. A 1/31/2020 text notes that Petitioner worked 42 hours last week. A 2/28/2020 text notes that Petitioner worked 35 hours last week. A 9/11/2020 text notes that Petitioner worked 37.5 hours last week. A 9/25/2020 text notes that Petitioner worked 40 hours.

These text messages document that nothing changed in the business relationship from Ms. Keating and Petitioner from 1/28/2020 – 10/14/2020. During this period, Petitioner performed work for Ms. Keating's various businesses including Capitol Storage, Egizii Electric, Boondock's Pub, and Boondock's Gun Club. Petitioner also worked on Ms. Keating's personal residence and property. Petitioner also performed work for Ms. Keating's son, daughter, and sister.

Petitioner introduced paychecks that he received from Capitol Storage, LLC from 9/03/2020 – 10/16/2020. During that period, Petitioner received a total of six checks from Capitol Storage, LLC. Four of those checks were in the amount of $1,200.00. Another check was for $1,135.00. Another check was for $990.00 (PX8).

Petitioner entered into evidence photos of three credit cards that he used while performing work for Ms. Keating. A Menard's card has Patrick Keating's name on it. A Thornton's gas card has Egizii Electric listed on it. A CEFCU card lists both Vince Gurski and Capitol Storage, LLC (PX5).

Petitioner also admitted into evidence pictures of the Egizii Electric van that he used while performing his different job duties. The pictures show the different tools and work product that were located inside the van (PX6).

Petitioner also introduced his tax records for 2020. Petitioner filed his taxes on 5/06/2021 and those documents note that Petitioner was paid by Capitol Storage, LLC on a Form 1099-NEC in the amount of $10,285.00 (PX2(d)).

Respondents, Capitol Storage, LLC and Egizii Electric both introduced underwriting documents covering the year of 2020. These documents note that Petitioner was not listed as an employee for either of these Respondents (Capitol Storage, LLC RX2; Egizii Electric RX1).

Respondent Keating also introduced records from Security Bank documenting that Petitioner applied and received a Paycheck Protection Program loan in the amount of $12,502.50. In Petitioner's application for the Paycheck Protection Program loan dated 7/17/2020, Petitioner noted that he was a sole proprietor. The Arbitrator notes that on page 24 of that document, Petitioner noted that he was self-employed as a plumber. Petitioner testified that he used the loan for his salary for the next 24 weeks. Petitioner agreed that he filed an application and received loan forgiveness and, in that application, he noted that he was still self-employed (Tr. 189-191).

The Arbitrator notes that Petitioner completed two intake forms at the Springfield Clinic. The first intake form is dated 11/11/2020. In that document, Petitioner did not list an employer and noted that his occupation was "plumber/construction" (Keating EX1). The other intake form is dated 1/21/2021. In that document, Petitioner noted that he was self-employed as a plumber/mechanic (PX4, p. 152).

Medical records note that Petitioner was seen at the emergency room of St. John's Hospital on 10/14/2020 and was admitted to the Regional Trauma Center. Petitioner was discharged on 10/17/2020. Petitioner voiced pain to his right knee and right shoulder and was diagnosed with a concussion. Diagnostic studies revealed no acute findings. Petitioner did undergo a laceration repair to his right elbow (PX9).

Petitioner did follow up with the Springfield Clinic on 10/27/2020. Staples were removed from the laceration repair. Petitioner was advised to limit his lifting for the next two weeks and to take over-the-counter pain medication for pain. Subsequently, on 11/11/2020, Petitioner was seen at the Springfield Orthopedic Clinic by Dr. David Shervin. Petitioner continued to complain of right knee, right shoulder, and neck pain. Physical therapy was prescribed and Petitioner began therapy on 11/19/2020.

Subsequently, Petitioner was seen at the Memorial Medical Center Emergency Room on 1/12/2021 with continued right shoulder pain. Petitioner was prescribed pain medication and advised to follow up with his primary care physician.

On 1/21/2021, Petitioner was seen by Dr. Allison Mayfield for an orthopedic consult with the Springfield Clinic. Petitioner completed an intake form on 1/21/2021 and noted that he was having right shoulder and right knee pain. Petitioner also noted in the intake form that he was self employed as a plumber/mechanic. Dr. Mayfield diagnosed Petitioner with subacromial impingement and adhesive capsulitis of the right shoulder and prescribed additional physical therapy. It was noted that Petitioner had tested positive for COVID on December 1 and was unable to attend physical therapy. Therapy began at the Springfield Clinic on 1/28/2021 for right shoulder and right knee complaints. Petitioner treated with physical therapy through 2/22/2021 at which time therapy was placed on hold.

Petitioner followed up with Dr. Mayfield on 3/01/2021. Petitioner noted that his right shoulder improved 40% since the last visit. Dr. Mayfield recommended a right shoulder MRI. Regarding the right knee, Dr. Mayfield recommended continued physical therapy which resumed on 3/03/2021. Petitioner's right shoulder MRI

proceeded on 3/15/2021 and demonstrated AC joint osteoarthritis with mild fluid in the subacromial space. Petitioner's rotator cuff tendons were intact.

Petitioner followed up with Dr. Mayfield on 4/22/2021. On that date, Dr. Mayfield elected to administer a steroid injection to Petitioner's right shoulder. She also secured right knee x-rays which revealed mild osteoarthritis. Dr. Mayfield kept Petitioner on light duty restrictions.

Subsequently, Petitioner resumed physical therapy and was last seen in therapy on 5/05/2021.

When Petitioner returned for a follow up appointment with Dr. Mayfield on 7/22/2021, Petitioner noted that his right knee pain was doing well with no issues, swelling or pain. Petitioner reported a 70% improvement in his right shoulder since the last visit. Dr. Mayfield administered another steroid injection into Petitioner's right shoulder. Dr. Mayfield also continued Petitioner on work restrictions.

Petitioner followed up with Dr. Mayfield on 10/21/2021. Petitioner noted that the injection improved his discomfort significantly. For the first time he reported instability and catching within his right knee. Dr. Mayfield administered a steroid injection into Petitioner's right knee. Petitioner was continued on work restrictions.

Petitioner followed up with Dr. Mayfield on 1/13/2022. On that date, it was noted that Petitioner's right knee was feeling great and he had no further issues. Petitioner also reported 90% improvement in his right shoulder since the last visit. Dr. Mayfield allowed Petitioner to return to full duty work following that visit.

Unfortunately, when Petitioner returned to Dr. Mayfield on 3/14/2022, Petitioner reported continued pain to his right shoulder. As such, Dr. Mayfield prescribed an MRI arthrogram and an electrodiagnostic study.

The electrodiagnostic study proceeded on 3/28/2022 and was interpreted as being unremarkable. The arthrogram proceeded on 4/01/2022 and was interpreted as demonstrating no structural injury to Petitioner's biceps tendon or attachment. No full thickness tearing of the supraspinatus region was identified.

Petitioner last saw Dr. Mayfield on 4/11/2022. Petitioner noted that he did not feel that his shoulder was weak but he experienced discomfort with certain movements. Since Petitioner was functioning quite well with some mild residual discomfort in his right shoulder, Dr. Mayfield released Petitioner from her care on that date. Petitioner was allowed to continue with his full duty work status (PX4).

Petitioner testified that his right shoulder continues to be weak and painful. He has difficulty holding items up high for a long time. Petitioner noted that his right knee and right elbow laceration were doing fine.

CONCLUSIONS OF LAW:

(B) Was there an employee/employer relationship?

The determination of whether a claimant is an independent contractor or employee is critical because an employer/employee relationship is an essential prerequisite for an award of benefits under the Act. Davis v. Industrial Commission, 261 Ill. App. 849, 852, 634 N.E. 2nd 1117, 1119. There is no inflexible rule for determination whether an individual is an employee or an independent contractor. Davis, 643 N.E. 2d at 852. Nevertheless, the question of whether a claimant is an employee remains one of the most vexatious in the law of workers' compensation. Roberson, 225 Ill. 2d at 174, 310 Ill. Dec. 380, 866 N.E. 2d 191. The difficulty arises from the fact specific nature of the inquiry. *Id* Since there is no clear line of demarcation between the status of an employee and an independent contractor, no rule has been, or could be, adopted to govern all cases in this area. Roberson, 225 Ill. 2d at 174-75, 310 Ill. Dec. 380, 866 N.E. 2d 191.

What makes this issue even more vexatious in this case is the fact that Ms. Keating owned several businesses and Petitioner performed tasks at each of these businesses. The businesses included Capitol Storage, LLC, Capitol Stable Farms, Egizii Electric, Boondock's Pub, Boondock's Gun Club. Also, during this period Petitioner performed work on Ms. Keating's personal property, the residences of Ms. Keating's son, daughter and sister. Petitioner also performed work on a four-wheeler and motorcycle for Ms. Keating's nephew. Additionally, complicating this issue is the fact that Ms. Keating and Petitioner are friends. Along with their spouses, they would vacation together.

The Illinois Supreme Court, has provided a list of various factors for a court to consider when determining whether and employment relationship exists, including whether the employer: (1) may control the manner in which the person performs a work; (2) dictates the person's schedule; (3) pays the person hourly; (4) withholds income takes and social security from the person's compensation; (5) may discharge a person at will; and (6) supplies a person with materials and equipment Roberson, 225 Ill. 2d at 175; 310 Ill. Dec. 380, 866 N.E. 2d 191. The significance of these factors rests on the totality of the circumstances, and no single factor is determinative. Nevertheless, whether the purported employer has a right to control the actions of the employee is the single most important factor. See Ware v. Industrial Commission, 318 Ill. App. 3d 1117, 252 Ill. Dec. 711, 743 N.E. 2d 579 (2000).

There are several factors that favor Petitioner being an employee of several of the Respondents. Petitioner was paid hourly. Petitioner was issued checks out of a Capitol Storage, LLC account, and was issued a Capitol Storage credit card. Additionally, Petitioner used an Egizii Electric van. Petitioner used Egizii Electric tools and was issued an Egizii Electric credit card.

However, the Arbitrator notes the significant difference between Petitioner and the employees of Capitol Storage, LLC and Egizii Electric. Unlike these employees, Petitioner did not have income tax and social security withheld from his pay. Petitioner was not paid a salary. Petitioner was not provided paid vacations or sick time and Petitioner did not have set hours. Petitioner was free to come and go as he wished. He would take vacations and would leave work early whenever he wanted to.

The Arbitrator also notes that Petitioner was aware that he was not an employee of any of these Respondents. As Ms. Lynch testified, Petitioner enjoyed being his own boss. Petitioner was paid on a 1099 and noted in several documents during this time period that he was self-employed. Petitioner advised the federal government that he was self employed during the application for a PPP loan and then in the application requesting forgiveness of that loan. Additionally, Petitioner was offered a salaried position with Egizii Electric but declined it.

Regarding the most important fact, the evidence shows that no Respondent had the right to control the Petitioner's work performance or work-related activities to any notable degree. Petitioner was not supervised while working. Petitioner was not directed how to complete the tasks. Ms. Keating did not have any skills or training to perform the jobs Petitioner was asked to complete. While Ms. Keating provided a list of the jobs to be completed, Petitioner was not directed on how to accomplish the specific job. Again, Petitioner was free to come and go as he pleased. If he needed to leave to take care of his mother, he would. If Petitioner wanted to leave early, he would. If Petitioner wanted to take a vacation, he would.

It is incumbent upon Petitioner to prove each and every element of his claim. Based on the above-the Arbitrator finds that Petitioner failed to meet his burden of proof on the issue of employee/employer relationship. Petitioner was an independent contractor and no employer/employee relationship existed between the Petitioner and any of the Respondents. Determination of other disputed issues is moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC007996
Case Name	Jennifer Miller v. State of Illinois/Shawnee Correctional Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0463
Number of Pages of Decision	20
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Nicole Werner

DATE FILED: 10/30/2023

/s/Maria Portela, 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

Jennifer Miller,

Petitioner,

vs. NO: 20 WC 007996

State of Illinois / Shawnee Correctional Center,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 12, 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.

October 30, 2023
o090523
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	20WC007996
Case Name	Jennifer Miller v. State of Illinois/Shawnee Correctional Center
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	18
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Nicole Werner

DATE FILED: 9/12/2022

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 7, 2022 3.32%

/s/ Linda Cantrell, Arbitrator
Signature

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

September 12, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JENNIFER MILLER
Employee/Petitioner

v.

STATE OF ILLINOIS / SHAWNEE CORRECTIONAL CENTER
Employer/Respondent

Case # **20** WC **007996**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Collinsville, Illinois**, on **July 26, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury? **(cervical spine)**
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 Petitioner exceeded her choice of two physicians as provided under Section 8(a) of the Act with regard to her left shoulder.**

FINDINGS

On **2/19/20**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**67,769.20**; the average weekly wage was $**1,303.25**.

On the date of accident, Petitioner was **51** 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 $**23,211.54** for TTD, $**0** for TPD, $**0** for maintenance, and $**All medical bills previously paid under Section 8(a) of the Act as stipulated by the parties**, for a total credit of $**23,211.54, plus all medical bills paid under Section 8(a) of the Act as stipulated by the parties**.

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

ORDER

The Arbitrator finds that Petitioner did not exceed her choice of two physicians under the Act with regard to her left shoulder injury. The Arbitrator finds that Petitioner's visit to the Orthopaedic Institute of Western Kentucky on the date of accident was an emergent visit, and therefore does not constitute a choice under the Act. Petitioner's first choice of physicians was Baptist Health Medical Group, where she presented on 2/24/20. Her second choice of physicians was Dr. Matthew Bradley who Petitioner treated exclusively with for her left shoulder injury until he released her at MMI on 10/7/21. Any post-operative treatment, including physical therapy and an EMG/NCS, was at the referral of Dr. Bradley.

Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's Group Exhibit 1, directly to the medical providers per the Illinois medical fee schedule or PPO agreement, whichever is less, as provided in Sections 8(a) and 8.2 of the Act and pursuant to the stipulation of the parties. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act and a credit for any medical expenses paid through Respondent's group medical plan, as provided by Section 8(j) of the Act and pursuant to the stipulation of the parties.

Respondent shall pay Petitioner permanent partial disability benefits of $**781.95**/week for **187.50** weeks, because the injuries sustained caused permanent partial disability to the extent of **12.5%** loss of Petitioner's body as a whole related to her left shoulder, and **25%** loss of Petitioner's body as a whole related to her cervical spine, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from 10/7/21 through 7/26/22 with regard to her left shoulder, and 4/4/22 through 7/26/22 with regard to her cervical spine, and shall pay the remainder of the award, if any, in weekly payments.

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

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

SEPTEMBER 12, 2022

Arbitrator Linda J. Cantrell

NSTATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARIBTRATION DECISION

JENNIFER MILLER,	)	
	)	
Employee/Petitioner,	)	
	)	
	)	**Case No.: 20-WC-007996**
v.	)	
	)	
	)	
STATE OF ILLINOIS/SHAWNEE CORRECTIONAL CENTER,	)	
	)	
Employer/Respondent	)	

FINDINGS OF FACTS

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on July 26, 2022. The parties stipulate that on February 19, 2020, Petitioner sustained accidental injuries that arose out of and in the course of her employment with Respondent when a security door closed on her while walking through. Respondent does not dispute liability for Petitioner's left shoulder injury. The issues in dispute are causal connection and medical expenses with regard to Petitioner's cervical spine, whether Petitioner exceeded the choice of two physicians under Section 8(a) of the Act with respect to her left shoulder injury, and the nature and extent of Petitioner's injuries.

The parties stipulate that if medical bills are awarded, Respondent shall pay same directly to the medical providers pursuant to the medical fee schedule or PPO agreement, whichever is less. The parties further stipulate that Respondent shall receive credit for all medical expenses previously paid and credit for all medical expenses paid through its group medical plan pursuant to Section 8(j) of the Act. The parties stipulate that all temporary total disability benefits have been paid and Respondent shall receive a credit of $23,211.54 in TTD benefits paid.

TESTIMONY

Petitioner was 51 years of age, single, with no dependent children at the time of accident. Petitioner has been employed by Respondent for over 23 years and is currently a Correctional Officer. Petitioner testified that on 2/19/20 she was walking through sliding doors when the door came back and pinned her between the wall and the door. She testified that the back of her left shoulder was pushed into the grate of the door and her coworker had to pull the door off her. Petitioner reported the incident and filled out an accident report.

Following the accident, Petitioner developed pain in her left shoulder, across her breast, right knee, and neck. Petitioner testified that she presented to her primary care physician at Baptist Health Immediate Care who referred her to the Orthopedic Institute of Western Kentucky. She was placed off work and prescribed medication. Petitioner followed up with Keisha Snow, NP at Baptist Health on 2/24/20 who placed her on work restrictions and referred her to physical therapy. Petitioner testified that NP Snow referred her to a specialist.

On 2/26/20, Petitioner was examined by Dr. Matthew Bradley who ordered an MRI and placed her off work. On 5/8/20, Dr. Bradley performed a left rotator cuff repair. Petitioner testified that surgery and physical therapy improved the symptoms in the front of her shoulder, but she still had pain in her neck and the back of her shoulder. Dr. Bradley referred Petitioner to Dr. Rutz in December 2020 who obtained a cervical MRI and recommended cervical disc replacements at C4-5 and C5-6. Surgery was performed in January 2021 that improved Petitioner's headaches and pain that radiated into her left arm. Petitioner continued to have pain in her left trapezius. Dr. Rutz ordered a second MRI and referred Petitioner to Dr. Hurford. Dr. Hurford performed trigger point injections and a medial branch block that provided temporary relief in the back of Petitioner's shoulder and significantly improved her headaches.

Petitioner testified she cannot lay on her left side or put pressure on the back of her left shoulder. She is currently working full duty without restrictions. At the end of her work shifts she has increased pain in the back of her shoulder and neck pain. Her pain is constant, and she takes muscle relaxers in the middle of the night to control her symptoms. She testified she is still taking the same prescription of muscle relaxers that were prescribed by Dr. Hufford in April 2022. She takes Tylenol 3 to 4 times per week. Petitioner has difficulty washing dishes, sleeping, mopping, showering, and activities that require reaching with her left arm.

Petitioner testified she had no problems or treatment with regard to her neck or left shoulder prior to her work accident. She has not returned to Dr. Bradley since he released her on 10/7/21. Petitioner last saw Dr. Hurford in April 2022 and she does not intend to return for additional treatment. Petitioner is not currently receiving treatment for her work injuries.

MEDICAL HISTORY

On 2/19/20, an Employee Injury Report was completed by K. Freeman, LPN on behalf of Petitioner that stated, "Walking through the slider in front of the Armory. I was smashed in the door. The door was closing on me. My left shoulder and right knee was caught". (RX4) LPN Freeman also completed a medical evaluation and noted objective findings of left shoulder and breast area, aching pain in the left lower back, and right knee redness and swelling present. (PX16)

On 2/19/20, K. Prescott completed an Incident Report that provided a consistent history of accident and indicated the right slide continues to malfunction periodically. (PX16, RX5) Consistent witness reports were also prepared by two additional employees. (PX16)

On 2/20/20, a Supervisor's Report of Injury was completed that noted the Armory Slide slammed shut striking Petitioner against the wall. (RX2) Lieutenant Bledsoe had to pull the door off her. Petitioner reported pain in her left shoulder, upper arm, right knee, and breast area.

On 2/21/20, Lt. Bledsoe completed a Witness Report that stated Petitioner was pinned in the sliding door and door frame. He attempted to pull the door open to relieve pressure from Petitioner. (RX3)

On 2/27/20, Petitioner filled out an Employee's Notice of Injury indicating she injured her left shoulder, left arm, and right knee when she was smashed in the sliding door. (RX1)

Petitioner presented to the Orthopedic Institute of Western Kentucky the day of the accident with complaints of left shoulder pain. (PX3) Jake Beggs, PA-C, noted Petitioner presented through urgent care for evaluation. Petitioner reported she was caught between a door and a wall at work and was struck on the anterior aspect of her shoulder and chest. She reported 6/10 pain in her left shoulder that worsened with overhead activity. She complained of numbness and tingling throughout her left upper extremity. Mr. Beggs noted Petitioner was taking Nocro, Duexis, and Tizanidine for pain relief. Physical examination showed tenderness in the periscapular region and pain with active overhead movement. X-rays of the left shoulder were normal. Mr. Beggs assessed acute, traumatic left shoulder pain and contusion. She was prescribed Duexis and Tizanidine, instructed to ice, and taken off work through 2/21/20. Petitioner was instructed to return if her pain persisted.

On 2/24/20, Petitioner presented to the office of her primary care physician, Baptist Health Medical Group, where she saw Keisha Snow, APRN. (PX4) Petitioner reported worsening left arm pain that radiated to the left side of her neck. She had guarded range of motion. Ms. Snow noted Petitioner sees Dr. Ruxer at the Orthopedic Institute for pain management who prescribes Duexis. Physical examination revealed tenderness to her chest area, decreased range of motion, tenderness and pain in her left shoulder, and tenderness, pain, and spasms in her cervical spine. She was instructed to continue taking Duexis, Norco, and Zanaflex for her left shoulder. A physical therapy referral was offered, but Petitioner reported she was in too much pain to consider therapy at that time. She was instructed to keep her follow-up appointments with the Orthopedic Institute and to return to the urgent care clinic if her pain increased. She was placed on restrictions of no lifting, pushing, or pulling greater than 10 pounds.

On 2/26/20, Petitioner presented to the office of Dr. Matthew Bradley. (PX5) She reported pain along her upper trapezius on the left side deep in her shoulder and tingling in her ulnar forearm and pinky finger. Her pain was worsened with movement, lifting, and reaching behind her back. Dr. Bradley noted that prior to the 2/19/20 incident, Petitioner did not have any injuries to her left shoulder and was pain-free and able to perform all of her activities of daily living and employment requirements. Physical examination of Petitioner's left shoulder revealed abnormal range of motion and painful load and shift testing. Examination of her cervical spine revealed pain to palpation along the upper left trapezius and at the insertion of the levator scapulae. Cervical x-rays showed mild degenerative disc disease but was otherwise normal. X-rays of her left shoulder showed what appeared to be a small acute fracture fragment. A left

shoulder ultrasound showed moderate subacromial effusion. Dr. Bradley was concerned that Petitioner had a possible inferior glenoid fracture and ordered an MRI. He believed that the intermittent tingling in her forearm and pinky finger could be related to her crush injury and/or inflammation and swelling. He noted that Petitioner's examination findings were consistent with her symptomatology and mechanism of injury. She was given supplements to promote bone health and a cold wrap for pain and inflammation.

On 3/20/20, Petitioner underwent a left shoulder MRI that revealed a full-thickness delaminating tear in the distal supraspinatus tendon one centimeter from the tendon insertion with associated diffuse tendinopathy, infraspinatus tendinopathy, a small posterior labral fibrillated tear, and mild acromioclavicular osteoarthritis with trace subacromial bursal effusion. (PX6)

On 3/30/20 and 4/20/20, Petitioner was treated at the Orthopaedic Institute of Western Kentucky for unrelated lumbar spine pain. (PX1 & 3)

On 5/8/20, Dr. Bradley performed a left rotator cuff repair, tenotomy biceps tendon, subacromial decompression, and application of elevated wound VAC dressing. (PX5 & 7) Petitioner remained off work and underwent physical therapy at Atlas Physical Therapy in Paducah, Kentucky. (PX8)

On 7/13/20, Dr. Bradley administered a subacromial injection into Petitioner's left shoulder for pain and stiffness. (PX5) Petitioner reported numbness and tingling in her left hand and fingers. Dr. Bradley noted that Petitioner had not suffered any trauma to her left hand and that she had a history of carpal tunnel two years prior. Phalen's and Tinel's testing was negative. Dr. Bradley recommended a recheck at her next appointment with regard to her left hand symptoms. Dr. Bradley placed Petitioner on restrictions of no lifting over two pounds, and no overhead or repetitive use of the left upper extremity.

On 8/10/20, Dr. Bradley noted that overall Petitioner was doing exceptionally well. The injection significantly improved her pain and swelling and allowed her to more fully participate in physical therapy. Petitioner reported that her range of motion and strength had significantly improved. She reported that the numbness and tingling in her left hand had improved but she continued to have intermittent symptoms. Dr. Bradley noted Petitioner continued to experience mild pain in her left elbow, left wrist, and parascapular area. He renewed Petitioner's prescription for physical therapy and prescribed Medrol Dosepak. Petitioner was continued on light duty restrictions which Dr. Bradley anticipated would be relaxed in 6 to 8 weeks.

On 10/12/20, Dr. Bradley noted some continued weakness and recommended aggressive strengthening in therapy. On 11/19/20, Dr. Bradley noted Petitioner developed left shoulder post-operative bursitis and scar tissue, which was causing pain with overhead activity. She also developed rotator cuff tendonitis and likely subacromial impingement secondary to exclusively using her right arm during recovery. Dr. Bradley administered injections into Petitioner's bilateral shoulders and instructed her to continue therapy on her left shoulder and a home exercise program on the right. He continued her light duty work restrictions.

On 12/1/20, Dr. Bradley referred Petitioner to Dr. Kevin Rutz for her neck symptoms.

On 12/28/20, Dr. Bradley noted Petitioner had continued bilateral shoulder pain, which was centered posteriorly and around her scapula, as well as pain into her neck and at the base of her skull. Petitioner reported the shoulder injections did not provide substantial relief. Dr. Bradley continued Petitioner's light duty restrictions and instructed her to follow up in four weeks following her appointment with Dr. Rutz.

On 12/29/20, Dr. Rutz noted Petitioner had symptoms of worsening neck and upper back pain, which developed following her 2/19/20 work accident. (PX9) Dr. Rutz acknowledged Petitioner's prior rotator cuff surgery and noted her neck pain went into her left upper arm, down into her elbow, and occasionally into her hand and fingers. Petitioner reported tingling in the left parascapular region, right arm weakness, and posterior headaches. Her symptoms were constant. X-rays of the cervical spine showed mild narrowing at C3-4 and C6-7, and moderate narrowing at C4-5. Physical examination revealed diminished extension with pain in the posterior neck and upper back, tenderness to palpation in the left cervical and parascapular regions, diminished sensation in the left upper arm, and left shoulder tenderness with passive range of motion. Dr. Rutz ordered a cervical MRI that showed a focal right-sided foraminal disc herniation at C5-6 with a slightly smaller one in the left foramen, and a central disc herniation at C4-5, which was indenting the spinal cord. (PX9, 10) Dr. Rutz did not believe further therapy or injections would resolve her symptoms, and he recommended C4-C6 arthroplasties.

On 1/29/21, Dr. Rutz performed anterior discectomies at C4-5 and C5-6 with removal of herniations, foraminotomies, and placement of total disc arthroplasties at both levels. (PX7, 11) On 3/16/21, Dr. Rutz placed Petitioner on restrictions of no inmate contact and no lifting over 20 pounds. (PX9)

On 4/12/21, Petitioner returned to Dr. Bradley and reported her left shoulder was doing well other than occasional achiness and stiffness. He noted she still experienced symptoms of rotator cuff tendinitis in her right shoulder. (PX5) Dr. Bradley administered another injection in her right shoulder, prescribed Tizanidine, and ordered physical therapy.

On 5/11/21, Dr. Rutz noted Petitioner was doing well and without radicular complaints. She occasionally took Aleve and had some aching in her left trapezius for the last three weeks. (PX9) Dr. Rutz released Petitioner at MMI without restrictions.

On 6/21/21, Dr. Bradley noted that since Petitioner's cervical surgery she has experienced left posterior shoulder pain and burning down her arm with numbness and tingling into her fingers. Dr. Bradley ordered an EMG/NCS. (PX5)

On 6/29/21, Petitioner returned to Dr. Rutz and reported that her left trapezius and neck pain had not improved, and she had radiating pain down her left arm into her fingers. (PX9) Dr. Rutz prescribed Meloxicam and ordered a cervical MRI.

On 7/27/21, the cervical MRI revealed central protrusions at C3-4 and C6-7, a C7-T1 left paracentral-foraminal protrusion, and a central C2-3 protrusion. Dr. Rutz recommended physical therapy.

On 8/31/21, Dr. Rutz noted the recommended physical therapy had not been authorized. He opined that he was premature in releasing Petitioner as he believed her persistent left-sided neck discomfort would improve over time but had not.

Petitioner completed physical therapy and reported to Dr. Rutz on 9/28/21 she gained little relief. Dr. Rutz reviewed the EMG/NCS ordered by Dr. Bradley and noted it did not show cervical radiculopathy. He prescribed Meloxicam and instructed Petitioner to follow up in three months.

On 10/7/21, Petitioner returned to Dr. Bradley and reported continued pain and tingling in the left upper trapezius into her left arm and hand. (PX5) Dr. Bradley reviewed the EMG/NCS and found no evidence of carpal or cubital tunnel syndromes. He did not find an etiology of the pain in her upper left extremity and felt it was likely related to her neck and back. He prescribed Lyrica and placed her at MMI without restrictions for her left shoulder.

On 11/23/21, Dr. Rutz noted Petitioner's continued pain in her left trapezius with radiculopathy in the triceps and tingling in her fingers. (PX9) Petitioner reported that Meloxicam and physical therapy did not improve her symptoms. Dr. Rutz indicated he was at a loss as to further treatment options and referred Petitioner to Dr. Hurford as he believed she could benefit from an evaluation by a physiatrist. He allowed Petitioner to return to work full duty without the use of firearms.

On 12/7/21, Petitioner was examined by Dr. Robert Bernardi pursuant to Section 12 of the Act. (RX6) Dr. Bernardi reviewed Petitioner's medical records and performed a physical examination. He noted that Petitioner was reluctant to answer questions regarding the injury and told him she was not supposed to answer those questions. Dr. Bernardi indicated he needed the MRI studies to complete his opinion and had only reviewed the MRI dated 7/27/21. However, he believed there were multiple issues, including the described injury was not the kind that would cause or aggravate a herniation, no examiner had described her left arm pain as following a dermatomal distribution, no examiner had described nerve root tension signs, no examiner had documented weakness in the muscles innervated by the C5 or C6 nerve roots, and no examiner had identified asymmetry in the biceps and brachioradialis reflexes.

Dr. Bernardi noted that prior to 2/19/20, Petitioner had not experienced or received treatment for significant or sustained neck pain. He did not detect any signs of symptom magnification. He acknowledged that early on in her injury, Petitioner had numbness and tingling in her left arm, which could have represented radiculopathy. He noted that Petitioner had pain around her left shoulder blade which is characteristic of an irritated cervical nerve root. He acknowledged that these symptoms persisted following her shoulder surgery. He opined that the cervical MRI was reasonable and warranted given her symptoms.

On 12/9/21, Petitioner reported to Dr. Patricia Hurford she had continued left lateral neck pain that radiated into her left posterior shoulder and arm, along with some weakness. She reported she was working full duty. Physical exam showed tenderness in the anterior pectoral region, pain and tautness at the teres minor, tenderness with palpation of the intraspinatus, and left upper trapezius and trigger points along the whole course of the sternocleidomastoid. Dr. Hurford performed trigger point injections and continued Petitioner's restrictions of limited firearms training. She prescribed medications for inflammation, pain, and sleep, and instructed Petitioner to follow up in three to four weeks.

On 1/3/22, Petitioner reported to Dr. Hurford she gained one week of relief from the trigger joint injections and her symptoms returned. (PX14) Dr. Hurford recommended a trial of medial branch blocks at C2, C3, and C4, which were performed on 1/25/22. On 2/7/22, Petitioner reported she gained a few hours of relief and her pain returned. Dr. Hurford recommended radiofrequency ablations on the left at C2, C3, and C4, which were performed on 3/1/22.

On 4/4/22, Petitioner reported to Dr. Hurford that her headaches had improved; however, she continued to have persistent left-sided neck pain that she rated 5/10. Petitioner was concerned that she may not tolerate the use of a firearm during safety and use assessments. Dr. Hurford refilled Petitioner's medications, placed her on regular work activities, and requested her to follow up to discuss any problems she had handling a firearm.

On 4/25/22, Dr. Bernardi authored an addendum report. (RX7) He reviewed additional medical records, including the pre-operative cervical MRI and indicated there were no objective findings on the MRI that can be attributed to the work injury. He felt it showed multilevel degenerative disc disease that was age appropriate. He noted a central disc protrusion at C4-5 and opined it was undoubtedly present prior to Petitioner's work accident and did not correlate with Petitioner symptoms. He opined that Petitioner was not suffering from radiculopathy because there was no evidence of it on the EMG/NCS. Dr. Bernardi opined that Petitioner's cervical condition was not causally related to the work injury and the two-level disc replacement was not appropriate.

Dr. Bernardi further stated his personal opinion regarding myofascial pain, indicating that the condition itself was difficult for him to accept. He felt there was no reason to suspect that Petitioner's upper cervical facet pain would refer to the area around her shoulder blade, and that he would not have recommended facet injections. He acknowledged that Petitioner had a favorable response to the facet injections, after which Dr. Hurford recommended and performed facet rhizotomies; however, he indicated that he would not have performed either of these procedures.

Dr. Bernardi felt that additional testing or treatment of Petitioner's cervical spine was contraindicated because it would only serve to reinforce her belief that she sustained trauma to her neck, when, in fact, there is no evidence that she did.

Dr. Kevin Rutz testified by way of deposition on 6/17/22. (PX15) Dr. Rutz is a board-certified orthopedic surgeon who specializes in spinal surgery. He performs cervical and lumbar fusions and disc replacements, lumbar microdiscectomies, coccygectomies, cervical

foraminotomies, and kyphoplasty, and performs approximately 545 surgeries per year. Dr. Rutz was not aware of any complaints, symptoms, or treatment regarding Petitioner's cervical spine prior to her work injury. He testified that following her injury and treatment of her shoulder, Petitioner had continued pain in her neck, upper back, and down her left arm to her elbow, and radiation to the first and third digits of her hand, along with weakness in her spine. He opined that Petitioner's symptoms and physical examination findings were consistent with the type of injury she sustained.

Regarding Petitioner's cervical MRI, Dr. Rutz acknowledged that Petitioner had some degeneration that was age appropriate. He opined that the disc herniation at C4-5 had an acute appearance after visualizing it in the operating room. He believed that the changes at C5-6 were more degenerative but became symptomatic after the accident. He testified that Petitioner had radiculopathy in her left arm that was consistent with nerve root irritation in her neck.

Dr. Rutz opined that there is an overlap between shoulder and neck symptoms, and believed that, due to Petitioner's significant shoulder pain and positive MRI findings, her shoulder treatment took precedence. He testified that Petitioner's MRI findings, which included herniations at C4-5 and C5-6, were consistent with her symptoms and mechanism of injury. He diagnosed cervical disc herniations from C4 to C6 and radiculopathy. He testified that Petitioner's intraoperative findings were consistent with MRI findings.

Dr. Rutz testified that Petitioner's symptoms in her arms returned and were not resolved by medication or physical therapy. He referred her to Dr. Hurford for persistent left-sided symptoms. He did not believe Petitioner's condition would have improved without surgery due to the amount of time she was symptomatic. Dr. Rutz testified that the treatment he provided to Petitioner and the treatment she received from Dr. Hurford at his referral was reasonable, necessary, and causally related to the work accident. He opined that, based on Petitioner's onset of symptoms, her injury, her lack of previous cervical problems, MRI findings, and intraoperative findings, Petitioner's work injury caused her cervical condition that required surgical intervention.

On cross-examination, Dr. Rutz testified that Petitioner's left arm pain followed a dermatomal distribution of the C5-6 nerve root, as was reflected in her pain diagram. He testified that the vast majority of people that have pinched nerves in their neck with associated symptoms of pain, numbness, and tingling still have normal strength. He testified that Petitioner's main complaint when he released her from care was left trapezius pain. He admitted that pain complaints are subjective. Dr. Rutz testified that an MRI is just a snapshot at the time of the spine's condition, and you cannot date a herniation. He admitted the herniations may have been present prior to the injury. Dr. Rutz admitted that Petitioner's MRI showed multilevel disc degeneration and that calcification takes time to occur. He agreed that herniations can occur without an acute injury. Dr. Rutz testified he never noted Petitioner having loss of hand coordination, gait disturbance, signs of hyperactive reflexes, pathological reflexes, or objective abnormalities on her neurological exam.

Dr. Robert Bernardi testified by way of deposition on 6/24/22. (RX8) Dr. Bernardi is a board-certified neurosurgeon. Dr. Bernardi testified that Petitioner was not very forthcoming when answering his questions and she indicated she was told not to give certain information. He testified that Petitioner left large portions of the patient health history form blank.

Dr. Bernardi testified that the mechanism of injury relayed to him by Petitioner was not the type to cause a disc herniation. He agreed that the door pinning the shoulder could have caused a shoulder injury, but not a herniation. He testified that tightening of the neck muscles is not a cause of disc herniation. He explained that Petitioner did not have arm pain that followed a dermatomal distribution of the C5 or C6 nerve roots, no nerve root tension signs, and no weakness in the muscles innervated by the C5 or C6 nerve roots.

Dr. Bernardi testified there was nothing on Petitioner's cervical MRI that correlated with her complaints, and she had multilevel degenerative disc disease that predated her work injury and was age appropriate. Dr. Bernardi opined that Petitioner's cervical spine condition was not related to her work injury and it did not aggravate her pre-existing condition.

On cross-examination, Dr. Bernardi agreed that Dr. Bradley noted numbness and tingling of the ulnar distribution of Petitioner's left forearm, but he opined it was more of the nerve root, not C5 or C6. He admitted that the tingling and numbness in her arm on the date of the accident could have represented radiculopathy, as well as early complaints of shoulder blade pain that was characteristic of an irritated cervical nerve root. He acknowledged he had no knowledge or medical records indicating Petitioner had prior problems with her cervical spine.

Dr. Bernardi testified he was not aware there was concern of a potential glenoid fracture following Petitioner's accident. He testified he did not focus on Petitioner's shoulder. Dr. Bernardi testified that, except on very rare occasions, he only performs surgery when there is nerve root impingement indicated. He agreed that the intraoperative focal disc herniation at C4-5 was an objective finding, and that this finding could be post-traumatic. He did not dispute that the operative report indicated that some of the disc material at C5-6 had begun to calcify and that it had to be taken down with a burr to open the nerve. He agreed that Petitioner's shoulder and neck symptoms have never returned to their pre-injury baseline.

CONCLUSIONS OF LAW

Issue (F): Is Petitioner's current condition of ill-being in her cervical spine causally related to the injury?

Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury, such as a chain of events showing a claimant's ability to perform manual duties before accident but decreased ability to still perform immediately after accident. *Pulliam Masonry v. Indus. Comm'n*, 77 Ill. 2d 469, 397 N.E.2d 834 (1979); *Gano Electric Contracting v. Indus. Comm'n*, 260 Ill.App.3d 92, 96–97, 631 N.E.2d 724 (1994); *International Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 442 N.E.2d 908 (1982).

The Arbitrator notes that the Commission has acknowledged there is overlap between shoulder injuries and cervical spine conditions. *See Tiffany Molton v. Red Bud Reg'l Care*, 18 I.W.C.C. 0381.

Respondent does not dispute causal connection with regard to Petitioner's left shoulder injury. Petitioner immediately received medical treatment for acute injuries to her shoulder. She was diagnosed with a traumatic full-thickness rotator cuff tear. On 5/8/20, Dr. Bradley performed a left rotator cuff repair, tenotomy biceps tendon, subacromial decompression, and application of elevated wound VAC dressing. Petitioner developed post-operative bursitis, scar tissue, rotator cuff tendonitis, and subacromial impingement was suspected. Petitioner's post-operative treatment was eventful and included physical therapy, a second round of aggressive therapy, medications, and injections through November 2020, at which time Dr. Bradley referred Petitioner for a cervical spine evaluation. The fact that it took ten months from the date of accident for Petitioner to be referred to a spine specialist is reasonable given Petitioner's left shoulder surgery and post-operative treatment to rule out the shoulder as the source of Petitioner's left upper extremity symptoms.

Petitioner complained of numbness and tingling throughout her left upper extremity when she presented to the Orthopedic Institute of Western Kentucky the day of the accident. Five days later she followed up with her primary care physician's office with worsening left arm pain that radiated to the left side of her neck. Physical examination revealed tenderness, pain, and spasms in her cervical spine. Petitioner's left shoulder symptoms were addressed with medications and physical therapy. On 2/26/20, Dr. Bradley noted tingling in Petitioner's ulnar forearm and pinky finger. His examination of Petitioner's cervical spine revealed pain to palpation along the upper left trapezius and at the insertion of the levator scapulae. Cervical x-rays showed mild degenerative disc disease but was otherwise normal. Dr. Bradley was concerned that Petitioner had a possible inferior glenoid fracture and ordered an MRI of her left shoulder. He believed that the intermittent tingling in her forearm and pinky finger could be related to her crush injury and/or inflammation and swelling. Petitioner underwent left shoulder surgery on 5/8/20 and engaged in post-operative therapy.

On 7/13/20, Petitioner continued to complain of numbness and tingling in her left hand and fingers. Dr. Bradley administered a subacromial injection into Petitioner's left shoulder. On 8/10/20, Dr. Bradley noted Petitioner's continued complaints of intermittent numbness and tingling in her left hand, though slightly improved. She reported mild pain in her left elbow, left wrist, and parascapular area. He continued to prescribe medication, physical therapy, and light duty restrictions.

On 10/12/20, Dr. Bradley injected both of Petitioner's shoulders after diagnosing left shoulder post-operative bursitis and scar tissue, rotator cuff tendonitis, and likely subacromial impingement secondary to exclusively using her right arm during recovery. He instructed her to continue therapy on her left shoulder and a home exercise program on the right.

It was not until 12/1/20 that Dr. Bradley referred Petitioner to Dr. Kevin Rutz for evaluation of her cervical symptoms. On 12/28/20, Dr. Bradley noted Petitioner had pain into her neck and at the base of her skull, with the bilateral shoulder injections providing minimal relief.

On 12/29/20, Dr. Rutz's examination revealed diminished extension with pain in the posterior neck and upper back, tenderness to palpation in the left cervical and parascapular regions, diminished sensation in the left upper arm, and left shoulder tenderness with passive range of motion. An MRI showed a focal right-sided foraminal disc herniation at C5-6 with a slightly smaller one in the left foramen, and a central disc herniation at C4-5, which was indenting the spinal cord.

There is no evidence Petitioner had issues with or received treatment for her cervical spine prior to the work accident. Dr. Rutz testified that Petitioner's symptoms and exam findings were consistent with the type of injury she sustained, as she had neck pain with radiation into her arm. He testified that the radiculopathy was consistent with nerve root irritation, and that Petitioner's her left arm pain followed the dermatomal distribution of the C5-6 nerve root. Dr. Bernardi also admitted that the initial numbness and tingling Petitioner reported could represent radiculopathy and that the pain around her shoulder blade was characteristic of an irritated cervical nerve root.

Dr. Rutz confirmed the cervical MRI findings intraoperatively. Dr. Bernardi agreed that Petitioner's intraoperative focal disc herniation at C4-5 was an objective finding and could be post-traumatic. Petitioner testified that her radicular symptoms improved following surgery, although she continues to have some residual symptoms. Dr. Bernardi admitted that Petitioner's shoulder and neck symptoms never returned to their pre-accident baseline.

Based on the above evidence, the Arbitrator finds that Petitioner's current condition of ill-being in her cervical spine is causally connected to the work accident of 2/19/20.

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

Issue (O): **Did Petitioner exceed her choice of two physicians as provided by Section 8(a) of the Act with regard to her left shoulder injury?**

The Act entitles Petitioner to recovery for reasonable and necessary medical services for emergency care, services from any first choice of physician and referrals therefrom, and services from any second choice of physician and referrals therefrom. 820 ILCS 305/8(a).

Respondent argues that Dr. Bradley was Petitioner's third choice of physicians and is therefore not liable for medical bills related to his treatment. After careful consideration of the record, the Arbitrator finds that Petitioner did not exceed her choice of physicians under the Act.

Petitioner's injury occurred on 2/19/20 at approximately 12:15 p.m. (RX1-5) She testified that she went to Baptist Health Immediate Care immediately following the accident but was referred by them to the Orthopaedic Institute of Western Kentucky. The Arbitrator notes that neither party submitted into evidence medical records or bills from Baptist Health Immediate Care. No testimony or evidence was presented that Petitioner was admitted or received any treatment at Baptist Health Immediate Care.

Petitioner presented to the Orthopaedic Institute of Western Kentucky at 6:40 p.m. on the evening of the accident. It was noted that Petitioner presented as an urgent care visit. The Arbitrator finds that Petitioner's visit to the Orthopaedic Institute of Western Kentucky on the date of accident was an emergent visit, and therefore does not constitute a choice under the Act.

The Arbitrator finds that Petitioner's first choice of physicians was Baptist Health Medical Group, where she presented on 2/24/20. APRN Keisha Snow ordered Petitioner to follow up with the Orthopaedic Institute where she had been receiving pain management for an unrelated low back condition. Medical records of the Orthopaedic Institute dated 3/30/20 and 4/20/20 relate solely to a pre-existing lumbar spine condition that is unrelated to the work accident. Expenses related to these visits were submitted to Petitioner's private health carrier, Healthlink. (PX1)

On 2/26/20, Petitioner presented to Dr. Matthew Bradley for treatment on her left shoulder. The medical record does not indicate if Petitioner was referred to Dr. Bradley's office. The Arbitrator finds Dr. Bradley was Petitioner's second choice of physicians under the Act. Petitioner treated exclusively with Dr. Bradley for her left shoulder injury until he released her at MMI on 10/7/21. Any post-operative treatment, including physical therapy and an EMG/NCS, was at the referral of Dr. Bradley.

Based on the above, the Arbitrator finds that Petitioner did not exceed her choice of two physicians under the Act with regard to her left shoulder injury.

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13, 229 Ill.Dec. 77 (Ill. 2000). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (1st Dist. 2001).

Aside from Respondent's argument that Petitioner exceeded her choice of two physicians, Respondent does not dispute liability for medical bills related to Petitioner's left shoulder injury. Respondent disputes liability for payment of medical bills related to Petitioner's cervical spine based on causal connection.

Based on the Arbitrator's finding that Petitioner's condition of ill-being in her cervical spine is causally connected to the work injury, Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's Group Exhibit 1, directly to the medical providers per the Illinois medical fee schedule or PPO agreement, whichever is less, as provided in Section 8(a) and Section 8.2 of the Act and pursuant to the stipulation of the parties. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act and a credit for any medical expenses paid through its group medical plan, as stipulated by the parties.

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

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

(i) **Level of Impairment**: Neither Party submitted an AMA rating. Therefore, the Arbitrator uses the remaining factors to evaluate Petitioner's permanent partial disability.

(ii) **Occupation**: Petitioner continues to work full duty without restrictions as a Correctional Officer for Respondent. She testified that at the end of a workday she has increased neck pain and her shoulder aches. There is no evidence that Petitioner's injuries have affected her job performance. The Arbitrator places greater weight on this factor.

(iii) **Age**: Petitioner was 51 years old at the time of her injury. Petitioner testified she intends to retire soon and answered, "yes and no" as to whether her injuries have contributed to her decision to retire. The Arbitrator places some weight on this factor.

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

(v) **Disability**: As a result of her accident, Petitioner underwent a left rotator cuff repair, biceps tenodesis, and subacromial decompression. She underwent extensive post-operative treatment, including physical therapy, medications, and injections. She developed post-operative bursitis, scar tissue, rotator cuff tendonitis, and subacromial impingement was suspected. Dr. Bradley released Petitioner at MMI without restrictions on 10/7/21.

Petitioner sustained cervical disc injuries and herniations at C4-5 and C5-6 and underwent cervical disc replacements at both levels. Post-operatively, Petitioner underwent trigger point injections, medial branch blocks, and radiofrequency ablations due to residual symptoms. On 4/4/22, Dr. Hurford released Petitioner to full duty work without restrictions and advised her to follow up if she had issues with the use of a firearm. Petitioner testified she has not returned to Dr. Hurford since being released.

Petitioner testified she still has pain in her neck and the back of her shoulder, which cause her difficulty sleeping. Her symptoms increase with activities such as washing dishes, mopping, and showering. Petitioner occasionally takes muscle relaxers that were prescribed by Dr. Hurford when she was still treating. She takes Tylenol three to

four times per week. Petitioner testified she does not intend to return for additional treatment for her neck or shoulder. 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 the body as a whole related to her left shoulder, and 25% loss of the body as a whole related to her cervical spine, as provided under Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from 10/7/21 through 7/26/22 with regard to her left shoulder, and 4/4/22 through 7/26/22 with regard to Petitioner's cervical spine, 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	22WC019711
Case Name	Matthew Ray v. City of Peoria
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0464
Number of Pages of Decision	12
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Stephen Kelly
Respondent Attorney	Adam Casson

DATE FILED: 10/30/2023

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Matthew Ray,

Petitioner,

vs. NO: 22 WC 019711

City of Peoria,

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 nature and extent and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 5, 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.

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.

October 30, 2023
O101723
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	22WC019711
Case Name	Matthew Ray v. City of Peoria
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Bradley Gillespie, Arbitrator

Petitioner Attorney	Stephen Kelly
Respondent Attorney	Adam Casson

DATE FILED: 6/5/2023

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

/s/ Bradley Gillespie, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Matthew Ray
Employee/Petitioner

v.

City of Peoria
Employer/Respondent

Case # **22** WC **019711**

Consolidated cases: _____

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Bradley Gillespie**, Arbitrator of the Commission, in the city of **Peoria**, on **April 5, 2023**. By stipulation, the parties agree:

On the date of accident, **July 16, 2022**, 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 $**115,000.00**, and the average weekly wage was $**2211.54**.

At the time of injury, Petitioner was **46** years of age, ***married*** with **4** dependent children.

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

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

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 $**0**/week for a further period of **0** weeks, totaling $0.00, because Petitioner did not sustain a permanent partial disability in accordance with the Section 8.1b factors.

Respondent shall pay all outstanding reasonable, necessary, and causally related medical expenses from the date of the injury through the time of the trial.

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.

Bradley D. Gillespie **JUNE 5, 2023**

Signature of Arbitrator

BEFORE THE WORKERS' COMPENSATION COMMISSION

MATTHEW RAY,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No: 22 WC 019711**
	)	
CITY OF PEORIA,	)	
	)	
Respondent.	)	
	)	

NATURE AND EXTENT DECISION OF THE ARBITRATOR

FINDINGS OF FACT

I. Alleged Accident and Claim for Compensation

In July of 2022, Petitioner, Matthew Ray, was a forty-six (46) year-old police officer for Respondent, City of Peoria. At that time, he had been employed by Respondent for twenty-four and one-half (24 ½) years. (Arb. Tr. p. 10). Petitioner's job duties included responding to calls, assisting subordinates, report writing, and evaluating officers. (Arb. Tr. p.12).

On July 16, 2022, Petitioner responded to a call regarding an individual standing in the median by Sterling Avenue and War Drive area. (Arb. Tr. p. 14) After determining the individual was lying about his name, and an attempt to take the individual into custody, the individual began to run away. *Id.* Petitioner chased after the individual and eventually took him into custody. (Arb. Tr. p. 14-15). Petitioner began searching the individual, inserted his hand into the individual's pants pocket, and was jabbed by a syringe with no cap on it. *Id.* Petitioner sought medical treatment immediately. (Arb. Tr. p. 16).

Petitioner filed an Application for Adjustment of Claim on July 29, 2022 alleging an injury to his right index finger and person-as-a-whole as a result of the July 16, 2022 work accident. (Pet. Ex. 1).

II. Issues in Dispute at Arbitration

On February 8, 2023, Petitioner filed a Request for Hearing.

At arbitration, the parties submitted a Request for Hearing, which was admitted into evidence as Arbitrator's Exhibit 1. Arbitrator's Exhibit 1 lists the nature and extent of the injury as the only issue in dispute. (Arb. Ex. 1; Arb. Tr. p. 5).

III. Petitioner's Medical Treatment

On July 16, 2022, Petitioner was seen at St. Francis Medical Center by Dr. Laaker. Petitioner reported he was stuck with one dirty needle in his right first finger while making an arrest. The needle was used by the detainee and likely others for the injection of drugs. No obvious blood was noted. The person in possession of the needle was not cooperative, and it was unknown if he had HIV, hepatitis B or C, or any other communicable diseases. Petitioner was recommended to undergo twenty-eight (28) days of HIB prophylaxis with Truvada and raltegravir. Petitioner would be retested for HIV and HepC in one month and 3 months. (Pet. Ex. 2).

Petitioner was then seen at OSF Occupational Health by Dr. Richardson on August 1, 2022. Petitioner reported he did not noticeably bleed from the puncture wound and thought that it was a shallow penetration. Petitioner started on Truvada and ISENTRESS which he tolerated reasonably well, but was having some transient GI side effects. Petitioner reported a minor GI complaint of diarrhea but otherwise was tolerating the medication well. Lab work was ordered to be done on August 12, August 26, November 16, and January 16, 2023. No work restrictions were ordered at that time. (Pet. Ex. 3).

To this date, all lab work has come back negative for any communicable diseases. There was no evidence Petitioner developed HIV, hepatitis C or hepatitis B infection. (Pet. Ex. 3).

IV. Petitioner's Testimony at Arbitration

At arbitration, Petitioner testified he was employed as a police officer for the City of Peoria Police Department. (Arb. Tr. p. 10). He was hired by Respondent approximately twenty-four and one-half (24 1/2) years prior to arbitration. *Id*. Petitioner's current assignment is a patrol sergeant. (Arb. Tr. p. 11). Petitioner testified on a routine basis, his job duties include responding to calls, assisting subordinates, report writing, and evaluating officers. (Arb. Tr. p 10-11). Petitioner described his job as a "management position." *Id.*

On July 16, 2022, Petitioner was working dayshift patrol sergeant and zone supervisor. (Arb. Tr. p. 14). Petitioner was driving in the direction of Sterling Avenue and War Drive area where an officer went out on an individual who had been standing in the median. *Id.* Petitioner stopped and spoke with Officer Bischoff, who indicated the individual was being deceptive and lying about his name. *Id.* Petitioner went over and spoke to the individual and testified he was "a hundred percent sure he was not being truthful about who his name is." *Id.* Officer Bischoff and another officer went to take the individual into custody for lying about his name at which time he pulled away and tried to run. Petitioner chased after the individual, and after a short pursuit, tackled the individual, went down to the ground, and took him into custody. (Arb. Tr. p. 14-15). Petitioner started searching the individual, inserted his hand to see if there was anything inside the individual's pants pockets, and his right index finger was jabbed with a syringe that had no cap on it. (Arb. Tr. p 15). Petitioner testified the individual had been staying outside in a homeless encampment in the City of Peoria, he was an obvious drug addict, and the individual admitted to the hospital that he had hepatitis. *Id.*

Petitioner immediately notified his lieutenant of the injury, and went to St. Francis Medical Center for treatment. (Arb. Tr. p 16). He was put on anti-AIDS medication and received injections for hepatitis and HIV. (Arb. Tr. p. 17). Petitioner testified he felt scared and freaked out by the

incident. *Id.* He further testified that his main concern "was the unknown thing that could potentially kill me is what was my main concern." (Arb. Tr. p. 17-18). Petitioner did not stay overnight at the hospital and was sent home that same day. (Arb. Tr. p. 18).

Petitioner was then seen at OSF Occupational Medicine by Dr. Edward Moody. (Arb. Tr. p. 18-19). Petitioner testified that Dr. Moody explained the percentage of contracting one of the diseases was very small. (Arb. Tr. p. 19-20). Petitioner was told to do preliminary checkups and blood draws, and continue with hepatitis injections. (Arb. Tr. p. 20). Approximately five to six blood draws were conducted at OSF. *Id.* The last treatment for concerns of hepatitis or HIV was in January 2023. (Arb. Tr. p. 20-21).

During the time frame of treatment Petitioner was receiving, he did not miss any time from work. (Arb. Tr. p. 21-22). Petitioner testified if it would have been offered, he "probably would have asked for at least a light duty status." (Arb. Tr. p. 22). He further testified the AIDS medication "destroyed my stomach." *Id.* He had "massive diarrhea" and he thinks he lost twenty pounds the first week he was on the medication. *Id.* Petitioner testified he still feels a "weird sensation" in his right index finger, and it feels "like my finger kind of falls asleep, like a numbness." (Arb. Tr. p. 24). Petitioner stated he mainly went to the doctor because he was "legitimately really worried about contracting one of the diseases." *Id.* He testified that the accident took a toll on his marriage for a little while. (Arb. Tr. p. 24-25).

Petitioner testified the needle prick wasn't "barely a nick" and he felt it go into his finger. (Arb. Tr. p. 25). He testified further that he still has long term concerns. *Id.*

On cross examination, Petitioner testified he did not have any follow-up appointments regarding his stomach issues or lingering effects from the medications. (Arb. Tr. p 29). He acknowledged that his stomach went back to normal once the course of antibiotics was done. *Id.* Petitioner further testified he did not schedule any follow-up appointments regarding issues with his finger. (Arb. Tr. p 30). He then claimed he could see blood from the puncture in his finger. (Arb. Tr. p. 31). Petitioner recalled a medical visit at OSF Occupation Health with Dr. Fred Richardson on August 1, 2022 where he stating to Dr. Richardson that he believed the puncture was a shallow penetration. (Arb. Tr. p. 31-32). Petitioner did not have any complaints about his injury or treatment to Dr. Richardson at that time. *Id.*

Petitioner confirmed he did not perform any other blood draws after January 2023. (Arb. Tr. p. 33). Petitioner acknowledged he did not speak to his job about the lingering effects that he had. *Id.* Petitioner further acknowledged he was not on any occupational or nonoccupational restrictions as a result of the accident. (Arb. Tr. p. 33-34). Petitioner testified on cross examination he was performing his duties as a police officer, but doesn't know if he was fully performing his duties. (Arb. Tr. p. 34). Petitioner further testified he spent a lot of time at the station during the first few weeks after the injury, and once he was off the medication for his stomach, he went right back to work. *Id.* Petitioner acknowledged he never complained about his stomach issues to his job or the doctors. (Arb. Tr. p. 35).

Petitioner acknowledged he had stress from the possibility of contracting viruses, but admitted he never sought any treatment for stress or anxiety as a result of the injury. (Arb. Tr. p.

35). He did not have any counseling or therapy sessions because of the stress he stated he was feeling. *Id.* He was never diagnosed with any stress or anxiety disorder and he was never prescribed any medication for stress or anxiety. (Arb. Tr. p. 36). Petitioner admitted he did not have any marriage counseling sessions due to the issues with his marriage he testified about earlier. *Id.*

FINDINGS OF LAW

I. Nature and Extent

Section 8.1b of the Illinois Workers Compensation Act requires consideration of the following enumerated factors in determining an employee's permanent partial disability:

(i) The reported level of impairment pursuant to an American Medical Association Impairment Rating;

(ii) The occupation of the injured employee;

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

(iv) The employee's future earning capacity; and

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

Section 8.1b further provides no single factor shall be the sole determinant of disability. Additionally, Illinois Appellate Courts have affirmed the aforementioned factors are not exclusive, meaning the Commission is free to evaluate other relevant considerations. See *Flexible Staffing Services v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 151300WC. In accordance with Section 8.1b, the relevance and weight of any factors used in reaching a conclusion in this matter are set forth below.

(i) First, with regard to the reported level of impairment pursuant to the AMA 6th Edition Guidelines, an AMA impairment rating was not submitted by either party. Accordingly, the Arbitrator gives no weight to this factor.

(ii) Second, regarding the occupation of the injured employee, the Arbitrator notes Petitioner was a police officer for the City of Peoria at the time of the July 16, 2022 accident. The Arbitrator acknowledges the heavy-duty nature of Petitioner's occupation and gives some weight to this factor.

(iii) Third, regarding the age of the injured employee, the evidence establishes Petitioner was forty-six (46) at the time of the July 16, 2022 accident. The Arbitrator places some weight on this factor, based on the expected duration of Petitioner's occupational and nonoccupational life.

(iv) Fourth, with regard to Petitioner's future earning capacity, the Arbitrator notes that there was no evidence of loss of future earning capacity, thus this factor will be given no weight.

(v) Lastly, with regard to evidence of disability corroborated by the treating medical records, the Arbitrator notes the medical records in evidence do not establish Petitioner sustained permanent partial disability.

Petitioner was first seen at St. Francis Medical Center by Dr. Annalise Laaker on July 16, 2022. Petitioner was diagnosed with a pin-point mark on the right first finger. No erythema, swelling, or discharge was found. Dr. Laaker noted no pain or bleeding at the entry site. Petitioner was ordered to take 28 days of HIV prophylaxis and provide blood tests for HIV and HepC in one month and three months.

Petitioner was then seen at OSF Occupational Health by Dr. Edward Moody on July 20, 2022. Dr. Moody noted there was no identifiable wound on the right index finger. Due to the exposure to a potentially hazardous bodily fluids, Petitioner was ordered for a recheck at two weeks and four weeks. Petitioner testified Dr. Moody told him that the percentage of him contracting a disease from the injury was very small. (Arb. Tr. p. 20). Petitioner was placed on regular duty with no work restrictions.

On August 1, 2022, Petitioner was again seen at OSF Occupational Health by Dr. Fred Richardson. Dr. Richardson noted that Petitioner reported he did not noticeably bleed from the puncture wound and thinks it was a shallow penetration. Petitioner reported minor GI complaint of diarrhea but otherwise is tolerating medication well. Dr. Moody noted Petitioner had no complaints two weeks past exposure. Petitioner was placed on regular duty with no work restrictions.

Petitioner's last examination was on August 15, 2022 with Dr. Moody. Petitioner stated he had some GI side effects that have been resolved since the completion of treatment. Dr. Moody noted Petitioner had no complaints at that time. No follow-up was ordered.

Petitioner underwent blood tests on August 12, 2022, August 26, 2022, December 7, 2022, and January 31, 2023. All blood results were negative. On January 31, 2023, Dr. Moody noted the HIV tests were negative and there was no evidence that Petitioner developed hepatitis C or hepatitis B infection. Petitioner was discharged from care on January 31, 2023 and has not received any further treatment regarding his injury. Petitioner did not seek any medical care or treatment for stress or anxiety he suffered as a result of his July 16, 2022 injury.

The Arbitrator finds it significant Petitioner returned to full-duty unrestricted work immediately, and testified he has been able to perform his duties and had not returned for any treatment. The Arbitrator also finds it significant that even though Petitioner testified about his concerns and stress about the possibility of contracting a disease, he did not seek any counseling or therapy sessions for stress or anxiety. (Arb. Tr. p. 35-36).

The foregoing facts are similar to *Kaiser v. St. Michael's Counseling Center Inc.*, 21-IWCC-0142. In this case, the claimant worked as a nurse in a methadone clinic. The claimant was drawing blood from a patient who had hepatitis C. As the claimant started to draw blood, the patient jumped and the needle came out and pricked the claimant's left thumb. The claimant's blood was tested and she was prescribed a 28-day course of antiviral medications as well as an HIV prophylaxis. The claimant was to follow up for viral testing in three months and six months.

Claimant testified that the medications made her nauseous and she experienced significant abdominal pain. She also testified that the work incident caused her to experience daily stress for months and still occasionally thinks about the incident. She never developed symptoms of hepatitis C or tested positive for any communicable disease.

Therein, the Commission decided the claimant failed to prove she sustained any permanent disability where there was no evidence the claimant ever followed up with her doctor to undergo further testing, and never tested positive for any disease as a result of the work accident. The Commission further stated the claimant may have experienced stress following the work incident, but there is no indication that the stress caused a permanent disability. The Commission pointed out that the claimant was never diagnosed with any type of stress or anxiety disorder, and the incident did not prevent her from continuing her work.

Similar to the claimant in *Kaiser*, Petitioner did not follow up with his doctor to under further testing, and never tested positive for any disease. Petitioner was never diagnosed with any type of stress or anxiety disorder, and he returned to work full-duty after the incident, just as the claimant did in *Kaiser*.

Based on the foregoing, the Arbitrator finds Petitioner did not sustain a permanent disability in accordance with the Section 8.1b factors. Based on the above factors, and the record taken as a whole, the Arbitrator finds Petitioner sustained permanent partial disability to the extent of 0.00% loss of use of the right index finger and person-as-a-whole, totaling 0 weeks, or $0.00 pursuant to §8(d)(2) and §8(e)(2) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC018793
Case Name	Alan J. Wujek v. Key West Metal Industries Inc
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0465
Number of Pages of Decision	41
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Arnold Rubin
Respondent Attorney	Michelle LaFayette

DATE FILED: 10/30/2023

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Alan J. Wujek,

Petitioner,

vs. NO: 20 WC 018793

Key West Metal Industries, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 8, 2022 is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $45,700.00. 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.

October 30, 2023
O092623
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	20WC018793
Case Name	ALAN J. WUJEK v. KEY WEST METAL INDUSTRIES, INC.,
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	38
Decision Issued By	Joseph Amarilio, Arbitrator

Petitioner Attorney	Arnold Rubin
Respondent Attorney	Michelle LaFayette

DATE FILED: 7/8/2022

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

/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
19(b)

Alan J. Wujek
Employee/Petitioner

v.

Key West Metal Industries, Inc.
Employer/Respondent

Case # **20 WC 018793**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joseph Amarilio**, Arbitrator of the Commission, in the city of **Chicago**, on **May 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 present condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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, **6/10/2020**, 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 $**105,310.40**; the average weekly wage was **$2,025.20**.

On the date of accident, Petitioner was **54** 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 $**90,170.52** for TTD, $**-0-** for TPD, $**-0-** for maintenance, and $**-0-** for other benefits, for a total credit of $**90,170.52**.

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

ORDER

- Respondent shall pay Petitioner temporary total disability benefits in the amount of **$1,350.13**/week for **100-4/7th** weeks, for the period of **6/15/2020 through 5/19/2022**, which is the period of temporary total disability for which compensation is due. Respondent is entitled to credit for TTD previously paid.

- The issues of medical bills and 8(j) credit are deferred for future proceedings by agreement of the parties. The issues are not waived and can be presented at future hearings.

- Respondent shall authorize and provide payment for the medical treatment recommended by his treating physician, Dr. Tioco, including completion of the work conditioning program and follow up appointment with Dr. Tioco. The authorization shall be in writing and forwarded to Petitioner's attorney.

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

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

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

/S/ *Joseph D. Amarilio*

Signature of Arbitrator JOSEPH D. AMARILIO

JULY 8, 2022

Alan J. Wujek v. Key West Material Industries, Inc.

Case Number: 20 WC 018793

D/A: 6/10/2022

ATTACHMENT TO ARBITRATION DECISION

I. Introduction

Evidence in the above-captioned claim proceeded to hearing on May 19, 2022 pursuant to Section 19 (b) of the Act. The Arbitrator heard the testimony of Mr. Alan J. Wujek (Petitioner) and two witnesses, Mr. Jason Paholik and Mr. James Burek. The Arbitrator also received into evidence various exhibits, which included: 1) medical records; 2) diagnostic study reports; 3) physical therapy records; 4) operative reports; 5) narrative reports of Dr. Tioco; and 6) transcripts of the evidence depositions of Dr. Tioco, Petitioner's treating surgeon, and Dr. Yaffe, Respondent's Section 12 examiner. The Arbitrator is considering the disputed issues of medical causation of the right shoulder, prospective medical care and payment of temporary total disability benefits. The issues of payment of medical bills and 8(j) credit have been deferred by agreement of the parties and can be presented at a later hearing.

Before making conclusions of law in connection with this case, the Arbitrator makes the following findings of fact:

II. Findings of Fact

Petitioner testified before the Arbitrator on May 19, 2022. The Arbitrator finds that Petitioner's testimony was credible. Petitioner credibly clarified the histories contained in the initial medical records. His testimony was consistent with the objective findings documented in the medical records, which were offered into evidence at the time of the hearing.

Petitioner presented the testimony of Mr. Jason Paholik. The Arbitrator finds the testimony of Mr. Paholik to be credible and persuasive. Mr. Paholik is an unbiased witness. His testimony is

consistent with and corroborated Petitioner's testimony. Respondent presented the testimony of James Burek. The Arbitrator also finds the testimony of Mr. Burek to be credible. His testimony is consistent with the testimony of Petitioner and Mr. Paholik. For reasons stated below, the Arbitrator places great weight on the credible testimony of the witnesses who testified under oath in reaching the conclusions stated herein. All three witnessed testified in a straightforward and candid manner.

A. Petitioner's Work History

Petitioner was employed by Respondent on June 10, 2020. He had been employed by Respondent for two years prior to June 10, 2020 as an ironworker. He was a member of the Local 1 ironworkers union. Petitioner had been employed as an ironworker for 25 years. Petitioner is right-handed. Petitioner is 6'1" tall and weighs 270 pounds.

Petitioner described his job duties as a union ironworker for Respondent. Petitioner performed work on anything involving structural integrity. Petitioner erected steel and fabricated steel and anything to hold up buildings, make repairs and rehabs. Petitioner climbed ladders. He climbed six-foot ladders and scaffolding. He also climbed 48-foot extension ladders. Petitioner lifted and carried. The lightest object that he lifted was a bolt, which weighed an ounce. The heaviest objects that he lifted were a come-along, chain fall or tool, which could weigh up to one hundred pounds. Petitioner lifted from floor to waist, waist to shoulder and shoulder to overhead. Petitioner also lifted and carried smaller beams and angles. They could weigh up to 200 pounds. Petitioner wore a tool belt that weighed sixty pounds. Petitioner carried and used spud wrenches, crescent wrenches, bull pins, tape measures, and a chalk line. Petitioner crawled in tight spaces.

B. Prior Medical Treatment

Petitioner testified regarding prior medical treatment. He testified that prior to June 10, 2020, he had not sustained any accidents or injuries involving his left or right shoulder. Petitioner had not received medical treatment for the left or right shoulder prior to June 10, 2020. Petitioner has not filed any previous workers' compensation claims. Additionally, no evidence on an intervening cause was introduced into evident.

C. Work-Related Witnessed Accident of June 10, 2020

Petitioner was performing his job duties on June 10, 2020. He was working in the shop in Crestwood, Illinois. He was fabricating a beam and putting notches and cuts in the beam so it would fit around other objects. Petitioner was performing a job that he normally performed. He testified that about 20% of his job was fabricating. The other 80% was installing what was fabricated on job sites.

Petitioner sustained an accident on June 10, 2020 after lunch. Petitioner was working on a 30-foot beam with his foreman, Jason Paholik. Mr. Paholik was working on a separate beam on the same table as Petitioner. Mr. Paholik was also a member of Local 1. Petitioner has known Mr. Paholik for 20 to 25 years since he started working as an ironworker. Petitioner would occasionally travel with Mr. Paholik from his home to the job site, which was not unusual for ironworkers. Over the course of his career, Petitioner had driven to job sites with other ironworkers. Petitioner occasionally socialized with Mr. Paholik and other members of Local 1.

Petitioner was working at a 6-by-12-foot steel table. The table had two 30 foot by 10" by 12" steel beams on it. Petitioner was using a steel cutting device, called a Metabo, to cut notches in various positions in the T so it could be installed around pipes and other objects. Petitioner was working in the center of the table, approximately six feet on the length side of the table. The beam

was approximately 30 feet long and hung off both sides of the table. On the table the beam was approximately a foot away from where Petitioner's hand would have been. Mr. Paholik was on the other side of the table working on an identical beam. Petitioner flipped the beam two or three times on June 10, 2020.

When Petitioner finished cutting the notches, he would flip over his beam. The beam weighed 300 pounds. Petitioner flipped the beam by standing in the center of the beam, spreading his arms wide and pushing with all his body weight until the beam fell onto the table. He flipped the beam onto another edge. As Petitioner was flipping the beam, Mr. Paholik was working on his side of the table. Mr. Paholik reached over the table as the beam was falling. Petitioner saw Mr. Paholik's hand out of the corner of his eye. He instinctively reacted and grabbed the beam as it was falling. Petitioner felt a sudden tear in his shoulders as he grabbed the beam. Petitioner tried to stop or slow down the falling beam. Petitioner held the beam for a few seconds before the weight pulled the beam out of his hands. Petitioner noticed a sharp pain in his right and left shoulder, significantly worse in the left shoulder.

After the accident, Petitioner tried to shake off the pain. Shortly thereafter, he told Mr. Paholik that his arms were hurting from when he caught the beam and that Petitioner thought he "messed up" something.

Petitioner continued working. He worked on June 11, 2020 and Friday June 12, 2020. On those days, the ironworkers were putting in grating on the floor, so Petitioner did not have to perform overhead or above the shoulder lifting. He was able to perform his duties because they were less physically demanding than what he had previously been performing. While he was working, Petitioner noticed pain in his shoulders and that he was not able to lift his left arm. Petitioner testified that he could barely lift the right arm and he could not lift the left arm at all.

Over the weekend on June 13 and June 14, 2020, Petitioner noticed that the pain in his shoulders was not going away. He soaked his shoulders in Epsom salt, whirlpool tubs, took Ibuprofen and hoped the pain would go away. Petitioner did not work on June 15, 2020 because the job was pushed back since the room where the beam was supposed to be installed was not emptied. The superintendent, Jim Burek, instructed the ironworkers to stay home an extra day, via phone or text on June 15, 2020.

On June 15, 2020, Petitioner had a conversation with Jim Burek regarding his accident. Petitioner knew he would be starting work on Tuesday and that he was not going to be able to perform all of his job duties, such as overhead welding. Petitioner drove to Mr. Paholik's house because ironworker protocol required that a worker hurt on the job inform the foreman of the injury. Mr. Paholik could call the superintendent to let him know that Petitioner would not be able to work. Petitioner called Mr. Burek from his truck. Mr. Paholik was standing nearby. The call was on speakerphone so Mr. Paholik could hear the conversation. Petitioner advised Mr. Burek that he would not be at work. Mr. Burek asked why and Petitioner responded that he injured both his shoulders. He advised that the left shoulder was worse than the right. He noted that Mr. Burek should write down both shoulders since the right was still hurting. Mr. Burek suggested that Petitioner go to the emergency room. Mr. Burek was on vacation. Mr. Paholik was standing next to Petitioner during the conversation. Petitioner went to the emergency room the next day. He did not go on June 15, 2020 because the hospital was packed with COVID cases and it had a shooting so the emergency room was locked down.

After Petitioner was examined in the emergency room, he had a second conversation with Mr. Burek. Petitioner called Mr. Burek to give him an update. He told Mr. Burek that he had a follow up appointment with the doctor he was referred to by the emergency room. Petitioner asked if Mr.

Burek remembered to include the right shoulder. Mr. Burek said he forgot to include it because he was on vacation.

D. Testimony of Petitioner's Witness, Jason Paholik

Mr. Jason Paholik testified on behalf of Petitioner. Mr. Paholik appeared at the Commission pursuant to a subpoena. Mr. Paholik was the ironworker foreman for Respondent. He had been an ironworker for 23 years. He had been the foreman for Respondent for 2.5 years. He was a member of Local 1. He was familiar with Petitioner and was a friend and co-worker of Petitioner. He testified that his relationship with Petitioner had no effect on his testimony.

On June 10, 2020, Mr. Paholik was fabricating some beams as part of his job duties for Respondent. The fabrication was being done on June 10, 2020 in the main building of Respondent's shop. He was working with Petitioner. Mr. Paholik was working on a table which was approximately 6 feet by 10 to 12 feet long. He was working on the same table as Petitioner. Petitioner was working on one beam and Mr. Paholik on another. Mr. Paholik was working directly across from Petitioner. The steel beams were longer than the tables and were approximately 20 to 25 feet long and weighed 200 to 300 pounds.

Mr. Paholik testified that Petitioner went to roll over one of the beams and said "ow." Petitioner asked if Mr. Paholik heard his shoulders pop and then said he was a little sore. Mr. Paholik clarified that the beam would have been rolling towards him. He said that Petitioner seemed fine and went back to work. They did not fill out an accident report at the time because the injury did not seem to be severe. Mr. Paholik agreed that the beam was flipped and that the elbows would push from a 45-degree angle. Petitioner immediately told Mr. Paholik that he was in pain after he flipped the beam. He also confirmed that sometimes a person does not realize for days that the injury happened.

Mr. Paholik was paying more attention to his work than to what Petitioner was doing. He did not micromanage Petitioner's work. He acknowledged that Petitioner could not lift one of his arms, but he had discomfort in both of his arms. Petitioner told him that he was sore after June 10 and as he was working on Thursday and Friday. He said that one arm was worse than the other. Mr. Paholik testified that on June 10th , Petitioner told him that both shoulders popped and he felt more pain in one shoulder than the other.

Mr. Paholik testified that Petitioner came to his house on June 15, 2020. Petitioner advised him that he finished working through the week and said that he could not lift one of his shoulders. Mr. Paholik did not recall which shoulder Petitioner could not lift. Then they called his boss from Mr. Paholik's phone. Mr. Paholik made the call and explained that Petitioner had an accident and then Petitioner explained the accident to the boss. They had a conversation with Mr. Burek.

E. Testimony of Respondent's Witness, James Burek

Respondent presented the testimony of Mr. James Burek. Mr. Burek was employed by Respondent. He had been employed by Respondent for three years as the division head for the ironworkers. Mr. Burek performed estimations and project management. He was the lead ironworker. Any work injuries were reported to Mr. Burek. Mr. Burek was familiar with Petitioner. He was not sure how long Petitioner had been with Respondent.

Mr. Burek testified that Petitioner reported a work accident that occurred on June 10, 2020. Mr. Burek was not present at the time of the accident. He was not sure if he was notified of the accident on June 10, 2020, but he was aware that Petitioner sustained an injury. Mr. Burek testified that he received a phone call from Petitioner on June 15, 2020. He was called by either Petitioner, Mr. Paholik or both of them together. Petitioner was identified through the caller ID on his cell phone. Mr. Burek was on vacation at the time of the call. He was told that when Mr. Paholik and

Petitioner were working at the shop, that a beam was rolled, Petitioner caught it and hurt himself. Petitioner had tried to work for the two days following because they were in the field. Mr. Burek testified that Petitioner sustained an injury to his shoulders, either singular or plural, and he could not lift his arm above his head. He could not recall if Petitioner mentioned one or multiple shoulders. Mr. Burek knew there was an injury but was not sure if it was to the right, left or both shoulders. Following the conversation, Petitioner did not return to work.

Mr. Burek testified that he had a second conversation with Petitioner. He also texted back and forth with Petitioner regarding his condition. Petitioner was agonizing about how long the process was taking. Further, Petitioner was having problems with his other shoulder in therapy. Petitioner specifically mentioned the right shoulder during the second conversation. Mr. Burek testified without the benefit of Petitioner's employment file or with a copy of the company's internal accident report.

Mr. Burek has known Petitioner for over two years. He is a member of Local 1. Mr. Burek testified that Petitioner was a good employee. He further testified that if Petitioner was released at 100% he would rehire Petitioner. Further, Mr. Burek testified that Petitioner is an honest man. Mr. Burek testified that he knew Petitioner injured his shoulders, but he was not sure if it was plural or singular. He testified that it was possible that Petitioner told him he injured both shoulders. Mr. Burke knew that both shoulders were damaged based on the conversation.

F. Medical Treatment

As a result of the work-related accident of June 10, 2020, Petitioner sought medical treatment. Petitioner was initially examined at Franciscan Health emergency department on June 16, 2020. (PX 1). Petitioner presented with complaints of shoulder pain after he was lifting something from a truck and felt a pop in his left shoulder with a burning sensation. (PX 1). The impression was

acute left shoulder pain. (PX 1). It was recommended that Petitioner wear a splint and follow up with ortho. (PX 1).

Petitioner testified that the history contained in the medical records from Franciscan Health was not accurate. Petitioner testified that he told the doctor that he noticed that he could not lift up his arm by the end of the day when he was attempting to push a beam further onto the truck. The personnel at Franciscan Health briefly asked about the accident. Petitioner stated that he described the accident as flipping over a beam when his partner's hand was in the way, and he tried to catch the beam. Petitioner felt a tear in his shoulder. Later he went to load the truck and realized he could not lift his arm. The hospital got the first part and the last part of the history correct. Petitioner complained of pain to both shoulders; however, he told the hospital that the left shoulder was worse. They only did a visual examination of the right shoulder. Petitioner testified that the hospital was packed, and it was the middle of COVID. Further, the staff was trying to rush him through the examination.

Petitioner was examined at LakeShore Bone and Joint Institute on June 23, 2020. (PX 2). Petitioner was examined by Dr. Guzzo on June 23, 2020. (PX 2). The history documented was that Petitioner was flipping over a 20-foot-long steel beam when he felt a snapping in the shoulder area. (PX 2). Petitioner experienced locking, weakness and giving way and had limited range of motion. (PX 2). The impression was left shoulder rotator cuff tear. (PX 2). Dr. Guzzo recommended an MRI. (PX 2). Dr. Guzzo only treated Petitioner for the left shoulder condition. Petitioner testified that continued to have complaints in both the left and right shoulder. Dr. Guzzo told him that the right shoulder would get better in therapy. Petitioner testified that the beam was 20 feet, not 30 feet long.

Petitioner testified that Dr. Guzzo told him that he was being examined for the left shoulder. Petitioner told him that he was being seen for both shoulders, but he does not think that Dr. Guzzo wrote down the complaints to the right shoulder. Petitioner requested that Dr. Guzzo document the right shoulder pain on August 5, 2020. Dr. Guzzo did not stay in the room with Petitioner for more than a short period of time.

Petitioner underwent the left shoulder MRI study on June 29, 2020 at Franciscan Health. (PX 3). The MRI revealed tendinosis and probable partial thickness tearing of the supraspinatus tendon with a probable small pinhole type full thickness tear with fluid extending into the subacromial subdeltoid bursa without significant retraction or muscular atrophy and mild osteoarthritic changes of the glenohumeral and AC joint with some undersurface AC joint spurring. (PX 3).

Petitioner followed up with Dr. Guzzo on July 8, 2020. (PX 2). Dr. Guzzo set forth a diagnosis of left shoulder complete rotator cuff tear or rupture of the left shoulder. (PX 2). Dr. Guzzo recommended an injection and physical therapy. (PX 2). He performed an injection. (PX 2). If conservative treatment failed, then Dr. Guzzo would recommend surgery. (PX 2).

Petitioner participated in physical therapy at ATI. (PX 4). Petitioner participated in physical therapy from July 13, 2020 through August 5, 2020. (PX 4). The physical therapist measured strength and range of motion in the left shoulder. (PX 4). Petitioner only participated in physical therapy for the left shoulder. Petitioner testified that the therapist did not examine the right shoulder during physical therapy. The only therapy he received for the right shoulder was exercises using both hands. Petitioner testified that ATI did not treat the right shoulder because Petitioner was referred to ATI for treatment of the left shoulder. Petitioner told ATI that he sustained injuries to both shoulders. The history provided to ATI was not fully accurate regarding the accident.

Dr. Guzzo examined Petitioner on August 5, 2020. (PX 2). Dr. Guzzo recommended physical therapy and surgery for the left shoulder condition. (PX 2).

Petitioner was initially examined by Dr. Tioco on August 26, 2020. (PX 5). Dr. Tioco documented that Petitioner complained of bilateral shoulder pain when he caught a 300-pound0 steel beam from falling onto his co-worker. (PX 5). Dr. Tioco set forth an assessment of pain in the right and left shoulders, sprain of the right rotator cuff capsule, sprain of the left rotator cuff, superior glenoid labrum lesion of the right shoulder and superior glenoid labrum lesion of the left shoulder. (PX 5). He recommended an MRI of the left and right shoulder and to apply heat to the bilateral shoulders. (PX 5).

Petitioner underwent the left shoulder MR arthrogram on October 27, 2020 at Munster Open MRI. (PX 6). The MRA revealed a complete thickness tear of the supraspinatus tendon with retraction of the torn edge to the 12 o'clock position, a tear of the distal attachment of the subscapularis tendon and extravasation of the injection contrast was seen in the subacromial and subdeltoid bursa extending laterally to the proximal head. (PX 6).

Petitioner underwent the MRA of the right shoulder on November 4, 2020 at Munster Open MRI. (PX 7). The MRA revealed a tear of the supraspinatus and infraspinatus tendon. (PX 7). There was no labral tear. (PX 7).

Dr. Tioco examined Petitioner on November 4, 2020. (PX 5). Dr. Tioco set forth an assessment of superior glenoid labrum lesion of the right shoulder, sprain of the right rotator cuff capsule and pain in the right shoulder. (PX 5). He recommended heat and a home exercise program and surgery for the right shoulder. (PX 5). He recommended that Petitioner remain off work. (PX 5).

On November 5, 2020, Petitioner was examined by Dr. Tioco for the left shoulder condition. (PX 5). He set forth an assessment of sprain of the left rotator cuff capsule, superior glenoid labrum of the left shoulder and pain in the left shoulder. (PX 5). Dr. Tioco recommended heat for the bilateral shoulders and surgery for the left shoulder. (PX 5).

Petitioner underwent surgery for the left shoulder on November 20, 2020 at Community Hospital. (PX 8). Dr. Tioco performed the surgery. (PX 8). He performed a left shoulder arthroscopy with SLAP repair, mini-open left rotator cuff repair, left subacromial decompression, biceps tenodesis and insertion of a pain pump into the subacromial space. (PX 8). The post-operative diagnosis was left rotator cuff tear and left SLAP tear. (PX 8).

Petitioner remained under the post-operative care of Dr. Tioco. (PX 5). Post-operative care included activity modification, physical therapy, follow up appointments and medication. (PX 5). Petitioner continued to have follow up appointments with Dr. Tioco for his left shoulder condition. (PX 5). Petitioner participated in physical therapy at Athletico. (PX 9).

On May 26, 2021, Dr. Tioco examined Petitioner. (PX 5). Petitioner was examined for his right shoulder. (PX 5). Dr. Tioco discussed the need for right shoulder surgery if Petitioner did not respond to conservative treatment. (PX 5). Petitioner continued to have follow up appointments with Dr. Tioco for his right and left shoulder. (PX 5).

Dr. Tioco examined Petitioner on July 28, 2021. (PX 5). He recommended heat and continued physical therapy for the left shoulder and surgery for the right shoulder. (PX 5). On September 1, 2021, Dr. Tioco recommended work hardening for the left shoulder. (PX 5). Petitioner participated in work hardening at ATI physical therapy. (PX 4). He was not able to complete the program because he had surgery for the right shoulder.

Petitioner underwent surgery for the right shoulder on September 20, 2021 at Community Surgery Center. (PX 10). Dr. Tioco performed the surgery. (PX 10). Dr. Tioco performed a right shoulder arthroscopy with SLAP repair, mini-open rotator cuff repair, subacromial decompression and biceps tenodesis and insertion of a pain pump. (PX 10). The post-operative diagnosis was right rotator cuff tear and SLAP lesion. (PX 10).

Petitioner remained under the post-operative care of Dr. Tioco. (PX 5). Post-operative care included physical therapy, medication, follow up visits and activity modification. (PX 5). Petitioner participated in physical therapy at ATI Physical Therapy. (PX 4). On February 10, 2022, Dr. Tioco set forth that Petitioner could continue work conditioning for the left shoulder once he was cleared from his recent right shoulder surgery. (PX 4).

On March 29, 2022, Dr. Tioco wrote an order for work conditioning. (PX 5). Petitioner participated in work conditioning beginning March 29, 2022 at ATI Physical Therapy. (PX 4).

Petitioner was last examined by Dr. Tioco on April 20, 2022. (PX 5). Dr. Tioco documented that Petitioner had complaints of soreness and weakness following a left shoulder arthroscopy. (PX 5). He set forth a diagnosis of sprain of the left rotator cuff capsule and superior glenoid lesion of the left shoulder. (PX 5). Dr. Tioco recommended continued work conditioning. (PX 5). He set forth that he would consider an FCE at the next visit. (PX 5). Petitioner was advised to follow up in 4 weeks and remain off work. (PX 5).

Petitioner is currently in work conditioning for his right and left shoulder condition. He has a follow up appointment scheduled with Dr. Tioco. He hopes that Dr. Tioco will release him to return to work at the follow up appointment.

G. Medical Opinions of Dr. Tioco, Petitioner's Treating Physician

Dr. Tioco prepared narrative reports dated March 31, 2021 and November 21, 2021. (PX 11). Dr. Tioco prepared a report dated March 31, 2021. (PX 11). Dr. Tioco summarized the medical care that Petitioner underwent. (PX 11). He set forth a diagnosis of left rotator cuff tear, left superior labral anterior posterior lesion, right rotator cuff tear and right superior labral anterior posterior lesion. (PX 11). He stated that Petitioner was temporarily totally disabled from working as an ironworker with respect to his left shoulder. (PX 11). Dr. Tioco opined that the left and right shoulder condition were causally connected to the work-related accident of June 10, 2022. (PX 11). He stated that Petitioner had not reached maximum medical improvement as it relates to the left and right shoulder condition. (PX 11). Dr. Tioco recommended physical therapy and work conditioning for the left shoulder condition and surgery for the right shoulder condition. (PX 11).

Dr. Tioco prepared a second report dated November 21, 2021. (PX 11). Dr. Tioco reviewed the medical records from ATI physical therapy and Dr. Guzzo at LakeShore Bone and Joint. (PX 11). Dr. Tioco noted that there was a history that Petitioner injured his left shoulder on June 10, 2020 while flipping over a 20 foot long steel beam and pushed against it and felt a snapping feeling in the shoulder area. (PX 11). He noted that the history was consistent with the history provided in his medical records that Petitioner had bilateral shoulder pain after catching a 300-pound steel bean from landing on his co-worker's hand. (PX 11). He noted that Petitioner did not have symptoms in either shoulder prior to June 10, 2020. (PX 11). Dr. Tioco noted that an ironworker's ability to flip or catch a 20 foot/ 300-pound steel beam would require both arms and shoulders and a pre-existing shoulder injury would prevent an ironworker from performing the job effectively. (PX 11).

Dr. Tioco stated that the MRI of November 4, 2020 revealed a full-thickness rotator cuff tear. (PX 11). Petitioner's recovery from the left shoulder surgery was limited due to persistent right shoulder pain and weakness. (PX 11). He noted that Petitioner underwent successful surgery for this right shoulder condition. (PX 11). Following the right shoulder surgery, Petitioner participated in an aggressive rehabilitation program for the right shoulder and will require work conditioning. (PX 11). Dr. Tioco stated that after reviewing the additional medical records, his opinion regarding medical causation had not changed. (PX 11). He confirmed the diagnosis of left rotator cuff tear, left SLAP lesion, right rotator cuff tear and right SLAP lesion. (PX 11). Dr. Tioco opined that Petitioner's right shoulder injury was a direct result of the work-related accident of June 10, 2020. (PX 11).

The evidence deposition of Dr. Tioco was completed on January 19, 2022. (PX 12). Dr. Tioco is board certified in orthopedic surgery. (PX 12 at 9). Dr. Tioco stated that Petitioner provided him with a history that he had bilateral shoulder pain from a work-related accident on June 10, 2020 when he caught a 300 pound steel beam from falling on his co-worker's hand. (PX 12 at 16). He summarized the medical care that he provided to Petitioner. (PX 12). Dr. Tioco was not aware of any medical treatment to the right or left shoulder prior to June 10, 2020. (PX 12 at 20).

Dr. Tioco testified that following the surgery for the left shoulder condition, Petitioner was complaint in scheduling follow up appointments. (PX 12 at 23). Dr. Tioco concentrated his medical care on the right and left shoulder conditions. (PX 12 at 23). Dr. Tioco noted that Petitioner's recovery from his left shoulder was being hindered by his right shoulder and Petitioner could not be fully rehabilitated without both hands. (PX 12 at 26). He testified that Petitioner was compliant in his recommendation for work conditioning for the left shoulder. (PX 12 at 27).

Following the surgery for the right shoulder, Petitioner needed to recover before resuming the work hardening program for the left shoulder. (PX 12 at 28). Following the right shoulder surgery, Petitioner's medical treatment was concentrated on his right shoulder with the goal of progressing him to work hardening for both shoulders. (PX 12 at 28).

Dr. Tioco testified that Petitioner had a left shoulder rotator cuff tear and superior labral anterior posterior lesion and a right shoulder rotator cuff tear and right superior labral anterior posterior tear. (PX 12 at 30). Dr. Tioco testified that Petitioner was temporarily totally disabled from performing his work as an ironworker. (PX 12 at 34). He testified that Petitioner had not reached maximum medical improvement as it relates to both shoulders. (PX 12 at 34-35). Dr. Tioco testified that as of the last examination, Petitioner could return to light duty work as an ironworker with regard to both shoulders. (PX 12 at 35). He testified that Petitioner was temporarily totally disabled from the surgery of September 20, 2021 for about eight weeks and then he could return to desk work. (PX 12 at 36). He testified that the medical treatment for the right and left shoulder were medically necessary. (PX 12 at 37). Dr. Tioco set forth that the subjective complaints were consistent with the objective findings. (PX 12 at 39).

Dr. Tioco testified that the right and left shoulder injuries were directly related to the work-related accident of June 10, 2020. (PX 12 at 40). The basis of his opinion was the subjective complaints, nature of the forces of the injury and imaging and surgical findings. (PX 12 at 40). He explained that a traction type force to the shoulders could cause significant damage to the soft tissue, rotator cuff and labrum. (PX 12 at 40). Lifting an object could also put a tremendous amount of force across the tendons, which could cause a tear. (PX 12 at 40). He stated that a 300-pound I-beam could cause a traction force with the muscle contraction and weight of the beam would all cause injury to the shoulders. (PX 12 at 41). He noted that the muscles were contracting

eccentrically as the beam was falling and the body was pushing the beam up contracting and stretching at the same time, which lead to the tearing of the tendon off the bone or the biceps and rotator cuff. (PX 12 at 41). Dr. Tioco testified that the right and left shoulder surgeries were causally connected to the work accident. (PX 12 at 41-42).

Dr. Tioco testified that the history contained in the medical records of LakeShore Bone and Joint were consistent with his understanding of the accident. (PX 12 at 43). The medical records from LakeShore Bone and Joint did not change his opinion regarding medical causation. (PX 12 at 44). He testified that a person would require both shoulders to flip the beam so the mechanism of accident was consistent with injuring both shoulders. (PX 12 at 44). Further, he noted that if Petitioner had a pre-existing injury to his right shoulder, he would not have been able to catch the 300-pound steel beam. (PX 12 at 45). He stated that there was no evidence of a pre-existing injury to the right shoulder. (PX 12 at 45).

Dr. Tioco reviewed the report of Dr. Yaffe. (PX 12 at 45). He testified that Dr. Yaffe's report did not change his opinions regarding medical causation. (PX 12 at 45). He agreed with Dr. Yaffe regarding causation of the left shoulder injury. (PX 12 at 45-46). Dr. Tioco disagreed with Dr. Yaffe regarding the causation of the right shoulder. (PX 12 at 46). He stated that Dr. Yaffe did not find supporting medical records or supporting documents within three months of the injury indicating any change to the right shoulder as a result of the injury. (PX 12 at 46). However, Dr. Tioco stated that Dr. Yaffe disregarded the nature of the injury and the fact that an ironworker would need to be contracting very hard with both shoulders to hold a 300-pound beam. (PX 12 at 46).

Dr. Tioco testified that the treatment records from Saint Anthony Hospital dated June 16, 2020 did not change his opinions. (PX 12 at 47). Dr. Tioco could not comment on the examinations

performed by Dr. Guzzo but stated that since the purpose of his examination was the left shoulder, the records for the right shoulder may have been a template. (PX 12 at 47). He states that with electronic medical records, if the exam is normal, the doctor clicks normal, and the record self-populates. (PX 12 at 48). The medical records of Dr. Guzzo document and left and right lower extremity examination as well. (PX 12 at 80).

Dr. Tioco acknowledged that the medical records from prior to his examining Petitioner did not contain reference to the right shoulder. (PX 12 at 51-52). He acknowledged that Petitioner was treating with Dr. Guzzo for the left shoulder. (PX 12 at 56). Dr. Tioco also acknowledged that Dr. Guzzo documented a normal right shoulder which appeared to be a template entry. (PX 12 at 56). When Petitioner began treatment with Dr. Tioco, he complained of pain in both shoulders. (PX 12 at 59). He noted that the tearing in the left shoulder was worse than in the right shoulder. (PX 12 at 60). Dr. Tioco stated that rotator cuff tears can be asymptomatic or degenerative. (PX 12 at 60-61). Dr. Tioco stated that since Petitioner was an ironworker, it would be difficult for him to perform his job duties if he had an asymptomatic rotator cuff tear. (PX 12 at 62). He stated that he was the first doctor to document the right shoulder injury approximately seven weeks after the accident. (PX 12 at 66). He stated that the histories provided to the doctors was consistent with the mechanism of accident; however, he documented new symptoms. (PX 12 at 66-67).

Dr. Tioco testified that about 6 to 12 months of therapy and work hardening would be appropriate following the left shoulder surgery. (PX 12 at 68). Following the right shoulder surgery, there would be a period where Petitioner would not be able to do therapy for the left shoulder. (PX 12 at 68). Petitioner could do a home exercise program for the left shoulder. (PX 12 at 68).

Dr. Tioco testified that the MRI studies that he reviewed indicated acute findings to the shoulder. (PX 12 at 72). There was no reference to them being chronic findings. (PX 12 at 72). He noted that the left shoulder had more damage than the right based on the MRI studies. (PX 12 at 72). Dr. Tioco testified that emergency room records are not always consistent with the description of how an accident occurred. (PX 12 at 77).

H. Medical Opinions of Dr. Yaffe, Respondent's Section 12 Physician

The evidence deposition of Dr. Yaffe was completed on March 15, 2022. (RX 1). Dr. Yaffe is a board certified in orthopedic surgery. (RX 1 at 7). Dr. Yaffe evaluated Petitioner on June 2, 2021. (RX 1 at 9). He reviewed the medical records and obtained a history from Petitioner. (RX 1 at 9). Petitioner provided a history that he was fabricating large metal beams and he was pushing a beam with his elbows flexed and his shoulders abducted. (RX 1 at 11). Petitioner tried to slow the motion of the beam with his bilateral hands and experienced a sensation "like a canvas tearing." (RX 1 at 12).

Dr. Yaffe reviewed the medical records and testified that they did not immediately document an injury to the right shoulder. (RX 1 at 13-14). Dr. Guzzo documented that the right shoulder as unremarkable. (RX 1 at 14). Dr. Yaffe set forth a diagnosis of the left shoulder of rotator cuff tear and SLAP tear, now post-surgical. (RX 1 at 18). He testified that the medical care provided to Petitioner for the left shoulder was appropriate. (RX 1 at 18). He further testified that the left shoulder condition was aggravated or caused by the work accident of June 10, 2020. (RX 1 at 18).

Dr. Yaffe set forth a diagnosis for the right shoulder of a low-grade rotator cuff tear either a partial thickness or a very small full thickness tear without retraction. (RX 1 at 19-20). He testified that there was no supporting evidence to conclude that the right shoulder pathology was either caused, aggravated or exacerbated by the work accident. (RX 1 at 20). He based his opinion on a

review of the medical records, which did not document any objective complaints for the right shoulder until August 26, 2020. (RX 1 at 20). He concluded that without any supporting medical records within the first three months of injury, he was not able to conclude that the right shoulder pathology was caused, aggravated or exacerbated by the work accident. (RX 1 at 21). He stated the MRI was more likely a degenerative, partial-thickness, low grade rotator cuff tear that was through normal use, time and age. (RX 1 at 24).

Dr. Yaffe testified that the findings on the left shoulder MRI were worse than on the right. (RX 1 at 25). He believed the findings on the left shoulder MRI were more consistent with an acute trauma injury. (RX 1 at 25). Dr. Yaffe recommended work conditioning as it relates to the left shoulder injury. (RX 1 at 26). He also stated that Petitioner could return to work in a restricted capacity with a lifting restriction, avoiding forceful and repetitive pushing and pulling and overhead lifting. (RX 1 at 26). Petitioner had not reached maximum medical improvement. (RX 1 at 26).

Dr. Yaffe agreed that if Petitioner had surgery on the right arm, he should stop work conditioning for his left shoulder. (RX 1 at 34). This could delay when Petitioner reached maximum medical improvement. (RX 1 at 35).

Dr. Yaffe did not review any medical records documenting an injury to the right shoulder prior to June 10, 2020. (RX 1 at 36). Dr. Yaffe testified that Petitioner was compliant in the examination. (RX 1 at 37). He agreed that the job of ironworker is a very heavy occupation. (RX 1 at 41). He testified that the subjective complaints in the right and left shoulder were consistent with the objective findings. (RX 1 at 45). Dr. Yaffe deferred to Dr. Guzzo for an interpretation of the medical records. (RX 1 at 49).

On cross-examination, Dr. Yaffe agreed that it would take both arms to flip over a 300-pound beam. (RX 1 at52). He testified that hypothetically the accident could have caused pathology in the right shoulder involving the rotator cuff. (RX 1 at 52). Dr. Yaffe testified that the left shoulder injury was caused by a traction mechanism of accident where Petitioner was holding the beam with his hands and a force was directed away from his body form the momentum of the beam. (RX 1 at 53). Petitioner advised Dr. Yaffe that the superintendent forgot to write down the injury to the right shoulder. (RX 1 at 53).

Dr. Yaffe acknowledged that the first reference of a right shoulder condition in the medical records was two months and two weeks after the accident, which is less than his three month causation window. (RX 1 at 57). Dr. Yaffe testified that any reference to the right shoulder, whether from the workplace or somewhere else, would be important to generate his assessment of the situation. (RX 1 at 59).

He testified that if there was a witness to the accident who corroborated Petitioner's complaints to the right and left shoulder that would be significant to him. (RX 1 at 59). Dr. Yaffe testified that with a witness, he could change his opinion regarding medical causation. (RX 1 at 60).

Dr. Yaffe acknowledged that MRI findings could be different than the findings during surgery. (RX 1 at 61). He noted that if the operative report indicated that Petitioner has a right shoulder SLAP tear that would be more reliable than the MRI. (RX 1 at 61). He testified that the surgery was reasonable for the right shoulder. (RX 1 at 61). Dr. Yaffe testified that Petitioner was temporarily totally disabled as of June 2, 2021. (RX 1 at 62).

I. Current Subjective Complaints

Petitioner continues to experience pain and stiffness in both of his shoulders. Petitioner is using topical cream for the shoulder soreness. Petitioner has not performed any work activities since June 15, 2020. He has not sustained any new accidents involving the right or left shoulder since June 10, 2020. Petitioner has not received any workers' compensation benefits since September 19, 2021.

III. Conclusions of Law

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below. Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the Petitioner bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his or her claim *O'Dette v. Industrial Commission,* 79 Ill. 2d 249, 253 (1980) including that there is some causal relationship between the employment and the injury. *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 63 (1989). And, yet it also is well established that the Act is a humane law of remedial nature and is to be liberally construed to affect the purpose of the Act - that the burdens of caring for the casualties of industry should be borne by industry and not by the individuals whose misfortunes arise out of the industry, nor by the public. *Shell Oil v. Industrial Comm'n,* 2 Ill.2nd 590, 603 (1954). The Act is a remedial statute which should be liberally construed to provide financial protection for injured workers. *McAllister v. IWCC*, 2020 IL 124848 ¶ 32. The main purpose of the Act is to provide protection for injured workers. *Cassens Transport Co. v. Industrial*

Comm'n, 218 Ill.2d 519, 524, (2006).The Act's provisions are to be read in harmony to achieve that goal. *Vaught v. Industrial Commission,* 52 Ill.2d 158, 165 (1972). Workers are entitled to "prompt, sure, and definite compensation, together with a quick and efficient remedy" with industry bearing the "costs of such injuries" rather than the injured worker. *O'Brien v. Rautenbush*, 10 Ill.2d 167, 174 (1956). Decisions of an Arbitrator shall be based exclusively on stipulation of the parties, the evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

In support of the Arbitrator's decision relating to "F," whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator makes the following conclusions:

The Arbitrator concludes that Petitioner's current condition of ill-being in connection with his right and left shoulder, including the left shoulder rotator cuff tear and superior labral anterior posterior lesion and a right shoulder rotator cuff tear and right superior labral anterior posterior tear, were causally connected to the work-related accident of June 10, 2020. The Arbitrator relies on the credible testimony of Petitioner, which was corroborated by the testimony of Mr. Paholik and consistent with the testimony of Mr. Burek, the objective findings contained in the medical records and the findings and opinions of Dr. Tioco, Petitioner's treating orthopedic physician. The Arbitrator also considered the opinions of Dr. Yaffe, Respondent's Section 12 physician, and notes that based on his testimony during cross-examination, he may change his opinion regarding medical causation if there was corroborating testimony regarding bilateral shoulder complaints. The Arbitrator notes that Respondent does not dispute medical causation as it relates to the left shoulder. It agrees that the left shoulder condition was causally connected to the work-related accident of June 10, 2020. The only issue before the Arbitrator is whether the right shoulder condition was causally connected to the work-related accident of June 10, 2020.

A. Medical Opinions of Dr. Tioco

Petitioner established medical causation in connection with the right shoulder through the medical records and opinions of Dr. Tioco, Petitioner's treating physician. Dr. Tioco opined that the right shoulder condition was causally connected to the work-related accident of June 10, 2022. Dr. Tioco noted that an ironworker's ability to flip or catch a 20 foot/ 300-pound steel beam would require both arms and shoulders and a pre-existing shoulder injury would prevent an ironworker from performing the job effectively. Dr. Tioco opined that Petitioner's right shoulder injury was a direct result of the work-related accident of June 10, 2020.

Dr. Tioco testified that the right and left shoulder injuries were directly related to the work-related accident of June 10, 2020. The basis of his opinion was the subjective complaints, nature of the forces of the injury and imaging and surgical findings. He explained that a traction type force to the shoulders could cause significant damage to the soft tissue, rotator cuff and labrum. Lifting an object could also put a tremendous amount of force across the tendons, which can cause a tear. He stated that a 300-pound I-beam could cause a traction force with the muscle contraction and weight of the beam would all cause injury to the shoulders. He noted that the muscles were contracting eccentrically as the beam was falling and the body was pushing the beam up contracting and stretching at the same time, which lead to the tearing of the tendon off the bone or the biceps and rotator cuff.

Dr. Tioco testified that the history contained in the medical records of LakeShore Bone and Joint were consistent with his understanding of the accident. The medical records from LakeShore Bone and Joint did not change his opinion regarding medical causation. He testified that a person would require both shoulders to flip the beam, so the mechanism of accident was consistent with injuring both shoulders. Further, he noted that if Petitioner had a pre-existing injury to his right

shoulder, he would not have been able to catch the 300-pound steel beam. He stated that there was no evidence of a pre-existing injury to the right shoulder.

By giving greater weight to the medical opinions of Dr. Tioco, Petitioner's treating physician, the Arbitrator relies on *International Vermiculite Company v. Industrial Commission*, 77 Ill.2d 1 (1979) (holding that the Commission can accord greater weight to the medical opinions of the petitioner's treating physicians). Accordingly, the Arbitrator finds that Petitioner's current condition of ill-being in connection with his right and left shoulder, including the left shoulder rotator cuff tear and superior labral anterior posterior lesion and a right shoulder rotator cuff tear and right superior labral anterior posterior tear, were causally connected to the work-related accident of June 10, 2020.

B. Chain of Events Analysis

The Arbitrator further concludes that Petitioner established that the current condition of ill-being as it relates to the right shoulder was causally connected to the work-related accident of June 10, 2020 through the "chain of events" analysis. Proof of prior good health and change immediately following and continuing after an injury may establish that the impaired condition was due to injury. *Ill. Power Co. v. Indus. Com'n*, 176 Ill.App.3d 317 (4th Dist. 1988).

In *Corn Belt Energy v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150311WC (3d Dist. 2016) the court held that the Arbitrator could accord more weight to the chain of events analysis than the opinions of the Section 12 physician. In *Kawa v. Illinois Workers' Compensation Commission*, 2013 IL App (1st) 12469WC (1st Dist. 2013), the appellate court reaffirmed the chain of events analysis. The court found that the claimant established a "causal nexus between the accident and his condition of ill-being" based on the evidence that the

claimant's condition had begun no sooner than the work-related accident and continued with no intervening cause that broke the chain of events. *Id.*

In the instant case, Petitioner testified that prior to June 10, 2020 he had not sustained an accident or injuries involving his right shoulder. Further, he has not received any medical treatment for the right shoulder prior to June 10, 2020. Petitioner was able to perform his very heavy job duties for Respondent without any issues prior to June 10, 2020. Dr. Tioco found the fact that Petitioner could perform his job duties as an ironworker significant to establish that Petitioner did not have a pre-existing injury to his right shoulder. No evidence was introduced that Petitioner had a pre-existing condition of ill-being that caused him to miss time from work or for which he requested any work accommodation.

Immediately following the work-related accident of June 10, 2020, Petitioner testified that he experienced pain in both his right and left shoulder. Mr. Paholik testified that Petitioner advised him that he experienced pain in both of his shoulders immediately following the accident. Mr. Paholik corroborated Petitioner's testimony that he injured both shoulders. Further, he testified that on June 15, 2020, Petitioner was experienced pain in both of his shoulders.

Mr. Burek testified that Petitioner reported the injury to him on June 15, 2020. He was not sure whether Petitioner advised him that he sustained an injury to both shoulders, but he knew that Petitioner damaged both shoulders. Accordingly, it is clear that Petitioner sustained an injury to his right shoulder as a result of the work-related accident and experienced immediate symptoms in the right shoulder. The Arbitrator finds it significant that Petitioner's testimony is corroborated by the testimony of Mr. Paholik. Respondent's witness, Mr. Burek, did not rebut the testimony and in fact acknowledged that he was aware that Petitioner injured both shoulders. Also, he did not rebut the Petitioner' version of the accident. Accordingly, the Arbitrator finds that following

the work-related accident of June 10, 2020, Petitioner experienced immediate pain in both shoulders. The Arbitrator finds it significant that Mr. Burek believed Petitioner to be honest and that he would not hesitate to take him back when he is released to return to work without restrictions.

Petitioner also sought medical treatment shortly after the work-related accident of June 10, 2020. Petitioner was initially examined on June 16, 2020. He was told to seek treatment by Mr. Burek. He further waited because he was able to perform lighter duties at work prior to June 16, 2020.

Respondent argues that since the medical records did not document any right shoulder complaints until Petitioner was examined by Dr. Tioco, the right shoulder is not causally connected to the work-related accident of June 16, 2020. The Arbitrator is mindful of the initial lack of corroborating medical histories which does at first blush causes concern as to causation. However, the Arbitrator is persuaded the mechanism of the injury combined with the sworn testimony of the witnesses overcomes this concern

Petitioner explained that he reported both left and right shoulder pain to the emergency room on June 16, 2020. However, the emergency room was busy because of COVID-19 patients and the staff was in a rush. Petitioner noted that the history documented in the medical records from Saint Anthony Hospital was not accurate or complete. It failed to document the right shoulder injury. Also, Petitioner was not loading a truck when he sustained the work accident. Petitioner testified that after he flipped the beam, he tried to load the truck and realized that he could not lift his left arm. The facts of the accident were undisputed and corroborated by the foreman, Mr. Paholik. Therefore, it is clear that the medical records form Saint Anthony Hospital did not contain a complete history of the accident. Dr. Tioco also testified that the medical records form an

emergency room are not always accurate. Further, The Arbitrator notes that in *Accolade v. Illinois Workers' Compensation Commission*, 371 Ill.Dec.713, 990 (3d Dist. 2013) the court held that "the history of injury contained in the written documents is not always consistent and it is not as detailed as claimant's testimony at the arbitrator hearing."

The Arbitrator acknowledges that Dr. Guzzo did not document complaints to the right shoulder. However, Petitioner testified that Dr. Guzzo stated that he was treating the left shoulder. Further, Dr. Tioco testified that the medical records self-populate if the examiner states that the body part was normal. He noted that the examination of the right shoulder throughout the examinations was the exact same. It is undisputed that Petitioner's left shoulder condition was worse than the right. Therefore, medical treatment was concentrated on the left shoulder condition. Based on the unrebutted and corroborated testimony of Petitioner that he sustained an injury to his right shoulder as a result of the work-related accident, the Arbitrator finds that Dr. Guzzo chose to focus medical treatment to Petitioner on the left shoulder condition only.

Petitioner participated in physical therapy at ATI for the left shoulder condition as recommended by Dr. Guzzo. He did not receive therapy for the right shoulder and the physical therapy records do not set forth any measurements or assessments of the right shoulder. It appears that the therapist did not examine the right shoulder because Petitioner was referred to therapy for the left shoulder.

Based on the testimony of Petitioner, Mr. Paholik and Mr. Burek, the Arbitrator is persuaded that Petitioner experienced pain in his right shoulder following the work-related accident of June 10, 2020. Petitioner tried to seek medical treatment for both shoulders. However, the emergency room failed to accurately document the history of the accident and Petitioner's complaints. Accordingly, the Arbitrator finds that since Petitioner experienced immediate right shoulder pain

and tried to seek medical treatment for the right shoulder, the chain of events analysis applies. It is significant that Petitioner had no complaints and was able to perform his job without issue prior to the accident.

Accordingly, the Arbitrator finds that the work-related accident of June 10, 2020 caused Petitioner's current condition of ill-being as it relates to the right shoulder since Petitioner was in good health prior to the accident and had immediate and ongoing symptoms following the accident.

C. Medical Opinions of Dr. Yaffe, Respondent's Section 12 Physician

The evidence deposition of Dr. Yaffe was admitted into evidence. The Arbitrator considered the opinions of Dr. Yaffe and finds that initial opinions regarding medical causation of the right shoulder were not based on the facts of the accident. The Arbitrator notes that based on the testimony presented at hearing, Dr. Yaffe may have changed his opinions if he was provided the testimony. Accordingly, the Arbitrator finds that Petitioner's right shoulder condition is causally connected to the work-related accident of June 10, 2020.

Dr. Yaffe reviewed the medical records and testified that they did not immediately document an injury to the right shoulder. Dr. Yaffe set forth a diagnosis for the right shoulder of a low-grade rotator cuff tear that was either partial thickness or a very small full thickness tear without retraction. He testified that there was not supporting evidence to conclude that the right shoulder pathology was either caused, aggravated or exacerbated by the work accident. He based his opinion on a review of the medical records, which did not document any objective complaints for the right shoulder until August 26, 2020. He concluded that without any supporting medical records within the first three months of injury, (and, yet August 26, 2020 is less than three months) he was not able to conclude that the right shoulder pathology was caused, aggravated or

exacerbated by the work accident. He stated the MRI was more likely a degenerative, partial-thickness, low grade rotator cuff tear that was through normal use, time and age.

Dr. Yaffe did not review any medical records documenting an injury to the right shoulder prior to June 10, 2020. Dr. Yaffe agreed that it would take both arms to flip over a 300 pound I-Beam. He testified that hypothetically the mechanism of the accident could have caused pathology in the right shoulder involving the rotator cuff. Petitioner advised Dr. Yaffe that the superintendent forgot to write down the injury to the right shoulder.

Dr. Yaffe testified that any reference to the right shoulder, whether it is from the work place or somewhere else, would be important to generate his assessment of the situation. He testified that if there was a witness to the accident, who corroborated Petitioner's complaints to the right and left shoulder, that would be significant to him. Dr. Yaffe testified that with a witness, he could change his opinion regarding medical causation. Dr. Yaffe was not informed that the accident was witnessed and that the witness corroborated Petitioner' version of the accident.

The Arbitrator finds it significant that Dr. Yaffe agreed that the mechanism of accident could cause a right shoulder rotator cuff tear. Further, it is significant that Dr. Yaffe based his opinion on the lack of right shoulder complaints following the work accident. Dr. Yaffe acknowledged that he could change his opinion if there was a witness, who corroborated that Petitioner sustained an injury to the right and left shoulder. Mr. Paholik testified that Petitioner sustained an injury to both shoulders as a result of the accident. Further, Mr. Burek was aware that Petitioner "damaged" both shoulders as a result of the accident. Dr. Yaffe was not aware of the testimony of Mr. Paholik or Mr. Burek. Since there was a witness corroborating Petitioner's complaints of right shoulder pain, Dr. Yaffe may well have changed his opinion regarding causation. At the least, the basis of his opinion that Petitioner did not have immediate complaints of pain was inaccurate.

Accordingly, the Arbitrator finds that Petitioner's right shoulder condition was causally connected to the work-related accident of June 10, 2020.

It is also significant that Dr. Tioco reviewed the report of Dr. Yaffe and disagreed with him regarding medical causation of the right shoulder. He stated that Dr. Yaffe did not find supporting medical records or supporting documents within three months of the injury indicating any change to the right shoulder as a result of the injury. However, Dr. Tioco stated that Dr. Yaffe disregarded the nature of the injury and the fact that an ironworker would need to be contracting very hard with both shoulders to hold a 300-pound beam.

Accordingly, the Arbitrator finds that the work-related accident of June 10, 2020 caused Petitioner current condition of ill-being in connection with the right shoulder condition. The Arbitrator relies on the testimony of Petitioner, Mr. Paholik and Mr. Burek and the medical opinions of Dr. Tioco. The Arbitrator specifically notes that at best, Dr. Yaffe could change his opinion based on the testimony of Mr. Paholik and at worst, based his opinion on inaccurate facts of the case. Accordingly, the medical opinions of Dr. Tioco are more persuasive that those of Dr. Yaffe.

In support of the Arbitrator's decision relating to "K," prospective medical care, the Arbitrator makes the following conclusions:

The Arbitrator concludes that Petitioner is entitled to payment for the medical treatment recommended by his treating physician, Dr. Tioco, including the work conditioning and follow up appointments. The Arbitrator concludes that the treatment recommendation constitutes reasonable and necessary medical care. In support of his finding, the Arbitrator relies on the credible testimony of Petitioner, the medical recommendations and opinions of Dr. Tioco and the medical opinions of Dr. Yaffe, Respondent's Section 12 physician.

Respondent has no defense to authorizing payment for the prospective medical treatment. While Respondent disputes medical causation of the right shoulder, it does not dispute medical causation as it relates to the left shoulder condition. Respondent only objects to the delay in Petitioner participating in work conditioning due to the right shoulder condition. It has no defense to authorizing the work conditioning since Petitioner has been cleared to participate in work conditioning from the right shoulder treatment.

Petitioner's treating physician, Dr. Tioco, and Respondent's Section 12 physician, Dr. Yaffe, recommended work conditioning. They testified that work conditioning was reasonable and necessary medical treatment. Accordingly, there is no dispute that work conditioning is reasonable and necessary medical treatment for Petitioner.

Based on preponderance of the evidence, the medical opinions of Dr. Tioco and Dr. Yaffe, the credible testimony of Petitioner, the Arbitrator finds the prescribed work conditioning to be reasonable and necessary. Respondent is liable for any and all outstanding medical charges to be incurred for this prospective medical treatment and all related treatment pursuant to the fee schedule. The Arbitrator awards Petitioner payment for the medical treatment, including the work conditioning. In support of his decision, the Arbitrator cites *Plantation Manufacturing Company v. Industrial Commission*, 294 Ill.App.3d 705 (2d Dist. 1997).

In support of the Arbitrator's decision relating to "L," temporary total disability benefits, the Arbitrator makes the following conclusions:

The Arbitrator concludes that Petitioner is entitled to receive temporary total disability benefits from June 15, 2020 through May 19, 2022. The Arbitrator relies on the credible and unrebutted testimony of Petitioner, the medical records admitted into evidence and the opinions of Dr. Tioco. Respondent did not dispute and agrees that temporary total disability benefit should be paid from June 15, 2020 through September 19, 2021. Respondent's defense to payment of benefits is

medical causation of the right shoulder. Having found that the right shoulder condition is causally connected to the work-related accident of June 10, 2020, the Arbitrator finds that Petitioner is entitled to payment of temporary total disability benefits from June 15, 2020 through May 19, 2022.

In *Freeman United Coal Mining Company v. Industrial Commission*, 318 Ill.App.3d 170 (2001), the court set forth that "a claimant is entitled to TTD when a 'disabling condition is temporary and has not reached a permanent condition.'" (quoting *Manis v. Industrial Commission*, 172 Ill.Dec. 95 (1st Dist. 1992)). The dispositive test for determining whether a claimant is entitled to TTD is whether the condition has stabilized. *Id.* In *Freeman United Coal Mining Company*, the court held that the condition of the petitioner's knee had not stabilized and that the petitioner was thus entitled to TTD benefits. *Id.* The court based its decision on the fact that the petitioner had not been released to full-duty work and future medical care was being considered by the petitioner's treating physicians. *Id.*

Respondent's defense is based on the belief that the right shoulder condition was not causally connected to the work-related accident of June 10, 2020. Therefore, Petitioner shoulder does not receive temporary total disability benefits while he was undergoing treatment for the right shoulder condition and delaying treatment for the left shoulder condition. First, the Arbitrator has found that the right shoulder condition was causally connected to the work-related accident. Second, even if the right shoulder condition was not related, Respondent has no defense for failing to pay benefits from March 29, 2022 to May 19, 2022. Petitioner began work conditioning for the left shoulder again on March 29, 2022. Dr. Tioco and Dr. Yaffe testified that Petitioner had not reached maximum medical improvement for the left shoulder, that work conditioning was reasonable and necessary medical treatment and that Petitioner was unable to return to work

without restrictions. Accordingly, Respondent has no basis to dispute payment of temporary total disability benefits from March 29, 2022 through May 19, 2022 since Petitioner was underactive medical care and unable to return to work.

For the period of September 20, 2021 through March 28, 2022, Petitioner was under the active medical care of Dr. Tioco for his right shoulder condition. He underwent surgery for the right shoulder condition on September 20, 2021. He remained under the post-operative care of Dr. Tioco, which included activity modification and physical therapy. Since the Arbitrator has found that the right shoulder condition was causally connected to the work-related accident of June 10, 2020, Petitioner is entitled to payment of temporary total disability benefits from September 20, 2021 through March 28, 2022 because Petitioner was under active medical care and unable to return to work. Petitioner had not been released from medical care as it relates to the left shoulder during this time period.

The Arbitrator notes that even if the right shoulder condition was not causally connected to the work-related accident of June 10, 2020, there is a basis for finding that Petitioner would still be entitled to payment of temporary total disability benefits while he received treatment for an unrelated condition where he was not released from medical care or to return to work as it relates to the causally connected body part. *See e.g., Marchiori v. Evanston School District #65,* 08 WC 34514, 11 IWCC 0948 (IWCC Sept. 23, 2011) (holding that the injured worker was entitled to receive temporary total disability benefits despite the work-related medical treatment being delayed due to the worker receiving treatment for cancer); *Esparza v. Pose-Robbins School District 143*, 11 WC 40544, 13 IWCC 0359 (IWCC April 5, 2013) (awarding payment of temporary total disability benefits where work-related hernia surgery was delayed due to an unrelated personal health condition); *Almaraz v. City of Chicago, Department of Water*, 16 WC

04780, 19 IWCC 0022 (IWCC Jan. 14, 2019) (holding that the injured worker was entitled to payment of temporary total disability benefits where there was a delay in medical treatment due to an unrelated health condition and rejecting the employers' argument that benefits should be terminated pursuant to Section 19(d)).

It is significant that Dr. Tioco testified that the right shoulder conditioning was hindering Petitioner's ability to perform therapy for his left shoulder. Therefore, Petitioner had to undergo surgery for his right shoulder to allow him to fully rehabilitate his left shoulder. Accordingly, the case law supports an award of temporary total disability benefits even if the Arbitrator had found that Petitioner's right shoulder condition was not causally connected to the work-related accident of June 10, 2020. However, the Arbitrator notes that this argument is not applicable based on the finding found Petitioner's right shoulder condition is causally connected to the work-related accident of June 10, 2020.

Based on the medical records and Petitioner's credible, the unrebutted testimony and the record as whole, the Arbitrator finds that Petitioner's condition had not stabilized and Petitioner is entitled to payment of temporary total disability benefits from June 15, 2020 through May 19, 2022.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC019247
Case Name	Jeffrey Habich v. Bear Construction
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	23IWCC0466
Number of Pages of Decision	11
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Matthew Heinlen
Respondent Attorney	Kisa Sthankiya

DATE FILED: 10/30/2023

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jeffrey Habich,

Petitioner,

vs. NO: 21 WC 019247

Bear Construction,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 9, 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.

October 30, 2023
o092623
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	21WC019247
Case Name	Jeffrey Habich v. Bear Construction
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Jeffrey Huebsch, Arbitrator

Petitioner Attorney	Matthew Heinlen
Respondent Attorney	Kisa Sthankiya

DATE FILED: 8/9/2022

THE INTEREST RATE FOR THE WEEK OF AUGUST 9, 2022 3.04%

/s/ Jeffrey Huebsch, Arbitrator

Signature

J. Habich v. Bear Construction, 21 WC 019247

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)

Jeffrey Habich
Employee/Petitioner
v.
Bear Construction
Employer/Respondent

Case # **21 WC 019247**

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 **December 2, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **March 18, 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 $**114,151.96**; the average weekly wage was $**2,195.23**.

On the date of accident, Petitioner was **49** 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, as no credit was claimed.

ORDER

Respondent shall authorize and pay for the treatment of Petitioner's right knee as recommended by Dr. Verma, specifically the right knee diagnostic arthroscopy with possible partial medial meniscectomy and possible plica excision recommended in his chart note of 3/1/2021, along with all related services, in accordance with Sections 8(a) and 8.2 of the Act.

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

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

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

/S/ Jeffrey Huebsch **AUGUST 9, 2022**

Signature of Arbitrator

FINDINGS OF FACT

Petitioner testified that he has been employed as a Construction Manager for his entire adult life. On March 18, 2020, he was employed by Respondent for a period of approximately ten months. His duties included supervising construction workers, quality control, occasional moving of construction materials and overall ensuring the workers around him were "doing their jobs".

Petitioner acknowledged a history of prior injuries, including injuries to his right leg, right foot, low back and possible shoulder injury. Petitioner also had several prior Workers Compensation cases, two of which were regarding the right leg/knee and two were for the surgery regarding the lumbar spine. Specifically, Petitioner had two prior injuries to his right leg, in 1990 and 1991 respectively. This gave rise to a claim (92 WC 25322) which settled for 5% loss of the right leg; and a claim (92 WC 32643) which settled for 6% loss of the right leg. (Rx1, Rx2) Petitioner testified that neither right leg injury involved surgery or any other invasive procedure. He returned to unrestricted duty after each right leg work accident and suffered no further problems with his right leg until the accident which is the subject of this case. The Parties stipulated that Respondent shall be entitled to a credit of 11% loss of the right leg when the time comes to evaluate permanency.

Petitioner testified that he was injured on March 18, 2020 while he was working at a construction project for Respondent, at the Main Post Office building across the Eisenhower Expressway in Chicago. Petitioner testified his project manager asked him to go to the basement to measure doors. This was the second time he was down there for the same task that day. Petitioner stated he observed that the doors were leaning on plastic and stacked against the wall after having been painted. He was searching for a particular sized door frame and pulled a door forward to measure the one behind it when the stack of doors began to slip and he fell with them, falling onto the right side of his body and was stuck. There were no witnesses in the immediate vicinity, but Petitioner testified that a co-worker, Josh Groen, arrived quickly at the scene and helped pull the doors off him. Groen also helped him get up the stairs. Petitioner testified that he noted immediate pain on his right side, including his right hip, knee and foot, plus his head and backside. He called his supervisor and went home for that afternoon.

Josh Groen, a Bear employee, testified at the request of Respondent. Groen testified that he received a call for help from Petitioner on March 18, 2020. He responded immediately and he found Petitioner trapped under a pile of heavy doors. Groen did not believe the accident was "staged". He estimated that the doors weighed more than 100 pounds each.

On March 24, 2020, Petitioner saw his primary care physician, Dr. Anne Donnelly. Due to COVID-19 restrictions, the visit was conducted remotely. Petitioner gave a history of right hip, knee and elbow pain since having been struck by a number of 300 pound doors that he was attempting to move on the preceding Wednesday. (Px1, p. 328) Dr. Donnelly ordered a set of x-rays and recommended that Petitioner consult with an orthopedic surgeon. (Px1, p. 333)

On April 9, 2020, Petitioner saw Dr. Edward Yang, a pain management physician with whom he had been treating for unrelated shoulder and back problems. Dr. Yang noted Petitioner's complaints of a "new" problem involving his right hip and knee. (Px1, p. 312) Dr. Yang noted Petitioner's pain had "significantly worsened," and that he "fell on a concrete floor landing on R side." Petitioner reported that he was stretching, using heat and had a pending appointment with an orthopedic surgeon. (Px1, p. 309) Petitioner returned to Dr. Yang on May 7, 2020, again reporting right knee pain since falling onto his right side on a concrete floor. X-rays were reported to be negative. (Px1, p. 298)

On June 8, 2020, Petitioner saw Dr. Aaron Bare, an orthopedic surgeon. He gave a history of having injured his right knee on March 24th when a 700 pound door fell on his knee and twisted it. (Px1, p. 274) The date of accident was also correctly reflected as March 18th on other pages of the chart. (PX 1, p. 288) Dr. Bare noted that x-rays revealed no osteoarthritis. The physical exam was suggestive of a torn meniscus, so Dr. Bare ordered an MRI. (Px1, p. 279) The MRI was performed on June 17, 2020. (Rx11)

Petitioner returned to Dr. Bare on June 24, 2020. His right knee pain was reported to be worse with weight bearing and using stairs. (Px1, p. 216) The MRI showed no structural abnormalities. Dr. Bare injected Petitioner's right knee with cortisone and recommended physical therapy. (Px1, p. 221)

When his symptoms persisted, Petitioner elected to seek a second opinion. On October 9, 2020, he saw Dr. Nikil Verma of Midwest Orthopedics at Rush. (Px2, p. 25) Petitioner complained of right thigh, hip and knee pain since some doors fell on him in March causing him to twist the right leg. Petitioner walked with an antalgic gait. Dr. Verma felt that Petitioner's knee pain was referred from the hip and represented a likely aggravation of pre-existing osteoarthritis. He referred Petitioner to his partner, Dr. Jeremy Alland, for consideration of an injection to the hip. (Px2, p. 27)

Petitioner saw Dr. Alland on October 13, 2020. (Px2, p. 19) He complained of significant right knee pain, mostly in the medial aspect, as well as right lateral hip pain extending through the thigh to the knee. (Px2, p. 23) Dr. Alland administered a steroid injection to Petitioner's right hip. (Px2, p. 24) He felt that the hip showed "signs of osteoarthritis which has likely been exacerbated by both the injury, as well as compensation for the right knee pain." (Px2, p. 25) Dr. Alland also provided Petitioner with a brace for his right knee.

Petitioner returned to Dr. Alland on November 5, 2020. (Px2, p. 17) He reported that the injection had provided some relief of his hip pain, but not for his knee pain. (Px2, p. 19) The MRI of Petitioner's right knee showed degenerative changes in the medial compartment. Petitioner reported that his knee pain was worse walking all day and mechanical symptoms were denied. Surgery was discussed as a last resort after attempts at physical therapy, bracing and injections. (Px2, p. 19)

On January 4, 2021, Dr. Alland provided Petitioner with a custom-fitted unloader brace. (Px2, p. 17) On January 21, 2021, Petitioner reported that his knee pain would progressively worsen throughout the work week. The first in a series of Euflexxa injections was administered. (Px2, p. 14) Dr. Alland provided Petitioner with a work note for full duty on Mondays and Tuesdays, light duty on Wednesdays, followed by full duty on Thursdays and Fridays. (Px2, p. 15) Dr. Alland administered a second Euflexxa injection to Petitioner's right knee on January 28, 2021. (Px2, p. 11) The third injection was administered on February 4, 2021. (Px2, p. 9)

On February 19, 2021, Petitioner was seen at Athletico and reported that his right knee pain spiked when he slipped on ice and significantly aggravated his pain. The pain continued to be sharp in nature on the medial side of the knee. (Rx13) This was documented in an email from Petitioner on 2/22/2021, apparently requesting a referral back to Dr. Verma. (Px2, p.136).

Petitioner returned to Dr. Verma on March 1, 2021. He reported that the series of injections and use of the brace had relieved his knee pain only slightly. He walked with a limp and his job required him to be on his feet throughout the day. (Px2, p. 4) Dr. Verma felt that Petitioner might still have a torn meniscus which was not apparent on the MRI and he recommended a diagnostic arthroscopy. (Px2, p. 5) Additional physical therapy was ordered and surgery was tentatively set for April 8, 2021. (Px2, p. 29) Dr. Verma felt that Petitioner could work full duty in the meantime.

Petitioner attendance all 27 physical therapy visits from December 4, 2020 through April 12, 2021. (Px2, p. 40)

On March 27, 2021, Dr. Verma was notified that Utilization Review had certified the right knee arthroscopic surgery (Px2, p. 192) This was after a peer to peer UR where it was stated by Dr. Verma's office that Petitioner's conservative care had not resolved his pain, the patient had mechanical symptoms and functional loss. (Px 2, p.135)

Petitioner testified that he continued to work for Respondent until he was terminated on April 6, 2021.

Respondent elected to have Petitioner examined by Dr. John Cherf on April 14, 2021, pursuant to Section 12 of the Act. Dr. Cherf also reviewed Petitioner's treating medical records. He felt that Petitioner had osteoarthritis of his right knee which pre-existed his accident of March 18, 2020. He felt that Petitioner's MRI was benign and had no findings suggestive of a work-related injury. Dr. Cherf felt that Petitioner's treatment consisting of physical therapy, cortisone, viscosupplementation injections and bracing had been appropriate and was related to the accident, but that he had attained maximum medial improvement and required no further treatment. Dr. Cherfs did not believe that Petitioner was a good candidate for arthroscopic surgery. He felt that Petitioner could continue to work without restrictions. (Rx14)

On May 9, 2021, Petitioner began work for RWE as a construction manager. His duties were substantially the same as those which he performed for Respondent but involved no moving of materials. In August, 2021, Petitioner took a similar job with ARCO, where he remains employed as of the date of trial.

Petitioner testified that he has not sustained any work accidents to his right leg since the accident of March 18, 2020. He admitted to having slipped in an icy parking lot at Athletico where he was receiving physical therapy which caused his knee pain to spike, but the pain returned to the status quo. (Rx13) He also testified that at no time since that accident has his right leg been asymptomatic. He continues to have right leg pain as of the date of trial. Petitioner wants to have the surgery recommended by Dr. Verma.

CONCLUSIONS OF LAW

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

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. *820 ILCS 305/1(b)3(d)*. To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980) including that there is some causal relationship between his employment and his injury. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 63 (1989)

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).

Petitioner's testimony is found to be credible. The Arbitrator finds Petitioner's testimony to be straight forward, truthful, and consistent with the medical records. Any inconsistencies in his testimony are not attributed to an attempt to deceive the finder of fact. Further, the Arbitrator find's Respondent witness, Josh

Groen, to also be credible and finds his testimony corroborated the testimony given by Petitioner regarding the work accident and for reasons stated below, this evidence persuaded the Arbitrator.

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

Petitioner sustained accidental injuries which arose out of and in the course of his employment by Respondent on March 18, 2020.

This finding is based on the testimony of Petitioner and Mr. Groen and the medical records. The Arbitrator is persuaded that the accident occurred as Petitioner described. He was on the job, working as a construction manager when the event occurred. The accident therefore was in the course of his employment by Respondent. This risk of having heavy doors fall on an employee measuring the doors that are stacked and resting on plastic, is clearly a risk incident to Petitioner's employment as a construction manager. The accident therefore arose out of Petitioner's employment by Respondent.

Issue F, whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds:

Petitioner's current condition of ill-being regarding his right knee (to wit: painful right knee refractory to conservative care, causing dysfunction in Petitioner's work and activities of daily living, as documented by Dr. Verma in his letter of 3/1/2021) is causally related to the injury.

Petitioner had two prior right knee injuries a few decades ago, neither of which resulted in surgery and neither of which prevented Petitioner from performing his job duties as a construction manager. The settlements of 5% and 6% loss of use of the right leg lead the Arbitrator to conclude that the injuries in question were not severe when compared to the current right knee injury, for which surgery has been recommended by Petitioner's well respected treating orthopedic surgeon, Nikhil Verma, MD.

Petitioner testified that he had a number of work accidents and surgeries prior to the accident which is the subject of this case, including his lower back, his left ankle, and his shoulders. He denied, however, suffering any additional injuries to or requiring any additional treatment for his right hip or knee other than the right knee work accidents and treatment previously mentioned. There is no evidence to the contrary. Petitioner did not have ongoing right knee or hip treatment and was working for Respondent without issues or pain to his right leg and hip when the March 18, 2020 work accident occurred.

The Arbitrator notes that Petitioner's prior complaints of leg pain referenced in the medical records refer to radicular pain stemming from Petitioner's lower back injury, for which Petitioner underwent extensive treatment including lumbar spine surgery. Similarly, the injections that Petitioner received prior to this case were to his SI joint and not to his right hip.

Petitioner testified that his right knee and hip pain began on the date of the accident of March 18, 2020 and have persisted since that time. The medical records support this testimony. Specifically, Dr. Edward Yang, with whom Petitioner was treating for pain management of his lower back condition, noted on April 9, 2020 that Petitioner had a "new problem" with his right hip and knee after falling on a concrete floor at work. (Px1, p. 309, 312)

The slip and fall on ice in the Athletico parking lot is not a sufficient enough event/injury to constitute a superseding, intervening accident. The chain of causation from the injury of March 18, 2020 to the surgical recommendation by Dr. Verma remains intact.

Dr. Verma initially felt that Petitioner's right knee pain was referred from the hip and represented a likely aggravation of pre-existing osteoarthritis. (Px2, 27) His partner, Dr. Alland, felt that Petitioner's hip had "likely been exacerbated by both the injury, as well as compensation for the right knee pain." (Px2, p. 25)

Finally, Dr. Cherf, Respondent's examining doctor, opined that the care rendered to Petitioner (cortisone injection, viscosupplementation, anti-inflammatory medication and knee orthotic were "a direct result of his subjective complaints from the work-related right knee injury." (Rx14). The Arbitrator finds Petitioner to be credible believes his history regarding prior right leg and hip pain.

The medical evidence in this case supports causation for the Petitioner's right knee and hip conditions being related to the work incident on March 18, 2020. Where the medical opinions differ is that Dr. Cherf believes a right knee diagnostic arthroscopy with possible partial medial meniscectomy and plica excision is not needed. Dr. Verma believes that the proposed surgery may benefit Petitioner and the Arbitrator concurs.

With regard to Issue K, Is Petitioner entitled to any prospective medical care, the Arbitrator finds:

Petitioner's symptoms have not improved with conservative care consisting of injections, therapy and a brace. Both the IME doctor and the treating doctors agree that treatment so far was related to the work injury to the right leg, knee and hip, that was reported to them as occurring on March 18, 2020. Dr. Verma has recommended a diagnostic arthroscopy for a torn meniscus or plica which may not be showing up on the MRI. (Px2, p. 5) Although Respondent's examining doctor did not believe Petitioner was a "good candidate" for such surgery (Rx14), the Arbitrator notes that the procedure was in fact certified by Respondent's Utilization Review in March of 2021. (Px2, p. 192)

The Arbitrator believes that Petitioner's ongoing complaints of pain are credible, that all attempts at conservative treatment has been exhausted and that a right knee diagnostic arthroscopy with possible partial medial meniscectomy and plica excision is a reasonable action at this point.

Accordingly, based on the above and the Arbitrator's findings on the issues of accident and causation, Respondent shall authorize and pay for the surgical treatment of Petitioner's right knee as recommended by Dr. Verma (Diagnostic arthroscopy and partial medial meniscectomy and possible plica excision) in accordance with Sections 8(a) and 8.2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC008209
Case Name	David D Dobbs v. State of Illinois - Menard Correctional Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0467
Number of Pages of Decision	14
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Jason Coffey
Respondent Attorney	Kenton Owens

DATE FILED: 10/31/2023

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David D. Dobbs,

Petitioner,

vs. NO: 20 WC 8209

State of Illinois, Menard Correctional Center,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, permanent partial disability, causal connection, medical expenses, 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 June 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 §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.

October 31, 2023
MP:yl
o 10/5/23
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	20WC008209
Case Name	DOBBS, DAVID v. SOI/MENARD C.C.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Jason Coffey
Respondent Attorney	Kenton Owens

DATE FILED: 6/29/2022

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

/s/ Jeanne AuBuchon, Arbitrator

Signature

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

June 29, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

David Dobbs
Employee/Petitioner

v.

SOI/Menard C.C.
Employer/Respondent

Case # **20** WC **008209**

Consolidated cases: **None**

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 **02/23/2022**. 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 **Claim Preclusion**

FINDINGS

On **03/06/2020**, 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 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 $**71,066.29**; the average weekly wage was $**1,366.66**.

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 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 for all medical bills paid through Petitioner's group health insurance plan under Section 8(j) of the Act.

ORDER

Benefits 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.

Jeanne L. PuBuchon

Signature of Arbitrator

JUNE 29, 2022

PROCEDURAL HISTORY

This matter proceeded to trial on February 23, 2022, on all issues. The issues in dispute are: 1) whether the Petitioner sustained accidental injuries that arose out of and in the course of his employment; 2) whether the Respondent was given notice of the accident within the time limits stated in the Act; 3) the causal connection between the accident and the Petitioner's carpal tunnel condition; 4) payment of medical bills incurred; 5) nature and extent of the Petitioner's injuries; and 6) claim preclusion. The parties stipulated that if there is an award of medical bills, the Respondent could pay those directly to the providers pursuant to the fee schedule.

FINDINGS OF FACT

The Petitioner was employed with Respondent as a corrections officer for approximately 25 years, having retired May 1, 2021. (T. 11) He testified to his job duties, which included bar rapping once per shift on 25 to 50 cells and using a Folger Adams key to unlock and lock cell doors (T. 13-15) He demonstrated these actions during his testimony.

He stated that for the first 10 years, he worked various assignments, and for the last 15 years he was assigned to the transportation unit. (T. 18-19) He said that for a two-year span, he worked on a 48-cell gallery that housed inmate workers, causing him to "key in" and "key out" inmates up to six times per day. (T. 17) The Petitioner testified that in using the Folger Adams key, he had to switch hands because his hands got tired turning the key. (Id.) He said that, for the most part, the cell doors would get stuck, making it more difficult to turn the key. (T. 18)

As a transportation unit officer, the Petitioner transported inmates throughout the state for medical furloughs, court writs or transfers. (T. 19) He would drive squad cars, vans, a bus and the property truck for two to seven hours per day. (T. 20) He said that even as a transportation unit officer, he would be assigned to cell duty on occasion. (T. 31) He also worked in receiving

and classification, which was a newer building where Folger Adams keys were not used and bar rapping was not necessary. (Id.) He also worked in the towers, where he did not perform bar rapping. (T. 31-32) He said that since 2009 and 2010, his bar rapping activities decreased dramatically. (T. 34)

The Petitioner testified that he experienced numbness and tingling in his hands and wrists while working for about 12 years. (T. 21-22, 25) On November 17, 2009, the Petitioner reported a carpal tunnel injury from turning keys, bar rapping and cranking galleries. (RX4) In his report, he stated that he had the beginning signs of carpal tunnel syndrome. (Id.) On or about November 16, 2009, the Petitioner filed an Application for Adjustment of Claim for repetitive trauma to his right and left hands and right and left elbows. (RX7) The claim was dismissed on May 8, 2012. (RX8) Treatment records showed the Petitioner underwent nerve conduction studies on November 9, 2009; April 5, 2010; and December 20, 2010, that were normal. (RX9)

Work records from the Respondent showed that from February 27, 2009, through April 4, 2009, the Petitioner worked in N1 stepdown; from April 5, 2009, through February 2, 2010, he worked in guard towers; from February 3, 2010, through June 27, 2010, he worked at the south lower door, the south upper "SPT/EXC/SAN" and a gallery; from June 30, 2010, through July 23, 2010, he worked in guard towers; from September 20, 2010, through October 1, 2010, he worked in the "R&C inner PRM;" from October 4, 2010, through May 16, 2011, he worked on galleries; and from May 23, 2011, until his retirement, he worked as a writ officer. (RX6)

The Petitioner gave notice of his current injury to the Respondent's workers' compensation coordinator on March 18, 2020, listing a date of injury of March 6, 2020. (T.22-23, RX3) The Petitioner wrote in his Employee's Notice of Injury that the duties he was performing at the time

of injury were: repetitive Folger Adam key turning, repetitive bar rapping, repetitive hand cuffing and repetitive gripping of steering wheel during long periods of driving. (RX3)

On January 6, 2020, the Petitioner saw his primary care physician Dr. Dale Blaise at Southern Illinois Healthcare Medical Arts Clinic and was referred to orthopedic surgery after being diagnosed with bilateral carpal tunnel syndrome. (PX1) He underwent nerve conduction studies on March 6, 2020, by Dr. Terrence Glennon, a physiatrist at Southern Illinois Healthcare Rehabilitation Institute of Chicago. (PX1, PX2) These studies revealed moderate bilateral median neuropathy at the wrist (carpal tunnel syndrome) but no evidence of ulnar neuropathy at the elbow or cervical radiculopathy. (Id.) The Petitioner testified that from 2010 until 2020 he reported numbness and tingling in his hands to Dr. Blaise. (T. 38)

On March 24, 2020, the Petitioner saw physician assistant Phillip Erthall at The Orthopaedic Institute of Southern Illinois and complained of numbness and tingling in both hands that was waking him up at night, as well as weakness in both hands. (PX3, Deposition Exhibit 2) He said these symptoms had been going on for several years. (Id.) Dr. Steven Young, an orthopedic surgeon at The Orthopaedic Institute of Southern Illinois, performed a right carpal tunnel release on June 5, 2020, and a left carpal tunnel release on June 26, 2020. (Id.) The Petitioner was released from care on August 7, 2020, at which time he reported no numbness, tingling or pain. (Id.)

Dr. Young testified at a deposition on October 27, 2020. (PX3) He testified that he had treated several correctional employees for carpal tunnel syndrome and was familiar with their job duties, including use of Folger Adams keys, bar rapping and cuffing and uncuffing inmates. (Id.) Dr. Young opined that the Petitioner's work duties over his career could have served as an

aggravating factor in the development of his carpal tunnel syndrome. (Id.) He also agreed that driving for several hours every day could also be a contributing factor. (Id.)

On cross-examination, Dr. Young admitted that the Petitioner's smoking habit and taking testosterone could lead to the development of carpal tunnel syndrome. (Id.) Dr. Young did not recall any specific conversation with the Petitioner regarding his job duties and did not know what specific jobs the Petitioner had. (Id.) He agreed that there were job duties at the correctional center that were less hand-intensive than those of a correctional officer on the gallery. (Id.) He also agreed that transportation officers would have time when they were not driving but waiting for an inmate. (Id.) He acknowledged that his treatment notes did not reflect the Petitioner complaining of having difficulty while driving. (Id.) He said he was unaware of the Petitioner's prior treatment or testing for suspected carpal tunnel syndrome in 2009 and 2010 but said those records would be beneficial. (Id.) He also said that looking at the Petitioner's job duties after 2010 could possibly help with developing an opinion as to whether the Petitioner's carpal tunnel syndrome was related to his work. (Id.) He acknowledged that whether there was a period of time away from the hand-intensive duties of a correctional officer could occasionally have an impact on symptoms or disease progression. (Id.)

On August 29, 2021, Dr. Mark Cohen, an orthopedic surgeon at Midwest Orthopaedics Hand & Shoulder Center at Rush, performed a records review that included: records from 2009 and 2010 showing reports of carpal tunnel symptoms with negative provocative and nerve conduction tests; records from the March 6, 2020, nerve conduction studies; the workers' compensation injury reports; records from The Orthopaedic Institute of Southern Illinois; and Dr. Young's deposition. (RX1) Dr. Cohen opined that the Petitioner's treatment appeared to be reasonable and appropriate. (Id.) He stated that carpal tunnel syndrome is idiopathic in the vast

majority of cases and can be seen in association with obesity, testosterone use, smoking and tobacco use. (Id.) He reported that the Petitioner's body mass index placed him in the "overweight" category. (Id.)

Dr. Cohen stated in his report that carpal tunnel syndrome can be seen in association with certain occupational activities that involve forceful and repetitive grasping and squeezing against resistance throughout the day. (Id.) He stated that he had no evidence to suggest that the Petitioner's carpal tunnel syndrome was in any way associated with his job duties and any such association was simply not supported by any anatomic or scientific basis. (Id.) He added that a manifestation of symptoms during a specific activity in no way suggests a cause-and-effect relationship or a change in the natural history of the condition. (Id.)

Dr. Cohen testified consistently with his report at a deposition on December 6, 2021. (RX2) In explaining his opinion that the Petitioner's work duties were not causally related to his carpal tunnel syndrome, he pointed to the description of activities that the Petitioner listed in his Report of Injury. (Id.) On cross-examination, Dr. Cohen was familiar with the term "bar rapping" but had no experience with the use of Folger Adams keys. (Id.) He had no information regarding the frequency with which various job duties were performed at the correctional center other than the use of the word "repetitive," which he said he did know what that meant. (Id.)

The Petitioner testified that since his surgery, his symptoms improved. (T. 26-27) He said he uses a butter knife to open a soda can and a pair of pliers for twisting because he still experiences tenderness. (T. 27)

CONCLUSIONS OF LAW

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

Issue (O): Is Petitioner's claim barred by claim preclusion?

The Petitioner had a previous claim for repetitive trauma alleging injuries to his right and left hands (09 WC 049015) alleging a date of accident of November 16, 2009. This claim was dismissed on May 8, 2012, for reasons not apparent on Respondent's exhibit, and was not reinstated. The Respondent contends that because this claim was dismissed, the Petitioner's current claim should be denied. In support of this, the Respondent cited Commission rules regarding dismissal and reinstatement of claims and argued that allowing the Petitioner to "refile" the claim with a new accident date subverts the Commission Rules. Neither party provided any case law on claim preclusion.

The doctrine of claim preclusion (a.k.a res judicata) provides that a final judgment on the merits rendered by a court of competent jurisdiction bars a subsequent action between the same parties or their privies involving the same cause of action. *Richter v. Prairie Farms Dairy, Inc*., 2016 IL 119518, ¶21, 53 N.E.3d 1, 402 Ill.Dec. 870. Three requirements must be satisfied for claim preclusion to apply: (1) a final judgment on the merits rendered by a court of competent jurisdiction, (2) an identity of cause of action, and (3) an identity of parties or their privies. *Id*.

The defense of claim preclusion fails on the second requirement. The Arbitrator finds that the instant claim is not the same as the 2009 claim. There are different accident/manifestation dates, and the nature of the injuries are different from what was present in the 2009 case, specifically that the Petitioner now has positive nerve conduction studies.

Therefore, the Arbitrator finds this case is not barred by claim preclusion.

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
Issue (F): Is Petitioner's current condition of ill-being causally related to the accident?

The claimant in a worker's compensation proceeding has the burden of proving by a preponderance of the credible evidence that the injury arose out of and in the course of employment, and that involves as an element a causal connection between the accident and the condition of claimant. *Cassens Transp. Co. v. Industrial Comm'n*, 262 Ill. App. 3d 324, 330, 633 N.E.2d 1344, 199 Ill. Dec. 353 (2nd Dist. 1994) An injury is considered "accidental" even though it develops gradually over a period of time as a result of repetitive trauma, without requiring complete dysfunction, if it is caused by the performance of claimant's job. *Id*. An injury need not be the sole factor, or even the primary factor of an injury, as long as it is a causative factor *Sisbro, Inc. v. Industrial Commission*, 207 Ill.2d 193, 205. 797 N.E.2d 665, 278 Ill.Dec. 70 (2003). A Petitioner's job duties need not be repetitive in the sense that the same task is done over and over again as on an assembly line to result in a compensable injury. *City of Springfield v. Illinois Workers' Comp. Comm'n*, 388 Ill.App.3d 297, 314, 901 N.E.2d 1066, 327 Ill.Dec. 333 (4th Dist., 2009). Intensive use of hands and arms can result in cumulative injuries that are compensable. *Id*. There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma. *Edward Hines Precision Components v. Industrial Commission*, 365 Ill.App.3d 186, 194, 825 N.E.2d 773, 292 Ill.Dec. 185. (2nd Dist. 2005)

Although medical testimony as to causation is not necessarily required, where the question is one within the knowledge of experts only and not within the common knowledge of laypersons, expert testimony is necessary to show that claimant's work activities caused the condition complained of, especially in repetitive trauma cases. *Nunn v. Industrial Com.,* 157 Ill. App. 3d 470, 478, 510 N.E.2d 502, 109 Ill. Dec. 634. (4th Dist. 1987) The Commission has held that a claimant fails to prove a causal relationship through repetitive trauma where the medical opinion upon which they have relied is based upon incomplete information about the claimant's job duties.

See, e.g., *Jones v. State of Illinois/Menard Correctional Center*, 19 IWCC 521 and *Clay v. State of Illinois, Hill Correctional Center*, 12 IWCC 152. Contra, *Plummer v. State of Illinois/Illinois Department of Corrections*, 18 IWCC 218.

Neither medical expert had detailed information regarding the Petitioner's work activities. The only medical evidence in support of causal connection is Dr. Young's opinion. Rather than having details of the duration, frequency and force of the Petitioner's work activities, Dr. Young based his opinion on the fact that he had treated several correctional employees for carpal tunnel syndrome and was familiar with their job duties, including use of Folger Adams keys, bar rapping and cuffing and uncuffing inmates. As to the Petitioner's duties in the transportation unit in the nine years preceding the manifestation date, Dr. Young likewise had little to no evidence that would support an opinion that the Petitioner's carpal tunnel syndrome was causally related to his work.

Therefore, the Arbitrator finds that the Petitioner has failed to prove by a preponderance of the evidence that his injury arose out of and in the course of his employment.

Due to the findings above, the other issues are not reached, and benefits are denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC005120
Case Name	Tammy Lane v. Illinois Central School Bus
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	23IWCC0468
Number of Pages of Decision	12
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Stephen McManus

DATE FILED: 10/31/2023

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tammy Lane,

Petitioner,

vs. No. 21 WC 005120

Illinois Central School Bus,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent and Petitioner 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, corrects clerical errors in 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 awarded Petitioner the "medical services identified in Petitioner's Exhibit 10." In fact, Petitioner's bills are identified in Petitioner's Exhibit 1, not Petitioner's Exhibit 10.

The Arbitrator also ordered Respondent to pay Petitioner 13-5/7 weeks of temporary total disability benefits, "commencing March 24, 2021, through June 28, 2021." While we agree that Respondent shall pay Petitioner temporary total disability benefits for that period, we find that period totals 13-6/7 weeks, not 13-5/7 weeks.

The Commission now corrects those two clerical errors. All else in the Arbitrator's decision is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 9, 2022, is hereby corrected as stated herein, and otherwise affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $71,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

October 31, 2023

MP/mcp
o-10/05/23
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	21WC005120
Case Name	LANE, TAMMY v. ILLINOIS CENTRAL SCHOOL BUS
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Stephen McManus

DATE FILED: 5/9/2022

THE INTEREST RATE FOR THE WEEK OF MAY 3, 2022 1.42%

/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

Tammy Lane
Employee/Petitioner

v.

Illinois Central School Bus
Employer/Respondent

Case # 21 WC 05120

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on March 31, 2022. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On January 27, 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 $n/a; the average weekly wage was $270.00.

On the date of accident, Petitioner was 59 years of age, single with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 10, , as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall pay Petitioner temporary total disability benefits of $270.00 per week for 13 5/7 weeks, commencing March 24, 2021, through June 28, 2021, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $270.00 per week for 53.75 weeks because the injury sustained caused the 25% loss of use of the right leg, as provided in Section 8(e) of the Act.

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

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

William R. Gallagher, Arbitrator **MAY 9, 2022**

ICArbDec p. 2

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment by Respondent on January 27, 2021. According to the Application, Petitioner "Slipped going down bus steps" and sustained an injury to her "Right knee" (Arbitrator's Exhibit 2).

Petitioner sought an order for payment of medical bills, temporary total disability benefits and permanent partial disability benefits. Respondent stipulated Petitioner sustained a work-related accident, but disputed liability on the basis of causal relationship. In regard to temporary total disability benefits, Petitioner claimed she was entitled to temporary total disability benefits of 13 5/7 weeks, commencing March 24, 2021, through June 28, 2021. Respondent stipulated Petitioner was disabled during the aforestated period of time, but disputed its liability for same (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a part-time bus driver. At the time she sustained the accident, she had been employed by Respondent for three years. Petitioner previously worked for Madison County as a bookkeeper and retired shortly before she became employed by Respondent.

On January 29, 2021, Petitioner parked the bus and was in the process of performing a child check when her right foot caught the edge of a step. When this occurred, Petitioner sustained a twisting injury to her right knee. Petitioner testified she had a history of right knee problems which required medical treatment prior to the accident; however, Petitioner stated she had been working full duty and was not under active medical care for right knee symptoms at the time she sustained the accident.

Following the accident, Petitioner experienced severe pain/swelling in her right knee. Petitioner initially sought medical treatment on February 4, 2021, from Dr. Rajinder Mahay. At that time, Petitioner complained of right knee pain/swelling and she advised Dr. Mahay she had slid down two stairs on a bus over one week prior. Dr. Mahay ordered x-rays of Petitioner's right knee. The x-rays were negative for fracture, but revealed tricompartmental marginal osteophytes, joint space narrowing of the medial compartment and small/moderate joint effusion. He referred Petitioner to Dr. Peter Anderson, an orthopedic surgeon (Petitioner's Exhibit 3).

Dr. Anderson evaluated Petitioner on February 9, 2021. When seen by Dr. Anderson, Petitioner complained of right knee pain and informed Dr. Anderson she had sustained a slip/fall. She also advised Dr. Anderson she had been treated for right knee symptoms in the past by Dr. Grebing. Dr. Anderson opined Petitioner had sustained a tear of the medial cartilage/meniscus and had arthritis in the right knee. He administered a cortisone injection into Petitioner's right knee and recommended Petitioner undergo an MRI scan of the right knee (Petitioner's Exhibit 5).

Petitioner was subsequently seen by Dr. Matthew Bradley, an orthopedic surgeon, on February 22, 2021. At that time, Petitioner informed Dr. Bradley she sustained an accident on January 27, 2021, when she was in the process of getting off a bus, caught her right foot on a step and sustained a twisting injury to her right knee. Petitioner also advised Dr. Bradley that, at the time of the accident, she experienced an immediate stabbing sensation along the medial aspect of the knee and

developed fullness/tightness in the back of her knee. Petitioner advised she had been treated for arthritis in the right knee for three/four years, but the pain she was currently experiencing was much different than the pain she had previously experienced (Petitioner's Exhibit 6).

Dr. Bradley examined Petitioner and opined she had likely sustained a traumatic medial meniscus tear. He ordered an MRI scan of Petitioner's right knee (Petitioner's Exhibit 6).

The MRI was performed on February 26, 2021. According to the radiologist, the MRI revealed a medial meniscal body and posterior horn undersurface defect, likely an undersurface tear (Petitioner's Exhibit 7).

Dr. Bradley saw Petitioner on March 4, 2021, and he reviewed the MRI scan. Dr. Bradley opined the MRI revealed a very large oblique acute tear of the mid-body and posterior horn of the medial meniscus. He also noted there was a meniscal fragment above the posterior horn, grade 4 chondrosis and some degeneration of the patellofemoral joint. He recommended Petitioner undergo surgery consisting of a medial unicompartmental arthroplasty (Petitioner's Exhibit 6).

Dr. Bradley performed surgery on March 24, 2021. The procedure consisted of a right knee medial unicompartmental arthroplasty; right knee partial patellectomy; and a right knee injection (Petitioner's Exhibit 8).

Following surgery, Dr. Bradley saw Petitioner on April 8, 2021, and noted she was doing "exceptionally well" and was doing home exercises. Dr. Bradley ordered physical therapy (Petitioner's Exhibit 6).

Dr. Bradley again saw Petitioner on May 10, 2021, and June 28, 2021, and Petitioner's condition continued to improve. When Petitioner saw Dr. Bradley on June 28, she advised she still had some difficulties with steps/stairs. Dr. Bradley opined Petitioner was at MMI and could return to work without restrictions (Petitioner's Exhibit 6).

In regard to the medical treatment for right knee symptoms Petitioner received prior to the accident of January 27, 2021, Petitioner was previously treated by Dr. Craig Beyer, an orthopedic surgeon, and Dr. Brett Grebing, an orthopedic surgeon. Dr. Beyer treated Petitioner from July, 2000, through October, 2014. Dr. Grebing treated Petitioner from October, 2018, through September, 2020 (Petitioner's Exhibit 5; Respondent's Exhibit 2).

Dr. Beyer evaluated Petitioner on July 7, 2000, and opined Petitioner had right patellofemoral pain. He initially treated the condition conservatively with injections, but Petitioner's condition did not improve. Dr. Beyer performed surgery on Petitioner's right knee on November 1, 2000. The procedure consisted of a retropatellar chondroplasty and lateral retinacular release (Petitioner's Exhibit 5).

On June 9, 2008, April 24, 2012, and September 15, 2014, Petitioner was again seen by Dr. Beyer because of right knee pain. Dr. Beyer opined Petitioner had osteoarthritic changes in the right knee

and he prescribed anti-inflammatories and ordered physical therapy. He did not diagnosed Petitioner with a torn meniscus (Petitioner's Exhibit 5).

Dr. Grebing evaluated Petitioner on October 3, 2018, and opined Petitioner had osteoarthritis in the right knee. He administered an injection into the right knee and recommended Petitioner undergo right knee surgery; however, Petitioner declined to do so (Respondent's Exhibit 2).

Dr. Grebing subsequently saw Petitioner on October 29, 2019. At that time, Petitioner had bilateral knee pain, more on the left than right. Dr. Grebing diagnosed osteoarthritis and administered cortisone injections into both knees. He again suggested surgery, but Petitioner declined to do so (Respondent's Exhibit 2).

Dr. Grebing last saw Petitioner on September 1, 2020. At that time, Petitioner again complained of bilateral knee pain. Dr. Grebing reaffirmed his diagnosis of osteoarthritis in both knees, administered cortisone injections and again recommended surgery which Petitioner declined. Dr. Grebing did not diagnose Petitioner with a torn meniscus (Respondent's Exhibit 2).

At the direction of Respondent, Petitioner was examined by Dr. Nathan Mall, an orthopedic surgeon, on September 15, 2021. In connection with his examination of Petitioner, Dr. Mall reviewed medical records for treatment provided to Petitioner both before and after the accident, as well as the MRI scan, which were provided to him by Respondent. Dr. Mall noted Petitioner had undergone a partial knee replacement and had very severe osteoarthritis in the patellofemoral compartment. He opined Petitioner would likely require a total knee replacement to resolve her symptoms. In regard to the MRI, Dr. Mall opined it did not reveal an acute/traumatic meniscal tear (Respondent's Exhibit 3; Deposition Exhibit 2).

Dr. Mall opined Petitioner did not sustain a significant injury as a result of the accident and the pain she experienced afterward could have been the effect of the injection wearing off. He opined Petitioner had an arthritic condition which had progressed rapidly prior to the accident and the "injury" did not change the course of care/treatment. In regard to the torn meniscus observed in the MRI, Dr. Mall opined this was a function of the severe arthritic condition in the medial compartment of the right knee (Respondent's Exhibit 3; Deposition Exhibit 2).

Dr. Mall also opined there was an AMA impairment rating of zero percent (0%). This was based on his opinion Petitioner had sustained a knee strain as a result of the accident and the meniscal tear and arthritic conditions were not related to the accident (Respondent's Exhibit 3; Deposition Exhibit 2).

Dr. Mall was deposed on November 22, 2021, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Mall's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Specifically, Dr. Mall testified he reviewed the MRI and observed it revealed a tear of the medial meniscus, but the tear was not related to the accident because of the severity of the arthritis. Dr. Mall testified the accident did not aggravate or accelerate the underlying condition because Petitioner had received treatment for the arthritic condition for 20 years, underwent an injection just four months prior to the accident

and the torn meniscus was in the area where there was bone on bone arthritis (Respondent's Exhibit 3; pp 21-22, 28-31).

Dr. Bradley was deposed on November 24, 2021, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Bradley's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Specifically, Dr. Bradley testified Petitioner had pre-existing arthritis which was exacerbated by the accident and the tear of the medial meniscus was acute. He noted the mechanism of the injury and Petitioner's pain/complaints thereafter were consistent with the tear being an acute care (Petitioner's Exhibit 11; pp 8-9).

On cross-examination, Dr. Bradley was asked if an individual with long-standing medial compartment arthritis could have a degenerative meniscal tear without acute trauma. Dr. Bradley responded such an individual could have a degenerative tear, but the MRI in this case revealed a huge tear which was displaced and jammed into the notch (Petitioner's Exhibit 11; pp 38-39).

At trial, Petitioner testified she had right knee symptoms for many years prior to the accident and knee surgery had been recommended to her but she declined. She said the injections helped her tolerate the symptoms, but after the accident, her right knee symptoms were much worse than they had ever been in the past so she proceeded with the surgery as recommended by Dr. Bradley. Petitioner testified her right knee condition was much improved, but she still experiences issues standing up from a sitting position and has problems with kneeling/squatting.

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 January 27, 2021.

In support of this conclusion the Arbitrator notes following:

There was no dispute Petitioner sustained a work-related accident on January 27, 2021, to her right knee.

Petitioner previously underwent right knee surgery in July, 2000, the procedure consisting of a retropatellar chondroplasty and lateral retinacular release.

Petitioner had a long-standing pre-existing arthritic condition in her right knee which was treated with medication, physical therapy and injections. Right knee surgery had been previously recommended to Petitioner which she declined.

While Petitioner had been treated for right knee arthritic symptoms for over 20 years prior to the accident, neither Dr. Beyer nor Dr. Grebing ordered an MRI scan of Petitioner's right knee or opined she had a torn meniscus.

Subsequent to the accident, Petitioner's primary treating physician, Dr. Bradley, ordered an MRI which he opined revealed a large acute tear of the medial meniscus which he causally related to the accident.

Respondent's Section 12 examiner, Dr. Mall, opined the MRI revealed a torn meniscus that was not related to the accident, but was because of the severe arthritic condition in Petitioner's right knee.

Petitioner credibly testified that, prior to the accident, the injections helped her tolerate the right knee symptoms and she was able to avoid surgery. However, after the accident, her right knee symptoms were much worse than they had ever been before so she proceeded with the surgery as recommended by Dr. Bradley.

Based on the preceding, the Arbitrator finds the opinion of Dr. Bradley to be more persuasive than that of Dr. Mall in regard to causality.

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

Based on 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 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

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

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 13 5/7 weeks, commencing March 24, 2021, through June 28, 2021.

In support of this conclusion the Arbitrator notes the following:

Petitioner and Respondent stipulated Petitioner was temporarily totally disabled during the aforestated period of time.

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

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of 25% loss of use of the right leg.

In support of this conclusion the Arbitrator notes the following:

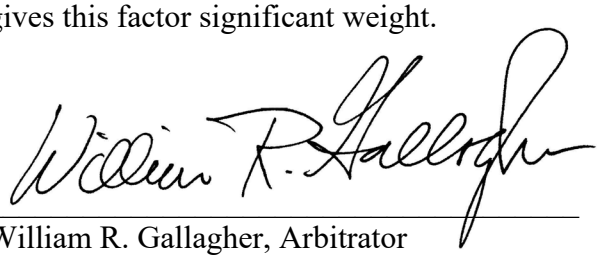
Dr. Mall opined Petitioner had an AMA impairment of zero percent (0%) of the right lower extremity. However, this impairment rating was based on Dr. Mall's opinion that Petitioner sustained a knee strain as a result of the accident and not the condition of ill-being which the Arbitrator has concluded is related to the accident. The Arbitrator gives this factor no weight.

Petitioner was employed as a part-time bus driver and was able to return to work to that job. The Arbitrator gives this factor moderate weight.

Petitioner was 59 years old at the time of the accident and 60 years old at the time of trial. Petitioner is presently retired from prior job as a bookkeeper and will reach normal retirement age in approximately seven years. The Arbitrator gives this factor minimal weight.

There was no evidence Petitioner sustained a reduced earning capacity as a result of the accident. The Arbitrator gives this factor moderate weight.

As a result of the accident, Petitioner sustained a tear of the right medial meniscus and an exacerbation of pre-existing arthritis. Petitioner underwent surgery consisting of a medial unicompartmental arthroplasty and partial patellectomy. Petitioner achieved a good surgical outcome but still had some complaints consistent with the injury she sustained. The Arbitrator gives this factor significant weight.



William R. Gallagher, Arbitrator